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

Smear/Misinformation Bundle ("SMB")

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IN THE EMPLOYMENT APPEAL TRIBUNAL **Case No: EAT/[ ]**

ON APPEAL FROM THE LONDON SOUTH EMPLOYMENT TRIBUNAL

EA-2022-001347-NLD

Case No.: 2300819/2019

B E T W E E N:

DR. CHRISTOPHER DAY

Appellant

-and-

LEWISHAM AND GREENWICH NHS TRUST

Respondent

NOTICE OF APPEAL

References to numbered paragraphs are references are references to paragraph number in the Employment Tribunal's written reasons unless otherwise stated.

1. The Appellant is Dr Christopher Day, of 156 Northumberland Avenue, Welling, London, DA16 2PY.Any communication relating to this appeal may be sent to Edward Cooper, Partner, Slater & Gordon, 22 Chancery Lane, London WC2A 1LS. Mr. Cooper's telephone number is 0330 995 5518 and his email address is edward.cooper@slatergordon.uk

2. The Appellant appeals from the decision of the Tribunal chaired by Employment Judge Anne Martin, with Ms. Edwards and Ms. Forecast as lay members, sitting in the London South Employment Tribunal as set out in the written reasons sent to the parties on 16 November 2022 and dated 15 November 2022 ("the Reasons"). The hearing took place between 20 June – 8 July 2022; 12 July 2022, 14 July 2022, and

in chambers 25 – 28 July 2022, 28 October 2022, and 3 November 2022. The hearing was heard by CVP, contrary to the Claimant's submissions that it should take place in person.

3. The parties to the proceedings before the Employment Tribunal were as follows:

    a. The Appellant was the Claimant before the Tribunal;

    b. The Respondent, who was also the Respondent in the Employment Tribunal, was Lewisham and Greenwich NHS Trust of University Hospital Lewisham, High Street, Lewisham, London SE13 6LH. The Respondent was represented by Counsel instructed by Andrew Rowland of Capsticks 1 St Georges Road, Wimbledon, London, SW19 4DR . Andrew Rowland can be contacted on 07738027472 or by email at Andrew.Rowland@capsticks.com. It is unknown to the Appellant whether the Respondent's solicitors remain on record.

4. Copies of:

    a. The written record of the Employment Tribunal's judgment ("**the Judgment**") and the written reasons of the Employment Tribunal ("**the Reasons**");

    b. The claim form (ET1);

    c. The response form (ET3);

    d. Relevant case management orders;

    e. The Appellant's written submissions placed before the Tribunal;

    f. The witness statement of Andrew Rowland, solicitor for the Respondent;

    g. Extract from David Cocke's first witness statement (referring to "senior doctors";

    h. The second witness statement of David Cocke;

i. Extracts from the Transcript as referred to below;

j. The record of the Board meeting produced in late disclosure.

are attached to this Notice of Appeal. Note that no schedule of loss was directed or served as this hearing was to determine liability only.

5. The Appellant has not applied for reconsideration of this decision.

6. The grounds upon which this Appeal is brought are that the Employment Tribunal erred in law and/or reached a perverse decision. Further or alternatively, that some of the reasons given by the Tribunal are insufficient and therefore not *Meek* compliant. This is explained further below in the Grounds of Appeal.

7. Hereafter, the parties are referred to as they were in the Employment Tribunal.

GROUNDS OF APPEAL

BACKGROUND

1. The Claimant brought a third whistleblowing claim ("the Third Claim") on 6 March 2019 for post-employment detriment suffered following the settlement of previous whistleblowing claims ("the First and Second Claims"), settled in contentious circumstances in October 2018, shortly after the Claimant had given his evidence.
2. The alleged detriments turned on comments made about the Claimant to various influential stakeholders and local MPs, as well as three public statements published on the Respondent's website and forwarded to journalists following the settlement of the First and Second Claims.
3. It was not in issue that a number of protected disclosures had been made. It was in issue whether the Claimant reasonably believed that five of the disclosures tended to show concealment (s43B(1)(f) ERA 1996).

THE DECISION OF THE EMPLOYMENT TRIBUNAL

4. The Claimant's claims were heard by a Tribunal chaired by Employment Judge Anne Martin, sitting with Ms. C Edwards and Ms. J Forecast at the final merits hearing beginning on 20 June 2022. With the consent of the tribunal, the Claimant had a professional transcript made of the hearing, which was shared with the Respondent and the Tribunal at the end of each day.
5. The Tribunal dismissed all of the Claimant's claims by its Reasons sent to the parties on 16 November 2022. The version of the Reasons sent to the parties includes one unfinished paragraph at 161(b).

General comments

6. It may assist the Appeal Tribunal to consider the following general issues that arise in the lengthy judgment of the Tribunal. These are not appeal points in and of themselves, though some of them will echo in the numbered grounds below; rather they demonstrate that the specific issues raised in this appeal are illustrative of an inadequacy in decision making which runs throughout the reasoning.

7. As is evident from the numbered grounds below, the Tribunal's reasoning throughout has numerous defects. The Tribunal fails to consider pleaded issues; fails to draw inferences or otherwise give reasons as to why an inference is not drawn; fails to apply the law correctly or otherwise explain why the law is not applicable.

8. In summary, the Tribunal's Reasons show an inconsistent approach to the evidence of the Claimant and the Respondent; and multiple errors of law. The Tribunal has further failed to have regard to the overall picture presented by the evidence and the totality of circumstances from which inferences could be drawn contrary to the guidance provided by HHJ Shanks in *Talbot v Costain Oil, Gas & Process Ltd* UKEAT/0283/16/LA at para 15.

Serious disclosure issues

9. The extraordinary failures in this case on the part of the Respondent to preserve, discover and disclose evidence; and the destruction of evidence by the Respondent were serious and jeopardised the fairness of the trial, but are barely reflected in the Tribunal's reasoning. This underpins a number of the Grounds of Appeal below. To assist the Appeal Tribunal, the Claimant sets out a summary of those issues here.

10. Some time prior to the final merits hearing, it became clear that the Respondent had not complied with the disclosure order of EJ Andrews dated 13 November 2020. This was noted by EJ Kelly in his record of the case management hearing 2 September 2021, as follows: "*R1 failed to comply with its discovery obligations*" in relation to a number of letters sent to stakeholders about the Claimant.

Subsequent events demonstrated that the Respondent had by the time of the final merits hearing still failed to comply with their preservation, discovery and disclosure obligations.

11. At the outset of the final hearing, the Claimant made an application for the Respondent to provide the Claimant with the names of the "senior doctors" referred to in David Cocke's witness statement for the Respondent. This application was rejected. At 9.30pm on Friday 1 July 2022, there was further disclosure from the Respondent. This suggested that the disclosure remained inadequate. Accordingly, the Claimant made an application for the disclosure exercise to be repeated in respect of certain individuals (see Reasons at paragraphs 50 – 56).

12. On Monday 4 July 2022, during the final hearing, the Tribunal made a further case management order, having granted the Claimant's application, providing that the deficiencies in disclosure be addressed. The hearing was adjourned for two days as a result.

13. On 5 July 2022, the Tribunal and the Claimant received a witness statement from David Cocke, who at the time was due to be cross-examined, which set out that having heard the cross-examination of Mr. Travis, and upon realising that he did have undisclosed emails in an archive folder which "*contain[ed] over 90,000 emails*", deleted the entire folder before the start of the hearing on 4 July 2022.[1]

14. More disclosure followed from the Respondent which revealed that the Respondent had also made numerous previous assertions about the evidence it held which were untrue.

15. As set out above, these matters are barely reflected in the judgment and despite an invitation to do so, no inferences are drawn from the Respondent's behaviour, despite the inescapably serious impact they had on the proceedings which included alleged disclosures concerning concealment of wrongdoing.

[1] See the Second Witness Statement of David Cocke, at paragraphs 14 and 18.

Overall tone of reasoning

16. The tone of the Tribunal's reasoning may be relevant when considering an appeal. The Claimant contends that the following are examples of an inconsistent approach as between the Claimant and the Respondent:

    a. At paragraph 80 of the Reasons, describing Mr. Cocke's conduct in providing limited late disclosure and then in deleting 90,000 emails during the final merits hearing as simply having "*opened a can of worms*";

    b. Relying on the untested evidence of Mr. Cooper KC (the Claimant's counsel having been prevented from continuing his cross examination of Mr Cooper) and Mr. Cocke (who ultimately was not produced by the Respondent to give evidence – and whose second witness statement was not even signed) to make findings against the Claimant;

    c. Despite having been supplied in the Claimant's submissions with the questions that would have been put to Mr Cocke in cross examination, failing to engage with any of the points arising from those questions;

    d. Noting at paragraph 106 that the Claimant, who is a whistle-blower who has faced significant adversity and has already had to take a preliminary issue (successfully) to the Court of Appeal before getting justice, had been "*highly critical of the appeal processes in the Employment Appeal tribunal and the Court of Appeal and of the judges who dealt with his appeal*" despite it not being relevant to the issues in this hearing (there had been a very unfortunate mistake at the Court of Appeal in 2020 who initially sent the parties a notice saying that the Claimant's application for permission to appeal on the Claimant's application to set aside the settlement in 2018 had been successful – subsequently revised to say that it had been unsuccessful);

e. Noting at paragraph 107 a statement said to be on the Claimant's crowdfunding website (actually an email to crowd-funders that had backed the case) that "*I always had faith in the British legal system but it seems there are a number of people that are either too weak or corrupt to do their duty*", despite it not being relevant to the issues.

17. At paragraph 197, the Tribunal refers to matters stated for the first time by the Claimant in his oral evidence in a manner that suggests that this impacts on his veracity; however, statements made by Mr. Travis for the first time in oral evidence are not remarked upon in the same tone, even when late disclosure showed them to be untrue (see, for example paragraph 198).

18. The tone of the Tribunal's Reasons does not give assurance to the reader that the Tribunal embarked on this exercise in a fair-minded manner from the outset.

NUMBERED GROUNDS

Ground 1: Failure to make findings on the issues

19. A Tribunal must make findings on specific issues raised by the parties (see *Jocic v London Borough of Hammersmith & Fulham* UKEAT/0194/07*; Peart v Dixons Store Group Retail Ltd UKEAT/0630/04; Noble v Sidhil Ltd,* UKEAT/0375/14). A failure to make such findings is an error of law. The List of Issues is attached to the Tribunal's Reasons at Appendix 1.

20. The Tribunal erred in law by failing to make findings in relation to the following:

a. the alleged protected disclosures at paragraph 2.2(b) and 2.2(c) in respect of the question of deliberate concealment under s43B(1)(f) ERA 1996 – involving 5 alleged disclosures to the Respondent which were disputed by the Respondent;

b. the detriment set out at paragraph 4.1(a)(i) of the list of issues;

c. the detriment set out at paragraph 4.1(a)(iii) of the list of issues;

d. Failing to deal with the detriment set out at paragraph 4.1(b) of the list of issues.

21. The Tribunal has therefore failed to properly adjudicate and engage with the Claimant's claims.

Detriment

Ground 2: Taking into account irrelevant information

22. *Beatt v Croydon Health Services NHS Trust* [2017] ICR 1240 is authority for the propositions that:

a. A public statement, even if true, may amount to a detriment (see paragraph 110);

b. A detriment does not have to be maliciously motivated (see paragraph 111).

23. In *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] ICR 1226 the Court of Appeal at paragraph 62 held that it is an error of law for the Tribunal to conflate the factual question of whether a worker was subjected to a detriment with causation.

24. At paragraph 154 of its decision, the Tribunal finds that if something in one of the Respondent's public statements is true, then it is not a detriment and that the detriments set out in the list of issues at 4.1(a)(i), 4.1(a)(ii) are true and therefore not detriments. The Tribunal further finds at paragraph 156 that paragraph 4.1(b) in the list of issues is true and therefore not a detriment.

25. The Claimant's case was that the statements were not true but the Tribunal has erred in law by finding that a true statement cannot be a detriment. The Tribunal has further erred by failing to assess the detriment from the viewpoint of the worker.

26. At paragraph 178, the Tribunal finds that the four doctors to whom the Claimant's protected disclosures had been made simply

wished to "*set the record straight*" and that this did not "*indicate any malice on the part of the doctors*".

27. The Tribunal falls further into error by taking into account whether there was any malice intended by the Respondent in respect of the detriments. This is also an irrelevant consideration.

28. Finally, it is an error of law for the Tribunal to approach detriment by looking at the employer's motivation for an act or omission and whether a detriment is true or not. Causation must be kept distinct from the factual question of whether a worker has been subjected to a detriment.

Ground 3: Drawing an adverse inference in respect of the Claimant's reliance on legal advice privilege

29. As set out in *Phipson on Evidence (20th Edition)* at 23-16:

> "*No adverse inference can be drawn from a claim for privilege. It would be inconsistent with privilege existing as a fundamental right on which the administration of justice is based for a court to draw any adverse inference from the making of a valid claim to privilege*" (see also *Wentworth v Lloyd* [1864] 10 HLC 589; *Sayers v Clarke Walker* [2002] EWCA Civ 910).

30. It follows that it is an error of law for a Tribunal to draw an adverse inference when a party makes a valid claim to privilege. For the avoidance of doubt, neither the Claimant nor the Respondent in these proceedings agreed to waive legal advice privilege.

31. The Tribunal erred in law by drawing adverse inferences in respect of the Claimant's reliance upon legal advice privilege. The Tribunal references the Claimant's refusal to waive legal advice privilege on at least five occasions at paragraphs 124, 127, 130, 135 and 140. There is not a single reference to the Respondent's refusal to do the same.

32. The Tribunal further erred in law by speculating repeatedly as to what the legal advice must have been at paragraphs 136, 137, 138,

139, 141, 142, 143, and 144 and in particular at paragraphs 138, 140, 141 and 142, where Tribunal has drawn an adverse inference as to what the specific legal advice was including making a finding related to advice on a potential finding of truthfulness, despite the Tribunal having no way of knowing the content of that advice and despite the tribunal's own finding as to Mr Milsom's evidence at para 136, which itself does not even accurately reflect what the transcript records Mr Milsom as saying: "Forgive me. I suppose the point that I really do reject is that I did anything or conveyed anything which signified an agreement that Dr Day was to be regarded as untruthful." [transcript Day 4, p85, line 2].

Ground 4: Applying the wrong legal test in respect of detriment

33. A detriment '*exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment*' (see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at paragraphs 33 to 35).

34. The Tribunal applied a higher standard to the Claimant in respect of the following findings:

a. Finding at paragraph 207 in respect of issue 4.2 that a detriment is not made out because the Respondent had responded to the request of Sir Norman Lamb, but did not respond in the way the Claimant had hoped. The very fact that the Respondent did not respond as the Claimant had hoped is capable of being a detriment to a reasonable worker. The Tribunal has not considered this point;

b. Finding at paragraph 211 in respect of issue 4.3 that the CQC had not asked the Respondent to remove the public statements, and therefore the detriment was not made out, when the Claimant's case (and issue 4.3) was that it was a detriment not to remove the public statements once contacted by the CQC with concerns. That is capable of being a detriment and the Tribunal has not considered this point;

35. The Tribunal therefore erred in law by failing to consider these allegations from the perspective of the reasonable worker.

36. Further or alternatively, the Tribunal has failed to give adequate reasons as to the findings above.

Causation

Ground 5: Application of the wrong legal test in respect of causation

37. The test of causation in whistleblowing detriment is not a simple but-for test. Section 47B will be infringed if the protected disclosure materially influences, in the sense of being more than a trivial influence, the employer's treatment of the whistle-blower (per Elias LJ in *Fecitt v NHS Manchester* [2012] IRLR 64 at paragraph 45).

38. The Tribunal refers to *Fecitt* at paragraphs 69, 81 and 100 of its reasons. The mentions at paragraphs 69 and 81 are references to submissions made by the Claimant as to how *Fecitt* should be applied in the context of a strike out application by the Claimant. The Tribunal incorrectly states at paragraph 2 that the causation test is a "because of test", and at paragraph 100 describes the test as one of "material influence". However the Tribunal failed to apply the test of material influence in the sense of being more than a trivial influence.

39. The Tribunal's findings on causation demonstrate that the Tribunal has taken a binary approach to the question of causation or at least that it was erroneously looking for the primary influence. The Tribunal has applied a high threshold "because of" or "but-for" standard, instead of considering whether the protected disclosure had a material influence on the detriment in the sense of being more than trivial, which should be a low threshold.

40. The findings which demonstrate this error are at paragraphs 173, 176, 177, 178 with the key finding on causation at paragraph 179 of the Reasons. In summary, these paragraphs make the following findings:

a. At paragraph 173 the Tribunal finds that the Daily Telegraph Article of 2 December 2018 was the reason the Respondent published the statement of 4 December 2018 without considering whether the publication of the statement was more than trivially influenced by the protected disclosures;

b. At paragraph 176 the Tribunal finds that the emails in late disclosure which show that there were communications between Ms. Lynch, Mr. Cocke and the four doctors does not show that they were feeding false and tainted information to be included in the statement. There is no requirement for the information to be "*false and tainted*", simply that it was materially influenced by the protected disclosures;

c. At paragraph 177 that the Tribunal had concluded that "*the official sign off and authority to publish the statements was made by Mr. Travis*". The relevance of this conclusion is unclear and the reasoning is incomplete;

d. At paragraph 178 that the late disclosure of the emails between Ms. Lynch and the four doctors "*does not indicate any malice on the part of the doctors, merely a wish to set the record straight from their point of view*". The fact that there was no malice is not a relevant consideration; there is no statutory requirement for a detriment to be founded by malice toward a whistle-blower.

41. At paragraph 179, the Tribunal merely accepts that the Respondent's statements were made in response to the media interest in the Claimant's case and "a desire to put the Trust's side of the story". The Tribunal further accepts that the only reason the statements were made was because of what it describes as a "PR battle".

42. The Tribunal has erred in law by applying the incorrect test for causation in respect of the findings set out above at paragraphs 45 and 46 of its Reasons. The Tribunal has not undertaken any

examination of the impact the protected disclosures had on the Respondent's actions, and simply finds that a but-for test is not met.

43. The Tribunal was specifically directed in submissions for the Claimant to para 64 of the Court of Appeal's Judgment in *Jesudason* stating that "the issue is not the reason why the letters rebutting the appellant's allegations were written but why the offending passages which caused the detriment were included in those letters" (Sir Patrick Elias). The Tribunal did not follow that guidance.

44. Further or alternatively, the Tribunal has failed to give adequate reasons for its findings in those paragraphs.

Ground 6: Failure to correctly apply the burden of proof

45. When considering causation, the burden of proof shifts to the employer to prove that if a detriment was done, it was not done on the grounds of the protected disclosure (see *Fecitt* at paragraph 43).

46. Further, it is not necessary for a worker to show that actual harm was suffered (see *Shamoon* at paragraph 35).

47. The Tribunal should not uncritically accept a reason advanced by a Respondent for detrimental action. That the employment tribunal may consider the reason given to be reasonable does not absolve the ET from further enquiry (see *Patel v Surrey County Council* UKEAT/0178/16/LA, para 101).

48. At paragraph 161, the Tribunal places weight on whether alleged statements were perceived to be detrimental by others. That is plainly an error of law. It is not permissible for the Tribunal to place the burden of proof in relation to detriment upon the Claimant.

49. The Tribunal further erred in respect of this finding by inferring that because the Tribunal had found that the alleged detriments were not, in terms, "detrimental", the Tribunal firstly disregarded that detriment is to be assessed from the perspective of the worker, and

secondly, placed a burden upon the Claimant to show that he had suffered actual harm.

50. Further or alternatively, the Tribunal failed to undertake any critical assessment of the reasons advanced by the Respondent for its detrimental actions. The Claimant repeats paragraphs 45 and 46 above.

51. As such, the Tribunal has erred in law by finding that the Respondent has succeeded in discharging the burden of proof.

Field of employment (majority decision)

Ground 7: Incorrect application of the law

52. The leading case on post-employment detriment is *Woodward v Abbey National Plc* (No1) [2006] EWCA 822; [2006] ICR 1436. At paragraph 68 of *Woodward* Ward LJ set out the rationale for protection extending beyond the contract of employment itself.

53. In its Reasons at paragraph 191, the majority applies a test that is derived incorrectly from the Court of Appeal's judgment in *Tiplady v City of Bradford MDC* [2019] EWCA Civ 2180; [2020] ICR 965, and which incorrectly defines the scope of the s47B protection (see paragraphs 182 to 189) and disregards the rationale behind it, as elucidated in *Woodward*.

54. At paragraph 191 (with reference to para 183), the majority erred in law by accepting the Respondent's argument that the Claimant was acting as a "crowd-funded litigant" merely because the Claimant had to raise funds in order to bring the litigation. This could impede the ability of whistle-blowers to fund their litigation.

55. The Tribunal further erred in those paragraphs by relying entirely on the decision in *Tiplady* as though it were authority for a new test, and disregarding *Woodward,* despite the Court of Appeal in *Tiplady* agreeing with the Court of Appeal in *Woodward.*

56. The Tribunal did not make any further findings on the point, which the Claimant contends shows an inadequacy of reasoning sadly

characteristic of this set of Reasons. Neither majority nor minority reasoning is set out.

Ground 8: Inadequate reasoning

57. Further or alternatively, the matters set out at Grounds 1 – 7 above are not *Meek* compliant and the reasons for the findings made by the Tribunal, where they exist, are inadequate (as identified above).

Approach to the evidence

Ground 9: Procedural unfairness

58. It is a fundamental principle of access to justice that a hearing will be procedurally fair. The overriding objective requires that tribunals deal with cases fairly and justly which requires, so far as is practicable, ensuring that the parties are on an equal footing. The ECHR in Duraliyski v Bulgaria [2014] ECHR 231 stated at para 30:

> *"The Court reiterates that the concept of a fair hearing implies the right to adversarial proceedings, in accordance with which the parties must have the opportunity not only to adduce evidence in support of their claims, but also to have knowledge of, and comment on, all evidence or observations filed, with a view to influencing the court's decision"*

59. During the hearing, one of the Respondent's witnesses was Ben Cooper KC, who had represented the Respondent in the First and Second claims. Mr. Cooper's witness statement evidence largely turned on his assessment of the Claimant's response to cross-examination at the hearing of the First and Second claims. With respect to Mr Cooper, he could not be other than a partisan witness. His evidence was robustly challenged by the Claimant. As a result of the Claimant's supplementary witness statement evidence in this regard, Mr Cooper accepted that one of the assertions in his witness statement may not be accurate.

60. The quality of the Claimant's evidence at the October 2018 hearing was a factor which, during this hearing, the Tribunal had itself

said was irrelevant (see Transcript, Day 3, p2, line 11; see also paragraph 38 of the Reasons):

> "The tribunal is not expected to make findings specifically about whether the Claimant was being truthful or what his demeanour was in giving evidence at the last tribunal, and both parties agree that that's not something for the tribunal to do".

61. It was on this basis that the Tribunal stopped further cross-examination by the Claimant's counsel of Mr Cooper on this topic from taking place.

62. Contrary to the principle of procedural fairness, the Tribunal, having stopped the cross-examination, relied on the untested content of Mr. Cooper's witness statement in relation to the detriments at paragraph 4.1 of the list of issues at paragraphs 137 and 140 of its Reasons.

63. This is an error of law and renders unsafe the findings at paragraphs 137 and 140 of the Reasons. It also amounts to taking irrelevant information into account.

Ground 12: Failure to take relevant evidence into account

64. It is also an error of law for the Tribunal to fail take into account relevant evidence.

65. In respect of this ground, the Tribunal did not consider the following in terms of its decision-making:

a. Whether the references to costs made at and around the time of settlement are relevant to whether the public statements were detriments;

b. In considering the other alleged detriments and causation, the Tribunal's own finding at paragraph 155 as to the timing of the Respondent's decision definitely not to pursue costs against the Claimant;

c. Dr Smith's relevant oral evidence that "there was a clear and present danger to patient safety" inherent in the Claimant's protected disclosures which may have had more than a trivial influence on the alleged detriments;

d. The fact that Mr. Travis had made assertions in cross-examination that the Respondent's disclosure had shown to be untrue in relation to the record of the Board meeting and additional stakeholder letters;

e. The fact that Mr. Cocke had deleted 90,000 documents and then not been produced for cross-examination;

f. That the settlement agreement in respect of the First and Second claims included an agreed statement, and that the Respondent had veered repeatedly from that statement in its public pronouncements

g. Failure to give due weight to evidence before the tribunal relating to use of a potential cost application to force the wording of an agreed statement; two tier cost consequences; and wasted cost consequences.

66. Further or alternatively, as a result of the above the Tribunal has failed to engage with the Claimant's case. The tribunal were requested in the Claimant's submissions to draw inferences from these (and other) matters. The tribunal's failure to do so or to explain why it would not do so amounts to an error of law.

Ground 13: Inconsistency in relation to drawing of inferences

67. As set out above, the Tribunal erred by drawing an adverse inference in respect of the Claimant's refusal to waive legal advice privilege. The Tribunal further makes inferences as to the Claimant's veracity at paragraphs 137 and 197.

68. By contrast, the Tribunal has failed to draw any inferences whatsoever in respect of the Respondent's conduct. The Tribunal fails

to do this in two key respects, which amount to procedural irregularity:

a. Firstly, despite the destruction of the 90,000 documents by Mr. Cocke in the middle of the hearing, and the evidential impact of Mr. Cocke not attending for cross-examination as a result of his conduct (the Tribunal having been supplied by the Claimant in submissions with the questions that would have been put to Mr Cocke in cross examination), the Tribunal does not draw any inference or adequately explain why it fails to do so.

b. Secondly, despite Mr. Travis stating in his cross-examination that he had written to no other NHS stakeholders personally setting out the public statements the Respondent had made in relation to the Claimant, the late disclosure demonstrated that there were in fact more letters to stakeholders: 4 CEOs of neighbouring Trusts: Amanda Pritchard, CEO, Guy's and St Thomas', Peter Herring, Interim CEO, Kings, Matthew Trainer, CEO, Oxleas, Dr Matthew Patrick, CEO, South London and Maudsley; and additionally to Steve Russell at NHSI and Jane Cummings at NHSE..

c. Mr. Travis had also told the Tribunal that there was no note of the board meeting prior to the settlement of the First and Second claims, a document which was also later disclosed by the Respondent.

d. Mr Travis' witness statement advanced a position that at the time of settlement he advised the Board of the Respondent that he wanted the case to run its course but the record of Board meeting that approved the settlement (that was withheld from disclosure, its existence having been denied by the Respondent for 4 years) showed the opposite and that he stated to the Board that he favoured settlement and that the four doctors has expressed concerns about giving live evidence.

69. It follows that the Tribunal has drawn adverse inferences in respect of the Claimant (even where the Tribunal was not so entitled), but has failed to comment at all on two extremely serious matters in relation to the Respondent.

70. Accordingly, the Tribunal has erred in law by failing to take a consistent approach to the drawing of inferences.

71. In respect of Mr. Cocke's mass deletion of evidence, the Tribunal has further erred in law by failing to draw an inference despite having directed itself in accordance with *Active Media services Inc v Burmester* [2021] EWHC 232 (Comm) at paragraphs 84 and 86 that it was able to do so.

72. Further or alternatively, the Tribunal has failed to give any reasons as to why an adverse inference was not drawn in relation to the Respondent's conduct set out above.

Ground 14: Perversity

73. Further or alternatively, the Tribunal's decision in respect of causation and the burden of proof set out above are perverse in that no reasonable tribunal properly directed would conclude that that the Respondent had met the burden of proof.

74. This is particularly so in light of the destruction of documents and Mr. Cocke's failure to attend for cross-examination, when he was the only witness who could speak to the drafting of the public statements that underlie the alleged detriments at paragraph 4.1. The Tribunal failed to even engage with the points made in the cross-examination questions that would have been put to Mr Cocke as set out in the Claimant's submissions.

ORDER SOUGHT

75. The Claimant invites the Appeal Tribunal to overturn the decision of the Employment Tribunal and remit the matter to a differently constituted Tribunal.

Andrew Allen KC

Elizabeth Grace

Outer Temple Chambers

IN THE EMPLOYMENT APPEAL TRIBUNAL **Case No: EAT/[ ]**

ON APPEAL FROM THE LONDON SOUTH EMPLOYMENT TRIBUNAL

Case No.: 2300819/2019

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1. The Appellant is Dr Christopher Day, of 156 Northumberland Avenue, Welling, London, DA16 2PY. Any communication relating to this appeal may be sent to Edward Cooper, Partner, Slater & Gordon, 22 Chancery Lane, London, WC2A 1LS. Mr. Cooper's telephone number is 0330 995 5518 and his email address is edward.cooper@slatergordon.uk

2. The Appellant appeals from the costs decision of the Tribunal chaired by Employment Judge Anne Martin, with Ms Edwards and Ms Forecast as lay members, sitting in the London South Employment Tribunal as set out in the written reasons sent to the parties on 26 April 2023 and dated 6 March 2023. The parties made submissions in writing; and the Tribunal made its decision on the papers with the agreement of both parties.

3. The parties to the proceedings before the Employment Tribunal were as follows:

    a. The Appellant was the Claimant before the Tribunal;

b. The Respondent, who was also the Respondent in the Employment Tribunal, was Lewisham and Greenwich NHS Trust of University Hospital Lewisham, High Street, Lewisham, London SE13 6LH. The Respondent was represented by Counsel instructed by Andrew Rowland of Capsticks, 1 St Georges Road, Wimbledon, London, SW19 4DR. Andrew Rowland can be contacted on 07738027472 or by email at Andrew.Rowland@capsticks.com. It is unknown to the Appellant whether the Respondent's solicitors remain on record.

4. The Appellant has already filed an appeal EA-2022-001347-NLD in respect of the substantive decision of the Tribunal in this matter and asks that his appeal in relation to costs is considered with the appeal of the substantive decision.

5. Copies of:

   a. The written record of the Employment Tribunal's costs judgment ("**the Costs Judgment**") and the written reasons as to costs of the Employment Tribunal ("**the Costs Reasons**");

   b. The written record of the Employment Tribunal's judgment ("**the Judgment**") and the written reasons of the Employment Tribunal ("**the Reasons**");

   c. The claim form (ET1);

   d. The response form (ET3);

   e. Relevant case management orders dealing with disclosure;

   f. The Appellant's written submissions dated 13 December 2022 and placed before the Tribunal in respect of the Costs Reasons;

   g. The Appellant's costs schedule appended to the written submissions, also dated 13 December 2022;

   h. The Respondent's submissions in response to the Appellant's costs application, dated 9 January 2023;

   i. The Appellant's written response to the Respondent's submissions placed before the Tribunal in respect of the Costs Reasons, dated 28 February 2023;

j. The witness statement of Andrew Rowland, solicitor for the Respondent;

k. The second witness statement of David Cocke;

l. The record of the Board meeting produced in late disclosure.

are attached to this Notice of Appeal. Note that no schedule of loss was directed or served as this hearing was to determine liability only.

6. The Appellant has not applied for reconsideration of this decision.

7. The grounds upon which this Appeal is brought are that the Employment Tribunal has erred in law in its decision on costs, or has failed to give adequate reasons as to the same. Further or alternatively, the decision reached by the Employment Tribunal is perverse. This is explained further below in the Grounds of Appeal.

8. Hereafter, the parties are referred to as they were in the Employment Tribunal, and the Employment Tribunal is referred to as "the Tribunal."

GROUNDS OF APPEAL

BACKGROUND

1. As set out in detail in the Claimant's substantive appeal, the underlying claim in respect of which the costs application was made was a third whistleblowing claim ("**the Third Claim**") filed on 6 March 2019 for post-employment detriment suffered following the settlement of previous whistleblowing claims ("**the First and Second Claims**").

2. The alleged detriments in the Third Claim turned on comments made about the Claimant to various influential stakeholders and local MPs, as well as three public statements published on the Respondent's website and forwarded to journalists following the settlement of the First and Second Claims.

3. It was not in issue that a number of protected disclosures had been made. It was in issue whether the Claimant reasonably believed that five of the disclosures tended to show concealment (s43B(1)(f) ERA 1996). The key issue for the Tribunal was whether the Claimant had suffered a detriment as a result of the

disclosures and that background question relating to a culture of concealment was relevant to the question of detriment.

4. In particular, the Claimant alleged in the Third Claim, among other things, that it was a detriment that the Respondent had materially misrepresented to MPs, the press, and key stakeholders the substance and seriousness of the underlying disclosures the Claimant had made in the First and Second claims. Another detriment alleged was that the Respondent had materially misrepresented the scope and findings of formal investigations into the disclosures.

5. It was for this reason that evidence was presented as to the basis of those disclosures and as to their seriousness .

6. By way of its Judgment and Reasons sent to the parties on 16 November 2022, the Tribunal dismissed the Claimant's claims, but did find that the Claimant was subjected to a detriment. That Judgment is currently under appeal as set out in detail in the Notice and Grounds of Appeal dated 22 December 2022 in respect of that decision. The grounds in relation to the substantive appeal will not be repeated here, though the Claimant invites the Tribunal to deal with the appeal against the Reasons and this appeal against the Costs Reasons together.

7. The Claimant's costs application turned on the Respondent's conduct in respect of disclosure issues, which in this case were extraordinary and of the utmost seriousness. They are set out in detail in the Claimant's costs application appended to these grounds; however, in very brief summary, during the final hearing:

    a. Discovery and disclosure failures became abundantly clear, including the fact that the Respondent had put forward an untruthful case in relation to the existence of notes or minutes of a board meeting;

    b. Mr David Cocke, one of the Respondent's witnesses, admitted to permanently deleting an archive folder which "*contain[ed] over 90,000 emails*" during the course of the hearing upon it having become apparent during the course of the hearing that he had not undertaken a proper search and that there were undisclosed documents. He did this on the day

that he was due to give evidence, and ultimately claimed thereafter to be too unwell to give evidence;

c. It transpired that the Respondent was in serious breach of the Tribunal's orders as to disclosure dated 13 November 2020, 2 September 2021, and 4 July 2022.

8. This conduct was serious and had costs implications for the Claimant, particularly since the manner in which the disclosure failures were revealed happened piecemeal over a two-week period. The late disclosure was drip-fed to the Tribunal and the Claimant during the hearing between 1 July 2022 and going up to 13 July 2022, well after the evidence had finished, creating considerable additional work for the Claimant's lawyers over and above the work that would have taken place had the Respondent complied with its discovery and disclosure obligations from the outset.

9. By way of his costs application dated 13 December 2022, the Claimant alleged that the Respondent's conduct had been unreasonable. The detail is set out in the costs application appended to these Grounds. In short the Claimant alleged that the Respondent's conduct in respect of disclosure was unreasonable conduct for the purposes of Rule 76, including but not limited to the egregious and deliberate deletion of an entire email archive on 5 July 2022 following an order for further disclosure on 4 July 2022 and the existence of documents that the Respondent's witnesses had hitherto, including under cross-examination, denied existed. The Claimant further contended that the Respondent's conduct was in breach of the Tribunal's orders.

THE DECISION OF THE EMPLOYMENT TRIBUNAL

10. The Tribunal dismissed the Claimant's costs application. The Costs Reasons of the Tribunal set out at paragraph 1 that the Respondent's conduct was unreasonable, and that therefore the Stage 1 threshold test was met.

11. Further, at paragraph 12, the Tribunal set out that it did not consider Stage 2, namely the means of the paying party, was relevant in this case. In respect of Stage 3, the Tribunal appears to have determined that it was nonetheless not appropriate to award costs; however, in so determining, the Tribunal focussed

entirely on the Claimant's conduct and not on the conduct of the Respondent which was the subject of the application.

NUMBERED GROUNDS

Ground 1: The Tribunal erred in law in its failure to exercise its discretion in the Claimant's favour by disregarding relevant factors and giving impermissible weight to irrelevant factors and failing to make findings on each of the issues raised in the Claimant's costs application and/or failing to engage with the Claimant's arguments in respect of the same.

Further or alternatively, the Tribunal failed to give any or any adequate reasons as to the same.

1. The Tribunal failed to consider the submissions made by the Claimant in respect of the impact of the Respondent's conduct. Instead, the Tribunal devotes paragraphs 14 to 21 of the 22-paragraph Costs Reasons to reciting the Respondent's submissions. In essence, the Tribunal approached the matter as though it were dealing with an application by the Respondent rather than the application by the Claimant that it was in fact dealing with, which turned on the Respondent's extraordinary and unreasonable conduct in respect of disclosure. In fact, the Respondent's conduct as outlined at paragraphs 7 - 8 above is not in mentioned in the Costs Reasons at all.

2. The Tribunal has also failed to address that it was part of the Claimant's pleaded case that his detriments included the fact that the Respondent had materially misrepresented their investigations and the substance and seriousness of the disclosures the Claimant had made in the First and Second claims. This was plainly relevant to the exercise of the discretion, as was the fact that it was the Respondent's unreasonable conduct that resulted in such a lengthy hearing.

3. In considering whether to make a costs order at the third stage, the Tribunal should have considered all relevant factors. While the Tribunal correctly held that it had jurisdiction to award costs in this case, due to its finding in the Reasons that the Respondent's conduct had been unreasonable, it should have gone on to consider that conduct (and its gravity and impact on the Claimant's case) as a relevant factor in exercising the discretion.

4. Instead, the Tribunal did not deal with the Respondent's conduct at all. The Tribunal focussed solely on the Claimant's conduct despite the Claimant's conduct not being in any way material to the disclosure issues that comprised the Claimant's discrete costs application.

5. Further, the Tribunal has plainly taken into account a number of irrelevant factors, including the Claimant's social media activity after the case had concluded (see Costs Reasons at paragraph 21), and the fact that the Tribunal understands that the Claimant has brought a further claim (see Costs Reasons at paragraph 19).

6. Even if the Tribunal had found that the Claimant's own conduct had contributed to the costs in respect of the disclosure failings (which, for obvious reasons, it did not), the proper approach would be to exercise the discretion to award costs but as part of that discretionary exercise, to reduce the amount of costs awarded.

7. For the reasons set out above, the Tribunal has erred in law by not exercising its discretion in the Claimant's favour.

8. The Claimant contends further or alternatively that the Tribunal's decision is not **Meek** compliant. As is clear from the Costs Reasons at paragraphs 14 - 21, there is a lengthy discussion of the Respondent's submissions, but no analysis as to other relevant factors; no balancing of the relevant factors; and no adequate explanation as to why the Tribunal declined to exercise its discretion. Instead, the Costs Reasons end abruptly at paragraph 22.

Ground 2: The Tribunal erred in law by considering in isolation the Respondent's submissions as to the Claimant's conduct at stage three of its assessment.

9. While it is accepted that a receiving party's conduct may be taken into account by an employment tribunal, the Tribunal erred in law by :

    a. Failing to factor into stage three the Respondent's conduct in any way or at all. The Tribunal considered the Claimant's conduct in isolation at stage three of its assessment;

b. Reaching conclusions in respect of the Claimant's conduct in the Costs Reasons which were not corroborated by findings of fact in the Tribunal's underlying Reasons; and,

c. Further or alternatively, reaching a perverse decision.

Failing to factor into stage three the Respondent's conduct.

10. In particular, the Tribunal failed to consider that in terms of the costs claimed by the Claimant, it was the Respondent's conduct throughout proceedings, and the disclosure failures, including untruthful statements as to disclosure, which were discovered during proceedings, that were relevant to the exercise of the discretion.

11. It is only permissible for the Tribunal, in looking at the whole picture, to take into account the Claimant's conduct as found in the Tribunal's Reasons in respect of the underlying claim. It is not permissible for the Tribunal to accept new factual submissions without supporting evidence.

12. Further, the tribunal failed to make a determination that the Respondent did not comply with tribunal orders despite it being part of the Claimant's application.

13. In short, the correct approach to be applied by the Tribunal was to:

a. take into account the costs caused by the paying party's unreasonable conduct as found in its Reasons;

b. take into account the conduct of the receiving party in light of any relevant finding of fact in its Reasons;

c. depending on those relevant findings of fact in respect of each party, to assess the proper amount of a costs order.

14. The Tribunal therefore erred in law by concluding that no order of costs should be made against the Respondent because of the Claimant's conduct without having identified any factual basis to support that decision, and without having considered the Respondent's conduct, which was the subject of the Claimant's costs application, at the second stage of its assessment.

Reaching conclusion regarding the Claimant's conduct which are not corroborated in the underlying Reasons.

15. In particular:

a. There is no finding in the underlying Reasons that the Claimant had conducted his case unreasonably; in fact, there is only one mention of unreasonableness in relation to the Claimant's conduct (see Reasons at paragraph 157) and relates to one sentence;

b. The Tribunal has taken new post-facto evidence adduced by the Respondent in its submissions in response to the Claimant's costs application as being relevant to all the circumstances of the case, which it plainly cannot be. Further, as set out in the Claimant's reply dated 28 February 2023 , the Respondent has in any event mischaracterised that evidence. The Claimant's reply does not appear to have been considered by the Tribunal at all;

c. The Tribunal made no findings in its underlying Reasons as to the scope of the Claimant's claim, and contrary to its finding at paragraph 17 of the Costs Reasons, the Tribunal at no point referred to **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 in its Reasons.;

d. There is no finding at paragraph 197 of the Reasons that the Claimant's conduct in cross-examination amounted to unreasonable conduct of proceedings;

e. The findings at paragraphs 18 and 19 of the Costs Reasons do not correlate in any way with the Tribunal's findings in the Reasons; instead, the Reasons show that the Tribunal curtailed the evidence (see Reasons at paragraph 38), which meant that absent the Respondent's unreasonable conduct, there was considerable leeway in the trial timetable. In fact, the only findings regarding the length of the trial were directly caused by the Respondent's unreasonable conduct (see Costs Reasons at paragraph 11). The findings at paragraph 11 further fail to take into account the increased demands placed upon the Claimant's legal team in dealing with the late disclosure and consequential issues (see Claimant's schedule of costs);

f. The finding at paragraph 19 of the Costs Reasons is an impermissible reference to another claim which could not possibly be relevant to the Claimant's conduct at the hearing in question. The Claimant contends that this is an entirely unsafe finding;

g. The finding of unreasonable conduct at paragraph 20 is entirely new, and does not correlate with any finding in the underlying Reasons;

h. At paragraph 21, the Tribunal plainly takes into account the Claimant's social media activity. This cannot be relevant to the Claimant's conduct at the hearing given that the tweets did not exist at that time. The Claimant contends that this is another example of an entirely unsafe finding;

16. Taken together, the above amount to a clear error of law when the Tribunal considered all the circumstances of the case in relation to the Costs Reasons. In short, the Tribunal made no finding that the litigation conduct of the Claimant was to be criticised. Accordingly, there was no proper factual basis for a conclusion that as a result of the Claimant's conduct, no costs should be awarded.

The Tribunal's decision was perverse.

17. Further or alternatively, the Tribunal's decision was perverse in that no reasonable tribunal properly directed would conclude that that the Claimant's conduct should be the focus of the Claimant's own application for costs against the Respondent, and in so concluding, take into account a range of impermissible factors as outlined in paras 9 to 16 above.

ORDER SOUGHT

18. The Claimant invites the Appeal Tribunal to overturn the decision of the Employment Tribunal in relation to costs and remit it to a differently constituted Tribunal.

19. The Appeal Tribunal is further asked to note that insofar as this appeal of the Costs Reasons is a free-standing appeal, if the Claimant's appeal of the underlying Reasons is successful in whole or in part, then that too will influence the outcome of this appeal. The Claimant contends that if his underlying appeal succeeds on any or all bases, then his appeal as to costs is also likely also

succeed. It is therefore respectfully suggested that they should be heard together.

Gmail Chris Day <chrismarkday@gmail.com>

EA 2022 001347 and 2023 000545 NLD Dr C Day v Lewisham and Greenwich NHS Trust - 2300819/19

Chris Day <chrismarkday@gmail.com> Wed, Feb 28, 2024 at 3:27 PM
To: EATAssociates <EATAssociates@justice.gov.uk>, LONDONEAT <LondonEAT@justice.gov.uk>

Dear Sir/Madam

Please can you confirm receipt

For the urgent attention of Deputy High Court Judge Andrew Burns KC

I am the Appellant in above appeal. I do not wish to expend legal resources instructing that my lawyers deal with this matter. I am mindful that I have trade union support that I do not wish to waste.

Deputy High Court Judge Andrew Burns KC, 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;

My note of the 27 February Judgment records;

"*Dr Day after the hearing was completed asked for the consequential dismissal to be reconsidered. He did so on the basis of duress – threat of award of costs if he fought and lost. It is common that if a claim is conducted properly, no award of costs is made against losing party. However, if a claim is conducted unreasonably, a tribunal has power to make costs award. It is not unusual for a party to raise the prospect of costs. The bar for suggesting that comments about costs amount to duress is a high one and it is not surprising that the EJ refused the application for reconsideration and Dr D was not successful at EAT and CA in getting the reconsideration decision overturned.*"

As stated this application was not grounded on duress which would have been futile but was grounded on mistake/misrepresentation. The Employment Judge dealing with the application in 2018, which was Employment Judge Martin, also ignored our ground of mistake/misrepresentation and re-invented the ground as an application on duress which Judge Burns seems to have also done. I attach my 2018 application to set aside the settlement to this email.

My application provided and was supported by evidence of multiple proposed cost applications, a proposed wasted cost application against my former solicitor and evidence that a proposed cost application was used to force the wording of an agreed statement saying that the NHS acted in good faith. This forced public statement has not aged well with the way the case has developed.

This evidence was ignored when dealing with my application on account of the re-invented ground of duress. I attach this evidence in the form of a witness statement of my wife, Melissa Day, which makes reference to emails from my former barrister Chris Milsom in addition to what we told by our lawyers.

Moreover Judge Martin's 2022 Judgment, that is the focus of the above appeal makes findings that further support my application as at least arguable.

For instance the finding at paragraph 155, shows the Respondent NHS Trust's board were not given accurate information by their lawyers when they agreed to settle the case as the wording referred to below was stated to be approved by their Solicitors Capsticks;

"The wording is that the Respondent decided not to pursue the Claimant for its legal fees before he withdrew his case...the Tribunal finds that it was on settlement that the Respondent decided definitively not to purse costs...The impression given here is that the Claimant knew that the Respondent was not going to pursue costs when the Claimant was saying that it was the costs matters that meant he settled. The Tribunal finds that this is a detriment."

At paragraph 130 of the 2022 Martin Judgment it is found in addition to the NHS board, that I was also not given accurate information by my barrister when settling the case;

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

At paragraph 123 there is a finding that surely amounts to a wasted costs threat but also shows a further discrepancy in accounts between the lawyers ;

"There was a possibility of wasted costs in relation to the late disclosure of covert recordings the Claimant had made which came out during his evidence. Mr Cooper says it was HEE that raised this and not the Respondent."

The judicial findings above clearly show that my application to set aside the settlement is arguable because even with the evidence that was ignored by Judge Martin she has found that both me and the relevant NHS Board were not given accurate information by our lawyers. The wasted cost threat also clearly violates the principle of impartial and conflict free legal advice when agreeing to a settlement in addition to being another example of misrepresentation.

In any event, the oral Judgment given by Judge Burns on 27 February gave the impression that my application to set aside the settlement in 2018 was a futile application based on duress. I understand why a Judge who is also a barrister may wish to take the emphasis off the actual ground raised which was of lawyers engaged in misrepresentation and the gaping hole in accounts between them when describing my settlement and the multiple proposed cost applications.

That said, I want to put on record that such an approach in unfair and damaging to me. The oral judgment given on 27 February was given to a public gallery of 30 who could now quietly rightly question my stated basis for challenging the settlement agreement in 2018.

I also note that the way this appeal has been handled has been such to avoid fact finding in the discrepancy in accounts between a powerful group of lawyers on the way proposed cost applications and wasted cost applications were used in this case not just to induce settlement but also to force the wording of an agreed statement and to agree to a clause protecting all lawyers from wasted costs.

My faith in the Employment Tribunal system and Employment Appeal Tribunal system is at rock bottom and if this correspondence is not dealt with properly, I will be considering withdrawing my appeal as I do not wish to be subject to yet another Judgment that re-invents a narrative to protect powerful people.

I am deeply disappointed about the way my case has been handled by the EAT over the last 10 years. The present case simply needed to work out whether a load of powerful people had been misled on my protected disclosures, formal investigations and whether cost applications were used to force settlement and an agreed statement. This can only be done properly by making factual finding on these issues to work out who is telling the truth out of me and the NHS and their lawyers. It is my view the system is just coming up with excuses to avoid this fact finding process.

I think it is unfair that my 2018 application to set aside the settlement has been re-invented in a public Judgment into a futile application on duress. Please can I ask the following

1. The transcript of the 27 February Judgment is amended to accurately reflect the reality of my 2018 application to set aside the settlement and its grounding on misrepresentation.

2. That the attachments to this email are read

3. The Judge considers any adjustments to his Judgment in light of this email

Please can I ask that the EAT respond directly to me on this discrete issues as I wish to save legal fees for my trade union.

Yours,

Dr Chris Day

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2 attachments

Application and Claimant Statement (1).pdf
7032K

WS Melissa Day signed.pdf
7063K

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.

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

DRAFT APPELLANT'S AMENDED GROUNDS OF APPEAL
Following preliminary hearing on 27th February 2024

It is proposed that the text below replaces in its entirety the section of the Notice of Appeal from page 8 onwards in which the Grounds of Appeal are set out.

NUMBERED GROUNDS

Detriment

Ground 1: Taking into account irrelevant information and failing to take into account relevant information regarding the Claimant's pleaded detriments

1. *Beatt v Croydon Health Services NHS Trust* [2017] ICR 1240 is authority for the proposition that a public statement, even if true, may amount to a detriment (see paragraph 110). At paragraph 154 of its decision, the Tribunal finds that if something in one of the Respondent's public statements is true, then it is not a detriment and that the detriments set out in the list of issues at 4.1(a)(i)[1] and 4.1(a)(ii)[2] are true and therefore not detriments. The Tribunal further finds at paragraph 156 that paragraph 4.1(b)[3] in the list of issues is true and therefore not a detriment. The Claimant's case was that the statements were not true but the Tribunal has erred in law by finding that a true statement cannot be a detriment.

[1] 3.1(a)(i) according to the LoI attached to the Judgment
[2] 3.1(a)(ii) according to the LoI attached to the Judgment
[3] 3.1(b) according to the LoI attached to the Judgment

2. When determining whether the Respondent's statements amounted to detriments:
    a. the tribunal have failed to take into account their own findings as to the content and tone of the Respondents' statements; and about the CQC concerns about the statements;
    b. The Tribunal erred in not taking into account that the taking of the unusual step of sending statements about the Claimant to a number of MPs and public officials was detrimental in itself;
    c. The Tribunal erred in not taking into account whether the references to costs and wasted costs made at and around the time of settlement are relevant to whether the public statements were detriments.

3. At paragraph 211 in respect of issue 4.3[4] the tribunal found that the CQC had not asked the Respondent to *remove* the public statements, and therefore the detriment was not made out, when the Claimant's case (and issue 4.3) was that it was a detriment not to remove the public statements once the Respondent was *contacted* by the CQC with concerns. That is capable of being a detriment and the Tribunal has not considered this point and / or taken an irrelevant matter into consideration (i.e. whether the CQC asked the Respondent to *remove* the statement).

<u>Ground 2: Failure to draw inferences from the Respondent's misconduct</u>

4. The Tribunal failed to draw any inferences whatsoever in respect of the Respondent's conduct (despite being invited to do so); and it fails to explain why this is so (indeed the tribunal found at para 168 that it has 'no reason' to doubt evidence of Mr Travis and Mr Cocke). That failure is in relation to a number of key parts of the evidence:
    a. the destruction of the 90,000 documents by Mr. Cocke in the middle of the hearing [323-326], and the evidential impact of Mr. Cocke not attending for cross-examination as a result of his conduct (the Tribunal having been supplied by the Claimant in submissions with the questions that would have been put to Mr Cocke in cross examination [279-289]);
    b. Mr. Travis stating in his cross-examination that he had written to no other NHS stakeholders personally setting out the public statements the Respondent had made in relation to the Claimant, the late disclosure demonstrated that there were in fact more letters to stakeholders: 4 CEOs of neighbouring Trusts: Amanda Pritchard, CEO, Guy's and St Thomas', Peter Herring, Interim CEO, Kings, Matthew Trainer, CEO, Oxleas, Dr Matthew Patrick, CEO, South London and Maudsley; and additionally to Steve Russell at NHSI and Jane Cummings at NHSE;
    c. Mr. Travis telling the Tribunal that there was no note of the board meeting prior to the settlement of the First and Second

[4] 3.3 according to the LoI attached to the Judgment

claims - a document which was also later disclosed by the Respondent;

d. Mr Travis' having advanced a position in his witness statement that at the time of settlement he advised the Board of the Respondent that he wanted the case to run its course - but the record of Board meeting that approved the settlement (that was withheld from disclosure, its existence having been denied by the Respondent for 4 years) showed the opposite and that he stated to the Board that he favoured settlement and that the four doctors has expressed concerns about giving live evidence;
e. Mr Cocke's witness statement evidence about there being no record of his meeting with Sir Norman Lamb was shown to be inaccurate by the subsequent disclosure of such a record.

5. In respect of Mr. Cocke's mass deletion of evidence, the Tribunal has further erred in law by failing to draw an adverse inference despite having directed itself in accordance with *Active Media services Inc v Burmester* [2021] EWHC 232 (Comm) at paragraphs 84 and 86 that it was able to do so.

6. This point is relevant to the question of whether it was a detriment for the Respondent to write to MPs and public officials in the manner in which it did as well as the question of causation.

7. Further or alternatively, the Tribunal has failed to give any reasons as to why an adverse inference was not drawn in relation to the Respondent's conduct set out above.

Causation

Ground 3: Application of the wrong legal test in respect of causation

8. The test of causation in whistleblowing detriment is not a simple but-for test. Section 47B will be infringed if the protected disclosure materially influences, in the sense of being more than a trivial influence, the employer's treatment of the whistle-blower (per Elias LJ in *Fecitt v NHS Manchester* [2012] IRLR 64 at paragraph 45).

9. The Tribunal refers to *Fecitt* at paragraphs 69, 81 and 100 of its reasons. The mentions at paragraphs 69 and 81 are references to submissions made by the Claimant as to how *Fecitt* should be applied in the context of a strike out application by the Claimant. The Tribunal incorrectly at paragraph 2 used the language "because of"; and correctly at paragraphs 69, 81 and 100 refers to the test as one of "material influence". However, the Tribunal failed to apply the test of material influence in the sense of being more than a trivial influence.

10. The Tribunal's findings on causation demonstrate that the Tribunal has taken a binary approach to the question of causation or at least that it was erroneously looking for the primary influence. The

Tribunal has applied a high threshold "because of" or "but-for" standard, instead of considering whether the protected disclosure had a material influence on the detriment in the sense of being more than trivial, which should be a low threshold.

11. The findings which demonstrate this error are set out below, and support the key finding on causation at paragraph 179 of the Reasons:
    a. At paragraph 26, the Tribunal fails to grasp that Dr Smith's relevant oral evidence that "there was a clear and present danger to patient safety" inherent in the Claimant's protected disclosures may have had more than a trivial influence on the alleged detriments;
    b. At paragraph 79, the Tribunal finds that Mr. Travis had made assertions in cross-examination that the Respondent's subsequent disclosure had shown to be untrue in relation to the record of the Board meeting and additional stakeholder letters – but then the Tribunal makes nothing of this untruth;
    c. At paragraph 155, the Tribunal makes a finding as to the timing of the Respondent's decision definitely not to pursue costs against the Claimant – but then the Tribunal makes nothing of this timing;
    d. At paragraph 173 the Tribunal finds that the Daily Telegraph Article of 2 December 2018 was the reason the Respondent published the statement of 4 December 2018 without considering whether the publication of the statement (and its tone and content) was more than trivially influenced by the protected disclosures;
    e. At paragraph 176 the Tribunal finds that the emails in late disclosure which show that there in fact *had been* communications between Ms. Lynch, Mr. Cocke and the four doctors do not show that they were feeding false and tainted information to be included in the statement. There is no requirement for the information to be "*false and tainted*", simply that it was materially influenced by the protected disclosures;
    f. At paragraph 177 that the Tribunal had concluded that "*the official sign off and authority to publish the statements was made by Mr. Travis*". The relevance of this conclusion is unclear and the reasoning is incomplete;
    g. At paragraph 178 the Tribunal's finding that the late disclosure of the emails between Ms. Lynch and the four doctors "*does not indicate any malice on the part of the doctors, merely a wish to set the record straight from their point of view*". This finding was made despite the Respondent failing to produce these individuals as witnesses at this hearing and the Respondent's resistance to even identify them. The fact that there was no malice is not a relevant consideration; there is no statutory

requirement for a detriment to be founded by malice toward a whistle-blower.

h. At paragraph 179, the Tribunal merely accepts that the Respondent's statements were made in response to the media interest in the Claimant's case and "a desire to put the Trust's side of the story". The Tribunal further accepts that the reason the statements were made was because of what it describes as a "PR battle". The tribunal fails to explain why they were not also materially influenced by the protected disclosures.

12. The Tribunal has erred in law by applying the incorrect test for causation in respect of the findings set out above. The Tribunal has not undertaken any examination of the impact the protected disclosures had on the Respondent's actions, and whether it was a more than trivial influence.

13. The Tribunal was specifically directed in submissions for the Claimant to para 64 of the Court of Appeal's Judgment in *Jesudason* stating that "*the issue is not the reason why the letters rebutting the appellant's allegations were written but why the offending passages which caused the detriment were included in those letters*" (Sir Patrick Elias). The Tribunal did not follow that guidance.

14. Having 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 and that this was only revealed by late disclosure, the tribunal erred in law in failing to go on to consider whether the involvement of the four doctors could have had a more than trivial influence on the decision to publish the statements and on their tone and content.

15. Further or alternatively, the Tribunal has failed to give adequate reasons for its findings in those paragraphs.

16. In a further alternative, the decision reached by the Tribunal is perverse in light of the matters set out above.

Field of employment (majority decision)

Ground 4: Incorrect application of the law

17. The leading case on post-employment detriment is *Woodward v Abbey National Plc* (No1) [2006] EWCA 822; [2006] ICR 1436. At paragraph 68 of *Woodward* Ward LJ set out the rationale for protection extending beyond the contract of employment itself.

18. In its Reasons at paragraph 191, the majority applies a test that is derived incorrectly from the Court of Appeal's judgment in *Tiplady v City of Bradford MDC* [2019] EWCA Civ 2180; [2020] ICR 965, and which incorrectly defines the scope of the s47B protection (see

Reasons paragraphs 182 to 189) and disregards the rationale behind it, as elucidated in *Woodward*.

19. At paragraph 191 (with reference to para 183), the majority erred in law by accepting the Respondent's argument that the Claimant was acting as a "crowd-funded litigant" merely because the Claimant had to raise funds in order to bring the litigation which the detriments were connected with his former employment and the claim which arose out of his former employment. This could impede the ability of whistle-blowers to fund their litigation. A former employee is protected from detriment even if he brings a claim and where the detriment arises as a consequence of that claim.

20. The Tribunal further erred in those paragraphs by relying entirely on the decision in *Tiplady* as though it were authority for a new test, and disregarding *Woodward,* despite the Court of Appeal in *Tiplady* agreeing with the Court of Appeal in *Woodward.*

21. The Tribunal did not make any further findings on the point, which the Claimant contends shows an inadequacy of reasoning. Neither majority nor minority reasoning is set out.

ORDER SOUGHT

22. The Claimant invites the Appeal Tribunal to overturn the decision of the Employment Tribunal and remit the matter to a differently constituted Tribunal.

Andrew Allen KC
Elizabeth Grace
Outer Temple Chambers
8 March 2024

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

Application to amend Grouds of Appeal

The Applications

1. The Claimant applies under Employment Appeal Tribunal Rules 1993 [EAT Rules] , Rule 33 (1)(c) for a review of the EAT decision of Deputy High Court Judge Andrew Burns KC and the reasons that were communicated by way of an Order dated 1 March 2024 that states "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". For this application the Claimant relies on

    (i) Submissions on Material Change in Circumstances in accordance with EAT Practice Direction 2023 , para 8.6.2 **[see paragraphs 5-19 below]**

    (ii) Submission on interest of Justice in accordance of Rule 33 (1)(c) **[see paragraph 20-34]**

    (iii) Submissions on the matters that require reconsideration in light of the material change in circumstances in respect of the Grounds of Appeal restricted or dismissed **[see paragraph 35-67]**

2. The Claimant attaches in support of the application the sealed order and written reasons dated 1 March 2024 **[Page 7-12],** and an 'Annex 2 Application for direction form' **[Page3-6]**. In addition the following documents are attached in support;

    a) The Judgment of Employment Judge Self dated 18 January 2023 **[Page 119-140]**

b) The Main Witness Statement of the Claimant for June 2022 **[Index Page 28]**
c) The First Supplementary Statement ("The Ben Cooper KC statement") **[Page 13-27]**

3. The Claimant is supported by the British Medical Association with lawyers including leading counsel for the conduct of his appeal but for the purposes of this application is acting a Litigant In Person (after being given permission to do so from the BMA). This is to give the EAT a chance to hear from the Claimant in his own words as a doctor on the important issues in this case.

4. The Appellant is described throughout this application as the "Claimant".

Submissions on Material Change in Circumstances in accordance with EAT Practice Direction 8.6.2

5. The Claimant accepts it is unlikely a review will be granted if it is just an attempt to argue the matter again and that there is a need to set out a material change in circumstances in any application for a review. This material change in circumstances will now be set out.

6. At a Preliminary Hearing on 27 February 2024. Judge Andrew Burns KC dismissed 4 Grounds of the Claimant's Appeal as unarguable and restricted one other. The Judge made these decisions when he wrongly understood (as the Judge has now accepted) that the Claimant's challenge to the 2018 settlement of his main whistleblowing case was grounded only on duress and that that there was no material difference in accounts between the Respondent's former counsel Mr Cooper and the Claimant's former counsel Mr Milsom in respect of a number of pleaded detriments in the case. The relevant pleaded detriments centered on the use of proposed cost applications against the Claimant and wasted cost applications against the Claimant's former lawyers to induce the 2018 settlement and to force the wording of an agreed statement. The detriments claimed are allegedly false denials of such methods by the Respondent both in public statements and in private briefings to MPs and NHS leaders.

7. It also seems from Judge Burn's oral Judgment and written reasons that he did not appreciate that two other pleaded detriments in the case related to the public and private misrepresentation of the substance of the Claimant's protected disclosures and findings of investigations that plainly supported the Claimant's position in his case.

8. It was only after the Claimant had heard the oral Judgment of Judge Burns, that the Claimant learnt that Judge Burns had materially misunderstood the Claimant's pleaded basis for many of the detriments in his case..

9. The day after Judge Burn's oral Judgment, the Claimant wrote to Judge Burns by way of an email explicitly challenging the most important of these misunderstandings and

attaching 2 documents that proved his position on the pleaded detriments in the case and the evidence that underpins them.[1] The Claimant asked the Judge to consider his email and read the two documents. The Claimant then asked the Judge to "consider any adjustments to his Judgment in light of this email."

10. In response to the Claimant's email , Judge Burns acknowledged his mistake and corrected his Judgment. This correction is included in the written reasons in the Order dated 1 March 2024 (see notes in requested correction to Judgment **[see page 10]**).

11. Judge Burns therefore has accepted the below section of the oral Judgment he gave on 27 February 2024 was wrong as the Claimant's application to set aside the 2018 settlement did not rely on duress but misrepresentation;

> *"Dr Day after the hearing was completed asked for the consequential dismissal to be reconsidered. He did so on the basis of duress – threat of award of costs if he fought and lost. It is common that if a claim is conducted properly, no award of costs is made against losing party. However, if a claim is conducted unreasonably, a tribunal has power to make costs award. It is not unusual for a party to raise the prospect of costs. The bar for suggesting that comments about costs amount to duress is a high one and it is not surprising that the EJ refused the application for reconsideration and Dr D was not successful at EAT and CA in getting the reconsideration decision overturned."*

12. This misunderstanding is of vital significance. There is a massive and material difference between a Claimant claiming duress in circumstances where all his opponents have done is make one cost threat limited only to a finding of untruthful evidence, and a Claimant making serious allegations of misrepresentation about a variety of ordinary and wasted costs threats being made against them and their lawyers. Then that being used to force settlement and an agreed statement. Not only that, then the reality of this being misrepresented by lawyers and NHS managers to the board of an NHS trust and then to a group of MPs. The difference in these two positions is not only material but dramatic as is the effect going to be on any Judge who believes either one of them to be true. This misunderstanding has clearly had an influence on Judge Burn's approach to the Claimant's appeal. Judge Burns has had the humility to accept his error.

13. The Claimant's realisation that Judge Burns did not understand his pleaded basis for the majority of the detriments in the claim being appealed and the Judge's acceptance of his misunderstanding is a material change in circumstances that came only after delivery of the oral Judgment.

14. The misunderstanding has materially influenced the dismissal of Ground 1 as unarguable and the restrictions applied to Ground 2. The corrected position of Judge

[1] The documents attached to the Claimant's email to Judge Burns dated 28 February 2024 included the Claimant's application to set aside the 2018 settlement and the witness statement for the June 2022 hearing of the Claimant's wife Melissa Day

Burns on duress/misrepresentation explicitly undermines the Judge's reasoning for dismissing Ground 8. This is set out below.

15. The consequences of dismissing Grounds 1 and 8 and restricting Ground 2 is to block the Claimant's ability to ever obtain a formal finding in this case on deliberate concealment. It also hampers attempts to secure a proper judicial process to determine whether or not MPs and the press have been misled by the Respondent and their lawyers about the Claimant's whistleblowing case.

16. The wording of the Claimant's application to set aside the 2018 settlement agreement clearly sets out its one and only ground as mistake/misrepresentation and is in no way unclear about the Claimant's basis for making the application;

> "*The basis for the application is set out in the attached witness statement of Dr Christopher Day-who was operating either under a mistake or pursuant to a misrepresentation given that the Respondents now say that no costs threats were made during and after his cross-examination or during negotiations on the terms of the settlement agreement but yet. Dr Day was told on numerous occasions as set out in his witness statement that the Respondents were intending to pursue him for costs if he proceeded to cross examine their witnesses and then ultimately was unsuccessful in his claim and that was the basis for his entry into the settlement agreement and withdrawal of his claim'*

17. Judge Burns explains his error by being misled by Employment Judge Martin's 2018 Judgment on the settlement;

> *" 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.. 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"*

18. It is clearly in the interests of justice that the reasons for the dismissal of grounds be revisited in the light of this acknowledged misunderstanding having been corrected

19. This is perhaps particularly the case in this case given the wider public interest application of the pleaded detriments which will now be turned to.

Submission on the Interests of Justice pursuant EAT Rule 33 (1)(c)

20. If several doctors and a former health minister hold a position that a group of MPs and NHS leaders have been misled by an NHS Trust and their lawyers on something as important as an NHS whistleblowing case, then it is clearly in the interest of justice to have a proper judicial process to decide whether or not that is the case.

21. At the center of the claim being appealed, are pleaded detriments that the Claimant claims are false and detrimental statements that have been made by the Respondent to the public and press about the Claimant's whistleblowing case . These public statements were also made privately to a group of London MPs/ councillors and local NHS leaders including the Respondent's board. Large amounts of this private communication had been concealed from the Claimant and the Tribunal and on occasions its existence was denied. This Appeal Tribunal has stated of the protected disclosures in this case that they are of the "utmost seriousness".[2] It took 6 years for the Respondents to concede that the Claimant had a reasonable belief in these disclosures and reasonably believed that they were made in the public interest. Resisting their validity involved concealment and the smearing of the Claimant.

22. The Claimant claims the public and private statements pleaded as detriments misrepresent the protected disclosures in the case and also deny the clear support certain formal investigations give to Claimant's claims of whistleblowing detriment and claims that serious patient safety issues have been deliberately concealed.

23. The Claimant also claims that the statements mislead on the circumstances in which the case suddenly settled in 2018, in particular both respondents' denial that proposed cost applications or 'cost threats' played any part in securing settlement or the agreed public statement in the settlement agreement. The Respondent even stated that they made clear before the Claimant decided to settle the case that they would not pursue him for costs if he lost. This has been found as untrue[3] in the Judgment being appealed but its significance disregarded. The public and private statements to MPs and others gave the clear impression the Claimant was not being honest about the facts in his whistleblowing case and the circumstances leading to why he settled his case in 2018. The Respondent has explicitly stated in letters to MPs that the statements pleaded as detriments in this case will leave a reader of them fully briefed about the Claimant's case.

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[2] "They were PD's of the utmost seriousness " is a direct quote taken from the oral Judgment of Deputy High Court Judge Andrew Burns on 27 February 2024.

[3] [155] Reasons "The wording is that the Respondent decided not to pursue the Claimant for its legal fees before he withdrew his case...the Tribunal finds that it was on settlement that the Respondent decided definitively not to purse costs...The impression given here is that the Claimant knew that the Respondent was not going to pursue costs when the Claimant was saying that it was the costs matters that meant he settled. The Tribunal finds that this is a detriment."

24. In late 2018, the Claimant provided to the MPs Sir Norman Lamb and Justin Madders written evidence from the Claimant's former barrister Chris Milsom. In this evidence Mr Milsom sets out several different proposed cost applications that were used by the Respondent against the Claimant. This evidence included 4 different types of proposed ordinary costs application, a proposed wasted cost application and a further proposed cost application in order to force the wording of a public statement.[4] Sir Norman Lamb and Justin Madders subsequently wrote a letter dated 17 December 2018 to the Secretary of State for Health that stated;

> "*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 the threats were made. This is very troubling"*

25. In early 2019, Sir Norman Lamb met several times with both the Claimant and the Respondent's Chief Executive, including in a joint meeting. Following a meeting where the Claimant put to the Respondent Chief Executive his basis for the public statements being false, Sir Norman Lamb wrote a letter to the Respondents stating;

> *"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."*

26. The health regulator the Care Quality Commission was asked by the national whistleblowing expert Sir Robert Francis KC to investigate the detrimental public statements in this case. The CQC expressed concern about the tone and content of the public statements. The CQC put their concerns to the Respondent. This was then fed back to Sir Robert Francis by letter dated 29 May 2018;

> *"We share your concerns about the <u>content and tone</u> 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"*

[4] The evidence of these multiple proposed cost applications was set out to Deputy High Court Judge Andy Burns by way of an email dated 28 February 2024 in which the Claimant secured a correction to the 27 February 2024 Judgment that wrongly stated the Claimant's previous application to set aside the settlement was grounded on duress. The Judge accepted it was grounded on mistake/misrepresentation about proposed costs applications. Attached to the email was the tribunal statement of the Claimant's wife Melissa Day setting out evidence of the multiple proposed cost applications used in the case. The Judge was asked to read this.

27. The Consultant anaesthetists Dr Sebastian Hormaeche in his June 2022 Tribunal statement, set out how the detrimental statements misled the public, NHS leaders and MPs on the protected disclosures and investigations in the Claimant's case;

> "*Given what I have set out above, I find the statements below that were released by the Trust on 24 October 2018 and were shared with MPs and the press, to be false and misleading. In my view, they clearly misrepresent the substance of the Dr Day's important protected disclosures and the findings of their external investigation as set out in his Grounds of Claim"*

28. Dr Smith who is head of serious incident investigations at a London teaching hospital clearly described the significance of the false and detrimental statements made by the Respondent pleaded in this case as whistleblowing detriments;

> *"The Claimant's concerns, communicated over a long period of time prior to and after the incident on 10 January2014, related to chronic understaffing of the ICU out of hours, and the risk to patients that posed. Concerns of this nature are not something that are "usual" or "commonplace" in the NHS. They are serious; the evidence is clear that mortality and morbidity in ICU patients increases as staffing falls (see above). An institution that sought (or seeks) to play down or dismiss such enormous systemic failures as a "one-off" incident should ring alarm bells for clinicians, commissioners, and regulators alike"*

29. In complete contrast to the *clearly* stated positions of the Claimant, his wife, 2 consultant anaesthetists, a former health minister and the healthcare regulator the CQC, the Tribunal rejected the Claimant's position that the pleaded detriments were false statements and found all but one of the allegedly false and detrimental statements to be true.

30. The judicial process of the Tribunal that resulted in this finding involved;

a) The Tribunal disregarding significant amounts of relevant evidence from multiple sources that support the Claimant's position on the pleaded detriments as false and detrimental statements.

b) Significant amounts of evidence being destroyed and concealed by key people at the Respondent including the NHS Directors that were the current and former instructing legal client, the NHS Director responsible for drafting allegedly false statements to MPs and the press (which are the pleaded as detriments in the case) and the recipients of the now accepted protected disclosures in the case;

c) Contentious evidence from the Respondent being accepted by the Tribunal without being tested by cross examination or any reference to an intended cross

examination provided by Andrew Allen KC in the Claimant's final submissions (once the witness became too unwell to be cross examined after destroying evidence)

d) Contentious evidence from the Respondent being accepted despite it being demonstrably untrue from contemporaneous documents (that were hidden from the Tribunal in the lead up and for most of the final hearing of the case)

31. Using the above objectively flawed judicial process to decide against the Claimant on the pleaded whistleblowing detriments in this case is plainly unsafe and also easily meets the threshold of being perverse.

32. When the Claimant's appeal came before Deputy High Court Judge Andrew Burns on 27 February, 6 grounds were given permission to progress to a full hearing. Some of these were restricted and 4 grounds were dismissed. The grounds that were dismissed or restricted related to challenging failures of the Employment Tribunal to make adequately reasoned findings on pleaded issues as fundamental to the case as the pleaded detriments on whether MPs, NHS leaders and the public had been misled about the Claimant's protected disclosures. Also significantly restricted was any challenge to failures to take account of relevant information. The last ground to be removed from the appeal was any challenge to procedural unfairness in the case. These are clearly fundamental failures in this case yet they have not been permitted to be argued at the final hearing of this appeal.

33. Separate to the Claimant's clear right to justice and a fair hearing, it is plainly in the interests of justice for there to be a proper and fair judicial process to decide something as important as whether a group of MPs and NHS leaders have been misled by an NHS Trust about an important whistleblowing case containing protected disclosures of the "utmost seriousness". A fair and proper judicial process plainly has not occurred in this case. If required the Claimant relies on words of the ECHR in *Duraliyski v Bulgaria* [2014] ECHR 231 stated at para 30:

> *"The Court reiterates that the concept of a fair hearing implies the right to adversarial proceedings, in accordance with which the parties must have the opportunity not only to adduce evidence in support of their claims, but also to have knowledge of, and comment on, all evidence or observations filed, with a view to influencing the court's decision"*

34. For these reasons it is clearly in the interests of justice to grant the following application which will now be turned to.

Submissions on the matters that require reconsideration in light of the material change in circumstances in respect of the Grounds of Appeal restricted or dismissed:

35. It is submitted that Judge Burns has shown in his oral Judgment and his written reasons a number of fundamental misunderstandings of the Claimant's case that run through his reasons for dismissing and restricting certain grounds of appeal. The Claimant hopes the Judge will see and accept this and be supportive of reviewing his decision on the basis of the following misunderstandings;

a) Misunderstanding that the Claimant's challenge of the validity of the 2018 settlement relied on a the ground of duress (not misrepresentation as the application states, and as Judge Burns now accepts). The Judge therefore did not understand that the application was based on a serious discrepancy in accounts between Claimant and Respondent lawyers on several proposed cost and wasted cost applications rather than a futile application on duress based on an overreaction by the Claimant to one cost threat restricted only to a finding of untruthful evidence.

b) The error on duress is then repeated and deepened in the Ground 8 dismissal reasoning, " *The question* that *the ET had to decide was largely agreed evidence between Mr Cooper and Mr Milsom"*

c) Misunderstanding that the pleaded detriments in the case were confined to statements about the settlement. The Judge therefore did not understand the need for findings on the protected disclosures and formal investigations in the case as he did not understand that the misrepresentation in public statements of the protected disclosures and investigations were pleaded as detriments in the case.

d) Misunderstanding that the Claimant's main whistleblowing case that claimed a series of serious whistleblowing detriments resulting in career loss (some now conceded by the Respondents[5]) was just a mere dispute about mandatory training that held the Claimant's career back.

36. These misunderstandings lead to a potential material misunderstanding of all the pleaded detriments in the case and cannot help but paint the Claimant in a certain light.

[5] Paragraph 177-178 of the Claimant's Main June 2022 sets out series concessions from the respondents which include from HEE conceding formal investigations were terrible and misleading and the Claimant's reasonable belief in deliberate concealment of patient safety issues after 6 years of resistance **[see page 68 of bundle]**

Rejected Ground 1: Failure to make reasoned findings on the issues

Judge Burns made no reference to the argument that two of the alleged detriments in the claim are that the Respondent misrepresented the Claimant's protected disclosures and what formal investigations say to support the Claimant's claims of whistleblowing detriment and cover up. It was argued on that basis that a finding of concealment is clearly required to properly decide these detriments

37. Judge Burns set out his view that the nature of the protected disclosures in this case were not relevant once they had been conceded by the Respondents (in this case it took the Respondents 4 and 6 years respectively). On that basis the Judge rejected the assertion that a finding on the category of deliberate concealment was required in this case.

38. The Claimant's answer to this was that his case was different from usual whistleblowing cases, as in his case, two of his pleaded detriments that the Tribunal had to decide upon were, firstly, that the Respondent had misrepresented the substance, scope and seriousness of the Claimant's protected disclosures. The Tribunal also were being asked to decide detriments on whether investigations showed that the disclosures were responded to by the Respondent in the right way as opposed to indicating deliberate concealment and whistleblowing detriment. Another pleaded detriment centered on whether a subsequent Peer Review Investigation (claimed by the Respondent to have being incorrectly linked by the Claimant to his case) was yet further evidence of a false and detrimental statement designed to smear the Claimant's integrity. The Claimant showed clearly in evidence how the Peer Review proves how the serious issues in the protected disclosures were covered up for several years and also proves a link to avoidable death. This basis of the relevant pleaded detriment is set out in the Ground of Claim.

39. A simple finding one way or another on concealment is clearly not only required in this case in order to rule on the pleaded detriments but represents the most efficient way of deciding such detriments without having to make detailed factual findings. A finding on concealment is likely to be enough to prove the detriment in the Claimant's favor, as finding on concealment is not compatible with the Respondent's position that the Claimant's protected disclosures in this case amount to a to a one off medical staffing issue being responded to by the Respondent in the right way one night.

40. The substance and nature of the protected disclosures especially something as fundamental as whether the disclosures contained a reasonable belief in deliberate concealment needed to be ruled on, in order to decide whether the protected disclosures and the respondent's response to them had been misrepresented in public statements and privately to MPs and NHS leaders to the Claimant's detriment. The public interest associated with doing this properly has been set out above.

41. These arguments about findings on concealment on the detriments are separate from any debate about whether a concealment finding is needed for causation, and it is submitted that as the oral and written reasons devote themselves only to whether a concealment finding is needed for causation, that has not been appreciated by the judge. In short the establishment of disclosures including a reasonable belief of deliberate concealment was required as part of the Claimant's case that his disclosures had been misrepresented (and that it was that misrepresentation which was a part of the detriments claimed by him)

42. At the hearing Judge Burns indicated surprise at the assertion that the substance of the protected disclosures and nature and findings of investigations were pleaded as detriments in the case. The Judge clearly indicated that he thought the pleaded detriments in the case were confined to how the settlement came about.

43. The Claimant asked for permission to address the Judge directly on this point. The Claimant himself emphasised the point that some of the pleaded detriments in the case were that the substance and scope of the protected disclosures were misrepresented as a minor medical staffing issue one night, when evidence clearly shows from multiple sources they were in fact about serious safety issues in an ICU ongoing for 2-3 years, linked to avoidable deaths and that the issues had been covered up.

44. The Consultant anaesthetist Dr Smith who was produced as a witness for the Claimant summarises the sort of analysis the Tribunal should have taken a view on one way or another in order to decide the relevant pleaded detriments;

> *The Claimant's concerns, communicated over a long period of time prior to and after the incident on 10 January2014, related to chronic understaffing of the ICU out of hours, and the risk to patients that posed. Concerns of this nature are not something that are "usual" or "commonplace" in the NHS. They are serious; the evidence is clear that mortality and morbidity in ICU patients increases as staffing falls (see above). An institution that sought (or seeks) to play down or dismiss such enormous systemic failures as a "one-off" incident should ring alarm bells for clinicians, commissioners, and regulators alike"*

45. The Claimant respectfully asks the EAT to re-consider its dismissal of Ground One on the basis that a finding on concealment is required to properly decide certain detriments in this case. This point has simply not been engaged with or even referenced in the oral judgment or written reasons but was emphasised at the hearing by both Counsel and the Claimant himself when he was given permission to address the Judge..

46. The Claimant does not understand if Judge Burns rejected this point why he didn't make it clear either at the hearing or in his Judgment. It is clearly of fundamental importance to the appeal.

Restricting Ground 2 - Taking into account irrelevant information and failing to take into account relevant information regarding the Claimant's pleaded detriments

In relation to issue 4.1(a)9i), 4.1(a)(ii) and 4.1(b), at paragraph 155, the timing of the Respondent's decision to definitively not pursue costs against the Claimant;

47. The Claimant has been prevented from arguing that the finding of the Tribunal relating to a solitary detriment [6] is relevant information that the Tribunal failed to take account of. This finding is hugely significant as it is a finding that the Respondent and their lawyers have misled the Respondent's board, a group of MPs and press on what they told the Claimant about legal costs before he decided to settle the case. Such a powerful finding should have led to inferences and influenced the way other pleaded detriments and causation points were decided. This was obviously fundamental context of the denial that cost threats were used in the case – how could it not be? The reasons given by Judge Burn's for blocking the argument of this point on appeal do not explain why this significant judicial finding was not an example of key information that the Tribunal failed to take account of. This is a powerful example of an appeal point that has been dismissed on the basis of the misunderstanding on there being no difference in accounts on the proposed cost applications in the case between the Claimant and Respondent lawyers. The Judge's view that there was no material difference in accounts between the Respondent and Claimant's lawyers on proposed cost applications was misplaced and his view that the Claimant relied only on an exaggerated claim of duress for his pleaded detriments is fundamental to why the Judge did not permit this plainly credible appeal point to proceed. The finding on the solitary detriment unlocks the context of other detriments and speaks to causation.

In relation to issue 4(b), the evidence of both Mr Milsom and Mr Cooper as to who had raised the issue of a potential finding by the tribunal that the Claimant's evidence was untrue

48. The reasons for dismissing this point has simply not engaged with the argument made on appeal which was that it was perverse for the Tribunal to find that a detrimental public statement was true when the hearing transcript showed it to be false from the relevant witnesses. The relevant detriment stated publicly that the Claimant's former legal team gave the Respondent's barrister the impression that they thought the Claimant's evidence was untruthful. The Claimant's basis for saying such a finding is perverse was that the Claimant was able to rely on the relevant part of an official transcript for the June 2022 hearing that confirms that both Mr Cooper and Mr Milsom clearly agreed Mr Milsom did not give any impression that he thought the Claimant's

[6] [155]"The wording is that the Respondent decided not to pursue the Claimant for its legal fees before he withdrew his case...the Tribunal finds that it was on settlement that the Respondent decided definitively not to purse costs...The impression given here is that the Claimant knew that the Respondent was not going to pursue costs when the Claimant was saying that it was the costs matters that meant he settled. The Tribunal finds that this is a detriment."

evidence was untruthful. The section of the transcript was provided to the EAT in the bundle.

49. When this alleged detriment was put to the Claimant's former barrister Mr Milsom, at the June 2022 hearing, the transcript records the following dialogue from Mr Milsom;

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

50. The transcript records the Respondent barrister's response;

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

51. The Judge's reason for blocking an appeal argument on this point only refers to the fact that the conversation happened as a result of a telephone conversation initiated by Mr Milsom (without instruction) exploring possible settlement of the case. This does not deal with the clear substance of the alleged detriment which is that it has been falsely claimed in the Trust's public statements that the Claimant's legal representatives gave the impression to the Respondent's barrister that they believed the Claimant's evidence to be untruthful in circumstances when a trial transcript showed the relevant lawyers confirmed this did not happen;

> *" There is nothing perverse in the finding that Mr Milson initiated the conversation and that would have involved asking about the Respondent's position.*

52. The Tribunal and now the EAT has decided to focus on the wording in the pleaded detriment that is not detrimental whilst ignoring the clear false and detrimental wording in the pleaded detriment publicly giving the impression Claimant is dishonest..

53. The Court of Appeal's Judgment in *Jesudason v Alder Hey is clear on such an approach and* states "*the issue is not the reason why the letters rebutting the appellant's allegations were written but why the offending passages which caused the* detriment *were included in those letters*" (Sir Patrick Elias). The clear reason this wording was included in the pleaded detriment was to make out publicly that the Claimant's own lawyers thought his evidence was dishonest and told the Respondent's lawyers this which has been denied as the transcript establishes . This is plainly an arguable point of appeal and appears to have been misunderstood as a minor point about who phoned who first between barristers.

54. This detriment is an extremely serious allegation, it is unfair that the Claimant's appeal point on it has not been engaged with , with the result that the point is not being permitted to be argued in the main appeal. The Court is asked to review their decision in light of this apparent misunderstanding as to the substance of the appeal ground.

Dismissed Ground 8 - Procedural Unfairness

It is not arguable that the ET took into account against Dr Day something that it had not permitted him to cross examine upon.

55. The Tribunal abruptly stopped the cross-examination of the Respondent's former barrister, Mr. Cooper KC, and then quoted the following in the public Judgment at paragraph 115;

> *"115. Mr Cooper sets out why he was considering making such an approach to the Claimant after his evidence had completed. His witness statement sets out his impression of the Claimant's evidence. His impression was that the Claimant had an "obsessive belief in his victimhood" resulting in him making a "progressively more elaborate re-writing of history by him to fit his narrative". He considered that the Claimant's evidence was "dishonest and underhand in pursuit of what he saw as the virtue of his case".*

56. The Tribunal Judgment fails to record that the cross examination of Mr Cooper was stopped or why it was stopped . The Judgment also fails to record that Mr Cooper's words were robustly challenged by a supplementary statement linked to documents showing Mr Cooper was incorrect in his accounts of the Claimant's evidence at the 2018 hearing (putting it mildly). Such was the nature of the Claimant's supplementary statement that it forced concessions from Mr Cooper even before he started to be cross examined by Andrew Allen KC. The Tribunal fails to record any of this and just merely represents the Claimant as disagreeing with Mr Cooper and offers no basis for this from the Claimant's evidence.[7] The existence of an official transcript for the June 2022 hearing means it can be said with certainty the Judge's basis for stopping Mr Cooper's cross examination.

57. The Tribunal's decision in this respect is of particular concern, given that despite the transcript showing that the Tribunal stopped the evidence on the basis that it would not make findings about the Claimant's truthfulness, the Tribunal in fact proceeded to make findings and allusions as to the same. It is plainly arguable that the Claimant's right to a fair hearing in adversarial proceedings has been violated.

58. It is stated in the Judge Burn's reasons for dismissing the ground on procedural unfairness that the above does not give rise to arguable ground for the following reasons;

> *"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*

[7] Attached to the application is the Claimant's Supplementary statement on Ben Cooper KC evidence **[see page 13-27 of bundle]**

into account against Dr Day something that it had not permitted him to cross examine upon."

59. In the reasons for dismissal it is not explained why when the Tribunal quoted the extremely strong words of Mr Cooper's statement in a public Judgment that was not an example of the Tribunal taking into account content that the Claimant was prevented from cross examining on. Paragraph 115 of the Judgment contains strong language that obviously influenced the Tribunal to such an extent that they chose to insert the content into a public Judgment. The words that show the potency of Mr Coopers position include;

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

60. Judge Burns has not referred to paragraph 115 of the 2022 Tribunal Judgment nor referenced the submissions made that Mr Cooper when making these strong statements in a Tribunal statement could not provide one example from the Claimant's tribunal statement of what he meant. This was shortly before Mr Cooper's cross examination was abruptly halted by the Employment Judge Martin (as evidenced by the transcript).

61. The untested insults and smears against the Claimant inserted into Mr Cooper's statement and then a public Judgment did not only influence Judge Martin's Tribunal but are now being used to influence other Judges about the Claimant in other litigation. Hill Dickinson Solicitors is relying on Mr Cooper's untested content in their defense of serious allegations in a wasted cost application related to the Claimant's successful litigation about the employer worker point. Judge Burns complemented the Claimant on his success on the worker point but seemed unaware of the seriousness of what has recently been uncovered about it. Employment Judge Self when allowing the Claimant's wasted cost application to proceed to full trial, early last year, commented in his Judgment[9]

"*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."*

62. As a direct result of Judge Martin's Judgment, Hill Dickinson's barrister Dijen Basu KC has inserted Mr Cooper's smears about the Claimant into a case management skeleton argument that is supposed to be dealing with how all doctors in England had their whistleblowing protection undermined by an important failure in disclosure. The quote speaks for itself;

[9] The Judgment of EJ Self dated 18 January 2023 is included with this application and is a further indicator of the serious allegations in this litigation against the Respondents and their lawyers **[see page 119-140 in particular conclusions at page 136]**

"*The diagnosis of whistleblowerits is a pithy way of describing a man who had developed an obsessive belief in his own victimhood to the point of being prepared to dishonest and underhand in pursuit of what he saw as the virtue of his cause as Mr Cooper described him"*

63. What has been set out here is obvious procedural unfairness and an attack on the fundamental principles of adversarial litigation. The cross examination of Ben Cooper KC was stopped on the basis that the Employment Tribunal stated they would not make findings about the evidence given by the Claimant at the 2018 hearing, and they then proceeded to reflect what Mr Cooper had said about the Claimant's evidence in their decision and public Judgment. Judge Burns does not address this point before dismissing any appeal point on procedural unfairness in the case as unarguable.

<u>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</u>

64. The second reason given for dismissing the Ground 8 on procedural unfairness is objectively wrong and comes as a result of the Judge's now accepted misunderstanding that the Claimant's ground for setting aside the 2018 settlement. This is explained in detail above at (para 5-28).

65. If there was a discrepancy in accounts between Mr Coooper and Mr Milsom then an assessment of Mr Cooper's credibility and a proper challenge under cross examination of Mr Cooper's conflicted account on costs and his strong words insulting and smearing the Claimant was a fundamental right that the Claimant has been deprived of .

66. Judge Burns would have clearly accepted such a position had he not been so misled by Judge Martin's 2018 Judgment believing there was no difference in accounts between Mr Cooper and Mr Milsom.

67. The Claimant's witness statement for June 2022 at paragraph 315-317, makes the following observation of the evidence that has come from the lawyers involved in the 2018 settlement which further supports the challenge to Judge Burn's fundamental assertion that evidence between the barristers that settled the Claimant's case is agreed. The Claimant was not challenged in this evidence nor could he be.

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

68. The above evidence illustrates what a genuinely difficult case this must have been to resolve for the Judge Martin Employment's Tribunal and the various Judges before her handling the applications to set aside the settlement, and also this Appeal Tribunal.

69. The Claimant is grateful to the EAT and Judge Burns for considering this application and also the work that went into accommodating so many observers at the previous hearing.

Dr Chris Day

12 March 2024

Chrismarkday@gmail.com

18 March 2024

Deputy High Court Judge Andrew Burns KC
Employment Appeal Tribunal

Dear Judge Burns,

I am the appellant in the above appeal.

This letter responds to your directed communication from the EAT dated 13 March 2024 to Edward Cooper of Slater and Gordon and Mr Cooper's response dated 15 March 2024 temporarily removing the firm from the EAT record as my representative.

I now address the points that you have raised that are not addressed by Mr Cooper's email.

BMA Point

"He says that he has sought permission, but he has not set out the response of the BMA or his solicitors."

I enclose with this letter an email dated 11 March 2024 from the BMA's Director of Legal to me and Edward Cooper of Slater and Gordon.

The Unusual Case Point

"The Appellant asks the Judge to consider this unusual approach because he says that the case is unusual"

Judge Martin states at paragraph 3 of her 2022 Judgment, "*This is a highly unusual claim with two barristers, one a KC, giving evidence in relation to their representation of the parties".*

The evidence in this case makes for uncomfortable reading for any employment lawyer or Judge. For instance, Mr Donavan KC, the Head of Chambers of my former barrister Chris Milsom commented, "*the Settlement Allegations raised issues of professional conduct and/or professional negligence*". They were found to be *"too serious"* to be handled under an internal chambers complaint policy. **[see paragraph 186 Page 71 Application bundle]**

It seems to me that the numerous Judges that have dealt with my case have failed to engage with any evidence or pleadings that point to the serious issues between the lawyers that were involved in settling my case in 2018.

With the greatest respect, your order dated 1 March 2024 is yet another example of this which I accept is in part explained by a misunderstanding that I am grateful has been acknowledged.

I accept that my case places Employment Appeal Judges in an unusual and difficult position. For instance, when Judge Heather Williams handled my 2018 application to set aside the settlement, she declared in open Tribunal that she knew the lawyers involved, that they were

highly respected professionals and she knew that they would have acted properly. The simple point (that has now been acknowledged) that my application on misrepresentation was wrongly handled as one of duress was not dealt with by Judge Williams.

I am not alleging impropriety or some grand conspiracy theory but just the predictable human factors that come from Judges handling cases involving serious allegations that involve as key witnesses several people that they know and/or have social or professional connections with.

Given the nature of employment law in London, I genuinely do not know what the solution is. However, a good starting point would be ensuring evidence and pleadings are dealt with clearly and logically with explanatory accountability. This would leave no one in any doubt why decisions have been made.

Reason for acting as a Litigant in Person

I am hugely lucky to have had BMA funding for my ET claim, this appeal process and a proposed professional negligence claim against my former lawyers from 2018. I take seriously the need to keep the BMA's costs down which is one reason why I have chosen to act for myself with this application.

The second reason is that in respect of the Ground one arguments in my application, I thought I might be able to assist the EAT as a doctor in understanding them better.

My last reason is there are things that I have set out above that need to be said but I would not wish to put my employment lawyers in the position of having to submit on my behalf. You may be aware that there have been calls from 2 MPs for a public inquiry into this case and how it has been handled (see attachment). It might be that a forum external to employment law is going to be the only place where these issues can be properly dealt with. I have been open about concerns I have about pursuing an appeal in the EAT if key issues in my case are not engaged with.

I mean no disrespect with this letter but I wanted properly answer your requests for information and would be happy to answer any further questions either in writing or at a further hearing.

Yours sincerely,

Dr Chris Day

Enc;

Email from BMA dated 11 March 2024

Letter from Justin Madders and Norman Lamb to Secretary of State dated 18 December 2018

Gmail Chris Day <chrismarkday@gmail.com>

Your applications: BMA position

Nicholas Fry <NFry@bma.org.uk> Mon, Mar 11, 2024 at 5:53 PM
To: Chris Day <chrismarkday@gmail.com>
Cc: "edward.cooper@slatergordon.co.uk" <edward.cooper@slatergordon.co.uk>

Dear Dr Day

We are content for you to submit and pursue as a litigant in person the application for a review of the EAT's judge's decision (on the preliminary hearing of 27 February 2024) and the new ground of appeal.

Edward has recommended that he reviews and advises you on your draft application and we agree that would be a sensible and proportionate step. We are happy to support the cost of that review and advice with a time estimate of approximately 2 hours.

Just to confirm, the BMA remains committed to supporting your appeal, and the funding in place for the appeal remains unaffected by your application (assuming you follow Edward's advice on the draft). For the avoidance of doubt, the BMA will continue to support your appeal whether this application is successful or not. However, I acknowledge that you may prefer not to pursue the appeal if the application is unsuccessful.

I trust I have made the BMA position clear, but if you are in any doubt about any aspect, please do let me know.

With best wishes.

Kind regards

Nick Fry

Head of Legal (Trade Union & Professional Activities)

Legal Department

British Medical Association

BMA House Tavistock Square London WC1H 9JP

T: 020 7383 6392 | E: nfry@bma.org.uk

HOUSE OF COMMONS
LONDON SW1A 0AA

The Rt Hon Matt Hancock MP
Secretary of State for Health and Social Care
Department of Health and Social Care
Ministerial Correspondence and Public Enquiries Unit
39 Victoria Street
London
SW1H 0EU

Please quote our reference in all correspondence with this office

Our Ref: NL32666-JK

17 December 2018

Dear Matt,

Re: Dr Chris Day

We write with regard to the case brought by Dr Chris Day against the Trust which had employed him as a junior doctor, the Lewisham and Greenwich NHS Trust and Health Education England.

We are deeply concerned about the outcome of this case which was a settlement reached in the employment tribunal.

We enclose a copy of an article from the Sunday Telegraph dated 2nd December which reports on allegations that cost threats were made by Health Education England and the Trust against Chris Day during the course of his evidence which forced him to decide to settle. Norman Lamb has met with Dr Chris Day since the settlement was reached. Dr Day made it absolutely clear that he and his wife felt that they could not risk an award of costs against them. They have a young family and could have lost everything had an award of costs been made against him. Anyone would have acted in the same way as Dr Day in such circumstances.

We enclose a copy of a letter which Norman Lamb wrote to Jeremy Hunt following a meeting which Chris Day and Norman Lamb had with Jeremy Hunt when he was Secretary of State for Health. There has been no response to that letter. We enclose a further letter which Norman Lamb wrote to you as a follow-up to the letter to Jeremy Hunt, following your appointment as Secretary of State for Health. No reply has been received to that letter either.

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.

We question whether it is ever appropriate to threaten an application costs in a case involving a whistleblower. Where whistleblowing relates to concerns over patient safety, it seems to us that it is in the public interest for the full case to be heard. Where false allegations are made, this will

emerge in a full and open tribunal hearing but where legitimate and genuine concerns are raised which are crushed by the employing organisation then it is vital that such behaviour is exposed. We will never achieve an open and transparent culture which puts safety first if such evidence is kept from the public domain.

The outcome of this case will have a chilling effect on any individual working in the NHS who is concerned about patient safety issues but feels that nothing is being done to address those concerns. The whole purpose of whistleblowing legislation is to enable an individual to speak out and to raise concerns.

We believe that there is a real need to review whistleblowing legislation in this country in order to ensure that it provides effective protection to individuals who need to speak out. Although the UK was a pioneer in introducing protection for whistleblowers, it has fallen behind international best practice and the protection offered is clearly now seen to be inadequate.

However, specifically with regard to this case, we urge you to intervene personally to examine what has happened. It is in everyone's interest that the full facts of this case are put into the public domain. It appears as if the threats made to Chris Day specifically protected all Trust witnesses from being cross-examined. That is not in the public interest. There is a strong case for a public inquiry into what has happened in this case. First, we urge you to appoint an independent person to examine the conduct of this case by Health Education England, the Trust and the Department of Health.

Over £700,000 of public money has been spent on legal costs effectively seeking to prevent Chris Day establishing that junior doctors had protection in law when they blew the whistle. This was established in the Court of Appeal, despite the best efforts of the Department of Health, Health Education England and the Trust. It is important to understand why decisions were taken to commit so much scarce resource to defending this case. It is also important to establish whether Chris Day suffered a detriment as a result of blowing the whistle on unsafe practices.

An application is due to be made in order to set aside the settlement. If this is defended, it will incur more public expense in attempts to keep the full facts of this case and the handling of it secret. That would not be acceptable. We urge you to intervene in order to conduct a full review of the handling of this case and to ensure that Chris Day receives justice. At the hearing the Respondents finally accepted Dr Day acted in good faith raising patient safety issues and that he performed a public service establishing whistleblowing protection for junior doctors. An individual who acts to raise concerns about patient safety deserves to be supported and praised not crushed by the NHS.

We look forward to your full response as soon as possible.

Yours sincerely,

The Rt Hon Norman Lamb MP
MP for North Norfolk

Justin Madders MP
MP for Ellesmere Port and Neston

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*

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 156 Northumberland Avenue, Welling, Kent, DA16 2PY, 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, not me.

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

54 Allenby Road
London
SE280BN

Ref: W05

Dr A Frankel
Health Education South London
Shared Services
Stewart House
32 Russell Sqaure
London
WC1B 5DN

Sunday 7th September 2014

Dear Dr Frankel,

Re: Dr Chris Day ARCP 3rd June 2014

Thank you very much indeed for the meeting on the 2nd September 2014. It was a pleasure to meet you and your personal care and concern for my career came across very strongly.

I am writing to clarify my position following our discussion.

I am sorry to have to say that I am not to prepared to accept the suggestion that I have not resigned from the Deanery as that would support the Deanery's assertion of me being "AWOL" from St Thomas'. This is damaging and supports the narrative that issues to do with my personal professional skills are to blame for this situation. I clearly resigned from my training post in an email addressed to Dr Lacy and Mr Rose on 15th July 2014.

I am also not prepared to accept strings attached to any return to training such as "mandatory counselling or coaching" as this again supports the narrative that my personal professional skills are to blame for this situation. I have very supportive friends and family including more senior doctors and have enjoyed exceptional support through this difficult time. I want to ensure that any free time that I do have is spent with my family and friends.

I will need to be able to explain this situation and want to be able to describe events openly, honestly and accurately. I am prepared to justify all the decisions that I have made including my decision to resign from the Deanery and my intended use of the Public Interest Disclosure Act. I have tried to ensure that all my decisions are well thought out and done for good reason.

I cannot consider any return to training until I have the results of the Deanery and Trust formal investigations. This will enable me to make an informed choice about

my future speciality training and location. I have to get this decision right first time as my son is approaching school age.

It has been 3 months from my original letter of formal complaint. I am disappointed that Health Education South London have still not formally investigated my complaint or been able to answer the simple question of the evidence that was considered at my ARCP. It is difficult to understand how Mr Waltham's report on my ARCP could be written without consulting the individuals that sat on my ARCP panel. Given the nature of my complaint I can see little justification for this.

I have not given up on seeking a resolution to this situation and I am grateful for your input in navigating this difficult scenario. I would like to thank you again for your kind words and concern at the meeting.

Kind regards

Yours Sincerely

Dr Chris Day

Gmail

Chris Day <chrismarkday@gmail.com>

Day, Christopher Mark (8231318)

7 messages

MBarwood@bma.org.uk <MBarwood@bma.org.uk> Wed, Sep 10, 2014 at 3:08 PM
Reply-To: MBarwood@bma.org.uk
To: gary.waltham@southlondon.hee.nhs.uk, chrisday@doctors.org.uk, chrismarkday@gmail.com

Dear Gary,

Further to our meeting on second September and as agreed I am writing to set out the questions which Dr Day and the BMA asked and which we believe remain unanswered in your report. These are as follows: –

1 We would like a detailed explanation as to why the 'no engagement with supervisor' box was ticked. The explanation you provided was that there had been no anaesthetic supervisor's report. Dr Day had supplied an IAC document which we believe to be superior to the report you have cited as missing. Furthermore, we believe that in the circumstances you described the correct box would have been the 'no evidence' box.

2 We would like confirmation in writing that no other documents, reports, statements were considered by the panel other than those supplied in Dr Day's e-portfolio.

3 We would like an explanation as to why your investigation contacted Duncan Brooke and Dr Lacy but did not contact the other members of the panel.

4 If it is correct that only the documents supplied in the e-portfolio were considered by the panel why where there repeated questions from Dr Lacy to Dr Day in reception after the end of the second interview as to whether he had confidence in Dr Brooke?

5 Why did Dr Lacy ask Dr Day during the interview on 6 June – will you fly off the handle at St Thomas's if you see something you don't like or believe is unsafe?

6 Why did Dr Lacy focus on anger management?

7 Why has the ARCP report focused on one exam failure and highlighted it? We are well aware that an initial failure of the exam is common and indeed Dr Day passed the exam the following day. Are all other CT2s given an outcome five on that basis?

8 Why did your report contain the statement:-
'Dr Lacy and Dr Brooke agreed with the ARCP panel that Dr Day should be offered details about the professional support unit.'

9 How does HESL reconcile the suggestion in relation to the outcome that the trainee has issues to do with professional, personal skills, with the contention 'this was selected because the panel recognised the personal distress displayed… during the ARCP… patient safety issues'? We see these two issues as unconnected.

10 Why was Dr Day told he is currently 'AWOL' from the programme'?

11 How does HESL explain the comments made in an email to Dr Day by Dr Umo-Etuk as follows: -

Email from *Dr Joanna Umo-Etuk at 15/7/14 @1935*
I do recall your Educational supervisor saying that he thought you had doubts about your ability to complete the training.
I did find that disheartening because in my opinion any person who could undertake a career change of such magnitude has strength of character most mere mortals can only dream off!
I sincerely hope you do persevere with your chosen specialty because you have a wealth of life experience from your previous life which you can bring to bear in Emergency medicine

12 What did Dr Brooke say to the panel when Dr Day was out of the room?

13 Why was Dr Day asked on his return to the room whether there are any mitigating circumstances surrounding his placement when he had already accepted an outcome five on the basis of a failure to supply certain documents?

14 Is HESL confident that it can defend a claim under the Public Information Disclosure Act that Dr day has suffered a detriment due to a series of protected disclosures including one during the first ARCP meeting?

Kind Regards

Maryse

Maryse Barwood
Industrial Relations Officer
British Medical Association, Regional Services
Monday, Tuesday, alternate Wednesday 8.30 - 4.30
bma.org.uk
dt: 020 8655 8801
df: 020 7554 6340
dt: secretary Teresa Brown 020 8655 8808

Do you or your colleagues need non-clinical career support?
Find out more on our website here

For support email: support@bma.org.uk
or telephone 0300 123 123 3 Monday to Friday 8.30am to 6pm
or to web chat click here

For 'terms of support' click here

WALTHAM, Gary <Gary.Waltham@southlondon.hee.nhs.uk> Wed, Sep 10, 2014 at 3:33 PM
To: "MBarwood@bma.org.uk" <MBarwood@bma.org.uk>, "chrisday@doctors.org.uk" <chrisday@doctors.org.uk>, "chrismarkday@gmail.com" <chrismarkday@gmail.com>
Cc: "McDonnell, Menna" <Menna.McDonnell@southlondon.hee.nhs.uk>

Dear Maryse,

Thank you for your email.

A brief note to acknowledge receipt. A full response will follow in due course.

Yours sincerely,

Gary Waltham

Deputy Director of Operations

Health Education South London

Operations Department

IN THE EMPLOYMENT TRIBUNAL

Case Nos: 2302023/2014 B
& 2301466/2015 B

(LONDON SOUTH)

BETWEEN:

DR CHRISTOPHER DAY

Claimant

-and-

LEWISHAM AND GREENWICH NHS TRUST

First Respondent

- and -

HEALTH EDUCATION ENGLAND

Second Respondent

WITNESS STATEMENT OF DR HANS SAUER

I, Hans Sauer, of 51 Dunvegan Road, London, SE9 1RZ say as follows:

1. I qualified as a doctor in 1989. I was appointed as a Consultant Anaesthetist in 1997 and appointed to the Queen Elizabeth Hospital in Woolwich, the predecessor of the Trust, in 2004. From February to August 2014 as well as undertaking my usual duties as a Consultant I was also the clinical supervisor for the Claimant.

2. As part of the training, every junior doctor was required to have meetings with his supervisor and to undertake all the necessary assessments. The Claimant had completed his Initial Assessment of Competence (IAC) along with all the assessments and had his final formal supervisor meeting for the placement before the ARCP panel meeting took place on 3 June 2014.

3. The Claimant also completed an eight day off-site mandatory training course to complete both his Anaesthetic and ICU Novice Courses (pages 652-653).

4. On 22 May 2014, I held a formal supervisor meeting with the Claimant in relation to his placement. I signed a manuscript document for his ARCP to show that he had completed successfully the Initial Assessment of Anaesthetic Competence which showed he had attended the supervisor meetings and succeeded at a number of the stipulated assessments with other consultants. I believe this document dated 22 May 2014 was provided to the ARCP panel (page 582).

5. Generally, after each supervisor's meeting I would add my notes to the Eportfolio system. At the time I was unable to provide an electronic record of the supervisor's meeting with the Claimant due to a technical problem with the system.

6. My submitted supervisor's report of the meeting on 22 May 2014 was submitted electronically on the Eportfolio on 9 June 2014. It states the following (page 557):

> *"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 and advice."*

7. Even though my report was not available on the system on the day of the ARCP panel there were other reports available for the panel's review. On 3 June 2014 the ARCP panel would have had access to the Claimant's three other positive clinical supervisor's reports (pages 558 -561). Those reports show that the Claimant passed all previous clinical placements without any problems.

8. There was nothing in any of the Claimant's supervisor reports that would make the ARCP panel consider the Claimant not to be coping or having any issues with performance, conduct or engagement. On the contrary, his performance is praised. For instance, the Claimant's previous Intensive Care placement report, dated 27 April 2014, states that (page 558):

"CD has made exceptional progress and spent a great deal of time improving his knowledge and skills whilst in the ICU - he is very keen to learn and listen and question.

..huge experience in technical procedure..

Has gained experience and recognition of Critically Ill patients - utilizes protocols appropriately and recognizes when to deviate from such guidelines and to question"

9. On 12 August 2014, shortly after the Claimant finished his placement at the First Respondent, I provided him with the following reference (page 875):

"Dr Chris Day was employed at the Queen Elizabeth Hospital, Woolwich as a CT2 ACCS (EM) in Anaesthesia from February 2014 for six months.

He had no previous anaesthetic experience but rapidly became a very competent anaesthetist at CT level. When he took his place on the on call rota he was able to work without direct supervision where appropriate but was aware of his own limitations and knew when to summon help or advice.

He thought clearly and logically and could prioritise according to clinical need. He functioned well as part of a team communicating effectively with the full range of healthcare professionals as well as patients and their families. He coped well with responsibility and stressful situations.

He participated actively in the audit and teaching

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."

10. On 17 December 2014, I provided the Claimant with a copy of my previous reference at his request after learning that his dispute with the Second Respondent had not been resolved. My cover email to the Claimant states the following (page 1453(xiv)):

"Thank you very much for your email. I'm very sorry to hear that you are still have an unsolved situation with the deanery.

I'm happy to provide an in depth educational supervisor report for you but unfortunately I'm extremely busy at the moment.

As an attachment you will find a reference which I provided for a locum agency earlier this year. In addition to this reference I can only reiterate that I found you to be an excellent trainee. I liked your enthusiasm and your willingness to learn and practise the new anaesthetic skill set. Once you started working under distant supervision I was pleased to see how well you coped with the very often stressful and challenging workload.

In my role as educational and clinical supervisor I was very happy with your engagement in the teaching and learning process.

I wish you all the best for your further career and hope that you will able to solve your situation with the deanery."

11. 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 (page 875):

"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."

12. 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 (page 557-567).

13. In particular I understand that the ARCP panel which met on 3 June 2014 gave the Claimant an unsatisfactory Outcome 5, and that one of the reasons for this was his failure to engage with his supervisor. As one of his supervisors I can say that I never saw any evidence for such a finding and that I never had any difficulty with engaging with the Claimant as his supervisor.

14. I understand there were some speculations as to the number of holidays and sick leave the Claimant took throughout his placement with the Trust. I can confirm that the Claimant took very little sick leave; to my knowledge only one day was taken.

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

Signed: Dr. Hans Sauer

Dr Hans Sauer

Dated: 27-03-2018

VPD: 197

Lewisham and Greenwich NHS Trust

LEAVER / TERMINATION OF EMPLOYMENT FORM AND CHECKLIST

(To be completed by manager & sent to Medical Staffing, Education Centre, Queen Elizabeth Hospital, at least 3 weeks before the termination date)

This form MUST NOT be used if employee is transferring to another post within Lewisham Healthcare NHS Trust

EMPLOYEE DETAILS		ASSIGNMENT NO: 24121338
LAST NAME: Day	FIRST NAME(S): Christopher	BAND/GRADE: MN39
JOB TITLE: ACCS		DEPARTMENT: Anaes

TERMINATION DATE	
__ 05 / __08/ 2014 __	This must be the last day of service in the Trust. If the employee is moving to another Trust over a weekend with NO gap in service this date should be Sunday.
TERM TIME ONLY?	NO

ANNUAL LEAVE PAYMENT OR DEDUCTION	
Annual leave must be taken prior to last working day except in exceptional circumstances.	
OUTSTANDING LEAVE that has not been taken before last working day **to be paid** in final salary	19 Days ~~hrs~~
OVERTAKEN LEAVE **to be deducted** from final salary	hrs

OTHER PAYMENTS / DEDUCTIONS / INSTRUCTIONS	
E.g. Redundancy, lieu of notice, etc. Provide as much detail as possible	
RECEIVING CHILDCARE VOUCHERS? YES / NO	
LEASE CAR USER? YES/NO	FINANCIAL ACCOUNTS NOTIFIED ☐

NB: EXPENSES: Any outstanding expenses must be claimed on or before the last day or service. These will be paid the following month. Any expenses claimed after the employees last day of service will not be reimbursed.

DESTINATION ON LEAVING	
Please specify NHS organisation or tick one of the boxes	
NHS ORGANISATION	
☐ Social Services	☐ Private Health / Care
☐ General Practice	☐ Private Sector Other
☐ Prison Service	☐ Self Employed
☐ Armed Forces	Abroad: EU ☐ Non EU ☐
☐ Education Sector	☐ Education / Training
☐ Other Public Sector	☐ No employment
☐ Return to Practice	X Unknown

REASON FOR LEAVING	
☐ Resignation Adult Dependant	☐ Retirement Early[1]
☐ Resignation Better Package	☐ Retirement Age[1]
☐ Resignation Child Dependant	☐ Retirement Flexi[1]
☐ Resignation Health	☐ Retirement Ill Health[1]
☐ Resignation Working Relationship	☐ Employee Transfer TUPE
☐ Resignation Lack of Opportunities	☐ Redundancy Compulsory
☐ Resignation Promotion	☐Redundancy Voluntary
☐ Resignation Relocation	☐ Dismissal Capability
☐ Resignation Work Life Balance	☐ Dismissal Conduct
☐ Resignation Not known / Other	☐Dismissal Statutory
☐ Pregnancy	☐ Dismissal Other
X Fixed Term Contract	☐ Death in Service

BANK CONTRACTS will also be terminated
Recruited through K Cowhig / medacs?[3] YES / NO

FORWARDING ADDRESS: .....

OTHER COMMENTS: .....

MANAGER'S SIGNATURE

I have discussed this form with the employee and provided them with a copy of the Exit Interview Procedure. I have reviewed all the information and agree that payments should be made as illustrated. I have ensured that any property of the Trust has been/will be returned on the employee's last working day.

SIGNED: [signature] PRINT NAME: CLARE ARNOLD DATE: 15/7/14

ESR WORKFORCE TEAM USE

VERIFIED BY: ..... DATE: ..... INPUT BY: R.A.H DATE: 11/12/14

IF APPLICABLE, PENSION END DATE ..... [2]CB NOTIFIED ☐ PENSIONS NOTIFIED ☐ RIGHT TO WORK ☐

[3]PROCUREMENT NOTIFIED ☐ SENT TO SBS BY: ..... VIA: COURIER / SCANNER DATE: .....

[1] For RETIREMENTS form must be submitted at least 4 MONTHS IN ADVANCE to allow enough time for Pension arrangements and enable first Pension payment to be made on time.