All Party Parliamentary Group

Dr Chris Day Whistleblowing Case

A Case Study on All That Is Wrong With PIDA

Bundle

Index

Part One – Whistleblowing case against Lewisham and Greenwich NHS Trust

Part Two – Arguing Doctors Out of Whistleblowing Protection

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

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 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

---

2 attachments

Application and Claimant Statement (1).pdf
7032K

WS Melissa Day signed.pdf
7063K

IN THE EMPLOYMENT TRIBUNAL **Case No: 2300819/2019**

(LONDON SOUTH)

B E T W E E N:

DR CHRISTOPHER DAY

Claimant

-and-

LEWISHAM AND GREENWICH NHS TRUST

Respondent

WITNESS STATEMENT OF MRS MELISSA DAY

I, **Mrs Melissa Day** of 156 Northumberland Avenue, Welling, Kent, DA16 2PY, will say as follows:

1. I am the wife of Dr Christopher Day, the Claimant in these proceedings. We married in 2007.

2. I am a Registered Nurse and am employed by Guy's and St Thomas' NHS Foundation Trust.

3. I have re-read my witness statement dated 11th December 2018, submitted in support of the application to set aside the settlement agreement reached in 2018. I confirm this to be true and ask for it to be included as part of this statement.

Thursday 11 October 2018

4. I travelled back from Croydon to Cloisters barristers' chambers for a conference. I attended the meeting with my husband, barrister Chris Milsom and from my husband's Solicitors firm, Tim Johnson, and Ellie Wilson.

5. At the conference, we were informed by Mr Milsom that both Respondents had adopted the 'drop hands offer' which had been described to my husband on 7 October.

6. It was clearly expressed on 11 October that if my husband did not take up the offer and proceeded to cross examine the Respondents' witnesses that the offer would be withdrawn. We were told that if the case then proceeded to judgment, the Respondents would proceed to attempt to recover their costs for the whole of the proceedings if the case was lost.

7. The Respondents' Counsel had told Mr Milsom what the costs were likely to be, and Mr Milsom passed this information on to us. Mr Milsom described details of the financial information given to him from the Respondents' side. We were told Ben Cooper QC's brief fee was around £70,000 and the total cost liability that Chris (and therefore our family) could be exposed to could be as much as £500,000.

8. I would like to offer further explanation of my understanding of the various cost threats that made up this £500,000 figure as described by Chris Milsom at the conference.

9. Firstly, I understood if Chris were to lose the case, the respondents would as the conference note states claim for "the costs between now and the end of the hearing (£120,00 or more)" [sic] **(Page 976).** This was a significant amount of money which would have caused severe financial stress for our family.

10. A further cost threat was linked to potential credibility findings relating to Chris' use of covert audio. In these circumstances, the potential total cost liability could be closer to £500,000 which was more than the value of our house and clearly would have put it at risk. At no point were any of the cost threats linked to the truthfulness of Chris' evidence and I certainly had no concerns about this. I did have concerns about a potential reaction from the judge on the use of covert audio. This is despite what the audio showed about the way the patient safety issues were investigated and the

validation it gave Chris' claims that the Respondents' made false accounts of his dialogue. One example is the 18 September 2014 Roddis Associates meeting. (para 57 of 2014 Grounds of Claim, **Page 21**).

11. Mr Milsom confirmed in an email dated 30 November 2018 **(Page 1123):**

> *"As I have stated previously this was a sophisticated discussion in that a two tier approach was mooted by them and in no way invited by me,*
> *a) rejecting a drop hands offer and losing at trial without any adverse credibility findings would lead to an application in respect of ongoing costs of trial*
> *b) as above but with adverse credibility findings: the Respondents expressly stated that costs of the entire litigation may be at large."*

12. In the conference, when Mr Milsom was asked by Chris what the potential liability would be associated with the cost threats Mr Milsom listed wasted costs in relation to covert recordings with Chris' potential cost threat liabilities as the conference note confirms **(Page 976):**

> *"CM said that there are two types of costs: wasted costs (in relation to the covert recordings) and the costs between now and the end of the hearing (£120,00 or more) …… CM said that AM told him that if we go ahead then they would ask for their £55,000 back"*

13. At the time I did not properly understand how wasted costs differed from what I now know are ordinary costs. I had no previous experience of employment tribunals or the different types of cost threats. As they were listed together and reference was made to covert audio, I assumed that Chris would be liable for the costs Mr Milsom had listed.

14. In addition to the 2 cost threats described above, we were informed that Angus Moon QC, the HEE barrister had stated that if Chris proceeded to cross examine any of the Respondents' witnesses and then lost the case, that they would also ask for the £55,000 costs payment agreed just before the May 2018 Preliminary Hearing to be returned. That hearing was to have been about whether junior doctors are covered by whistleblowing protection. The conference note states **(Page 976)** *"CM said that AM told him that if we go ahead then they would ask for their £55,000 back".*

15. Chris consulted me and wanted to discuss our options over dinner, I replied that there was no discussion to be had and I was not prepared to risk our family's security. Chris decided very quickly in the conference that based on the costs threats and my opinion that he was not prepared to accept the risk to our family home and security that proceeding with the case would involve. Chris withdrew the case as a direct result of the costs threats. My stated reluctance for him to continue came also as a direct result of the cost threats. There was no doubt in my mind that proceeding with the case was not an option after hearing about the cost consequences despite the serious safety issues at the centre of the case, the unacceptable NHS response to them and the toll that getting this case heard had taken on Chris and our family over the preceding four years.

16. After the conference, outside the conference room, I overheard Mr Milsom and our solicitors discussing a fine and how much it was likely to be. This was not mentioned in the conference when the costs threats were described by Chris Milsom, so I assumed it had nothing to do with them and was something separate. I told Chris what I had heard. At the time I did not link this to wasted costs but I now know this could have been a discussion about the proposed application for wasted costs in the Employment Tribunal or a reference to a referral to the Solicitor's Regulation Authority. At the time, I was unaware of the significance of this conversation.

Friday 12 October 2018

17. I attended the London South Employment Tribunal to support my husband with settlement negotiations. I arrived when negotiations had already started after I had taken my children to school. I became aware that the Respondents were insisting on an agreed statement as part of the withdrawal.

18. During a discussion in Costa Coffee in Croydon, I became aware through Mr Milsom's reported telephone conversations with Mr Moon that Heath Education England through their counsel, were starting to apply the cost threat originally associated with continuing proceedings in getting my husband to consent to certain wording in the agreed statement.

19. I understood that this was a stance supported by the Trust, as the discussions described below regarding Dr Roddis could only have been with a Trust representative

even if Mr Moon was the person conveying the position to Mr Milsom over the phone. The wording required was that all individuals employed by the Respondents had acted in good faith. We were told that this was a 'red line' for HEE, though I understood as detailed below, the stance was supported by the Trust. I understand from Chris' legal team that Mr Milsom has confirmed this account in his approved statement.

20. I remember a discussion about how it could possibly be said that Dr Roddis and Mr Plummer acted in good faith given their actions in the investigations for the Trust (Dr Roddis) and for HEE (Mr Plummer). In Costa, Chris discussed how Roddis Associates had excluded the Serious Untoward Incidents (SUI's) from the investigation and had described clearly unacceptable staffing (**SB p97)** as "acceptable" **(Page 675-676).** Chris discussed how Mr Plummer had been criticised by HEE's own witness, Dr Chakravarti for giving "an exaggerated or distorted impression" and attributing phrases **(SB p178-179**) to her which she could not recall saying **(SB p301-2 para 20-21).** I understand the false statements attributed to Dr Chakravarti remained in the relevant NHS formal report to discredit Chris **(SB p165-6)** and even appeared in tribunal pleadings pleaded as not only the view of Dr Chakravarti but the view of all the panel members. **(Page 102 para 34) .** This was despite the statements being contradicted by evidence from the ARCP panellist Dr Umo-Etuk **(SB p148-149)**. Dr Umo-Etuk's account was excluded from the investigation.

21. Mr Milsom had a discussion on the phone with Mr Moon QC. From the discussion, it became evident that the response to the points Chris raised about Roddis Associates and Mr Plummer from the Respondents was that these people did not matter because they were not now employed by either of the Respondents. It follows that Mr Moon must have discussed the Dr Roddis' employment status issue with Mr Cooper, a Trust solicitor, or the instructing NHS manager. Instead of it being argued why the Respondents' actions were made in good faith, we had a long discussion about the employment status of both Dr Roddis and Mr Plummer which could have only happened if the Trust's managers and lawyers had been involved in the discussion. Mr Milsom spent a large proportion of the morning walking up and down Croydon precinct outside Costa on the phone to counsel about the agreed statement. It is clear all these discussions about the agreed statement would not have happened without the cost threats as Chris would not have agreed to the wording that everyone acted in good faith or any similar wording.

22. Negotiations about the agreed statement went on for most of the day (Friday 12 October). Eventually, Chris accepted that he had no choice but to accept the final wording of the agreed statement. The cost threats were the only reason that he agreed to this wording. I supported his decision as I felt we had no choice after being threatened for costs in the way described above.

Bath

23. After the tribunal came to an end my parents in law paid for us both to go to Bath for a few days while they looked after our children. It was a particularly stressful time. As it was a high profile, crowdfunded case, people wanted to know why the case had suddenly settled. As a result of the settlement, we felt that we were only able to refer to the agreed statement.

24. There was a great deal of hostility on social media at this time. The Trust had released their first public statement at 9.59am on the morning of 24th October 2018, I have included the relevant sections below **(Page 169-172):**

> *"Some of this publicity around this case has incorrectly made a link to the findings of a peer review of the critical care unit at QEH undertaken by the South London Critical Care Network in February 2017. This review found a range of concerns, including the number of consultants employed in critical care. It is important to be clear that these were not the same issues that Dr Day had raised in January 2014, which related to junior doctor cover on the medical wards."*

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

25. This statement was particularly damaging to Chris because it gave the impression Chris' protected disclosures were not about the intensive care unit, focusing only on one situation where there was a problem with medical ward cover on one night and claimed they had decided not to pursue Chris for costs. As I have mentioned previously, the cost threats were the only reason he withdrew the claim.

26. On 24th October 2018 whilst away, we were sitting outside around lunchtime at a central Bath Café as the weather was warm for the end of October. My husband received an email from Phil Hammond with a draft of a Private Eye article with an offer to edit the article if there were any errors. He stated he had taken the information from publicly available documents from the Employment tribunal and previous proceedings. As we were in central Bath without access to a computer, we went to the library and Chris edited the document which did not take too long. It was sent from my email account, from memory due to a problem with accessing Chris' email account in the library. From memory, we were granted guest access at the library for a limited time.

Norman Lamb

27. I attended a meeting with Norman Lamb and Chris at Portcullis house to give my side of the story regarding the settlement of the case. It would have been in December 2018 or January 2019 before the 14th January meeting with Mr Travis, I cannot remember the exact date.

28. On 14th January 2019, I attended a meeting at Portcullis house with my husband with Norman Lamb MP, Mr Ben Travis, the CEO of the Trust, and Mr David Cocke. It was a fast-moving meeting. Chris set out why the Trust's public statements were untrue, misleading and damaging.

29. Following the meeting, I assisted my husband with the writing of the letter dated 23rd January 2019 **(Page 157-168).** This was sent to Norman Lamb MP and forwarded onto the Trust. Mr Lamb also wrote a letter to the Trust dated 28th January 2019. I note that he describes aspects of the Trust's public statements as 'severely defamatory and should be withdrawn forthwith and that there should be a full apology' **(Page 272-273).**

30. There has been no apology from the Trust and the public statements remain on their website. Chris and I now know that the 24th October 2018 and 4th December 2018

statements have also been sent to several local MPs and councillors including the mayor of Lewisham.

Norman Lamb in Parliament 3 July 2019

31. It was a huge relief to have the truth of this situation set out in the House of Commons by Norman Lamb MP on 3rd July 2019 and I watched the video of the debate **(Page 1431)** The toll it has taken on our family was also acknowledged. Norman Lamb said

> *"Dr Chris Day, a brave junior doctor working in a south London hospital, raised safety concerns about night staffing levels in an intensive care unit"*
> *"What happened to Dr Day, because he spoke out, is wholly unacceptable. He suffered a significant detriment. His whole career has been pushed off track, and his young family have been massively affected."*

32. The pressure that the 2014 claims and now this current claim have put on my family over the last 7 years has been immense. We have made huge sacrifices towards getting this case heard, my husband has lost his career and our lives have been put on hold. Chris waited 4 years to get the 2014 case heard in the Employment Tribunal and withdrew only because he was threatened for costs and was not prepared to lose any more because of this case.

33. As a health professional in the NHS, it was important for me that these serious issues about night-time understaffing associated with 2 Serious Untoward Incidents (SUI's) in an intensive care unit and the NHS response to them were heard. However, I agreed with Chris that we could not risk our family home once he was threatened for costs.

34. I could not believe it when the Trust released statements giving the impression that the case was not at all about the intensive care unit, and they did not threaten Chris with costs. It has always been clear that the now accepted protected disclosures were about the intensive care unit. This Autumn it will be 4 years since the hearing in 2018 and more than 8 years since he made his first protected disclosure.

35. The Queen Elizabeth Hospital in Woolwich is our local hospital and we come across many people who work there in our day to day lives. To have the Trust give the impression that the protected disclosures were just about ward cover, which most people in the NHS understand as an unavoidable situation, and in addition deny any cost threats is deeply damaging. The Trust's public statements give the impression that it was all a fuss about nothing and at their worst imply that Chris' own lawyers thought his evidence was untruthful **(Page 1314-1317)**.

36. The Trust statements caused a reaction on social media, one example of this on Twitter is Dan Wilson @mrdanfresh appearing to refer to Chris being dishonest after reading the Trust's January 2019 public statement. Another similar example of this is a tweet from Ben Dean @bendean1979 (**Page 1535-1536)** I have set out in detail why the truthfulness of Chris's evidence was not the issue regarding credibility and that the actual issue was about Chris's use of covert audio.

37. When "Dr Chris Day" is googled even at the time of this statement the Trust 24th October 2018 statement appears 9th on the list, when "Dr Chris Day Case" is googled, the same statement appears 7th on the list **(SB p248-49).** This google ranking is significant as it shows how widely viewed this statement has been and how likely people are to read it going forward, this is similar for Yahoo. This is deeply damaging to but not limited to future opportunities and employment prospects for my husband.

38. As a result of this case, Chris has already lost his career and his personal and professional reputation continue to suffer so long as these statements are not retracted and apologised for. He did not pursue the case for 4 years just to suddenly drop it. As stated, the cost threats were the only reason Chris withdrew from the case.

39. It took until 2020 for both the Trust and HEE to accept there had been protected disclosures made by Chris as first asserted in 2013 when he started his job in intensive care at Woolwich. Chris has been left in the vulnerable position of standing alone with these serious patient safety issues against significant resistance. Our family have paid a high price for this.

40. By denying any cost threats were made, stating Chris' protected disclosures were not linked to the intensive care unit and implying that his own legal team thought his evidence was dishonest, the Trust, it seems to me, with their highly damaging statements, have sought to destroy Chris' personal and professional reputation and any future career he may have.

41. Almost 4 years after the 2018 hearing and calls for their removal by Norman Lamb MP in January 2019, the public statements on the Trust's website remain, significant numbers of people have been misled and this false narrative continues to cause Chris harm.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true

.....Mday.....

MRS MELISSA DAY

Dated this 24th May 2022

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.

---

[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

EMPLOYMENT APPEAL TRIBUNAL

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

B E F O R E

**ANDREW BURNS KC, DEPUTY JUDGE OF THE HIGH COURT
IN CHAMBERS**

IN THE MATTER of Appeals under Section 21(1) of the Employment Tribunals Act 1996 from the decisions of an Employment Tribunal sitting at London (South) and sent to the parties on 16 November 2022 and 26 April 2023.

B E T W E E N :

Dr Christopher Day — Appellant

- and -

Lewisham and Greenwich NHS Trust — Respondent

UPON a written application by the Appellant (acting in person – whose correct name is Christopher Day) for a review under rule 33(1) of the Employment Appeal Tribunal Rules 1993 and a joint application by the parties to extend the time estimate for the full hearing.

IT IS ORDERED THAT:

1. The Application for a Review is refused.

2. The full hearing be listed for 1½ days to include time for judgment.

D A T E D 18 March 2024

TO: Dr Day Mark Christopher The Appellant

Capsticks for the Respondent

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

(Case No. 2300819/19)

REASONS

1. The Appellant applies under rule 33(1) of the EAT Rules 1993 to review the order dated 1 March 2024 allowing Grounds 2,3, 5 and 7 of the Liability Appeal and the Costs Appeal to proceed to a full hearing and dismissing the remaining grounds.

2. He applies as a litigant in person with his solicitors coming off the record to permit him to bring this review application rather than it being brought with the assistance of his union and legal representatives. Although this is unusual, I am satisfied it is not an abuse of process, even though his solicitors are intending to come back on the record after I have determined the review application.

3. The Appellant's application is very lengthy but essentially says that the interests of justice require a review largely for points raised at the preliminary hearing and that the 1 March 2024 order was wrongly made as the result of an error in my oral judgment in which I recited the background to the appeal.

4. My judgment said that the Appellant's grounds for reconsideration of the ET judgment dismissing his claim on withdrawal was that the Appellant had settled under 'duress'. He says that he applied on the grounds that he settled due to a mistake or misrepresentation and not 'duress'.

5. However the Appellant referred and relied on 'duress' in paragraph 27 of his witness statement supporting his reconsideration application. He told the ET that "The financial duress of the costs threat was the reason for my agreement to such wording". His application was based on mistake and misrepresentation, but also relied on duress.

6. I indicated in the reasons to the 1 March 2024 order that I was content to correct any transcript to 'mistake or misrepresentation' rather than 'duress' as that appeared to be a better description of the Appellant's grounds for the reconsideration. I did so as it made no material difference to my judgment or to the issues at the preliminary hearing.

7. There is no material or relevant error on which to base a review application. The prospects of the Appellant persuading the ET to reconsider a judgment following a settlement agreement upon which the Appellant was legally represented were very high whether the ground was duress, mistake, misrepresentation or any combination of those grounds.

8. The Appellant submits that this is 'of vital significance'. The Appellant suggests it is relevant 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". This is also his second ground for a review.

9. I understand that this may be a matter of general importance to the Appellant personally, but the ET and EAT have a jurisdiction which is

limited by statute. The EAT is confined to errors of law in an ET decision and I cannot permit an appeal to progress to a full hearing so that it may conduct enquiries about whether a public authority has misled third parties. The Appellant relied on duress, mistake and misrepresentation, but in any event it makes no difference to whether any of the grounds of appeal were arguable.

10. The Appellant applies to review the order saying that the ET's findings are perverse. The EAT has not misunderstood the Appellant's case. I considered the Appellant's case and ruled that some of his grounds were not arguable. The Appellant seeks to argue those matter afresh in this application and add arguments that were not argued by his legal representatives at the preliminary hearing, probably on the basis that they were hopeless. I have considered the application and I am satisfied that there are no grounds to review the order.

11. The Appellant indicates in a letter accompanying his application that he intends to withdraw his appeals unless the grounds which have been dismissed as not legally arguable are heard alongside the permitted grounds in this review. If that remains his position following this order, the Appellant should notify the EAT promptly, in accordance with the overriding objective, that he is withdrawing his appeals.

12. The parties jointly apply for the time estimate of the full hearing to be extended from 1 day to 1 ½ days. Although the issues in the Appeals are reasonably straightforward, there are a number of them and they are likely to be argued thoroughly. I agree that the Appeal Tribunal will be assisted by having a further half day in particular to give proper time for consideration and judgment.

Wasted Costs

Arguing Doctors Out of Whistleblowing Protection

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 Submission

---

1. The Skeleton argument Hill Dickinson has chosen to submit for this case management hearing contains numerous smears and false statements about the Claimant and his whistleblowing case. Although not relevant to this hearing they may have a powerful effect on the Tribunal (as in previous hearings) if they are not exposed and challenged.

2. It is necessary to have a dedicated bundle to support this submission which includes 2 Notices of Appeal and an EAT order dated 1 March 2024 granting a hearing for 6 separate grounds of appeal for Claimant's Claim 2300819. Hill Dickinson chooses to make numerous comments about this claim. The appeal papers and the appeal Judge's comments are a good lens to view much of the Hill Dickinson skeleton argument. The so-called 'Smear and Misinformation Bundle' accompanying this submission will be abbreviated to ("SMB").

3. For the purposes of time, three examples of misleading factual statements and two examples of smears will be set out in the hope that it encourages Hill Dickinson to be more focused on the issues of substance in this wasted cost application. The Claimant looks to the Judge for support on this.

Misleading Factual Statements about the Claimant's Case

Example One – Paragraph 5

"Over 9 ½ years ago, on 15 July 2014 Dr Day emailed Lewisham and Greenwich NHS Trust to say he was resigning his employment from them"

4. The above is an objectively false statement attempting to give the impression that the Claimant resigned or stated he would resign from his clinical duties at Lewisham and Greenwich. In particular it is alleged that he did this or was threatening this in the middle of his one year fixed term contract with the Trust. It is an extremely serious matter for a doctor to resign during a rotation at an NHS Trust where the doctor has important commitments to his colleagues and patients. This is a robust example of the numerous lies told about the Claimant in this case.

5. Lewisham and Greenwich's own human resources record confirms the Claimant worked every day of his one year fixed term contract at Lewisham and Greenwich NHS Trust from August 2013 to August 2014 **[see SMB page 103]** . The record also confirms the Claimant did not take 19 days of annual leave that he was entitled to take as a result of his commitment to the Trust's anaesthetic department**.** The Claimant has never stated to Lewisham and Greenwich NHS Trust that he would withdraw or resign from any clinical duties for any reason including as a result of this dispute and is proud of that fact.

6. This Claimant's supervising consultant at Lewisham and Greenwich, Dr Sauer also confirmed in his 2018 Tribunal statement that every day of the fixed term contact at the Trust was worked by the Claimant and includes in his statement a quote from his glowing supervisor report and reference to glowing reports about the Claimant from other staff at the Trust. These reports were ignored by the two NHS formal investigations of the Claimant's case **[see SMB page 100-101]**

> *" 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."*

7. The Claimant did not wish to sign another fixed term contract at another NHS Trust (Guy's and St Thomas) until serious issues had been investigated by HEE including a number of false allegations made against the Claimant. HEE delayed this process for a few months and even suspended their formal complaint policy when Guy's sent it to the Claimant to assist him. The Claimant's supervisor at Lewisham and Greenwich, Dr Sauer also commented on this situation in his Tribunal statement **[see SMB page 101]**

> "*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* 40 *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. 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* "

Example 2 - Paragraph 5

"He ceased to be a doctor training, at least by 10 September 2014, when he confirmed his resignation to his Post Graduate Dean who had urged him to reconsider"

8. The principle detriment in the Claimant's whistleblowing case was Health Education England's deletion of the Claimant's National Training Number (path to consultant) on 10 September 2014 by their most senior doctor Dr Frankel. This occurred on the same day as a robust email sent to Dr Frankel's Department in HEE from the British Medical Association. The email raised a number of serious issues about the Claimant's case with an explicit reference to pursuing BMA supported whistleblowing Tribunal claims **[see SMB page 96-97].** 3 days previously the Claimant had sent a letter dated 7 September 2014 asking for the serious issues in his case to be investigated but ending with the words **[see SMB 94-95]**;

> *,"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"*

9. Any suggestion that a legal threat from the BMA on the same day as the Claimant's National Training Number being deleted is not connected is absurd.

10. The facts relating to the what caused the BMA to make a legal threat of whistleblowing claims and the resultant deletion of the Claimants National Training Number on 10 September 2014 are set out in the Claimant's Grounds of Claim dated October 2014 between paragraph 21-56 **[see main bundle page 22-27].**

11. The Tribunal may also wish to consider the concessions that Health Education England have been forced to make on these issues which were set out in detail in the Claimant's June 2022 statement in paragraph 178 **[see SMB 73-75]**

> *"[178]b Concession that formal investigation was terrible and misleading*
>
> *[178]c Conceding a false account of my protected disclosure in a formal report;*
>
> *[178]d Conceding that the Claimant's formal ARCP/Appraisal document was inappropriate*
>
> *[178]e Conceding that a briefing document sent by former Post Graduate Dean, Dr Frankel was misleading*
>
> *[178]f Conceding use/sharing of my personal data described by Judge Andrews in a Judgment dated 16 February 2022 as ""wholly inappropriate"*
>
> *[178]g Concession on "perhaps being deceitful" from Dr Frankel (recorded in a Judgment by Judge Andrews dated 16 February 2022 but no action taken)*

Example 3 False Statement – Paragraph 17

Reference to audio recording *"furtively made of senior doctors with whom he had meetings near the end of his employment"*

12. It has been made clear on numerous occasions that the Claimant resorted to covert audio recording only after his employment at Lewisham and Greenwich NHS Trust had ended. This was done during formal investigations meetings only once a whistleblowing claim had been lodged with ACAS following several examples of the Claimant's dialogue

being fabricated. The covert audio proved further fabrications of the Claimant's dialogue. **[See Claimants Ground of Claim October 2014 paragraph 57 see main bundle page 27]**

13. When considering what Hill Dickinson say about wasted costs arising from covert audio both now and back in 2018 through their client HEE, the Claimant asks the Tribunal to consider Judge Martin's findings at paragraph 123 **[SMB page 36]** and what Mr Cooper KC states in his Tribunal statement **[[SMB page 91-92].**

Examples of smears

"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"

14. Given what has now been established about this case and who and what evidence supports it such language is astonishing **[See SMB page 54-57]** .

15. The above insulting language and allegations of dishonesty made against the Claimant by Mr Cooper, the former barrister of Lewisham and Greenwich is relied on by Hill Dickinson in paragraph 11-13 of the skeleton argument which will now be dealt with broadly.

16. The above content from Mr Cooper was discredited by a supplementary statement by the Claimant to the June 2022 hearing **[SMB page 79-93**]. This statement forced remarkable concessions from Mr Cooper that his sworn witness statement to June 2022 statement was not accurate. Mr Cooper's cross examination was then cut short by the Judge which prevented the inevitable further concessions that would have been obtained had this halting not occurred. This is a point that has been taken on appeal as a violation of the fundamental principle of adversarial litigation.[1]. It is being contested on the basis that Mr Cooper's strong language was not taken into account by the Tribunal. The Claimant is contesting this as the quote appears in a public Judgment. The Claimant

[1] Permission to appeal has been granted to the Claimant by Order dated 1 March 2024 for 6 out 10 Grounds of Appeal for the liability and cost appeals. This order is now also subject to an application for Rule 33 Review **[See SMB pages 2-72]**

is also using on appeal the fact this content from Mr Cooper is being relied on by Hill Dickinson in this wasted cost application **[See SMB page 63-64].**

17. The reference to whistleblowerits refers to a serious dispute between the Claimant and his former barrister Chris Milsom that Mr Milsom's head of chambers Mr Donavan states ""*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 SMB 76-77].** Clearly such serious allegations deserve to be handled properly and not just casually referred to in a skeleton argument with misleading spin.

18. The dispute between the Claimant and Mr Milsom has been exacerbated by a seriou serious and troubling discrepancy in accounts between Mr Milsom and the Respondents barristers on how the 2018 settlement came about [see SMB Page 65-66]. This ground of misrepresentation has finally been acknowledged by the EAT in an order dated 1 March 2024 granting permission to appeal **[SMB see Page 38-43]** following the Claimant emailing the Judge after the oral Judgment **[SMB page 34-37]** to point a significant mistake in his understanding which the Judge has now accepted.

Smears about Setting Aside the Settlement

19. Paragraph 21 to 32 of the Hill Dickinson skeleton argument is devoted to smearing the Claimant's reasonable complaint about the way his 2018 application to set aside the settlement agreement was handled by the legal system.

20. The Claimant has advanced a simple point that when Judge Martin dealt with his application to set aside the settlement agreement in 2018 the actual ground of misrepresentation was ignored and re-invented to a futile application grounded on duress. This involved Judge Marin ignoring not just the ground of the application but also the obvious evidence there is of misrepresentation among the lawyers involved **[SMB page 65-67] .** This evidence (ignored in 2018) is now even reflected to some extent in the findings of Judge Martin in her June 2022 judgment at paragraph 155,130 and 123 **[SB page 35-36].**

21. Deputy High Court Judge Andrew Burns KC when giving the Claimant permission to appeal on 1 March 2024 commented on how he had been led to the wrong conclusion by

Judge Martin's approach on this point and agreed to correct his Judgment accordingly. The Claimant's submission on 'material change in circumstances' in his EAT Rule 33 review sets this out **[SMB page 51-52 in particular paragraph 10-13].**

22. If the Claimant has a valid or at least logical and reasonable complaint against Judge Martin then it follows that this complaint extends to the 3 appeal Judges that endorsed Judge Martin's decision. The Claimant can't just be insulted and smeared for holding such a position.

23. Much is made in the Hill Dickinson skeleton argument of the Claimant publicly expressing criticism of the various Judges involved in his settlement agreement. In particular, Lady Justice Simler is emphasised. Simler LJ, initially granted leave to appeal to the Claimant on his settlement agreement. The order was signed and sealed on 10 March 2020 and then revoked nearly a month later on 8 Aspril 2020 as an apparent clerical error.

24. Hill Dickinson state this mistake was quickly corrected and accuse the Claimant of wrongly imputing the error to Lady Justice Simler. If it was this Judge that signed and sealed the wrong order then the Claimant holds the view that a Judge cannot simply blame a court clerk for such a significant professional mistake.

25. Whatever view is taken on the alleged clerical error versus professional mistake point the Claimant does not feel it is appropriate for him to be smeared at an unrelated case management hearing on his view . Moreover, the Claimant is reasonably entitled to question, criticise and wonder why Lady Justice Simler has endorsed Judge Martin's reinvention of the ground of his 2018 application from the clearly stated ground of misrepresentation to duress.

26. The 54000 Doctors tweet, retweeted by the Claimant, is a blunt way of saying what the Claimant has set out to Judge Andrew Burns KC in a letter dated 18 March 2024 **[SMB 68-69].**

"

<u>Conclusion</u>

27. Given the history of this case, in particular the allegations being made in this wasted cost application, it is surprising to say the least Hill Dickinson would choose to adopt the approach set out above particularly for a private case management hearing.

28. Hill Dickinson has a track record in this litigation of pushing hard with smears and misinformation for this Tribunal to make isolated decisions in this case at focused Preliminary Hearings **[see paragraph 25-31 of Claimants Further and Better Particulars main bundle page 1042-3].**

29. As can be seen from the above and Hill Dickinson's requests for yet more Preliminary Hearings history may be repeating itself.

Dr Chris Day
20 March 2024

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

Claimants skeleton argument for PH 30.01.24

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. As material Section 43 K states:

(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

The claim for wasted costs

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

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

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

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

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

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

Should there be a preliminary hearing?

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

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

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

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

15. The first issue proposed is that :

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

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

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

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

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

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

> *"There would appear to be a need to enquire into how the original bundle did not contain that document* [though EJ Self may have been referring to the 2012 LDA the commentary applies equally to the the 2014 Specific LDA which applied at the time] *and an assessment of the materiality or otherwise. At first blush it seems an important document which was highlighted in Mr Linden's skeleton argument as being key and there was a concession shortly thereafter. Findings will need to be found about the materiality of that*

document in HEE's consideration, subject of course to any privilege issues." {see para 79 p984)

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

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

22. The second issue proposed by HD is that :

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

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

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

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

26. The third proposed issue is

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

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

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

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

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

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

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

Slater and Gordon
Solicitors for the Claimant
29.01.24

(ii) For fraudulent misrepresentation on the part of HD in failing to disclose the specific 2014 LDA or the fact that it had been drafted by it on which it was reasonable to believe that C would rely and that C was materially influenced by the said fraudulent misrepresentation;

(iii) C contends that that there would have been a negligent misrepresentation by reason of HD having drafted the 2014 generic and/or specific LDA;

(iv) In addition to failing to disclose the specific 2014 LDA or the fact that it had been drafted by it, because it was represented by HEE when HD were their solicitors:

(a) In their skeleton argument for the Employment tribunal dated 24 February 2015 it was stated that " it is submitted that it is fanciful to state that the party which substantially determines the terms and conditions of the claimants engagement is or could be the respondents" (see paragraph 26 of the HEE skeleton argument for the employment tribunal)

(b) Further at paragraph 30 of the ET skeleton argument, it is stated: "..Thus on the wording of the Gold guide it is submitted to be unarguable that the body which is responsible substantially for determining the claimant's terms and conditions as regards work is other than R1" [R1 being the Trust}

(c) At paragraph 34 of the ET skeleton argument : "... it is submitted that the effect of all of the above is to render fanciful any suggestion (which for the avoidance of doubt the claimant has not made) that the respondents are the entity which "substantially determines or determined the terms of which he is always engaged....". Any other case is simply irreconcilable with the undisputed contemporaneous documentation."

(d) In context these representations were false and materially misleading, and either negligent in that HD ought to have known that they were false or fraudulent in that they knew them to be false at the time they were made.

(v) In addition, this misrepresentation was further relied on and maintained in the skeleton argument of HEE before the EAT dated 25th January 2016 (see para 26) which stated that: "On the basis of the Employment Tribunal's findings of fact it was an entirely permissible conclusion that the Respondent was not the (or a) substantial determiner of the Claimant's terms of work." In context this representation was false and materially misleading, and either negligent in that HD ought to have known at the time it was made that it were false or fraudulent in that they knew it to be false at the time it was made

(vi) In addition, this misrepresentation was further maintained in the skeleton argument of HEE before the Court of Appeal, which

(a) at paragraph 19 asserted that "the appellant does not meet all the requirements of section 43K in any event as the respondent was never the substantial determinant of his terms in which he undertook the said work on the unimpeachable findings of the employment tribunal"

(b) At paragraph 20, the HEE skeleton maintained that despite the repeated and sustained attempts throughout this appeal to suggest the central control of the respondent over the appellant, on the employment tribunals findings of fact as the EAT correctly found them to have been such a categorisation of the respondents role is submitted plainly to be incorrect. It is submitted and on the employment tribunal's findings of

fact the only permissible conclusion was that the substantial determiner of the terms on which the appellant performed the work was to trust

(c) In context these representations were false and materially misleading, and either negligent in that HD ought to have known at the time they were made that they were false or fraudulent in that they knew them to be false at the time they were made.

4. C's position is that the agreement is between the parties to the litigation and is not an agreement entered into with those parties' legal representatives and this application for wasted costs is not an attempt by the Claimant to re-open his litigation against the Respondents – but rather a separate but related application against HD, the 2nd Respondent's solicitor. The Claimant did not know as at October 2018 that HD had drafted the specific and generic 2014 LDA (and indeed drafted many such documents in relation to HEE's relationship with various Trusts). Had the Claimant known then what he knows now, he would not have entered into an agreement which could stop him applying for costs against HD.

5. C disputes HD's paragraph 7(iv) below including:-

(i) that then counsel for C, Chris Milsom, instigated a discussion about settlement while C was part-way through his evidence in the hearing because there was a significant chance that C would not be successful with a finding of untruthfulness. C is concerned that HD make this assertion despite evidence from Mr Milsom given to the employment tribunal in June 2022 rejecting the suggestion that he did or conveyed anything to HEE or the Trusts lawyers to signal he viewed C to be regarded as an untruthful witness. No credible example from C's pleadings or witness statement as been provided as an example of his alleged untruthfulness.

HILL DICKINSON

The Regional Secretary
London South Employment Tribunal
Montague Court
101 London Road
West Croydon
Surrey
CR0 2RF

Your Ref: 2302023/2014
Our Ref: 12003208.4.MWRI.OLM.

Date: 20 February 2015

Direct Line: +44 (0)161 838 4978
orla.mcgarrigle@hilldickinson.com

By email only: LondonSouthET@hmcts.gsi.gov.uk

Dear Sirs

Re: **Dr C Day v Health Education South London & Others**
Case Number: 2302023/2014

We act for the Second and Third Respondents in the above proceedings.

After consultation with our client and Counsel, we write to clarify the matters set out in our application dated 25 November 2014 to be considered at the Preliminary Hearing on 25 February 2015.

The Tribunal will recall that our application of 25 November 2014 consisted of two parts; an application to strike out the claim on the basis that the Tribunal does not have jurisdiction to hear the Claimant's claim against our clients and a further application that the Claimant's claims have no reasonable prospects of success.

We respectfully request that the Tribunal disregards the second part of our application for the purposes of the Preliminary Hearing and considers only the first part of our application: namely the jurisdictional issues. For the avoidance of doubt, we respectfully request that the Employment Tribunal Judge deals with our application as set out below at the forthcoming Preliminary Hearing.

Jurisdiction

The Claimant was never at any time employed by the Second or Third Respondent, nor was he ever a worker of the Second or Third Respondent. We would submit that, whilst the Claimant had entered into a training agreement with the Second Respondent, he had not entered into a contract of employment and therefore was never an employee of the Second or Third Respondent.

We note that the Claimant has withdrawn his claim that the Second and Third Respondents were his employer under section 43K(1)(d) of the Employment Rights Act 1996 (ERA). However, the Claimant's claim that the Second and Third Respondents were his employer under section 43K(1)(a) ERA remains.

Hill Dickinson LLP
50 Fountain Street
Manchester M2 2AS
Tel: +44 (0)161 817 7200
Fax: +44 (0)161 817 7201
DX 14487 Manchester 2

We dispute the Claimant's claim that he was a worker employed by the Second Respondent for the purposes of 43K(1)(a) ERA throughout the period from 5 August 2013 to 10 September 2014. We would submit that the extended definition of worker in s43K ERA does not assist the Claimant's case. The Claimant was not supplied by the Second and Third Respondents to carry out work at the First Respondent, he was simply appointed to a training programme which consisted of various placements at NHS Trust hospitals. In any event, it was not the Second or Third Respondent who determined the terms on which the Claimant was engaged, this was the responsibility of the NHS employer trust, who was the First Respondent at the relevant time.

It is not accepted that, in the alternative the Claimant was an employee of the Second Respondent throughout the period from 5 September 2013 to 10 September 2014. As previously stated, the Second and Third Respondent were only responsible for overseeing the delivery of the Claimant's training and there was no employment relationship between the parties.

For these reasons, it is the Second and Third Respondents' position that the Tribunal does not have jurisdiction to hear the Claimant's claim against them as the Claimant was not an employee or worker of the Second and Third Respondents.

We confirm that we have complied with rule 92 of the ET Rules by providing a copy of this letter to the Claimant's and the First Respondent's representatives.

Yours faithfully,

Hill Dickinson LLP

cc Tim Johnson Law
cc Capsticks Solicitors LLP

HILL DICKINSON

Tim Johnson Law
117 Temple Chambers
3-7 Temple Avenue
London
EC4Y 0HP

Your Ref:
Our Ref: 12003208.4.MWRI.OLM
Date: 10 October 2016

Direct Line: +44 (0)161 838 4978
orla.french@hilldickinson.com

Please ask for Orla French

By email: Tess.Callaway@timjohnson-law.com

Dear Sirs

Re: **Dr C Day v Lewisham & Greenwich NHS Trust and Health Education England**

Thank you for your letter dated 30 September 2016.

It is correct that the joint whistleblowing guidance issued by HEE and the BMA acknowledges that there is a gap in the law for junior doctors unless the decision in this case is successfully challenged or proceedings against HEE are successfully brought by a different legal route. However, that is the result of the position of HEE not being an employer of postgraduate trainees and you will be aware of the comments of Langstaff J in the EAT in this respect.

However, as the guidance goes on to say, this is exactly what the HEE/BMA agreement seeks to address in reaction to the request of the BMA and the appreciated perception of some junior doctors. The purpose of the agreement is to provide junior doctors in England with legal protection if they are subjected to detrimental treatment by HEE as a result of whistleblowing.

The agreement grants trainee doctors express third party contractual protection against whistleblowing detriment, providing a contractual right to bring proceedings in the County Court or High Court to enforce the relevant provisions of the ERA 1996, thereby effectively closing the 'gap' in whistleblowing protection for junior doctors. We note your comments regarding the financial implications should a trainee doctor have to bring parallel proceedings in the High Court/County Court and the Employment Tribunal; however, we would remind you that any trainee who succeeds with their claim in the civil courts will be able to recover legal costs.

In addition, we note the Claimant's contention in his Grounds of Appeal that:

"there is another compelling reason why permission to appeal should be granted: if the decision of the EAT is correct, the Second Respondent…..may subject those doctors to the most serious detriments on the ground that they made protected disclosures, without it being held accountable for such conduct."

Hill Dickinson LLP
50 Fountain Street
Manchester M2 2AS
Tel: +44 (0)161 817 7200
Fax: +44 (0)161 817 7201

Given the contractual protection against whistleblowing detriment by HEE now granted to junior doctors, we consider that this argument has no merit and the Claimant's prospects of being granted permission to appeal to the Court of Appeal are greatly reduced.

For these reasons, we confirm our client will not be withdrawing its invitation that the Court of Appeal refuse your client's application for permission to appeal.

Yours faithfully,

Hill Dickinson LLP

HILL DICKINSON

Employment Appeal Tribunal
5th Floor
Rolls Building
7 Rolls Buildings
Fetter Lane
EC4A 1NL

londoneat@justice.gov.uk

Your ref: UKEAT/0250/15/RN
Our ref: PAF.RLF.12003202.228
Date: 1 August 2019

Direct Line: +44(0)151 600 8615
Philip.Farrar@hilldickinson.com

Please ask for Philip Farrar

BY EMAIL

Dear Sirs

Re: **Dr C Day v (1) Lewisham & Greenwich NHS Trust (2) Health Education England**
Case Number: UKEAT/0250/15/RN

We act for the Second Respondent in this matter.

We write in response to the application for wasted costs made by Rahman Lowe Solicitors on 12 June 2019 and in reply to the direction of HHJ Eady on 11 July 2019.

In summary and with respect, the Claimant's application is misplaced in several respects and should not be considered. The overall proceedings to which it relates are concluded and the Judgement doing so was made following an agreement between the parties in October 2018. By prior agreement between the parties there was no order as to costs at the Court of Appeal. The costs of the remitted Employment Tribunal were addressed by consent in May 2018, which followed disclosure of the document of which complaint is made. The overall case is withdrawn with no orders as to costs by consent and the concluded settlement agreement in which the parties agreed terms expressly compromises any costs claims This application is significantly out of time and its premise is incorrect.

The Claimant was a Specialist Registrar in Medical Training who worked under a contract of employment with Lewisham & Greenwich NHS Trust ("Lewisham"). He had, as is common, an overarching training relationship with Health Education England ("HEE") and was placed at Lewisham on a one year rotational placement. He made disclosures about patient safety to Lewisham, and repeated them to HEE, which arranged his training placements and regularly reviewed his progress as a doctor in training. He claimed to have been treated detrimentally by Lewisham and HEE because of these disclosures.

In its response to the claim HEE asserted that the Employment Tribunal did not have jurisdiction to the Claimant's claim against them, as Dr Day was not an employee or worker of HEE the purposes of the extended definition of worker under the whistleblowing legislation (S43K of the Employment Rights Act

1996). An application was made to strike out this claim on that basis ie that Dr Day was not an employee or worker of HEE.

At that time, the relevant legislation was understood to mean that a worker under s43K was not someone with an employment or worker relationship with another body (see s43K(1): "For the purposes of this Part "worker" includes an individual who is not a worker as defined by Section 230(3)…"). Further, the Claimant was pursuing a claim based on s43K(1)(d) of the ERA, which required the Claimant to be engaged otherwise than under a contract of employment. The Claimant was employed by Lewisham.

A preliminary hearing was listed for 25 February 2015 to hear the Respondents' strike out applications; no order was made requiring disclosure.

At the relevant time, the solicitors with conduct of the case were not aware of the Learning and Development Agreement (LDA) that forms the subject of the Claimant's current application; this relates to the generic, model agreement (as detailed in the response to the Freedom of Information Act request appended to the Claimant's application). A bundle of documents was assembled in liaison with the Claimant and other Respondent. It is not considered that the LDA (whether generic or specific to Lewisham) was relevant and it was not disclosed by the Second Respondent.

The claims against HEE were struck out at the preliminary hearing on 25 February 2015. This decision was appealed to the Employment Appeal Tribunal and then the Court of Appeal Dr Day's appeal was allowed and the application of the legislation above clarified and the case was remitted to the Tribunal to determine whether HEE could be an employer within the extended definition under whistleblowing legislation.

A further preliminary hearing was listed from 14-17 May 2018 to consider this issue. The Employment Tribunal ordered standard disclosure and this was effected, by agreement, in February 2018. The specific Lewisham LDA was part of this disclosure sent on 14 February 2018. It was item 14 in an indexed list of 20 items; we do not understand the suggestion that it was 'buried' within disclosed documents to any extent.

The Claimant, through his then representatives, made detailed submissions in relation to the LDA in the Claimant's skeleton argument. The Claimant's representative expressly referred to seeking costs relating to the alleged late disclosure of the LDA in this hearing and in correspondence. The parties subsequently agreed, by consent, that the preliminary issue (of employment status) was conceded and HEE paid £55,000 towards Dr Day's costs. The preliminary hearing was vacated and the terms were expressly in full and final settlement of that jurisdiction aspect.

At the full hearing in October 2018, the parties agreed, by consent, that the claim was withdrawn with no order as to costs; this is the subject of the Claimants current appeal against the Tribunal's review of that decision. The Clamant entered into a settlement agreement compromising all claims including, expressly, any claim or application for costs against any other party or representative whether in relation to their conduct or otherwise. In this context, the application is wholly unjustified.

The Claimant's application assumes that the content of the relevant LDA was "a highly relevant document" to the issues before the preliminary hearing in 2014 and the issues before the Employment Appeal Tribunal in May 2015 and a "vital document to the case". The importance of this document is overstated. Further it assumes that the LDA was relevant to these proceedings and./or there was a breach of relevant directions or obligations; this is not the case.

Paragraph 21.5 of the EAT Practice Direction 2018 states that an application for a wasted costs order must be made in writing, setting out the nature of the case upon which the application is based and the best particulars of the costs sought to be recovered. The Claimant's application does not quantify the alleged losses nor the causal link between the non-disclosure and such losses.

The Claimant has failed to make this costs application either during or at the end of a relevant Employment Appeal Tribunal hearing, or in writing to the Registrar within 14 days of the seal date of the relevant order of the EAT. The Claimant has had legal representation throughout the course of the majority of these proceedings (including expressly at the salient times) but failed to make the costs application within the required time limits or within a reasonable period thereafter.

It is not accepted that the information provided by HEE in response to the Freedom of Information Act request is sufficient excuse for the delay and, indeed, does not give rise to any new factor in that the Claimant was aware of the specific LDA in any event. This knowledge existed both at the remitted hearing where costs were agreed and at the subsequent substantive hearing where the claim was withdrawn further to a settlement agreement that expressly compromised any such costs applications.

In Wall v Lefever [1998] 1 FCR 605, (1997) Times, 1 August, CA, Lord Woolf cautioned that appeals against wasted costs orders, or the refusal thereof, should not be used to create subordinate or satellite litigation which was as complex and expensive as the original litigation. It further held that the jurisdiction in a wasted costs application should only be exercised in a reasonably plain and obvious case. Courts should think carefully before hearing a wasted costs application in a case in which there is a conflict of evidence to be resolved and where legal professional privilege is engaged.

Should this application proceed, it will require a further complex and costly hearing to address the facts outlined above; the relevance of the LDA to the proceedings; the extent and obligation of disclosure at the relevant times for all parties; the application of Tribunal judgments including as to costs and the application of a concluded settlement agreement. With regard to the overriding objective, this is averred to be wholly disproportionate.

Yours faithfully

Hill Dickinson LLP

Tim Johnson/Law
Solicitors

117 Temple Chambers
3-7 Temple Avenue
Temple
London EC4Y 0HP

Tel +44 (0) 20 7036 9120
Fax +44 (0) 20 7036 9121
Direct
tess.callaway@timjohnson-law.com

Hill Dickinson LLP
50 Fountain Street
Manchester
M2 2AS

Our ref D00004-0003
Your ref 2003208.4.MWRI.OLM

9 February 2016

Dear Sirs

Re: UKEAT0250/15/RN – Dr C Day v 1) Lewisham & Greenwich NHS Trust and 2) Health Education England

We are extremely surprised that your client intends to apply for costs in relation to this appeal as the appeal obviously raises issue of great public interest. In the aftermath of the Francis Report it is very important that the law is clear on exactly what whistleblowing protection junior doctors have.

In your skeleton argument your client argues that there is a lacuna in the law. Yet your client intends to seek costs against a doctor who seeks to establish what the law is in this area! This is a shameful abrogation of responsibility on the part of a public authority which is responsible for the training of junior doctors.

It is obviously in the public interest that the hearing proceed tomorrow. We therefore invite you to withdraw your costs schedule and confirm as soon as possible that you will not be seeking costs.

Please ensure that this letter is drawn to the attention of those at the most senior level in the management of HEE.

Yours faithfully

TJL

Tim Johnson/Law

IN THE EMPLOYMENT APPEAL TRIBUNAL **CASE NO: UKEAT/0250/15/RN**

BETWEEN:

DR CHRISTOPHER DAY Claimant

and

LEWISHAM AND GREENWICH NHS TRUST First Respondent

and

HEALTH EDUCATION ENGLAND Second Respondent

RESPONDENT'S SCHEDULE OF COSTS IN RESPECT OF THE CLAIMANT'S APPEAL

Description of Fee Earner

(1)	Michael Wright	Legal Director	£150 per hour
(2)	Orla McGarrigle	Associate	£125 per hour

		£	£
	Preparation/Consideration		
(1)	20 hours at £150 per hour	3,000.00	
(2)	59 hours at £125 per hour	7,375.00	
			£10,375.00
	Emails/Letters out		
(1)	13.7 hours at £150 per hour	2,055.00	
(2)	10 hours at £125 per hour	1,250.00	
			£3,305.00
	Telephone attendance		
(1)	4.8 hours at £150 per hour	720.00	
(2)	3.3 hours at £125 per hour	412.50	
			£1,132.50
	Advocacy/ in Tribunal		

(2)	1.7 hours at £125 per hour	212.50	
			£212.50
	Attendance with client/others		
(1)	10.1 hours at £150 per hour	1,515.00	
(2)	5.9 hours at £125 per hour	737.50	
			£2,252.50
	Attendance with Counsel		
(2)	2 hours at £125 per hour	250.00	**£250**
	Total		**£17,527.50**
	Plus estimated costs of attending appeal hearing:		
(2)	6 hours at £125 per hour	750	
	Travel costs	332	
			£1,082
	Plus Counsel's fees		**£5,475.00**
	TOTAL COSTS		**£24,084.50**

The Respondent is VAT registered and no claim in respect of VAT is made.

DATED THIS 9th day of February 2016

Hill Dickinson LLP
50 Fountain Street
Manchester
M2 2AS

Solicitors for the Second Respondent
Ref: 12003208.4.MWRI.OLM

Gmail

Chris Day <chrismarkday@gmail.com>

FW: UKEAT/0250/15/MC Dr C Day v 1) Lewisham and Greenwich NHS Trust 2) Health Education England [HD-UKLIVE.FID5075288]

Tess Callaway <Tess.Callaway@timjohnson-law.com> Tue, Feb 9, 2016 at 5:13 PM
To: Chris Day <chrismarkday@gmail.com>
Cc: Tim Johnson <Tim.Johnson@timjohnson-law.com>, Lauren McLaughlin <Lauren.McLaughlin@timjohnson-law.com>

Hi Chris,

Please see attached and below from Hill Dickinson regarding their intention to seek costs if we are unsuccessful tomorrow.

Also, I don't know whether you have previously met Louise, but she takes the photographs for our website and other media use. She is available tomorrow morning to take a photograph of you before the hearing. It would be good to have a photograph to accompany a possible press release. Can you make it to our offices for about 9.45?

Best,

Tess

Tess Callaway

Legal Assistant | Tim Johnson/Law, Solicitors

117 Temple Chambers, 3-7 Temple Avenue, London EC4Y 0HP | +44 (0)2070369120

tess.callaway@timjohnson-law.com

From: Orla McGarrigle [mailto:Orla.McGarrigle@hilldickinson.com]
Sent: 09 February 2016 16:00
To: Tess Callaway

Cc: Lauren McLaughlin
Subject: RE: UKEAT/0250/15/MC Dr C Day v 1) Lewisham and Greenwich NHS Trust 2) Health Education England [HD-UKLIVE.FID5075288]

Dear Ms Callaway,

In advance of the appeal hearing tomorrow, please find attached our client's Schedule of Costs in respect of this appeal.

As set out in the Second Respondent's Skeleton Argument, following the comments of Mr Rec Luba QC at the Rule 3(10) hearing, the Second Respondent shall seek its costs under Rules 34 -34A should it succeed.

Kind regards,

Orla McGarrigle

Associate

Business Services

Employment & Pensions

Hill Dickinson LLP

50 Fountain Street, Manchester, M2 2AS

Tel: +44 (0)161 838 4978

Fax: +44 (0)161 817 7201

Schedule of Costs.PDF
58K

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

Further and Better Particulars

Introduction

1. The Respondents have stated that they intend to hold their position on the Claimant's protected disclosures that was agreed at the October 2018 final hearing.

2. If that continues to be the case further and better particulars are required in respect of the Claimant's claim relating to his protected disclosures. In particular, in respect of the claim of the Claimant's reasonable belief in deliberate concealment for the purposes of ERA s43(f).

3. The First Respondent finally accepted in October 2018 that the Claimant made eight protected disclosures containing information tending to show a reasonable belief that the health and safety of NHS patients has been, is being or is likely to be endangered for the purpose of ERA s43(d) but have stated the following in respect of the Claimant's claim of ERAs43(f) in respect of his disclosures;

> *" the extent that the alleged disclosures relate to information tending to show that matters are being or are likely to be deliberately concealed (F) (and to the extent that this matters in view of R1's admission in (a) above), R1 denies that any belief by held by the Claimant that any information disclosed tended to show such concealment was reasonable;"*

4. The Second Respondent has made no concession at all on the alleged protected disclosures in the Claimant's case despite its status as an employer for the purpose of ERA s43k. It has not pleaded a case to refute the Claimant having a reasonable belief in the relevant failures found in ERA s43.

5. The Claimant submits that given the evidence and in particular the new evidence sent to the former health minister, Sir Norman Lamb by Dr Frankel in January 2019, that the position of both Respondents on the status of the Claimant's protected disclosures has moved past unsustainable which it always was, to unreasonable.

Misrepresentation/Concealment of the Substance of the Claimant's Protected Disclosure

6. Dr Frankel was the Second Respondent's most senior doctor in London (or as the LDA puts it's duly authorized officer) at the time of the Claimant's case and was the medical manager running the Claimant's whistleblowing litigation including at the Tribunal in 2018. Dr Frankel conceded to Sir Norman Lamb in January 2019 the actual reality of a 'Quality Visit' by the Second Respondent in October 2014 to the First Respondent's Intensive Care Unit. This visit occurred a month after the Claimant's September 2014 protected disclosures. Dr Frankel stated to Sir Norman Lamb;

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

7. The First Respondent stated the absolute opposite in respect of the Second Respondent's quality visit in their formal investigation which both Respondents adopted at the final hearing of the Claimant's case at the Tribunal in October 2018 which misled the Tribunal;

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

8. What Dr Frankel conceded to Sir Norman Lamb in 2019 but not at the 2018 Tribunal is further bolstered by evidence from other junior doctors that raised similar concerns to the Claimant about staffing and the availability of airway doctor support in their evidence to the relevant quality visit. This is set out in the Claimant's witness statements that were sent to Sir Norman Lamb which the Claimant imagines Dr Frankel felt he had to justify. The significance of Second Respondent's quality visits to NHS Trusts is set out in the 2014 LDA between the Second and First Respondent at Schedule F Part D.

9. The Claimant's covert audio records Dr Frankel's stated view on the substance of the Claimant's protected disclosure in a formal meeting with the British Medical Association on 2 September 2014.

> "*What you describe to me is totally unacceptable for me to have trainees in a situation that you were in. In ICU you are not trained for intubation and airway care and you're in charge 19 never mind all the other issues. the whole things what you described is unsafe.. You were clearly not the only person who had concerns about it."*

10. Despite 1. The results of the Second Respondent's quality visit , 2. Dr Frankel's clearly stated position in 2 September 2014 on the Claimant's protected disclosure 3. ICU Core Standards (national staffing standards) 3. Serious Untoward Incidents involving the deaths of patients and their SUI reports; both Respondents adopted and defended the following position on the Claimant's protected disclosures at the 2018 Tribunal;

> *"Dr Day was expected to cover the 18 bedded ICU, ward outliers, A&E and ward ICU as a Resident SHO in QEH. In my opinion this was acceptable in light of his experience and skills at the time".*
>
> *"A recent Deanery Visit concluded that staffing levels (unchanged since January 2014) were safe and there were no concerns about supervision highlighted by them"*

11. A Critical Care Peer Review commented in 2017 on the Intensive Care Unit at the center of the Claimant's case. The comments obviously support the Claimant's protected disclosures and Dr Frankel's stated position to Sir Norman Lamb in 2019.

> "Staffing levels – there were 19 patients to just one consultant, which exceeded the recommended ratio of between 1;8 an 1;15. <u>It was apparent that this is a consistent issue with no clear recognition"</u>

12. The Claimant submits that the Second Respondent and Dr Frankel cannot reinvent history in 2019 with a former health minister and claim that the Second Respondent supported the substance of the Claimant's protected disclosure either in formal reports or at the Tribunal. The Second Respondent's 'on the record' position in 2014 was quite clear and was the complete opposite of the position of the Second Respondent's most senior doctor on covert audio.

> "*A recent Deanery Visit concluded that staffing levels (unchanged since January 2014) were safe and there were no concerns about supervision highlighted by them*
>
> *"Dr Day was expected to cover the 18 bedded ICU, ward outliers, A&E and ward ICU as a Resident SHO in QEH. In my opinion this was acceptable in light of his experience and skills at the time".*

13. It follows the Second Respondent deliberately concealed Dr Frankel's true view on the Claimant's protected disclosure and the reality of the October 2014 quality visit.

14. The Claimant submits that any reasonable reading of what is set out in paragraph [5-13] is enough to justify the Claimant's reasonable belief that deliberate concealment occurred in respect of the substance of his protected disclosures.

First Respondent's Response to the Claimant's Protected Disclosure

15. The evidence shows that the senior manager recipient of the Claimant's protected disclosure made by telephone on 10 January 2014 dramatically changed her description of the Claimant's telephone call in her evidence to the First Respondent's formal investigation into the safety issues in the Claimant's whistleblowing case.

16. The Claimants telephone call on the night of 10 January 2014 was initially described by a Director in the First Respondent after the Director had a meeting with the senior manager that received the Claimant's protected disclosure on 10 January. The Director describes the Claimant's telephone call, *"Dr Day is of course quite welcome to raise his concerns and clearly did so in what seems to be a very amicable conversation with Joanne Jarrett."*

17. The description of the Claimant's 'very amicable conversation' reported in the First Respondent's internal email dated 15 January 2014 was then dramatically changed in evidence to First Respondent's formal investigation by the duty senior manager Joanne Jarrett who subsequently described the Claimant's phone call with the words "communicating in anger", "very offensive" and "a little ridiculous".

18. Jane Dann, a senior nurse witnessed the Claimant's 10 January 2014 protected disclosure confirmed verbally and in writing that the Claimant when making his protected disclosure was "calm, professional and rational during the course of the whole telephone conversation."

19. The Claimant's Intensive Care Unit clinical supervisor contacted him at home to warn him about the actions of the senior manager recipient of his 10 January 2014 protected disclosure. This was commented on by the First Respondent's formal investigation. "*Dr Roberts passing on this to Dr Day in fact escalated the problem, allowing Dr Day to believe that Ms Jarrett had tried to undermine him"*

20. 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 the Claimant dated 24 June 2018 at 2157 which stated*, "I think you should call me for evidence before the Trust solicitors try to gag me"*. The Claimant 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"*

21. The Claimant's submits that any reasonable employer would have concluded from the senior nurse Jane Dann that the Claimant's phone call was calm, professional and important and questioned the credibility of the relevant senior manager given her change in position. The First Respondent's obvious motivation for not doing this was to smear the Claimant and confuse/conceal the substance of his protected disclosure.

22. It is submitted the facts above [15-21] support the Claimants claim of a reasonable belief in deliberate concealment ERA s43(f) .

Datix Incident Reporting

23. Datix is the system used in the NHS to report safety incidents and other significant events. The Claimant entered his January 2014 protected disclosure onto the Datix system. The First Respondent external investigation made the following criticisms of the way the Datix report was processed by the First Respondent;

    A) "the Datix report was not formally followed up and logged on the system as would be expected."

    B) "When a Datix report was submitted on 15 January 2014 it was not dealt with through routine governance processes. The responses to the clinical issues Dr Day raised were addressed in an informal and uncoordinated way"

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

24. The Claimant submits that the actions above in [23] demonstrates that it would be reasonable to suspect that the Datix report submitted by the Claimant was being deliberately concealed as opposed to being logged on the system and going through routine governance processes. The actions that followed the Datix report that were described as "undermining and bullying" is yet further evidence of the Claimant's position being reasonable.

Second Respondent's Response to the Claimant's Protected Disclosures

25. On 3 June 2014 the Claimant made a protected disclosure to an ARCP panel of 3 senior doctors and a lay chair at the Second Respondent. The substance of the disclosure has been dealt with at [6-14]. The Claimant also reported to the ARCP panel concerns that the First Respondent had handled his protected disclosures earlier in the year improperly as described above [15-24].

26. The Second Respondent ARCP chair has accepted for some reason that the ARCP panel did not make a record of the substance of the protected disclosure.

27. Similarly to the First Respondent with the 10 January 2014 protected disclosure the Second Respondent attempted to construct a false account of the Claimant making the protected disclosure to discredit and smear the Claimant. (see [15-22])

28. The Second Respondent falsely attributed to Dr Chakravarti, a senior doctor on the Claimant's ARCP panel a description of the Claimant making his protected disclosure on 3 June 2014 which included the words, "in the grip of angst", "physically shaking", "this behavior on the day alone does certainly appear to have raised questions for the panel about his state of mind".

29. The Claimant wrote to Dr Chakravarti on 29 December 2014 to challenge the statements that had

been attributed to her in the Second Respondent's formal report and made clear in a subsequent email that litigation had commenced and that covert audio would be used in the case to counter false accounts of the Claimant's dialogue in formal meetings.

30. Dr Chakravarti wrote to the Second Respondent on 5 January 2015 stating that "she was baffled by the various quotes attributed to [her]" in the Second Respondents formal report into the Claimant's whistleblowing case. She also ensured Hill Dickinson were aware.

31. The Second Respondent did not remove the statements from their report that baffled Dr Chakravarti. Dr Chakravarti received a response by email from the Second Respondent on 5 January 2015 which ended with a reference to the Second Respondent's intended strike out application to refute employer status (now subject to a wasted costs application and legal regulator investigation);

> *"We are reasonably hopeful that it will be struck out on the grounds that we (HEE) are not his employer which will be the end of it for you (and me)."*

32. Dr Chakravarti described the Second Respondent's formal investigation into the Claimant's whistleblowing case with the following words in her Tribunal statement;

> "*the notes made by Mr Plummer contain short phrases without giving their context and by stringing the phrases together I feel it gives an exaggerated distorted impression. Upon reading the report, I was very surprised to find various phrases in inverted commas seemingly quoting me, when I could not recall saying those phrases. I did not feel that the report portrayed the situation as accurately from my perspective as I would have wanted."*

33. The Second Respondent's formal investigation also failed to interview the ARCP panelist Dr Umu-Etuk. The investigation then ignored/excluded from their formal investigation an email to the Claimant dated 5 December 2014 from Dr Umu-Etuk. In the email Dr Umu-Etuk describes the Claimant making his protected disclosure on 3 June 2014.

> *"I was of the opinion that you came across confident and assertive.. I do not recall you to be visibly shaking but did form the opinion that the hospital in question failed to provide enough support out of hours..I remember that you had sole responsibility for ITU which seems to be beyond the expected competency of a CT1/2 doctor"*

34. Another ARCP Panelist present when the Claimant made his 3 June 2014 protected disclosure, Ms Annette Figuerido, stated to the Second Respondent's formal investigation that she "was unable to recall this particular ARCP"

35. The Second Respondent and their Solicitors pleaded the below as the unanimous view of the ARCP panel with the clear intention to smear the Claimant in the eyes of the employment tribunal;

"*the panel noted how the Claimant appeared to the live the experience physically shaking whilst he recounted the patient safety issues. The panel noted how the Claimant appeared to lack confidence in his own ability*"

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

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

37. The Claimant submits that the decision by both the Second Respondent and their legal representatives to plead the above account [35] as the unanimous view of the ARCP panel was deliberately dishonest/misleading given the following evidence;

a) The ARCP panelist Dr Umu-Etuk stating on 5 December 2014 that the Claimant was "confident and assertive" when making his protected disclosure on 3 June 2014 and "not visibly shaking"

b) The ARCP panelist Ms Annette Figuerido stating that she "was unable to recall this particular ARCP"

c) The fact ARCP panelist Dr Chakravarti wrote to the Second Respondent on 5 January 2015 stating that "she was baffled by the various quotes attributed to [her]" which included comments about physically shaking, being gripped with angst and unanimous concerns about state of mind. (This email was disclosed late in 2018)

d) Dr Sauer's evidence

38. Dr Sauer, the Claimant's clinical supervisor commented on the First and Second Respondent's actions towards the Claimant in his Tribunal statement;

"*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. 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.*"

Culture at the First Respondent

39. The 2017 Critical Care Peer Review made general comments about culture which is relevant to whether the Claimant's belief in deliberate concealment was reasonable;

    a) "*Poor incident reporting culture – two members of staff were approached by their managers after reporting incidents with one being told, "she had created a lot of work while another was told she should have said something verbally rather than submitting a formal incident form."*

    b) *""A complete lack of medical leadership, low consultant staffing levels, inadequate governance and poor culture"*

40. In January 2019, the First Respondent published an external investigation that it had commissioned into culture at the Trust which made the following findings about the First Respondent's culture;

    a) existence of widespread bullying and harassment
    b) menacing, threatening and heavy handed culture
    c) overt bullying at the most senior levels
    d) a lack of action to address
    e) it recommended the past failures of the senior team are publicly acknowledged

Conclusion

The Claimant claims what is set out in these further and better particulars clearly demonstrates the Claimant's reasonable belief in deliberate concealment for the purpose of ERA s43(f).

It is also submitted that they show the Respondents' position on the protected disclosures as unreasonable and in particular the Second Respondent's position on them as patiently absurd.

Dr Chris Day
11 November 2020

Case No. 2302023/2014 and 2301446/2015

EMPLOYMENT TRIBUNALS

Claimant: Dr C Day

Respondent: Lewisham and Greenwich NHS Trust (1)

Health Education England (2)

Heard at: London South (By CVP) **On:** 5 and 6 December 2022

Before: Employment Judge Self

Appearances

For the Claimant: Mr A Allen KC - Counsel

For Respondent: Mr A Moon KC - Counsel

RESERVED JUDGMENT

Upon the Tribunal determining that the test for striking out the Claimant's Application for a wasted costs order against the Second Respondent's solicitors (Hill Dickinson), pursuant to Rule 37 (1) (a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 (The Tribunal Rules), is not met, the application will be listed for a Case Management Hearing to enable directions to be made for a determination of the Application.

WRITTEN REASONS

1. This hearing was listed, of the Tribunal's own initiative, to consider whether the Claimant's application seeking wasted costs against Hill Dickinson LLP, dated 12 June 2019, pursuant to Rule 80 of the Tribunal Rules, should be

struck out pursuant to Rule 37 (1) (a) of the same Rules, as having no reasonable prospect of success. There was a preliminary point raised about the scope of this hearing at the outset and the above summarises my ruling thereon. Both parties have indicated to me that they do not need anything other than my oral ruling on that matter.

2. Within the course of the hearing and prior to the parties commencing their submissions an issue was raised whether such an application for wasted costs came within the definition of "Claim" pursuant to the Employment Tribunal Rules and both parties were, eventually, in agreement that it could and both wished the hearing to proceed.

3. These claims have been running since 2014 and it is not possible to deal with the application without being clear about the chronology and what has taken place to date. Indeed, both advocates rightly spent some time working through the chronology as they saw it and I will do the same drawing from both of their submissions

4. The Claimant brought claims of whistleblowing detriment against a number of Respondents on 27 October 2014 and then brought a further Claim on 10 April 2015. One of those Respondents was Health Education England (HEE) who were represented at all material times by Hill Dickinson LLP. The Claimant asserted that he was a worker under the extended definition of worker in section 43K Employment Rights Act 1996 (ERA) between 5 August 2013 and 10 September 2014, which was the material period for the Claim, and that he had been subjected to a series of detriments on account of protected disclosures he had made.

5. HEE defended the allegations against it and the Response was received in late November 2014. Within that document HEE took the point that the Claimant did not fall within the extended definition of worker set out at section 43K of the Employment Rights Act 1996. It averred, at paragraph 8 of its Response (55), that it did not determine the terms upon which the Claimant was engaged and that that was the responsibility of the Trust who were employing the Claimant at the material time. It was pleaded that the Claimant had no reasonable prospect of success of coming within the section 43K definition of worker and that the Claim should be struck out on that basis (para 11 page 55).

6. This position was reiterated in a letter of 25 November 2014 and the Regional Judge in situ at that time listed a hearing so as to consider that point (among others) at an Open Preliminary Hearing (OPH). HEE points out that there was no order for disclosure prior to that hearing but the Claimant counters with the observation that there was a bundle prepared for the hearing into which documents the parties considered relevant were placed and then

considered by the Judge and referred to by her in the course of her Judgment.

7. That hearing was listed before EJ Hyde on 25 February 2015 and she struck out the claims against HEE after hearing representations from the parties. The basis for striking out the Claims was that they had no reasonable prospect of success.

8. At para. 42 of the Judgment it was recorded that counsel for HEE stated that it was fanciful to suggest that the party who substantially determined the Claimant's terms and conditions was HEE. At para. 43 the Judge reflected that she had before her terms and conditions of employment with the various Trusts with whom the Claimant was placed and that was a good start point.

9. At para. 45 EJ Hyde set out relevant sections of what was known as the "Gold Guide" and at para. 46 utilising that document accepted that that document ***"overwhelmingly pointed to the First Respondent (Lewisham) as being the body which was substantially responsible for determining the Claimant's terms and conditions of work"***

10. At paragraphs 48, 49 and 50 the Tribunal cites certain documents in the bundle in support of the HEE position and that it accepted certain evidence from a witness (Mr McKay).

11. At paragraph 52 of that Judgmen,t which was sent to the parties on 14 April 2015, EJ Hyde said:

"In conclusion, I accepted the primary submissions on behalf of the Second and Third Respondents that in construing section 43K the focus is in relation to the work and as to who has substantially determined the terms on which the employee or the worker does that work. I agreed that it was relevant that (HEE's) role was to arrange the training of Dr Day over an extended period but that it was not (HEE) who substantially determined the terms on which he did the work for the trust. Here there was a training relationship which subsisted alongside the employment relationships with the various trusts who were the Claimant's employers and determined the terms upon which he performed his work either on their own or with others not including the Respondents. The claim against (HEE) therefore has no reasonable prospects of success".

12. It is clear that EJ Hyde carefully considered the evidence provided to her including the documentary evidence that was placed in the bundle and made her decision on the information before her.

13. The Claimant appealed that Judgment and the matter came before Mr Justice Langstaff at the Employment Appeal Tribunal on 10 February 2016

with Judgment being handed down on 9 March 2016. The appeal was refused. It does not seem to me that the reasoning is relevant to the issues of this case and so I need not go into the Judgment in any great detail. Mr Moon referred to a passage in the Judgment at page 139 of the bundle where the issue was referred to as ***"one of hard-edged law".*** The issue in dispute still required a factual assessment and evidence of what the Claimant's situation was and, in particular, identification by that evidence of who determined his terms and conditions and whether it brought him within the extended definition of worker set out in the Employment Rights Act 1996.

14. The matter was then further appealed to the Court of Appeal and the hearing took place on 21 March 2017 with Judgment being handed down on 5 May 2017. At this point both parties not only engaged established senior Employment law Juniors on their case bus also had instructed QCs in order to argue the point. In addition, Public Concern at Work were permitted to intervene and were also represented by Queen's Counsel. The parties to this litigation agreed on 27 October 2016 that they would not pursue costs against each other whatever the outcome of the appeal and an Order reflecting that was made by the Court of Appeal to the effect that whatever the outcome each would bear their own costs. This effectively prevented the need for an application to be made by the Claimant to limit recoverable costs pursuant to Rule 52.19 of the CPR.

15. The lead judgment at the Court of Appeal was given by Lord Justice Elias who noted at paragraph 6 that whilst he accepted that the issue was suitable to have been dealt with as a Preliminary Hearing it would have been ***"desirable"*** for the issue to be determined as a Preliminary Issue following findings of fact as opposed to being dealt with via a strike-out.

16. Since the EAT hearing there had been another case (**McTigue**) which the Court of Appeal was able to draw from and at para. 23 of the Court of Appeal judgment they observed that **"in principle HEE could fall within the scope of section 43K (2) (a) ERA notwithstanding that the Claimant had a contract with the Hospital Trust."**

17. The Court of Appeal then went onto consider whether the EAT had applied the correct test in that it did not properly consider that both the employing Trust and HEE could both substantially determine the terms of agreement. It was found (para. 27) that the Tribunal had not engaged directly with the question whether HEE itself substantially determined the terms on which the Claimant was engaged and therefore the Tribunal and the EAT had fallen into error. It was not accepted that the answer to the correct question to be asked was clear and obvious and so the Claim was remitted to the Tribunal for that to be considered by way of a Preliminary Issue i.e., whether HEE substantially determined the Claimant's terms of engagement.

18. The matter made its way back to the Employment Tribunal and REJ Hildebrand presided over a directions hearing on 10 July 2017 and sent out an Order with directions for a four-day hearing on the Preliminary Issue identified as ***"Whether the (Claimant) was a worker of HEE pursuant to section 43K Employment Rights Act 1996"*** and that was to be considered ***"on the facts and in light of the guidance provided by the Court of Appeal Judgment"*** .

19. Standard disclosure by List and then inspection of any documents ***relevant to the issue*** identified in the case as set out in the preceding paragraph was made (my emphasis). Further standard directions preparing his matter for a hearing were also made.

20. Although the Order gave dates in August 2017 for the disclosure and inspection it was not until 14 February 2018 that a Senior Associate at Hill Dickinson sent a list and copies to the Claimant's then solicitors and in a covering email she stated that she looked forward to receiving disclosure from other parties in due course. Neither party asserted that there was any dilatory conduct in relation to the timing of disclosure and so I proceed on the basis that an extension was agreed by the parties.

21. One of the documents disclosed was listed as being **"Learning and Development Agreement between London Strategic Health Authority (LSHA) and South London Healthcare NHS Trust"** (2012 LDA Agreement). Although the background is slightly more complicated than I am about to set out, LHSA was a predecessor of HEE and the Lewisham Trust fell under South London etc at the time of this agreement which is dated 1 April 2012.

22. At this point in time I have been given no information as to how this document came to light or how it came to be in the List of Documents and, no doubt, if this application proceeds to a final hearing those matters are likely to be the subject of evidence. All I can take from it at the moment, however, is that a decision was taken by Hill Dickinson that this document was one that met the criteria of being a document relevant to the issue to be determined as of February 2018. It is also apparent that it was not a document placed within the bundle when the issue was first at the Employment Tribunal some years earlier and I have received no explanation for that omission in the course of this hearing.

23. Matters proceeded and the hearing was listed for 14-17 May 2018. Mr Linden QC (as he then was) was instructed by the Claimant for the hearing and I have seen his skeleton argument for that hearing (314 - 330). At paragraph 6 he states that the Claimant's position is that HEE and the Trust both substantially determined the terms upon which the Claimant was engaged but that HEE had a far more important role than the Trust.

24. At paragraph 10 Mr Linden identified documents that, in his view, the Tribunal ***"may wish to consider more carefully"*** and the first of these was the 2012 LDA Agreement ***"which sets out the obligations of the Trust and HEE in relation to the specialist training programme which the Claimant was undertaking".***

25. At paragraph 13 Mr Linden identified the importance of the case as it affected approximately 54,000 junior doctors and specialist registrars in the NHS and also had wider ramifications where working arrangements were determined by more than one organisation. At para 14 he explained that in his view the possibility that HEE would be able to retaliate against a whistle blower without any recourse by the whistle blower, taking into account the role it played in relation to doctors in training, was surprising to say the least.

26. At paragraph 32 Mr Linden referred to the 2012 LDA Agreement and stated that:

"The important point for present purposes is that it includes a number of terms that governs the relationship between the Trust and the Trainee. HEE therefore also "determines" the terms on which the trainee is to be engaged at work, through the LDA".

He then provided a substantial number of examples from the Agreement to demonstrate this point and then referred to part of a witness statement from one of the HEE witnesses which he described as effectively an admission that through the LDA, HEE substantially determined the terms upon which Junior Doctors are engaged.

27. Mr Moon KC's skeleton argument is dated 11 May 2018. I do not know whether he had had sight of Mr Linden's skeleton before he drafted his own. At paragraph 3 of that document Mr Moon wrote:

"After very careful consideration, including consideration of the evidence, HEE has decided to concede the preliminary issue on the basis that postgraduate trainees are workers within the meaning of section 43K (ERA)."

Mr Moon invited the Tribunal to make an Order which reflected the concession on the Claimant's status and to make a formal finding that:

"The Claimant was a "worker" within the meaning of section 43K(1) ERA and that HEE was his "employer" within the meaning of 43K(1) ERA throughout the period from 5 August 2013 to 10 September 2014 when the Claimant was a Postgraduate Trainee and that the Claimant is accordingly entitled to bring these proceedings under the ERA against HEE".

28. On 14 May a document was signed by EJ Freer in which the concession drafted by Mr Moon was recorded and the Tribunal made the finding requested above. In addition, it was recorded:

"By consent the Employment Tribunal orders that in full and settlement) of all the Claimant's claims for costs in respect of the "worker" issue HEE will pay the Claimant's costs to the Claimant's solicitors in the sum of £55,000 inclusive of VAT within 28 days of today."

29. The Claimant indicated at this hearing that the £55,000 was only part of the costs which he had expended on the preliminary point. No doubt if this application proceeds that will be evidenced.

30. The substantive claims were listed for a final hearing commencing on 1 October 2018. The Claimant was cross examined and it is common ground that before the end of that cross examination a settlement agreement was entered into on 15 October 2018. The Claimant was represented by counsel at that hearing and the settlement agreement entered into is in relatively standard form. It records in a preamble that in the course of the hearing ***"the parties have reached agreement for the withdrawal and settlement of those claims"*** brought before the Employment tribunal at that time. Further in the preamble it was said that the Agreement was ***"in full and final settlement of those claims and all or any claims the claimant has or may have against…. HEE, their directors, officers, agents and / or employees arising out of or in connection with the Claimant's employment and / or training and / or their termination."***

31. At paragraph 2.2 of the Agreement (338) the Agreement states:

"This Agreement is also in full and final settlement of all or any claim or application for costs / expenses that any of the parties may have against any other party or parties representative , whether in relation to the claims or their conduct or otherwise".

32. On 28 November 2018 a Judgment was sent to the parties which simply stated that **"Upon Agreement having been reached between the parties, the Claimant's claims are dismissed upon withdrawal."** And so it was that the first set of proceedings were compromised and ended.

33. On 11 December 2018 the Claimant sought to set aside the Settlement Agreement and to have the Judgment referred to in the previous paragraph reconsidered and then revoked. (344 et seq). The Claimant asserted that he had entered into the Agreement "operating under a mistake or pursuant to a misrepresentation given that he entered into the Agreement on the basis that he believed that the Respondent had said that it would pursue the Claimant

for costs if he proceeded with the trial and ultimately lost whereas he was now told that that was not the case (345). The Claimant attached a witness statement to his application in support (347-353).

34. In that document the Claimant described his account of what had happened during the hearing and, in particular, how it had come to be that he had come to withdraw his claim and how ***"as a direct result of the costs threats we decided to withdraw the case."*** The Claimant then described how he was contacted by a journalist (Mr Greene) and how other information had come to light to the effect that the Respondent denied making any form of costs threat. If that was true, said the Claimant, then the basis upon which he entered into the Agreement was a false one as there had either been a misrepresentation or a mistake.

35. On 18 February 2019 EJ Martin considered the application and concluded that there was no reasonable prospect of a reconsideration being successful and the application was refused (394-395). On 26 February 2019 the Claimant asked for a reconsideration of that decision and set out his reasons for that. He also intimated that he was also taking steps to appeal EJ Martin's order and that appeal was received by the Employment Appeal Tribunal on 26 or 28 March 2019 (the date stamp is not clear on the document I have). That appeal was rejected on the sift by HHJ Eady (as she was then) who indicated that in her view it had no reasonable prospect of success.

36. On 24 July 2019 the Claimant requested an oral 3 (10) hearing to plead his case in person but permission to appeal was dismissed by Heather Williams QC sitting as a Deputy Judge of the High Court. On 30 December 2019 the Claimant appealed to the Court of Appeal and on 7 April 2020 Lady Justice Simler refused permission to appeal on all grounds. And so it was that the Claimant's first attempt to set aside the Settlement Agreement concluded in failure.

37. A further Employment Tribunal claim was commenced in early March 2019 against HEE (inter alia) but the case against HEE was struck out in mid-February 2022 for reasons that are not relevant to the issues I have to determine. Similarly, the fate of the Claimant's claims against the NHS Trust also has no bearing on the issues in this Claim.

38. On 12 June 2019 the Claimant's then solicitors made an application for wasted costs under Rule 80 of the Tribunal Rules **"for the legal costs incurred in defending a preliminary strikeout issue raised by the Second Respondent (HEE)…"** It was confirmed that HEE were represented by Hill Dickinson LLP who were the subject of the wasted costs application.

39. The application gave a brief account of the background set out above and then stated as follows:

"The Second Respondent (HEE) had not disclosed a vital document in the case, the Learning Development Agreement (LDA) between the First and Second Respondents until the 14th of February 2018.

In May 2019 in response to a Freedom of Information (FOI) request made by a journalist Mr Tommy Greene the Claimant discovered that Hill Dickinson were also the solicitors who drafted the LDA. The Claimant understands that Hill Dickinson drafted this document in generic form, in the specific form used between the First and Second Respondents and for other NHS Trusts and the Second Respondent (HEE). It was a significant piece of work for that firm, for which they were well remunerated.

We attach a copy of HEE's response for the tribunal's consideration"

40. The Claimant contended that he had to incur significant costs as a result of the improper, unreasonable and/or negligent acts of Hill Dickinson. It was asserted that "***Hill Dickinson must have known of the LDA which it drafted and ought to have brought the significance of the LDA to its Client's attention in the early stages of these proceedings as this would have disposed of the need to make an application for strike out of the Claimants claim and the Claimant incurring substantial costs in responding to and preparing for a hearing associated with the application.***

The Claimant has decided to pursue this application now on the basis of the information obtained through the FOI by Mr. Greene where the claimant has discovered that Hill Dickinson were also the solicitors who drafted the LDA and were paid for doing so, thereby making it apparent to the Claimant that Hill Dickinson were aware or should have been aware of his existence at a much earlier stage and advised their clients accordingly".

Further on in the application:

"We submit that this application is consistent with the overriding objective of the Tribunal and the rules of natural justice because the Claimant would suffer a substantial injustice if the application is not heard and granted. Recognising the potential relevance of the Settlement Agreement of the 15th of October 2018 and in order to avoid expenditure of any further unnecessary legal costs the Claimant proposes that this application is immediately stayed pending the resolution of his appeal to the Employment Appeal Tribunal in relation

to the October 2018 settlement agreement and the Employment Tribunal order of the 28th of November 2018".

41. I read that paragraph as an acknowledgement that the issue of setting aside the settlement agreement would have to be resolved before the application for wasted costs could be considered and that if it was set aside on the basis of the existing application then there would be no need to go into the matters raised in this application thereby saving costs. I am satisfied that there have been two entirely separate and distinct arguments being advanced as to why the Settlement Agreement needs to be set aside. The first being in relation to Costs being sought in the event the Claimant lost and the second on the basis of material non-disclosure / misrepresentation/ fraud.

42. As at the date of the application the change in circumstance relied upon was that the Claimant became aware that the LDA document which had been key to the concession made by HEE on the preliminary point at a late stage had been drafted by Hill Dickinson and it called for an explanation as to why Hill Dickinson did not alert HEE to that earlier. In July 2019 the relevant LDA between HEE and Lewisham was disclosed to Mr Greene, the journalist.

43. Whilst it is clear to me that nothing happened on the Wasted Costs Application I have not been able to find any evidence of a formal stay being ordered. The issue was considered by REJ Freer in his letter of 3 October 2022. He concluded that the wasted costs application should first be considered at a Preliminary Hearing to determine whether it had sufficient prospects of success to proceed to a substantive hearing having regard to the nature and content of the relevant Settlement Agreements entered into between the Claimant and HEE and the consent order entered into by the parties at the Court of Appeal dated the 27th October 2016.

44. On the final page of the letter REJ Freer confirmed that the issue to be determined was

"Whether or not the Claimant's application for wasted costs should be struck out on the basis that it has no reasonable prospect of success having regard the content and nature of relevant compromise agreements reached between the Claimant and the Second Respondent (HEE) and / or the consent order dated the 27th October 2016".

45. In particular the parties were asked to address relevant authorities on the setting aside of compromise agreements and / or the consent order particularly on the basis of fraud / misrepresentation / mistake. The parties were also asked to address whether or not despite any agreements that may preclude the claimant himself pursuing a wasted costs order the tribunal should nevertheless make an order of its own initiative.

The Statutory Basis for the Application

Wasted Costs Orders

46. Under the Tribunal Rules, Rule 80 - 82 deals with wasted costs applications as follows (so far as is relevant):

80.— (1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay. Costs so incurred are described as "wasted costs".

(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

81. A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.

82. A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.

47. In order to be successful on an application for wasted costs the Claimant must demonstrate, on the balance of probabilities that he has incurred costs as a result of an improper, unreasonable or negligent act or omission on the part of Hill Dickinson.

48. Rule 80 is based on the wasted costs provisions that apply in the Civil Courts, with the definition of 'wasted costs' being identical to that contained in S.51(7) of the Senior Courts Act 1981. Accordingly, the authorities applicable to wasted costs in the civil law generally are equally applicable in the Employment Tribunal. The two leading authorities analysing the scope of S.51 and the circumstances in which such orders can be made are **Ridehalgh v Horsefield (1994) 3 All ER 848, CA**, and **Medcalf v Mardell (2002) 3 All ER 721, HL**.

49. In **Ridehalgh** the Court of Appeal had advocated a three-stage to adopt in respect of wasted costs orders:

a) Has the legal representative acted improperly, unreasonably, or negligently?
b) If so, did such conduct cause the applicant to incur unnecessary costs?
c) If so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

50. The Court of Appeal in **Ridehalgh** emphasised that even where the Court / Tribunal is satisfied that the first two stages of the test are satisfied (i.e., conduct and causation) it must nevertheless consider again whether to exercise the discretion to make the order and to what extent and that it still has a discretion at that stage to dismiss an application for wasted costs where it considers it appropriate to do so.

51. In **Ridehalgh** the Court of Appeal examined the meaning of 'improper', 'unreasonable' and 'negligent and this was subsequently approved by the House of Lords in **Medcalf**— as follows:

a) 'improper' covers, but is not confined to, conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty;

b) 'unreasonable' describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case;

c) 'negligent' should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

52. Mr Justice Elias (as he then was) confirmed these principles **in Ratcliffe Duce and Gammer v Binns (2008) EAT**, where he observed that where a wasted costs order is concerned, the question is not whether the party has acted unreasonably. The test is a more rigorous one, as the leading authorities make plain. The distinction therefore is between conduct that is an abuse of process and conduct falling short of that. A wasted costs order requires a high standard of misconduct on a representative's part. An abuse of the court includes such matters as issuing or pursuing proceedings for reasons unconnected with success in the litigation; pursuing a case known to be dishonest; and knowingly making incomplete disclosure of documents.

Strike Out Order

53. An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on any of the following five grounds pursuant to Rule 37 (1) of the Tribunal Rules. There are a number of grounds upon which a claim can be struck out but in this case we are looking at subsection (a) i.e., that the Application "***has no reasonable prospect of success"***.

54. The power to strike out all or part of a claim or response is discretionary. Even if one of the five grounds in r 37(1) is made out, the tribunal must consider whether to exercise their discretion or make an alternative order. The first stage involves a finding that one of the specified grounds for striking out has been established and, if it has, the second stage requires the Tribunal to decide as a matter of discretion whether to strike out the claim or response (or part thereof).

55. Lady Smith in ***Balls v Downham Market High School and College*** **UKEAT/0343/10** said at paragraph 6 of that Judgment:

"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their

written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."

56. Once a claim / application has properly been identified, the power to strike it out under the Tribunal Rules on the ground that it has no reasonable prospect of success will only be exercised in comparatively rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755, at [30])**. In particular, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute as often a hearing is required where evidence is challenged and evaluated. (**Tayside**). As such, a Claimant's case must ordinarily be taken at its highest – with the assumption being that the Claimant will establish that the facts which they have asserted in their claim are true, however vehemently the other side takes issue with them. Taking the claim at its highest means taking it at its highest not just in the pleadings but in any relevant supporting documentation available to the tribunal.

57. It is also important that the reference to 'disputed facts' is not limited to disputes about factual events (what happened) but also covers disputes over the reasons why those events happened, where that is relevant to the legal claim that has been brought. There will therefore be a crucial core of disputed fact in a case which turns on why a decision maker acted as they did, and the parties have competing assertions on those reasons, even where there is no dispute as to how that decision maker acted and what they in fact did. Where a claim will turn on the question of how a decision maker evaluated disputes of fact, and precisely what conclusions they reached, these are matters that can only be resolved at a full hearing.

58. It is not impossible for a claim which involves disputed facts to legitimately be struck out as having no reasonable prospect of success, but it will be an exceptional case where this is justified (see **Ezsias v North Glamorgan NHS Trust [2007] IRLR 603**), An example, however, where a strike out may be appropriate notwithstanding a dispute of fact is where 'it is instantly demonstrable that the central facts in the claim are untrue' (see **Tayside)**. The qualification that it must be 'instantly demonstrable' that the pleaded facts are untrue is significant – it must be possible to quickly and decisively show that the central foundations of the claimant's case are untrue for a strike out to

be warranted. It is not enough that with further time and examination (whether of witnesses or documents) it is likely that the claimant's assertions will be shown to be untrue. Thus, where the assertions made in the claim are contradicted by plainly inconsistent documents, that will provide a basis for a Tribunal to strike out a claim as having no reasonable prospect of success; or, as it was put in **Ezsias**, where the facts sought to be established by the Claimant were ***'totally and inexplicably inconsistent with the undisputed contemporaneous documentation'*** (at [29], per Maurice Kay LJ).

59. All Claims and parts of Claims are subject to the same principles regarding strike out and, of course, the same wording of **Rule 37 (1) (a)**. There has been a line of cases, however, that makes it clear that as discrimination and whistleblowing cases in particular, commonly turn on matters such as the mental processes of decision makers and inferences to be drawn from behaviour, as well as credibility of witnesses, and may involve a reversal of the burden of proof, they are particularly unsuitable for resolution at a preliminary stage on a strike out application.

60. This is an application for a wasted costs order and not a claim for discrimination or whistleblowing. Having said that the same test is in situ for all claims and in my view there is no special power invested in a discrimination case to withstand strike-out in appropriate circumstances, but care needs to be taken where there are core issues of fact turning on oral evidence whatever the subject matter of the case. As discrimination cases are often of that nature it is that which means that great care has to be taken.

61. The listing of this application for a hearing to determine whether or not the merits of the application were such that the application should be struck out was made of the Tribunal's own motion as opposed to an application by either of the parties. It was determined however that the Respondent would provide their submissions, in favour of the strike-out first.

The Respondent's representations

62. I will attempt to summarise the Respondent's submissions and I emphasise that I have carefully read and re-read both parties' skeleton arguments and also my notes of the extensive oral submissions made by Mr Moon KC and Mr Allen KC and have taken all they have said and written into account.

63. At para 7 of the Respondent's submissions stated:

"In short the application for wasted costs has no prospect of succeeding because such an application is not open to the Claimant in light of the terms of the settlement agreement entered into by the Claimant in October 2018. The Claimant says that this settlement agreement should be set aside and his application for wasted costs should be heard on its merits."

That would seem to place the Respondent's primary focus as being what they consider to be the insuperable difficulty that the Claimant will have in setting aside the October 2018 Settlement Agreement and in particular paragraph 2.2 thereof which is clear as a compromise of either party's ability to pursue costs including wasted costs in relation to those claims.

64. At para. 22 of the Respondent's submissions that primary focus is confirmed and the observations of Simler LJ, when she refused the Claimant's appeal on the sift in relation to his first attempt to set aside the settlement agreement, to the effect that the agreement met the terms of s.203 Employment Rights Act 1996 and that the Claimant had been advised by both counsel and solicitors when entering into the contract are used as support for the Respondent's position.

65. At para 23. The submissions concede that:

"Nonetheless it is accepted that a settlement agreement made in accordance with section 203 ERA may be set aside on certain common law grounds including ….. misrepresentation".

Counsel then cites a definition of misrepresentation from Foskett on Compromise (para 4-37 9th Edition):

"A false representation of a material fact made prior to a compromise and which induces it may at the instance of the party misled operate to vitiate the compromise".

66. The Respondent goes on to accept that a failure to disclose a *material* document in litigation might involve a misrepresentation and cites Para 4-40 of Foskett:

"A suppression of a fact or document which, if its existence were revealed would destroy totally (rather than perhaps merely undermine to some extent) a claim being advanced by a Claimant would involve the Claimant in pursuing a claim which he knew to be unfounded . A compromise of such a claim could be invalidated".

67. At paragraph 26 the Respondent makes it clear that if the matter were to proceed to a full hearing then HD would "strenuously maintain" that they have not acted in a manner that would justify a wasted costs order. At paragraph 27 the Respondent sets out its reasons why the application is "bound to fail" and therefore should be struck out as having no reasonable prospects of success. In summary they are as follows:
    a) The 2012 LDA was disclosed on 14 February 2018 and was in the list of documents;
    b) There can be no legitimate criticism of HD prior to the decision of the Court of Appeal on the worker issue as there was no order for disclosure;
    c) The documents not disclosed by HD prior to the October 2018 settlement agreement were not material. There is no difference in real terms between the 2012 LDA agreement known prior to the settlement and the 2014 LDA after the settlement
    d) The Claimant has already received his costs for the late disclosure of the 2012 LDA already and received £55,000 for it.
    e) The Claimant had complained about the disclosure point in his previous applications to set aside and so should not be permitted a second chance.

68. At para 29 HD make representations as to why it is that the Tribunal should not make an order for wasted costs of its own initiative which relate to the importance of finality in litigation and the weight to be attributed in the event that the October 2018 agreement not being set aside. All of the points above were amplified by Mr Moon KC in his eloquent submissions to me over several hours.

The Claimant's Representations

69. Mr Allen KC drafted submissions on behalf of the Respondent. At para.39 he contends that the Court of Appeal costs agreement is no bar to the application as it plainly only relates to the costs of the Appeal and was a means by which applications did not need to be made to the Court of Appeal for such an order.

70. At paragraph 40 he refers to the 17 May 2018 agreement for HEE to pay £55,000 costs to the Claimant and points out that this deals with inter partes costs only, that it was a contribution to costs only and that it could not have been in the contemplation of the Claimant that there was any potential for a wasted costs order against HD as they did not know the full picture of HD's involvement in the LDAs at that time. It is asserted that had the Claimant known what he now knows ***"he would have sought an Order for all of his costs against HD or HEE."***

71. At paragraph 45 Mr Allen KC accepts that the wording of the settlement agreement does cover wasted costs applications. In the next paragraph (46) he accepts it in order to progress his wasted costs application against HD he must argue either that either the costs are not covered by this agreement or that the agreement should not prevent him from seeking a wasted costs given that he was unaware at the time of entering into the settlement agreement that the grounds for such an application existed.

72. Paragraph 47 contains the nub of the Claimant's contentions in which he acknowledges that the finality of litigation principle but asserts that ***"As at October 2018 the Claimant did not know that HD had drafted the LDA (and indeed drafted many documents in relation to HEE's relationship with various Trusts). Had the claimant known then what he knows now he would not have entered into an agreement which could stop him applying for costs against HD. It is in the interests of justice to permit the Claimant to progress this application".***

73. At para 49 it is asserted that a settlement agreement can be set aside on the basis of misrepresentation, mistake or duress and it is confirmed that duress is not being relied upon by the Claimant. The case of **Hayward v Zurich Insurance Company** is relied upon to show that fraud, misrepresentation or mistake need not be the sole cause but only needs to be the material cause which induced a party to enter into a settlement agreement. Mr Allen KC states at paragraph 52 that:

"Whether or not the actions of HD full within the categories identified in Hayward V Zurich can only be determined following disclosure and witness evidence."

Conclusions

74. During the course of the hearing, I asked the advocates to draw up what they considered to be the List of legal and factual Issues they considered a Tribunal would have to consider in the event that this matter proceeded past today. I asked for it to be agreed if possible but also indicated that if there were differences then they could be marked upon the document so that I could see where there was dispute. Despite asking for progress over the hearing and being assured that one was being curated one was never provided. That is highly unfortunate. It is unclear to me as to why that has not been undertaken but I will proceed without such a document..

75. Of necessity, in my view, there has been a lengthy preamble in this judgment leading to these conclusions which will, in comparison, be (perhaps mercifully) brief.

76. The application which the Claimant wishes to pursue is one of wasted costs against HD in relation to their involvement in a series of hearings in the early parts of this litigation. The Claimant has made his allegations and HD has denied those allegations although the factual position of HD's conduct has not been given in any detail at all. A full hearing will enable both parties to produce documents and evidence in relation to that

77. The following seems to be common ground:

a) The Claimant will need to set aside the October settlement agreement as a pre-requisite to being able to have his wasted costs application heard.
b) There is a route by which a Claimant could have the settlement agreement set aside if he can show a misrepresentation / fraud / mistake.

78. It is an agreed fact that HEE raised the issue of whether the Claimant came within the extended definition of worker in their Response and that there was then an extended period of litigation during which substantial costs were incurred culminating in HEE's concession prior to the matter being litigated. HD were HEE's retained legal representatives through that whole period

79. It is an agreed fact that no LDA was disclosed prior to a generic document being disclosed in the document list following REJ Hildebrand's order. Although there was no order for disclosure at the original Employment Tribunal hearing before EJ Hyde HEE and their solicitors had supplied a bundle of documents which they must have considered relevant to the issue to be determined and that bundle did not include any LDA. There would appear to be a need to enquire into how the original bundle did not contain that document and an assessment of the materiality or otherwise. At first blush it seems an important document which was highlighted in Mr Linden's skeleton argument as being key and there was a concession shortly thereafter. Findings will need to be found about the materiality of that document in HEE's consideration, subject of course to any privilege issues.

80. Clearly the generic LDA disclosed and the specific LDA between Lewisham and HEE were in existence at all material times and there will need to be a fact-finding process as to why it was that those documents were disclosed in the way and at the time they were. A determination will have to be made about the factual circumstances that gave rise to the disclosure of the LDA document within the disclosure list, why it was not disclosed before and the subsequent disclosure of the actual LDA agreement and the information that HD had drafted all of those documents. The Claimant will have to persuade the Tribunal that the information that was received after the settlement had

been entered into was sufficient to enable the settelement agreement to be swept aside. That is a matter of evidence and assessment of that evidence.

81. It may well be, of course, that privilege is not waived and the Tribunal has to consider the situation with that handicap. I have had no definitive information from the parties at this stage (nor would I expect any) as to what is to happen to privilege.

82. The mechanism by which the setting aside of the agreement would be argued is going to be by a consideration of oral evidence and then applying that oral evidence to the law. At this stage I have no clear idea about precisely what either party will say. The Claimant will say in broad terms that he was misled / the victim of fraud by HD's conduct and that would be sufficient to have caused him to act in a different way and accordingly the Settlement Agreement needs and can be, according to case law, set aside. There will be an assessment of HD's conduct (if they choose to provide an explanation) which will feed into the assessment process.

83. As stated there will be an issue as to the importance of the LDA in the Respondent's abandonment of their primary contention on the status point. The Claimant will point to the payment of £55,000 in costs as supporting their contention that the document was a material one that should have been disclosed earlier. The Respondent may argue otherwise.

84. It is beyond doubt that the Claimant was fully aware of the LDA at the time the status point was conceded and accepted £55,000 from the Trust in recompense for that. He has indicated that his position would be that he would never have entered into that agreement had he known that potentially there was an improper, unreasonable or negligent act or omission on the part of HD and instead he would have sought a higher payment of costs and/or made an application against HD for their part in the situation. That is an evidential matter which can only be considered in light of all the circumstances and upon the Claimant being cross-examined.

85. I return to the legal position relating to strike-outs and in particular the fact that I am obliged to take the Claimant's case at its highest and the dicta of Lady Smith in the **Balls** litigation, which I repeat again here for ease of reference:

"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a

careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."

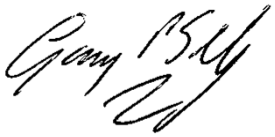
86. I am satisfied on the information and representations laid before me that the Respondent has failed to persuade me that there are no reasonable prospects of success. As stated previously it is acknowledged that there is a route through which the Claimant could travel to set aside the Settlement Agreement and then persuade the Tribunal that HD have acted in such a manner that a wasted costs order is appropriate. Whilst I acknowledge that the Claimant's path appears to be one with a number of hurdles I am not persuaded that any of those hurdles is insuperable either individually or taken together and taking the Claimant's case at its highest I am satisfied that the strike-out test is not met. I am satisfied that the application can only properly be considered taking into account the evidence of the parties and factual findings found.

87. Using the dicta in Tayside I am not satisfied that the Respondent has demonstrated that this is one of those cases where **"it is instantly demonstrable that central facts in the claim are untrue."** It is arguable that documents that should have been before EJ Hyde were not before EJ Hyde. It is arguable that the fault lay with HEE or it is arguable that some culpability lay with HD. It is arguable that had the full picture been known at the time the Settlement Agreement was entered into that the Claimant would have declined to enter into it and sought other terms / outcomes. It is arguable that depending on the evidence which is presented about the circumstances that HD's conduct could be impugned to such an extent that there was a misrepresentation / fraud which would allow the Settlement Agreement to fall away. If the Settlement Agreement falls away then it is possible that HD could be found to meet the test whereby a wasted costs order could be made depending on the findings of fact on their conduct once their position has been put

I am quite satisfied that all those matters need to be scrutinised following appropriate disclosure and evidence.

88. I have considered the specific points raised by the Respondent and which I have set out at paragraph 67 above and do not consider that any of the points raised either individually or in any combination leads me to a conclusion that there is no reasonable prospect of success.

89. Following disclosure of relevant documents and the evidence of the parties it is my view, at least possible that the Settlement Agreement could be set aside and if that is the case at least possible that a Wasted Costs order could then be made. The Respondent has not persuaded me that there is no chance of that taking place and accordingly I decline to strike this Application out. The matter will be listed for a Case Management Hearing in order to give directions for a full hearing of the Claimant's wasted costs application.



Employment Judge Self
Date: 18 January 2023

Sent to the parties on:
19 January 2023

Mr A Byndloss-De'Allie
For the Tribunal Office