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

Core Documents for Appeal against Registrar Decision dated 15 April 2024

Chrismarkday@gmail.com

4 April 2024

Dame Jennifer Eady,
President Employment Appeal Tribunal

Dear Judge Eady

EA 2022 001347 and 2023 000545 NLD Dr C Day v Lewisham and Greenwich NHS Trust

I write to you as a doctor 10 years into whistleblowing litigation now on my third appeal to the EAT.

The decision of the EAT in first my appeal in 2015 ended up undermining whistleblowing protection for the nation's 54,000 doctors below consultant grade.[1] This was mainly as a result of the ET, then EAT being badly misled factually by NHS lawyers on how junior doctors are employed. However, the EAT also took an irrational and illogical interpretation of Section 43K of the Employment Rights Act (ERA) that wasn't even submitted in the ET by my opponents. This was robustly criticised in the Court of Appeal. The earlier flawed EAT interpretation of ERA s43k in my case was also completely at odds with the clear guidance on ERA s43k you gave in Keppel Seghers v Hinds in the EAT in 2014. The havoc the 2015 EAT appeal in my case has caused in the NHS has been considerable. It also wasted public money and caused a 4 year delay to my case being heard. It fell to me to litigate to correct the law whilst being threatened for costs. I have asked the EAT to put before you my recent update on my wasted cost application proceedings in both the EAT and ET which will add context to this letter.

It may come as no surprise that I and large numbers of doctors feel deeply let down by the way the EAT has handled my case over the last 10 years. I believe its decisions have not been logical and have ignored evidence, pleadings and important appeal points. I believe the most likely explanation for this is the EAT's failure to manage properly the conflicts of interests and human factors that have come into play when Judges have dealt with certain issues in my case affecting their legal colleagues.

The main purpose of me writing to you, is to formally put to the President of the Employment Appeal Tribunal my most recent example of the pattern set out above. This is a series of orders made by Deputy High Court Judge Andrew Burns when dealing with the above appeals and a Rule 33 Application. The destruction, concealment and ignoring of large amounts of evidence at the June 2022 ET hearing of my case and the obstruction of 2 of our proposed cross examinations was widely reported and shocked people. Many were expecting these obvious issues to be dealt with decisively by the appeal tribunal. Instead, I have had to get into an argument with the EAT about whether such extraordinary conduct is enough for me to advance procedural unfairness as a ground of appeal or

[1] See email from Claimant to EAT dated 25 March 2024 at 1016am updating on the progress of the ET wasted cost application (following request from EAT Registrar). In particular see the words of Justin Madders MP in paragraph 2 and the GMC paragraph 3 of the Claimant' skeleton argument for 21 March 2024 'Day v HD C Skeleton PH 30/1/24'. This email was marked for the attention of the President.

whether there is a need for a finding on deliberate concealment (which are arguments I have apparently lost outside of a main appeal hearing for no clear reasons see Rule 33 Application).

I am supporting the work of an All Party Parliamentary Group on whistleblowing. This APPG is seeking a new law and system for dealing with whistleblowing cases in this country. I plan to use my case and in particular this letter and your response to it to assist in this work.

Attached is a briefing that I have used for MPs and my 5,000 crowdfunders about Judge Burns' recent orders which is structured as 5 issues.

Issue 1,3 and 4 are straightforward appeal points that have just been removed from my appeal whilst the substance of the points have either been ignored or re-invented to unarguable points. Issue 5 describes a potentially significant conflict of interest in so far as it shows the EAT Judge dealing with my case, at the time of making decisions on my appeal, had social media connections to 3 lawyers to which the pleaded position in my whistleblowing case makes serious allegations against.[2]

I have effectively been told by Judge Burns in his recent order that Issues 1-4 are hopeless points from a Litigant in Person but that is not right. 3 of the issues are the same appeal points that were brought on my behalf by leading counsel Andrew Allen KC with support from the British Medical Association. They cannot be sensibly dismissed as hopeless points from a Litigant in Person. Issue 5 is a serious point about conflict of interests and issue 2 concerns a significant misunderstanding that Judge Burns accepts he made but then refuses to consider my points about its effect on his decision.

Please can I ask you to consider the attached briefing and whether Issues 1-5 require you on my request or of your own accord to instigate your own Rule 33 Review or any other action.

I am seriously considering whether I can proceed with an appeal in this court whilst the EAT refuses to answer the above points. I am not asking the EAT to agree with me on every point but just for clear explanation on why issues 1-5 are points that can be reasonably described as hopeless and unarguable. I do not think that is too much to ask given the issues at stake in this case.

It seems to me that NHS whistleblowing cases and the current law leaves Judges (as well as Claimants) in very difficult situations. For example, the EAT could not have meant in 2015 to remove the careers of 54,000 junior doctors from whistleblowing protection. With this in mind, I would appreciate clarity on your position on the 5 issues in the enclosure so I can be sure misunderstanding is not the reason for where we find ourselves.

Yours sincerely,

Dr Chris Day

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[2] 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*" that were *"too serious"* to be handled under an internal chambers complaint policy. **[see paragraph 186 Page 71 Rule 33 Application bundle]**

DrChrisDay

Twitter @drcmday

Home

Request for Review Refused by Deputy High Court Judge Andrew Burns KC

Request for Review Refused by Deputy High Court Judge Andrew Burns KC

My EAT Rule 33 Application can be read here .

Judge Burn's Order refusing the review ignores virtually every point made in my application and can be read here.

The Employment Tribunal will see you now doctor

Dr Chris Day

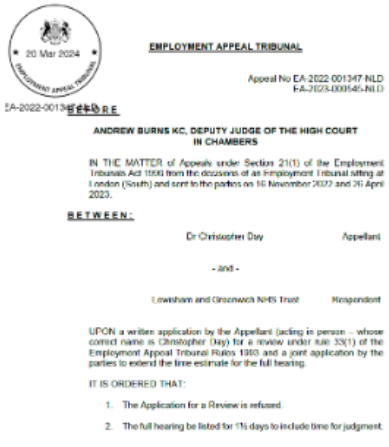
Locum Emergency Medicine Doctor

14 articles

If you would prefer to read something less legal about all of this click here for my Linked In articles. A negligence lawyer has also written a good piece here.

My Summary of the Recent EAT Order

I set out below the main issues in my appeal that the EAT has repeatedly failed to engage with and frankly is ignoring.



20 Mar 2024

EMPLOYMENT APPEAL TRIBUNAL

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

EA-2022-001347-NLD

BEFORE

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.

BETWEEN:

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.

Issue One

Dodging the question on whether an NHS Trust and their lawyers misled a group of London MPs, the press and the public about my whistleblowing case despite these issues being formally pleaded as whistleblowing detriments in my case (and the Judge being repeatedly reminded of this fact but failing to acknowledge it)

The Judge states,

"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 [Lewisham and Greenwich NHS Trust] and their lawyers about the Claimant's whistleblowing case. 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."

What is the Judge ignoring?

The pleaded detriments in my case (that therefore cannot just be ignored by the court) include allegations that an NHS Trust misled the press, the public and local MPs on the safety and governance issues in my now accepted protected disclosures and on the reality of certain formal investigations. This includes the support the investigations give my position on the patient safety issues and claims of cover up in my protected disclosures. Misleading the press, the public and MPs on these matters is clearly a serious whistleblowing detriment. They make me out to be vexatious and a liar with what I have claimed in my case both inside and outside of court which was clearly their intention.

The legal system repeatedly ignores the plain fact that these issues are pleaded as whistleblowing detriments in my case and therefore can't just be ignored or dismissed as not relevant. In our preliminary hearing Judge Burns seemed to wrongly believe these issues were not pleaded as whistleblowing detriments. He has now not responded to being corrected on this both in writing and orally.

The London South Employment Tribunal's judicial process that found against me on these detriments involved the Tribunal ignoring large amounts of evidence and turning a blind eye to evidence being destroyed and concealed. This is clearly an error of law. You can see this point has also not been engaged with in the above reasoning from Judge Burns.

My Rule 33 Application States;

At [Paragraph 20]

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.

[from Paragraph 28]

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.

See also paragraph 37-42 of Rule 33 Application

Issue Two

The Judge accepting making a key mistake, then agreeing to change their Judgment but refusing to engage with the effect of the mistake on the rest of their decision to remove or restrict Grounds of Appeal (despite this effect being clearly set out)

My Rule 33 Application States;

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.

From [paragraph 9]

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;

Issue Three

Ignoring what an official hearing transcript says from 2 key witnesses in order to find against me on a detriment implying that my own legal team thought I was dishonest

What is the Judge ignoring?

Judge Burns simply does not engage or make any reference whatsoever to the below content of my Rule 33 Application before removing it from my appeal. The lawyers involved clearly benefit from this action.

My Rule 33 Application States;

From [paragraph 48]

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.

Issue Four

Removing the Ground of Appeal of Procedural Unfairness from the appeal without engaging with the multiple appeal points that indicate procedural unfairness including an Employment Judge stopping our cross examination of a key witness and then placing that untested evidence into a public Judgment

What is the Judge ignoring?

Judge Burns simply does not engage or make any reference whatsoever to the below content of my Rule 33 Application before removing it from my appeal. The lawyers involved clearly benefit from this action.

My Rule 33 Application States;

From [Paragraph 55]

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.

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

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

My Statement on Ben Cooper KC

My Statement on Ben Cooper KC

DrChrisDay

Issue Five

Conflicts of Interests

During my Rule 33 application, I have attempted to make the point politely and respectfully about how that the various Judges dealing with my case have had quite predictable conflicts of interests that are clearly affecting the way the case is being dealt with. I made my Rule 33 application in person so I could make and explore this point.

The point has simply been ignored which proves my point that no attempt is made to manage these obvious conflicts of interests in my case.

My letter to Judge Burns stated 18 March 2024 states;

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

This weekend the @54kDoctors X (formerly Twitter) account posted the following;

I say nothing more about the above Tweet than it illustrates the need as my letter states for Judges to deal with evidence and pleadings in my case properly with clear explanatory accountability.

EMPLOYMENT APPEAL TRIBUNAL

Fifth Floor, Rolls Building, 7 Rolls Buildings,
Fetter Lane, London, EC4A 1NL
Case Management Queries:
Listing Office Queries: 020 7273 1038/1024
Facsimile : 01264 785 028

Our Reference: EA-2022-001347-NLD and EA-2023-000545-NLD

Dr Mark Christopher Day
By Email

15 April 2024

Dear Sir/Madam,

Dr Day Mark Christopher v Lewisham and Greenwich NHS Trust & Other

These matters have been referred to Ms S Lindsay (authorised to act on behalf of the Registrar), who directs as follows:

By Employment Appeal Tribunal (EAT) Order seal dated 20 March 2024 the Appellant's application for a Review of the EAT's Order seal dated 01 March 2024 was refused by Andrew Burns KC (Deputy Judge of the High Court), for the reasons contained therein.

By letter dated 04 April 2024, the Appellant seeks a further review by the President of the EAT.
By email on 10 April 2024, the Appellant asks that his letter dated 4 April 2024 is also considered to be a request for permission to appeal to the Court of Appeal against either or both of the EAT's Orders of 01 and 20 March 2024.
Further application for a review

There is no provision or rule by which a party is entitled to seek a further review from a different Judge of the EAT. Any disagreement with a decision of the EAT should be made by way of an appeal to the Court of Appeal (see section 13 of the EAT Practice Direction 2023 (the Practice Direction)).

As such no action will be taken on the Appellant's further request for a review.

Application for permission to appeal to the Court of Appeal

In accordance with section 13.1.2(c) of the Practice Direction, any application for permission to appeal to the Court of Appeal should be made to the EAT within 7 days of the date of determination of the relevant EAT decision.

In this case, any application for permission to appeal against the EAT Order seal dated 01 March 2024 should have been received at the EAT by no later than 4pm on 08 March 2024. Any application for permission to appeal against the EAT Order seal dated 20 March 2024 should have been received at the EAT by no later than 4pm on 27 March 2024.

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By email on 10 April 2024, the Appellant asks that he is granted permission to appeal to the Court of Appeal “despite the application being out of time”.

The Practice Direction provides at section 13.1.4 that an application for an extension of time to apply for permission to appeal may be granted by the EAT if a Judge or Registrar considers it is necessary to delay until the judgment has been provided in writing or for other good reason; but that applications for an extension of time to apply for permission to appeal should normally be made to the Court of Appeal.

In this case I consider that there is no ‘good reason’ to depart from the default position that applications to extend time to apply for permission to appeal should be made to the Court of Appeal. The Appellant has not explained why his request for permission to appeal was made late nor given any good reason as to why the EAT should extend time.

Therefore, I refuse to extend time for the Appellant to apply for permission to appeal.

Yours faithfully

Mr R Scalamandre
for Registrar

cc: Capsticks for the Respondent

Gmail Chris Day <chrismarkday@gmail.com>

EA-2022-001347-NLD, EA-2023-000545-NLD - Dr Day Mark Christopher v Lewisham and Greenwich NHS Trust & Other

Chris Day <chrismarkday@gmail.com> Tue, Apr 16, 2024 at 1:36 PM
To: LONDONEAT <londoneat@justice.gov.uk>

Dear EAT,

I write in response to the letter dated 15 April 2024 sent to me on behalf on the EAT Registrar.

It is my understanding that I have a right of an Appeal to an EAT Judge for any decision taken by the Registrar. If that is the case please can this email be considered by a Judge.

My letter dated 4 April 2024 to the President contains serious and important issues containing matters of conflict or interest and matters affecting statutory whistleblowing protection for the nations doctors. Instead of dealing with them the EAT seeks to rely on time limits and other procedural rules.

For instance, it is stated by the Registrar, "that there is no provision or rule by which a party is entitled to seek a further review from a different Judge of the EAT."

I do not accept that my letter can be described as a request for a further review. There has never been Rule 33 Review for the Judge Burns order dated 20 April 2024. The letter also includes points made about the Judge's social media connections.

These matters are significant enough to be determined by a Judge.

I do not have the resources to take these matters to the Court of Appeal. If this court were to give me permission to do so then I would feel more comfortable seeking external funding from my trade union or crowdfunding.

I am trying my best to be reasonable and proportionate but for the reasons set out in my letter dated 4 April, these issues are of fundamental importance and clearly justify flexibility on time limits and a further judicial review.

Yours,

Dr Chris Day

Gmail Chris Day <chrismarkday@gmail.com>

EA-2022-001347-NLD, EA-2023-000545-NLD - Dr Day Mark Christopher v Lewisham and Greenwich NHS Trust & Other

Andrew Rowland <Andrew.Rowland@capsticks.com> Thu, May 2, 2024 at 10:33 AM
To: LONDONEAT <londoneat@justice.gov.uk>
Cc: Chris Day <chrismarkday@gmail.com>

Dear EAT,

Thank you for your email dated 24 April 2024 and the email below and we apologise for the delay in responding. The Appellant has sent to us separately his letter to the President of the EAT dated 4 April 2024 (for which we are grateful) and we have now taken instructions from our client.

We consider that the letter from the EAT to the Appellant dated 15 April 2024 accurately sets out the position in relation to applications for permission to appeal and the time limits for such applications, together with the position in relation to applications for review. We note that any application for a review here would appear to be an impermissible attempt to re-argue the matters considered at the preliminary hearing on 27 February 2024 and that any challenge to the outcome of that hearing should have been made by seeking permission to appeal within the relevant time limits.

We have copied the Appellant into this response.

Yours faithfully,

Capsticks LLP

Andrew Rowland
Head of Healthcare
Capsticks LLP
T: 0208 780 4760 | **M**: 07738027472
andrew.rowland@capsticks.com | www.capsticks.com |

Gmail Chris Day <chrismarkday@gmail.com>

EA-2022-001347-NLD, EA-2023-000545-NLD - Dr Day Mark Christopher v Lewisham and Greenwich NHS Trust & Other

Chris Day <chrismarkday@gmail.com> Fri, Jun 21, 2024 at 12:59 PM
To: EATAssociates <EATAssociates@justice.gov.uk>, LONDONEAT <LondonEAT@justice.gov.uk>

Dear EAT,

I refer to above appeal.

I want to make my position clear as I do not want to be accused of wasting the courts time or a listing.

Please can I ask that no further action is taken on this appeal until the judicial decision that I have been promised is made on whether the EAT Registrar was correct to refuse my request for the attached letter to be read and then answered by the EAT President.

The 5 issues raised in the letter are plainly important not just to me but also for the public interest and the interests of justice.

I am trying trying to be straightforward. Given my experience of this court in my 2 previous appeals, as set out out in my letter, I do not want to proceed with a third appeal whilst the EAT fails to address the 5 issues raised in my letter to Judge Eady.

I take the view that if the EAT continues to ignore the 5 simple issues raised in my letter to Judge Eady that there is not much chance of my appeal being handled fairly for the reasons also set out in my letter.

Two MPs have called for a public inquiry into this case and understand the importance of the 5 issues raised in my letter. I can therefore only assume their importance is equally apparent to the EAT.

I would be grateful if the EAT could make there position clear on this so I can draw a line under this matter. Even if I don't pursue an appeal in the EAT,I will be pursuing the way the ET and EAT has handled this case over the last 10 years and have significant support to do so.

Yours,

Dr Chris Day

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EMPLOYMENT APPEAL TRIBUNAL

Appeal No EA-2023-000545-NLD

B E F O R E

HER HONOUR JUDGE TUCKER
IN CHAMBERS

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 26 April 2023

B E T W E E N :

Dr Christopher Day — Appellant

- and -

Lewisham and Greenwich NHS Trust — Respondent

UPON considering the Appellant's email dated 16th April 2024

AND UPON considering the Employment Appeal Tribunal (EAT) Practice Direction 2023

IT IS ORDERED THAT:

1. If the appellant seeks to appeal against the Registrar's determination set out in a letter dated 15th April 2024, he must do so by completing and returning the form at Annex 2 of the EAT Practice Direction within 5 working days, therefore by 4pm on 28th June 2024.
2. By 4pm on 3rd July 2024 the Respondent may, if so advised, provide a response to that application.
3. The appeal against the Registrar's Order shall be considered by a Judge on the papers in the week commencing 8th July 2024.

D A T E D 21 June 2024

TO: Dr Christopher Day the Appellant
Capsticks for the Respondent

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

(Case No. 2300819/2019)

Reasons

Appellant	Dr Christopher Day
Respondent	Lewisham and Greenwich NHS Trust
EAT number	EA-2023-000545-NLD
Judge	Her Honour Judge Tucker
Date	21 June 2024

Reasons:

1. The parties are referred to r.21 of the EAT Rules of Procedure and paragraphs 7.14.1-10 of the EAT Practice Direction 2023.
2. It appears from the Appellant's email of 16 April 2024 that he seeks to appeal against the Registrar's decision sent to him in a letter dated 15th April 2024. If so, the Appellant has not completed the form at Annex 2 of the 2023 Practice Direction which is are required to complete and return that form within 5 working days. That will ensure that the application is made in accordance with the EAT procedure and that there is clarity in respect of it.
3. On the basis that that is indeed the application which the Appellant makes, I consider that it is suitable to be heard on the papers and without a hearing having regard to the overriding objective and the issues raised in it. I consider that that is the proportionate procedure to adopt. The Appellant may set out fully his grounds for his application in the form at Annex 2 of the Practice Direction which can then be considered by the Judge.