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

LONDON SOUTH

B E T W E E N :-

Dr CHRISTOPHER DAY

Claimant

-and-

HILL DICKINSON LLP

Defendant

Witness Statement of Claimant
in support of application for wasted costs

I, **Dr Christopher Day** of [redacted] make this statement and say as follows:

1. I make this statement in support of my application for wasted costs against the solicitors Hill Dickinson (HD)

Introduction

2. It is now 10 years since I commenced employment tribunal proceedings in my whistleblowing claim against Lewisham and Greenwich NHS Trust (the First Respondent) and Health Education England (HEE) (Second Respondent) ; case numbers . 2302023/2014 and 2301466/2015

3. The substantive hearing of my whistleblowing claim was heard in October 2018. The significant time between issuing the claims in 2014 and 2015 and that October 2018 hearing, some 4 years, was taken up in resolving whether I (and 54,000 junior 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 has been represented by HD [HD].

4. HEE had sought to strike out my claim against them and had succeeded in the Employment Tribunal and successfully resisted my appeal to the Employment Appeal Tribunal. My appeal to the Court of Appeal was successful and the court remitted my case back to a fresh tribunal to decide as a preliminary issue whether HEE substantially determined the terms of my engagement **[see page 171]** . On 11 May 2018, 3 days before this remitted hearing was due to commence, HEE eventually conceded that I was a worker under section 43K. This concession occurred over a year after our successful appeal in the Court of Appeal **[See page 334-335].**

5. My wasted cost application arises because of the failure of HD to disclose the Learning and Development Agreement that they had drafted in 2014, which took effect from 1 April 2014 which governed the relationship between Lewisham and Greenwich NHS Trust and HEE, and which made clear that HEE had substantial influence in respect of the terms on which I was employed by the First Respondent **[Page 719-870].**

6. Before I set out my evidence in chronological order I want briefly to put in context the effect the legal arguments advanced in this case have had both in healthcare, experienced by patients and NHS staff and also in the wider media and political spheres.

7. From early 2016, this situation has been widely reported in the national media including multiple press articles and several appearances by me on TV and radio including Radio 4 and ITV News at 10. The Evening Standard were the first to publish and did so on the 22 February 2016 quoting the words of the EAT Judge Mr Recorder Luba when granting me permission to appeal during an EAT Rule 3 (10) hearing **[Page 1511]**

> "*There would appear to be a lacuna [gap] in respect of the ability of a junior doctor to complain of detrimental treatment on account of a protected disclosure at the hands of the body responsible for his or her training and ultimately career progress"*

8. The medical regulator the General Medical Council acknowledged on 12 August 2016 the effect on patient safety of the legal arguments advanced in this case **[page 949]**

> *"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 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."*

9. This situation has also been the subject of numerous letters between MPs and Ministers **[see page 436-441]** and has been discussed in Parliament on 3 occasions between 2016 and 2019. The MP and former lawyer Justin Madders described his understanding of this situation in the House of Commons on 3 July 2019 **[Page 942]**

> *"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."*

10. In the same debate in the House of Commons Sir Norman Lamb MP responded **[page 942]**

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

11. I understand that despite this clear and serious criticism in the House of Commons from two legally qualified MPs that HD have conducted no external or internal investigation to establish the facts, in that they have not disclosed any investigation report and say there is none. Further they have not disclosed any other document evidencing enquiries being made in response to my solicitor's request for such disclosure. .

12. It is my position that in order for HEE to achieve their objective or as Justin Madders MP puts it in order to remove 54,000 doctors from whistleblowing protection, HEE, represented by HD relied on misleading factual submissions as to the role of HEE in determining my terms and conditions that would not have been possible to sustain had they not also failed to disclose both the model form commissioning contract between Health Education England and some 200 NHS Trusts **[See page 1203-1317]** and the specific version of this contract relevant to this case between HEE and the First Respondent Trust in these proceedings **[Page 719-870]**. HD had been paid to draft these 2014 contracts.

13. It is troubling that neither HD, Health Education England, Lewisham and Greenwich NHS Trust nor their lawyers Capsticks have been able to locate the signed copy of the relevant LDA commissioning contract from 2014 . As I will set out, there is a clear likelihood that this

contract was signed by Mr Plummer and Janet Lynch who were I understand it the people primarily responsible for instructing lawyers on behalf of HEE and the First Respondent in this case.

14. Although I was eventually proved right on the ERA s43k point, my position that HEE substantially determined my terms and conditions was dismissed as fanciful in the ET in 2015. I was threatened with costs by HEE when progressing my appeal to the EAT, in both cases where HEE and HD had failed to disclose the LDAs of either 2012 or of 2014 *(the latter of which HD had drafted). My campaign to raise awareness of the importance of properly scrutinising and judicially determining this point was ridiculed publicly using the same misleading factual spin used by HD in court.

Central Facts Relied on in this Wasted Cost Application

15. HEE at the material time was the national NHS body that funded, commissioned and governed junior doctors' training and employment path to hospital consultant or GP following their graduation from Medical School.

16. The term junior doctor is extremely broad and encompasses inexperienced doctors that have just graduated from medical school all the way through to senior registrars with over 10 years of working in the NHS just before they become consultants. It is often the case as in this case, that at night medical staffing and onsite supervision in hospitals is conducted by 'more senior' junior doctors. For example, at the material time, when working in the First Respondent's Intensive Care Unit I was the only doctor onsite covering the ICU but was being supervised from home by a consultant over the phone who retained ultimate responsibility for the ICU..

17. At the material time I was a doctor with just under 5 years' experience employed in the NHS after graduating from medical school in 2009. HEE recruited me and were 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 that I would have worked at as part of my agreement with HEE to train as a hospital consultant **[Page 944].**

18. The whistleblowing detriment dispute at the centre of this case was ongoing for several months from January 2014 but came to a head 2 months before the end of my fixed term contract at Lewisham and Greenwich NHS Trust on 5 August 2014. To clarify, contrary to what has been suggested , I did not resign or state an intention to resign from my fixed term contract or clinical duties at Lewisham and Greenwich NHS Trust . My position was that I was not prepared to sign another fixed term contract at another NHS Trust until the (now

conceded) serious issues in my protected disclosures and claims of detriment had been properly investigated and explained **[Page 1458-1465].**

19. I worked every day of my fixed term contract at Lewisham and Greenwich. The next Fixed Term contract that I was to be offered by Health Education England was Guys and St Thomas' NHS Trust **[see page 945-8]** which I did not wish to take up until the whistleblowing dispute had been formally investigated and the allegations made against me explained. Guys and St Thomas' then asked me to resign from HEE to allow them to source another HEE doctor.

20. HEE's agreement to commission and fund my employment at each NHS Trust which comprised a Learning and Development agreement (referred to hereafter as an "LDA") relied on me 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 my employment and training and that of other HEE doctors was also conditional on the relevant NHS Trust abiding by various terms imposed by HEE as set out in the relevant LDA contract. This was in return for significant funding from HEE **(Page 685-716].**

21. The 2014 specific LDA at the centre of this wasted cost application was the relevant commissioning contract from 1 April 2014 between the First and Second Respondent in this claim **(see Page 719-870),** and referred to hereafter as the "2014 LDA")), and therefore in place for the latter third of my employment with the First Respondent ,at the time I signed the run through contract with HEE which bound HEE to commission training/employment until I was a consultant **[see Page 944]** and at the time of all my protected disclosures to HEE **[page 1462/3]** . The value of similar LDA contracts ranges from between £6-79 million **(Page 685-716]**. This 2014 LDA contract clearly shows HEE, at the material time, imposing the terms on the First Respondent (Lewisham and Greenwich NHS Trust) on which they engaged me and all other HEE doctors in return for significant sums of money.

22. Though I will refer later in this statement to how the existence of both the 2012 LDA (the Learning and Development Agreement between the predecessors of both the First Respondent and the HEE, namely South London Healthcare NHS Trust and the London Strategic Heath Authority **[see pages 178- 313]**) and the 2014 LDA were first disclosed to me , it is relevant to note that <u>the 2014 LDA was never disclosed in these proceedings</u> and the 2012 LDA was only disclosed in February 2018. HD had drafted the 2014 LDA and in doing I would assume have been made aware of the 2012 LDA, which preceded the 2014 LDA, when working on the 2014 LDA.

23. It is evident that the commissioning contract between Health Education England and Lewisham and Greenwich, the 2014 LDA was relevant to the question of HEE's influence over my terms of engagement as a HEE junior doctor at the First Respondent .

My claim against HEE

24. My 2014 claim against HEE arose from my ARCP in the summer of 2014. This was investigated on behalf of HEE by Mr Plummer who produced a report in respect of his investigation. This had attributed quotes to a member of the ARCP, Dr Chakravarti, which led to Dr Chakravarti , on seeing those quotes to write to Mr Pummer on 5 January_2015 stating that "*she was baffled by the various quotes attributed to [her]*" in his report.(The accuracy of those quotes was relevant in my 2018 October hearing.) **[See Page 1567/8]**

25. Dr Chakravarti received a response by email from Mr Plummer dated 5 January 2015 which ended with a reference to HEE 's intended February 2015 strike out application to refute employer status which is at the centre of this wasted cost application **[Page 1565];**

> *"We are reasonably hopeful that it will be struck out on the grounds that we (HEE) are not his employer and the Public Interest Disclosure Act therefore does not apply to the relationship that existed between him and HEE which will be the end of it for you (and me)."*

26. The substance of the quotes attributed to Dr Chakravarti by Mr Plummer, that baffled Dr Chakravarti was an extremely negative and damaging account of me making one of the key protected disclosures in my case. In addition to Dr Chakravarti distancing herself from the account, the account in Mr Plummer's report was also contradicted by the stated positions of two other members of the ARCP panel. Despite this evidence Hill Dickinson pleaded in HEE's Grounds of Resistance the account attributed to Dr Chakravarti by Mr Plummer as the unanimous view of the ARCP panel. This evidence is set out in my Further and Better Particulars **[see Page 1458-1464]** and was used by me at a hearing on 13 November 2020 to secure concessions from HEE on all my protected disclosures (after 6 years of resistance) including in the category of reasonable belief in deliberate concealment.

27. Dr Chakravarti described her view of Mr Plummer's investigation into my case in her witness statement to the final hearing of my post detriment whistleblowing claim that ran for two weeks through late June early July 2022 **[Page 1514-1518];**

> *"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… 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."

28. Mr Plummer relied on the HEE stance , when represented by HD refuting HEE's employer status on the proposed strike out application as the reason for not addressing Dr Chakravartis comments.

29. Within hours of the claim being struck out on 25 February 2015, Mr Plummer prioritises updating Dr Chakravarti by email and does so at 1525 **[Page 1563];**

> *"I thought you might like to know that Dr Day's whistleblowing claim against HEE was today "struck out" by the Employment Tribunal judge as anticipated. This means this matter is now closed. Best wishes"*

30. I have since established that HEE's Director of HR and OD, Mr Plummer who I understood to be the HEE Director instructing HD in defence of my *2014* claims signed LDAs at other London NHS Trusts in 2014 **[Page 1469-1472]** and hence he would have been well aware of the terms of LDAs with those trusts , and therefore the First Respondent (even if he did not sign that particular LDA which is unlikely). As stated HEE, their lawyers HD and Lewisham and Greenwich NHS Trust and their lawyers Capsticks have all been unable to locate the signed copy of the relevant LDA in this case.

<u>The strike out application and subsequent appeals</u>

31. I was represented in these employment tribunal proceedings up to and including the 2018 October hearing by Tim Johnson Law (TJL) .

32. On 20 February 2015, HEE, represented by HD made a strike out application which included the following factual assertion which was materially misleading;

> "*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"* ***[see page 1201/2]***

33. HD claim in their defence of this application that the dispute in respect of Section 43K was focussed on the interpretation of that section of the Employment Rights Act 1996. However, that was not the nature of the issue before the Employment tribunal.

34. It should also be noted that when the strike out application first came before the Employment Tribunal both parties adopted and relied on the approach given by HHJ Eady[1] 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".

35. The terms on which HEE progressed their strike out application on 24 February 2015 as recorded by the Employment Tribunal Judge, EJ Hyde, were **not** based on 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* …") , such that I was excluded from being a worker of the HEE within the extended definition of 'worker as I had a contract of employment with the First respondent meant that I, who was a worker as defined by section 230(3) (as an employee of the Trust) could not rely on that extended definition. ". There is no mention of this argument in the judgment of EJ Hyde and indeed, the EAT acknowledged that it was not an argument recorded by the Tribunal. It was therefore highly germane to the Employment tribunal as to whether the HEE substantially determined the terms on which I was employed.

36. At the heart of the case of HEE was the assertion that it was fanciful for me to assert that Health Education England had a substantial and significant influence over my and other doctors terms of engagement at a series of NHS Trusts on our career pathway to consultant. This had the effect of materially undermining my claim to be a worker of HEE under the extended definition under section 43K (and therefore that HEE were for that purpose my employer). Such assertions also made it seem both inside and outside of court that the issue of whether HEE was covered by whistleblowing law was an unimportant issue being pushed by a vexatious/fixated Claimant.

37. There was no order for disclosure of documents before the strike out application was heard by the employment tribunal. A bundle of documents was before the tribunal which included the Gold Guide but neither the 2012 LDA nor the 2014 LDA. The papers presented to the tribunal were therefore incomplete and provided a misleading picture of the relationship between HEE and the First respondent which addressed the role of HEE in determining my terms conditions of employment with the first respondent

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[1] Keppel Seghers v Hinds in the EAT in 2014

38. In support of their application to strike out heard by the Employment Tribunal HEE , represented by HD, made the following points amongst others in their skeleton argument :

a) at paragraph 26 ;

> "*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"*

b) at Paragraph 30 (contrary to the position that HD appears now to adopt in their defence of this wasted cost application);

> "*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:;

> *"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."*

39. Having drafted the 2014 LDA , HD would, or should, have known these submissions to have been misleading. These submissions could only be made in light of the failure of both HEE and HD to include in the bundle of documents before the Employment Tribunal both the 2012 LDA of which HEE must been aware and the 2014 LDA which HD drafted.

40. In striking out the claim against HEE , the Employment Tribunal (EJ Hyde) found that "it was not the [HEE] who substantially determined the terms on which [I] did the work for the Trusts" (see para 53 ET decision page 96).

41. It was one thing for HEE to have failed to disclose the 2014 LDA (they may not have been advised or understand its relevance) quite another for HD not to have disclosed it . The Employment Tribunal in 2015 struck out my claim against HEE on the basis that "it was not the [HEE] who substantially determined the terms on which [I] did the work for the Trusts" and where HEE had argued that it was fanciful to suggest that HEE had substantially determined my terms and conditions of employment. If the Employment Tribunal had been made aware of 2014 LDA the decision would very likely have been very different (and the costs of both the

EAT and Court of Appeal may have been avoided). No explanation has yet been provided by HD for why neither the 2012 LDA nor the 2104 LDA were not disclosed at this time.. I understand that HD have acted regularly for HEE in claims involving junior doctors.

42. I appealed the decision of the Employment Tribunal to the Employment Appeal Tribunal (EAT). After a successful rule 3 (10) hearing in my appeal, I have crowdfunded all my legal representation in this matter through Crowd Justice until more recently where I have secured legal support for part of my representation from the British Medical Association with my current firm of solicitors.

43. The EAT hearing was fixed for 10 February 2016 **[see page 127]**

44. No steps were taken by HEE or HD to add either the 2012 or 2014 LDA to the documentation before the Employment Appeal Tribunal to correct the position as presented to the Employment Tribunal and on which the Employment Tribunal had made their decision.

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45. HEE threatened me by email from HD on 9 February 2016 to seek a costs order in the EAT if my appeal was unsuccessful (see costs schedule served at **[Page 1383-4]** and cover email dated 9 February 2016 **[Page 1455]**) and my then solicitors, TJL, made clear their objection to this in their letter of 9 February 2016 **[See page 1385].** It was clear that HEE were taking such steps when advised by HD to dissuade me from progressing my challenge to the Employment tribunal strike out decision.

46. In defending my appeal of the Employment Tribunal decision to the EAT, HEE, as represented by HD advanced 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."*

47. .. EAT Judge Langstaff , based on what HEE had represented as the factual position found that ;

> "Though HEE here plainly made the decision as to where the claimant was to work, it kept his training under review, and supplied much of his salary, this does not mean that the tribunal was obliged to hold that it determined "the terms on which the claimant... was engaged to do the work", let alone substantially **[see para 41 page 148]** …….*HEE was little different from any third party who might have acted detrimentally towards him as a whistleblower"* ***[see page para 42 149]***

48. As stated, the EAT decision and before this matter was determined by Court of Appeal , there was widespread concern as to the implications of the decisions of both the employment tribunal and EAT. The medical regulator the GMC acknowledged as early as 12 August 2016 the effect that the decisions had on patient safety nationally **(see page 949);**

> *"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."*

49. Due to this widespread concern HD were engaged by HEE to produce a third party contractual solution to enable doctors in England to sue HEE for whistleblowing in the High Court. It was suggested by HD on behalf of HEE that this third party contractual provision meant that an appeal to the Court of Appeal was inappropriate , despite such protection being well short of that which I was contending for under section 43K **[Page 1318-9].** The prohibitive costs associated with High Court litigation, including the adverse cost risk is another obvious flaw in such an approach .

50. An agreement was reached between me and HEE that in respect of the Court of Appeal both parties would be responsible for their own costs whatever the outcome of the appeal and an order was made to this effect **[see page 159-160].** Had I had first known then about the 2014 LDA , of which both HEE and HD were then aware, I would not have contemplated such an agreement, as it meant that the ET decision was itself based on an incomplete picture and the acceptance of materially misleading submissions from HEE when HD were acting.

51. The Court of Appeal proceeded to consider the position again but on the basis that there was an incomplete and misleading factual picture as the 2014 LDA had not been disclosed (nor the 2012 LDA) by the time of the Court of appeal hearing.

52. In defending my appeal to the Court of Appeal , HEE, again represented by HD in their submissions, relied heavily on the findings of fact of the Employment Tribunal :

a. at paragraph 19;

> "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

> “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”

53. The second ground of appeal was, as recorded by the Court of Appeal, “that the ET erred in concluding that HEE did not substantially determine the terms on which [I] the worker was engaged” **[see page 169]**. This was to be argued on the basis of the documents omitting documents of central relevance ; namely the 2012 and 2014 LDAs

54. The first part of this ground concerned whether the ET had applied the correct test, which the Court of Appeal found that they had not.

55. The second part was as my counsel then James Laddie QC submitted to the Court of Appeal that “if the correct test had been adopted , the inevitable conclusion would have been that the ET must have found in [my] favour**” [see page 169 , para 24]** . <u>HEE maintained that “from the reasoning of the ET, that it would inevitably have found in its favour”</u>. The Court of Appeal concluded that it was not for them to make relevant findings of fact and hence remitted the case back to a fresh tribunal to decide as a preliminary issue whether HEE substantially determined the terms of my engagement **[see page 171] .**

The May 2018 ET hearing and the agreement as to costs

56. Directions were given for the disclosure of documents relevant to this issue on 10 July 2017 **[see page 172]** . Though disclosure was ordered for 24 August 2017 , it took place in early 2018 , and HEE disclosed the 2012 LDA on February 2018, but the 2014 LDA was not disclosed. The decision of Employment Judge Self dismissing the application to strike out this application for wasted costs does not make this distinction clear; and it is a very important one. The 2012 LDA had not been drafted by HD, the 2014 LDA, which was the relevant one, had been and is also likely to have been signed by Mr Plummer as was the case in respect of LDAs at other NHS Trusts in London.

57. Before the hearing of this issue due in May 2018 but <u>after the exchange</u> of witness statements and supplementary statements, HEE conceded that I was a worker under section 43K and agreed to make a payment of £55,000 “in full and final settlement of all the Claimants claims for costs in respect of the “worker” issue”. This consent order was not therefore limited to the costs incurred by me in the respect of the May 2018 hearing, and I had by then incurred aggregate costs in the ET, EAT, and Court of Appeal well in excess of £55,000..

58. The sum of £55,000 was paid by HEE to my solicitors TJL Tim Johnson and in accordance with the arrangements with Crowd Justice this money was held by TJL to fund any further legal costs I might incur or, in the event that it was not spent on such legal costs would have been returned to Crowd justice. No part of that sum of £55,000 was paid to me.

59. Of course, at the time of the agreement to accept the sum of £55,000 neither I nor my legal representatives were aware of the 2014 LDA as drafted by HD. We had only been provided with the 2012 LDA,. The failure to disclose the 2014 LDA was a material omission because :

a. It was the 2014 LDA which in force at the time of my ARCP with HEE, my protected disclosure to them, and the removal of my National Training Number
b. Whereas the 2012 LDA was made between the predecessors of both the First Respondent and the HEE, namely South London Healthcare NHS Trust and the London Strategic Heath Authority; the 2014 LDA was made between the parties to my claim (the First Respondent and the HEE)
c. I can show that the 2014 version of the LDA was signed (at other London NHS Trusts) by the HEE Director, Mr Plummer that was the HEE Director instructing HD in my case **[Page 1469-1473]**

60. Mr Plummer, who I understand was instructing HD and had given a witness statement on behalf of HEE for the 2018 October hearing and other senior employees at HEE will have known of the 2014 LDA and that HD had drafted it, so it is very concerning that it was still not then disclosed despite an order for disclosure.

61. I still do not understand how in February 2018 only the 2012 LDA was disclosed and not also the 2014 LDA. No explanation has yet been provided for this. The failure to disclose meant that no wasted costs order was at the stage sought against HD

62. Had I been made aware of the 2014 LDA and the fact that this had been drafted by HD at this time I would not have been prepared to accept only the sum of £55,000. in light of the representations made by the legal representatives on behalf of HEE before the employment tribunal, the employment appeal tribunal and the Court of Appeal. The failure to disclose the

2014 LDA was a serious breach of the order for disclosure, and HD having drafted were clearly aware of it.

63. I would also have never agreed to the terms of the consent order in the Court of Appeal if I had known about either the 2012 of 2014 LDAs, that the 2014 was drafted by HD and that Mr Plummer had signed several if not all of the LDAs in London. Such evidence would have thoroughly undermined the HEE position in the Court of Appeal and would have been grounds to seek wasted costs against the firm. HD relied on the Court of Appeal consent order to severely limit the costs I could claim back from HEE in May 2018 on the employer/worker point; though wasted costs were not an issue at that time.

64. The hearing of my substantive claims was heard in October 2018 and was settled by a settlement agreement dated 15 October 2018 **[pages 336-340].** This was again reached at a time when I had not been made aware of :-

a. the existence of the 2014 LDA or HD's drafting of it, and
b. therefore, their failure to provide this to the ET, the EAT or the Court of Appeal when they were considering the worker status issue,
c. the breach of the disclosure order made in July 2017
d. Mr Plummer's actions

65. If I had been aware of this at that time I would not have been prepared to agree to the terms of the settlement agreement as proposed which included provision that it be in full and final settlement of any claim that there may have been for wasted costs against a party's representative . I was not then aware that HEE had failed to disclose the 2014 LDA, which had been drafted by HD, and in breach of the order of July 2017. Any claim for wasted costs against my legal representatives would have been a matter for them ,and had I known of the potential for a claim for wasted costs against HD I would not have agreed to a settlement on the basis that both parties agreed that there be no claim against the respective legal representatives

The LDAs

66. As explained above , the 2014 LDA was never disclosed in these proceedings 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 2014 LDA disclosed was not signed. I have sought the disclosure of the signed version (or detail as to who signed on behalf of HEE).

67. I have since established that Mr Plummer who was HEE's Head of HR and OD, the investigating officer of my whistleblowing *case* and understood to be the HEE Director

instructing HD in defence of my *2014* claims signed LDAs at other London NHS Trusts in 2014 **[Page 1469-1473].** Though I cannot be certain of this, I would anticipate it likely that he would have signed the 2014 LDA on behalf of HEE .

68. It is only after <u>all</u> the various settlement agreements that I have found out HD's material role in drafting the LDA contracts in 2014/15 the same year as the strike out hearing in my case and Mr Plummers actions surrounding the strike out application in 2015.

HD knowledge of the 2014 LDA

69. I appreciate that HD say that those fee earners having conduct of this claim for HEE were not aware at the material time of the 2014 LDA, though HD have not as yet provided any evidence to support this. Clearly HD the firm did know as they drafted the 2014 LDA and it seems that Mr Plummer a key witness for HEE in the proceedings and a senior employee of HEE must have been aware of the 2014 LDA, and of the worker status dispute (and if not the person instructing HD on behalf of HEE, it would be surprising if he was not asked by HD to explain the interrelationship between HEE and the First Respondent and the contractual relationship between them),

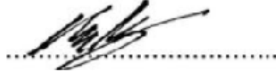
70. Philip Farrar at the material time was Head of NHS Employment at HD and the relevant ledger shows he was one of the lawyers that had conduct of my case and/or supervised the conduct of my case. In May 2018, Mr Farrar had direct involvement in the negotiation of the £55k associated with the May 2018 settlement.

71. By this time the 2012 LDA had been disclosed (in February 2018) but , for a reason which has yet not been given by HD, the 2014 LDA had not been disclosed.

Incorrect Submissions in this Wasted Costs Application

72. The pattern of misleading submissions by HD have continued in this wasted cost application. HD in the person of Philip Farrar. Mr Farrar wrote to the EAT in response to my claim for wasted costs (expressly based on the non-disclosure of the 214 LDA and HD's drafting it) to the EAT on 1 August 2019, that "the specific Lewisham LDA was part of the disclosure sent on 14 February 2018" **[Page 1031/2].** This is not correct ; the 2012 LDA was disclosed but not the 2014 LDA, which is the relevant agreement. .

I confirm that this statement is true to the best of my knowledge and belief.

Signed 

Name **DR CHRIS DAY**

Dated 16 September 2024