IN THE EMPLOYMENT TRIBUNAL
LONDON SOUTH

Claim nos.: 2302023/2014
& 2301466/2015

WASTED COSTS APPLICATION

B E T W E E N :-

CHRISTOPHER DAY **Applicant**

and

HILL DICKINSON LLP **Respondent**

WITNESS STATEMENT OF MICHAEL WRIGHT

I, **Michael Wright** of Hill Dickinson LLP, 50 Fountain Street, Manchester M2 2AS will say as follows:

1. I have been a qualified solicitor of the Senior Courts since 2005. I am a Partner at Hill Dickinson LLP ("the firm") and Head of the Health Employment team based in the firm's Manchester office. I have been a Partner since June 2016 and became head of the team in May 2022. Prior to this I was employed by the firm as a Legal Director from July 2015. I joined Hill Dickinson as an Associate solicitor in July 2013.

2. Prior to joining Hill Dickinson, I trained with Weightmans solicitors from 2003 to 2005. I undertook training seats in civil and employment tribunal litigation. I qualified as a solicitor with Weightmans in 2005 and was employed in the employment team as an Associate. Since then, I have carried a full caseload of employment tribunal litigation for almost 20 years. I have occasionally also undertaken employment-law related civil litigation.

3. I make this witness statement in connection with the firm's defence of Dr Day's application for wasted costs, dated 12 June 2019 [**Bundle p677-682**]. He has made a corresponding application to the Employment Appeal Tribunal (EAT).

4. Orla French, Associate was the solicitor with day-to-day conduct of the defence of Dr Day's claims against Health Education England ("HEE") at all times relevant to his

application for wasted costs. I was responsible, as a more senior solicitor, for overseeing Orla's work. Dr. Day presented his first claim to the Employment Tribunal on 27 October 2014 and his second claim on 10 April 2015 [**Bundle p7-31 and 68-85**].

5. On account of a period of maternity leave, Rachel Spink, Associate took on day-to-day conduct of the defence. Until his retirement from the firm in October 2020, the supervising partner in relation to the defence of the claims was Phillip Farrar. Various trainees in the Health Employment team also provided support throughout the case.

6. Originally established as a Special Health Authority in June 2012, with effect from 1 April 2015, HEE was a Non-Departmental Public Body (Body Corporate) under the Care Act 2014. HEE operated under a mandate from the Department of Health and Social Care, performing, on behalf of the Secretary of State, the duty under section 1F(1) of the National Health Service Act 2006 to plan and deliver education and training for health care workers. In addition, HEE was required to exercise its functions with a view to ensuring that a sufficient number of persons with the skills and training to work as health care workers for the purposes of the health service were available to do so throughout England (Chapter 1, Part 3 of the Social Care Act 2014). HEE was required to exercise its functions with a view to securing continuous improvement in the quality of education and training provided for health care workers and in the quality of health services.

7. Following implementation of the Health and Care Act 2022 and the Health Education England (Transfer of Functions, Abolition and Transitional Provisions) Regulations 2023, HEE was abolished on 1 April 2023. Its functions and liabilities were transferred into NHS England.

8. At the time relevant to the claims, each NHS Trust that provided training placements to junior doctors and a variety of other healthcare professionals entered into an overarching agreement with HEE that sets out each party's obligations. I now know that the Learning and Development Agreement ('LDA') was the agreement between HEE and a training placement provider that set out those obligations, including the financial payments that are made to training placement providers to fund the many types of clinical training and training in the NHS. I am now aware that the LDA, and associated documents, were drafted for HEE by the firm's Commercial Department around the time that I joined the firm.

9. As far as I am aware, neither I nor others in the firm's Health Employment Department acting for HEE in relation to the claim (primarily Orla French, Rachel Spink and Philip

Farrar, supported by a number of different trainees) had any involvement in or knowledge of the work undertaken by the firm's Commercial Department. This is also shown in the summary billing information for each file, which lists by unique fee-earner code, each of the fee-earners who worked on each file [**Bundle p1405 and 1406**]. No-one who worked on the ET litigation file worked on the commercial file and vice-versa. In addition, it is worth noting that, at this point in time, the firm did not hold regular client team meetings at which staff from across the firm met to discuss/share information about the work they were undertaking for HEE. As a result, I did not know, unless I was asked for advice or to provide support, what work colleagues in different teams and offices were carrying out for HEE. Nor too, was any of us even aware of the existence of the LDA prior to the EAT's decision in March 2016. In about June 2016, I and Philip Farrar became aware of it (as detailed below) on account of different matters on which were advising HEE, about which I cannot give further detail because of the firm's duties in relation to legal professional privilege.

10. Until his resignation, Dr Day was a Specialist Registrar in Medical Training who worked under a contract of employment with Lewisham & Greenwich NHS Trust ("the Trust"). As a doctor in training (often referred to as a "junior doctor"), Dr Day had an overarching training relationship with HEE which had placed him at the Trust on a one-year rotation. He was due to move to another NHS trust following this rotation. Dr Day's (and all postgraduate doctors') medical training is governed by the "*Reference Guide for Postgraduate Speciality Training in the UK" (the "Gold Guide*"). It set out the respective roles, responsibilities, rights and obligations of Dr Day, the Trust and HEE. At the time of his training, the relevant version of the Gold Guide was the 2013 edition [**Bundle p1074-1200**]. The Gold Guide was well known to Dr Day and his advisors and was included in the bundle prepared for the original preliminary hearing in his first claim in February 2015.

11. I was initially approached on or about 13 August 2014 by Gary Waltham, Deputy Director of Operations at HEE in South London, to provide advice, after Dr Day had made an internal complaint. The Tribunal and Dr Day will understand that I am unable to give evidence about confidential communications passing between the firm and HEE which is the subject of legal professional privilege. I am not authorised to discuss any privileged matters.

12. Following the commencement of Dr Day's claim, the firm's instructions came from Keith McKay (then Head of Trainee Development & Resolution at HEE), who had worked for HEE and its predecessor, the London Deanery, since 2001. Mr McKay was experienced

in defending employment tribunal litigation as he had led on ET claims made against HEE in London, and its predecessor, for many years. I also recall him telling me that he had a law degree. I had worked with Mr McKay on other Employment Tribunal disputes from October 2013. He had been a witness in one such matter, in early 2014, where the dispute had concerned whether HEE employed doctors in training for the purposes of an unfair dismissal claim. Following a preliminary hearing in that case, it was held that HEE did not employ doctors in training for the purposes of protection against unfair dismissal as set out in the Employment Rights Act 1996.

13. On Friday 31 October 2014, Mr McKay sent me Dr Day's claim form, which HEE had received by way of service from the Employment Tribunal. Shortly afterwards, I received background documents, including correspondence, complaint investigation and Annual Review of Competence Progression (ARCP) documents. An LDA was not provided to me by Mr McKay.

14. Within its response to the first claim, submitted on 9 December 2014, HEE asserted that the Employment Tribunal did not have jurisdiction to hear Dr Day's whistleblowing claim because he was not an employee or worker of HEE for the purposes of the extended definition of worker under the whistleblowing legislation (see section 43K of the Employment Rights Act 1996). On behalf of HEE, we applied to the Employment Tribunal to strike out his claim against HEE.

15. On 19 January 2015, the Employment Tribunal listed the first claim for a preliminary hearing on 25 February 2015 to hear the strike out applications. No order was made (or sought by Dr Day) for disclosure in advance of that preliminary hearing.

16. While I cannot discuss privileged matters, I can confirm that on 21 January 2015, Mr. McKay provided documents to the firm which included Dr Day's application for specialty training and his training agreement with HEE [**Bundle p1407-1408**]. An LDA was not included, and neither Orla French nor I had no knowledge of that document. Therefore, it was not disclosed to the Claimant. For the reasons I set out below, I consider, and respectfully submit, that the LDA does not add anything material to the clear terms of the Gold Guide and the issues that were in dispute at the Preliminary Hearing in 2015.

17. At that point in time, I understood the primary legal issue to be determined at the preliminary hearing was whether Dr Day was a worker under section 230(3) of the Employment Rights Act 1996. If the judge held that he was a worker of the Trust, then he could not rely on the extended definition of 'worker' in s.43K ERA and his case against

HEE would fail. The Claimant accepted at the Preliminary Hearing that he was an employee of the Trust. Therefore, the LDA was not relevant to that issue.

18. I also understood that, even if Dr Day could rely on s.43K, then the relevant legal question was which of the Respondents (the Trust or HEE) in practice determined the terms on which Dr Day was engaged to do his work more than the other. Later at the EAT, the Honourable Mr Justice Langstaff expressly endorsed the framing of these two legal issues in his judgment. Given that Dr Day had a contract of employment with the Trust, which set out the terms of his employment, that issue was plainly to be resolved in HEE's favour [**Bundle p127-150**].

19. Even if I had known about the LDA at the time, I do not consider that it was relevant to the issues before the judge at the preliminary hearing in February 2015. The framework for the Claimant's training was clearly set out in the Gold Guide. It confirms the responsibilities of the various bodies involved in a doctor's training and the Claimant's contract of employment set out the terms on which he worked. Significant analysis of other documents relating to his training, including the LDA, was not required or necessary to determine the two issues before the judge at the preliminary hearing.

20. Further, the LDA did not determine the terms on which Dr Day was engaged to do his work. Rather, it sets out the high-level, wider aspects of training and financial arrangements for various types of healthcare training. It is very generic in nature, as it has to cover the many types of healthcare training placements for the NHS (e.g. clinical scientists, psychologists, nurses, radiologists, doctors, etc…). This document does not determine the contractual terms on which doctors in training will be employed, such as pay scales, banding, annual leave, etc. Such terms are set out in the nationally agreed terms and conditions negotiated between representatives of the Government and the doctors' trade unions and at a local level in the contract of employment between the doctor in training and their Trust employer. There is also no detail in the LDA about how junior doctors will be allocated training posts and will be assessed. It certainly does not contain any terms which go beyond the terms set out in the Gold Guide.

21. The firm instructed counsel specialising in employment law, Nicholas Siddall (now KC) to advise our client and to appear at the preliminary hearing.

22. On 16 February 2015, we wrote to Dr Day's solicitor, requesting any documents concerning his relationship with HEE in respect of his training and employment, including his contracts of employment during his training programme.

23. We sent a draft bundle of documents to the Trust's solicitor on 19 February 2015, asking if they had any relevant documents to add. They provided us with the Trust's contract of employment with Dr Day. They did not provide a copy of the LDA between HEE and the Trust. I assume that the Trust's employment solicitors were either unaware of the LDA, as were my colleagues, or they did not consider that it was relevant to the Preliminary Hearing. I say this because, the Trust was a party to the LDA and, if they had been aware of it and considered that it was relevant, they would have disclosed it with the other material.

24. On 23 February 2015, two days before the preliminary hearing, Dr Day's solicitor provided us with documents for inclusion in the preliminary hearing bundle, which included an application for time out of programme, his e-portfolio and general information regarding specialty training. The preliminary hearing bundle also included the Gold Guide and his contract of employment with the Trust.

25. I did not attend the preliminary hearing on 25 February 2015 before Employment Judge Hyde, sitting alone. Orla French attended with Nicholas Siddall. Mr McKay gave evidence on behalf of HEE. In a reserved decision promulgated on 16 April 2015 (but which misstated the year as 2014), the Employment Tribunal struck out the claim against HEE [**Bundle p86-96**].

26. In May 2015, Dr Day appealed to the EAT on the basis that the Employment Tribunal had erred in its interpretation of the extended definition of worker in section 43K(1)(a)(ii) and s43K(2)(a) ERA 1996. The notice of appeal was rejected by a judge of the EAT, pursuant to Rule 3(7) because it appeared to the judge that it disclosed no reasonable grounds for bringing the appeal. Dr Day requested a Rule 3(10) hearing at which the EAT permitted the appeal to proceed.

27. The hearing before the EAT was listed for 10 February 2016 and it was Dr Day's solicitors' responsibility to prepare the appeal bundle. They sent it to us on 6 January 2016 and we requested that additional documents be added, including Dr Day's contract of employment and some further relevant extracts from the Gold Guide.

28. The EAT appeal was heard by the Honourable Mr Justice Langstaff who handed down judgment on 9 March 2016, dismissing the appeal (as detailed above at para.18).

29. On 27 June 2016, I became aware of an LDA in another HEE region in relation to another unconnected matter for HEE. HEE provided a copy of the contractual template document HEE used for its LDAs with Trusts. This was a generic LDA template dated

2015 (i.e. after Dr Day left training with HEE and employment with the Trust). I reviewed a limited number of terms of this document for the purpose of providing advice regarding the separate issue, which did not relate to the terms on which doctors work.

30. At that point in time, following successful hearings in the ET and EAT, even if I had reviewed the entire document, I would not have considered the 2015 generic LDA template or other versions of the LDA to be material to the legal issues to be determined in Dr Day's appeal to the Court of Appeal. The appeal concerned whether the ET had wrongly analysed the legal questions it had to determine. The Claimant submitted that it erroneously focused on which body, as between the Trust and HEE, played the greater role in determining the terms of engagement and thereby failed to appreciate that both may do so. As subsequently confirmed by the Court of Appeal, at paragraph 28 of its judgment, it was not for the Court of Appeal to make relevant findings of fact regarding whether HEE and/or the Trust substantially determined the terms on which the Claimant worked [**Bundle p170**].

31. At around this time I was also made aware by Philip Farrar that he was providing, with the support of counsel specialising in employment law, certain advice in relation to another matter. I am aware that he was provided with copies of similar LDAs to the one that was sent to me, and I shared the similar version sent to me with him.

32. The Tribunal and Dr Day and his advisers will understand that I am unable to give evidence about confidential communications passing between the firm and HEE which is the subject of legal professional privilege. I am not authorised to discuss any privileged matters and nor do I purport to waive legal professional privilege subsisting in any communication. However, and without waiving privilege, I can say that nothing I have seen in relation to the matter on which Mr Farrar was advising our client causes me concern that he (or counsel who were also advising) took the view, at the time, that the LDAs might be material to Dr. Day's status as a s.43K ERA worker employed by HEE or might be disclosable to him.

33. Dr Day secured permission to appeal to the Court of Appeal. On 21 March 2017, that Court overruled Mr Justice Langstaff (and Employment Judge Hyde) and explained that (1) a person could be a s.230(3) worker for one entity and a s.43K worker – for the same work – for another and (2) more than one entity could simultaneously substantially determine the terms on which a person was engaged to work – the question <u>not</u> being which entity determined the terms more than another (or others) but whether it ***substantially*** determined them [**Bundle p161-171**].

34. After the Court of Appeal's decision, a further preliminary hearing was listed for 14 – 17 May 2018 before the ET to consider whether HEE substantially determined the terms on which Dr Day was engaged to do his work. It was in preparation for this hearing that the Employment Tribunal made its first order for disclosure (to be complied with by 24 August 2017). An extension was then agreed between the parties until 28 November 2017.

35. Although the Court of Appeal had not determined this point, as a matter of law, it was now possible that the word "*substantially*" could be taken to mean "*more than minor or trivial*" (as in other legal contexts). Therefore, HEE and the Trust could both substantially determine the terms on which Dr Day worked and both be potentially liable as an employer under s.43K.

36. In preparation for the preliminary hearing, we met with Counsel, Nicholas Siddall, on 3 October 2017 to discuss the impact of the Court of Appeal's judgment on the case and the evidence and documents we would need for the preliminary hearing. Although we had already received some disclosure from HEE for the previous preliminary hearing in 2015, given the Court of Appeal judgment, we now required more information as to the kinds of factors the Employment Tribunal was likely to look at and, therefore, we required further documentation. Based on Counsel's advice, we put together a list of additional documents needed for the preliminary hearing and attached it to an email to HEE on 13 October 2017 requesting additional documents for disclosure. That list included a request for a copy of the service level agreement (SLA) between HEE and the Host Trust (Lewisham), in order to drill down into the nature of the relationship between the Trust and HEE.

37. On 24 November 2017, HEE provided us with a copy of the LDA between the London Strategic Health Authority and South London Healthcare Trust for 2011 – 2012 and a Variation Agreement from 2013. Following the dissolution of the South London Healthcare NHS Trust in 2013, its constituent hospitals were transferred to other NHS organisations, including the Queen Elizabeth Hospital transferring to Lewisham and Greenwich NHS Trust - a newly formed organisation. When HEE was established in June 2012, the local responsibility for postgraduate medical and dental training and education in the London region passed from the London Strategic Health Authority to HEE. Therefore, we understood that these were the relevant versions of the SLA documentation that governed the relationship between HEE and the Trust [**Bundle p178-313 and 952-965**].

38. Disclosure did not take place between the parties within the timeframe previously agreed and we did not hear from Dr Day's solicitors for some time as a result (I understand) of a change in fee-earner handling his case. We therefore contacted them in February 2018, reminding them that disclosure still needed to take place, and we agreed 15 February 2018 as the date for disclosure.

39. On 14 February 2018 we sent our list and copy documents to the parties, including the Service Level Agreement (i.e. the LDA dated 1 April 2012, and the Variation Agreement from 2013). Dr Day disclosed documents already considered as part of the previous hearings, together with a large amount of guidance documents and correspondence that post-dated 2015.

40. There were various emails from Dr Day's solicitors, in May 2018, disclosing further documents (the majority of them relating to junior doctor contract negotiations, which we did not consider relevant) but they did not raise any concerns about the LDA. Nor was any complaint about supposed late disclosure of the LDA made by Dr. Day's Leading Counsel in his skeleton argument prepared for the preliminary hearing [**Bundle p314-330**].

41. Dr Day was a party to his own training agreement with HEE, referred to by his Leading Counsel, and he had access to the Gold Guide throughout his training and litigation. I would further point out that, in his claim form, Dr Day had put forward the position (as an alternative to his s.43K argument) that he was HEE's employee from 5 September 2013 to 10 September 2014, much as the doctor in the previous claim to which I refer above in paragraph 12, had done.

42. The parties subsequently agreed by consent that the preliminary issue was conceded and HEE would pay £55,000 towards the Claimant's costs. The preliminary hearing was vacated.

43. Thereafter Dr. Day's claims proceeded to a final hearing in the ET in October 2018. On the final day of that hearing, the parties entered into a Settlement Agreement, which brought the litigation to an end [**Bundle p336-342**].

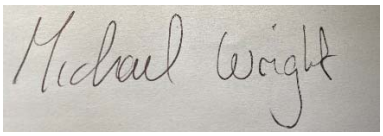
44. This resolution arose from Dr. Day's counsel making a settlement approach to the Trust's and HEE's counsel part-way through Dr. Day giving his evidence. The Settlement Agreement dated 15 October 2018, contains an express provision on costs, specifically:

2.2 This Agreement is also in full and final settlement of all or any claim or application for costs or expenses that any of the Parties may have against any other Party or Party's representative, whether in relation to the Claims or their conduct or otherwise".

That provision was put forward by Dr. Day's counsel, Christopher Milsom. He did so, as I understand it, in order to protect Dr. Day's solicitors from a wasted costs application as a result of their failure to disclose a recording Dr. Day had covertly made of a key meeting with his Postgraduate Dean. The events at the meeting were in dispute and relevant to both the Preliminary Hearing in May 2018 and the full hearing in October 2018.

45. In conclusion, having considered the various LDA documents, I remain of the view that they add materially nothing to the Gold Guide and to the training agreement between Dr Day and HEE, referred to in Dr. Day's skeleton argument. At best, as the skeleton argument says, it provides "***<u>further</u>*** *evidence of HEE determining the terms on which the Trainee is engaged to work*".

I believe that the facts contained in this witness statement are true.

Signe… 

Dated…12 September 2024……