Notes on oral submissions by Andrew Allen KC

1. HD and their clients HEE love a preliminary point – ideally a strike out
- in this long running litigation:

– they tried in February 2015 and succeeded – but ultimately failed after massive cost in money and time

And a massive fuss – para 8 of C's w/s GMC acknowledge in the middle of this unnecessary litigation that:

"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."

- That is very serious – doctors feeling insecure about raising concerns about patient safety

- HD tried another strike out in relation to this wasted costs matter in December 2022 and failed
- HEE and HD were successful in relation to Dr Day's 3rd claim – knocked out on a preliminary point in January 2022
- They still somehow seem to be arguing for a preliminary point to be taken in this matter in MLF's skeleton in the closing paras

None of C complaints about HEE have actually got to a final merits hearing at which a tribunal possessed of all of the evidence could make decisions as to whether the detrimental treatment of him by HEE more than a decade ago was on grounds that he had made protected disclosures

Had this happened many years ago, we would not be here today

2. Instead what happened was that a strike out came before an ET, without being given a full picture of the relationships between C, Trust and HEE
    a. We know that it wasn't a full picture – because after many relevant documents (not all) were disclosed on 14/2/18 (20 documents including a 2011 LDA and a variation of a 2012 LDA), HEE had to retreat -
    b. The arguments made before that ET – set out in Mr Siddall's full skeleton argument [1569-1583] are not the one that Mr Wright refers to at paras 17 and 18 of his w/s
        i. Mr Wright's suggestions as to how the law was understood are wrong – Mr Siddall's skeleton demonstrates this
            1. The CA did need to set things straight – but only because the EAT got it completely wrong – at para 37 of its Judgment
        ii. The submissions from HD's barrister at the ET in February 2015 were about the facts not the law and the ET did not have the full facts
        iii. Those February 2015 arguments – about the Gold Guide in particular – are now turned on their head – it was apparently for C (not HD) to work out that the Gold Guide referred to a

Service Level Agreement – which turned out to be the LDA – the Gold Guide apparently did contain sufficient information to indicated that HEE substantially determined C's terms – nonsense – it was guidance, the LDA was a contract

3. Whistleblowers in the NHS are stamped upon – it happens in case after case – in which extra hurdles are added to the already numerous hurdles in Part IVA of the ERA 1996 – the first is that you must be rich enough fund endless litigation; the second is that you must have sufficient stamina to survive years of litigation – the second is that you must be perfect – because any imperfection will be seized upon and never let go – the tactic is to attack the whistleblower – they are obsessive – they are litigious – can't let an injustice go - not the sort of people who get on in the NHS
    a. The skeleton argument on behalf of HD is a case in point – most of it is taken up in a partisan account of C's litigation which – and frequently inaccurate –
        i. such as the comment about him having got nowhere in the EAT
    b. and is largely irrelevant
        i. a comment that C made about LJ Simler (as she was then) in 2020 is a favourite stick to beat C with – what possible relevance it could have to this application is unknown
    c. And it came back again in MLF's oral submission -
    d. these attacks are now routine – that C has had to prepare a 'smears / misinformation document [1389] in anticipation of the same old points being trotted out

    Everyone knows this – Victoria Atkins - the Conservativee Health Secretary in May 2024 wrote in the Telegraph ""It cannot be right that NHS management spends millions of pounds fighting doctors who have concerns over patients' safety,"

    Wes Streeting, the Labour Health Secretary in July 2024 said in the Guardian "I'm deadly serious when I say NHS managers who silence whistleblowers will be out and will never work in the NHS again. It is the number one priority for the system. And I want people to have the confidence to speak out and come forward."

4. But the problem persists and the way in which these cases are litigated is part of the problem.

5. MLF says:

    a. Out of time – EJ Self did not stop it proceeding for that reason - application was brought on 12/6/19 [677] within a month of discovering via the answer to Tommy Greene's FoI request that HD had redrafted the LDA for HEE [681-682]
        i. And the application was expanded to cover the 2014 LDA on 16/8/19 - [874] from C enclosing a letter to the EAT of the

same date [875-878] – after the 2nd FoI response [871-872] enclosing the 2014 LDA

b. Barred by the settlement agreements – I can't add much to the written submission on these points – wasted costs against HD was never in C's contemplation – if it was in HD's contemplation in October 2018 as Mr Wright suggested in his oral evidence – that is very suspicious indeed
    i. C was not challenged on his evidence about whether he would have entered into these settlement agreements in his paras 50, 62 and 65

c. Takes too much time to be heard – *Medcalf v Mardell*
    i. that can't be a consideration at this point in time
    ii. C has already been through an unnecessary strike out before EJ Self on
    iii. it doesn't lie well with a Respondent which has raised numerous hurdles in the path of the Claimant involving previous orders and settlement agreements and then to pile on lots of irrelevant and contentious submissions about C's historical behaviour and - to then say that it is taking too long for the Claimant to deal with all the hurdles that HD has raised
    iv. this is a matter of public interest – questions raised in the house of commons by 2 MPS about HD's actions in this case – and in the background is the fact that 54,000 junior doctors were deprived of the ability to take HEE to the ET for w/blowing detriment until May 2018 when

d. HD either did nothing wrong or if they did – not negligent, unreasonable or improper
    i. it is very simple really – we ask you to find that HD employment lawyers were aware of the LDAs (and you have been given shamefully little information from HD about who knew what – all couched in Mr Wrights 'as far as I am aware . . .' language – having clearly not spoken to everyone – without giving the tribunal even a redacted version of the internal materials generated during the SRA process
    ii. no need to attempt to draw adverse inferences from things that he couldn't say because of privilege (which you can't do) – but you can draw adverse inferences from the lack of information presented to you which could have been presented to you entirely separate from privilege – the apparent lack of questioning of relevant lawyers (including Ms Spink) the presumption that what Mr Farrar says is accurate – despite him having made comments in his letter to ET on 26/9/19 [886-888] that were not only inaccurate – but where the inaccuracy had been pointed out to him []
    iii. I suggest that you ask yourself whether Mr Wright's evidence really did convey as HD set out in the LoI [1058, para 16(iv)] 'that those within HD's Employment Department, acting for HEE in relation to Dr. Day's claims, namely, Rachel Spink, Orla French, Michael Wright and Philip Farrar, for whom HD may be

held liable, were unaware of the LDA which had been drafted by those within HD's Commercial Department';