EMPLOYMENT TRIBUNALS

Heard at:	London South, via CVP	**On:**	23 to 25 October 2024
Claimant:	Dr C M Day		
Respondents:	(1) Lewisham & Greenwich NHS Trust (2) Health Education England		
Before:	Employment Judge Ramsden		
Representation:			
Claimant	Mr A Allen KC, Ms E Grace, Counsel		
Respondent	Mr D Basu KC, Counsel		

RESERVED COSTS JUDGMENT

1. This decision concerns an application made by the Claimant for a wasted costs order against the firm of solicitors acting for the Second Respondent, Hill Dickinson LLP (**HD**).

Factual background

<u>The arrangements between the Claimant, the First Respondent and the Second Respondent</u>

2. The Claimant qualified as a doctor in July 2009, and undertook a further two year Foundation Programme of training. Towards the end of that period he successfully applied to the London Deanery for training to become a consultant in Emergency Medicine.

3. Many of the functions of the London Deanery were taken over by the Second Respondent on 1 April 2013.

4. The Second Respondent was, at the material time, the national NHS body which funded, commissioned and governed both the training of junior doctors in England and their employment path following their graduation from medical

school. The Second Respondent funded the Claimant's employment by the First Respondent, and had he worked as a junior doctor with any other NHS trust in England the Second Respondent would have funded that employment.

5. The Claimant, in common with other doctors undertaking training to become consultants (known at the time as "junior doctors"), was:

   a) Placed with employing NHS trusts by the Second Respondent as part of his training programme, entering into fixed-term employment contracts with the relevant NHS trust in advance of commencing that placement. Those NHS trusts were referred to a "Local Educational Providers", or **LEPs**, for the purposes of the junior doctor training programme;

   b) Employed by the relevant NHS trust on terms and conditions the majority of which (including pay, working conditions and entitlement to holiday and sick pay) were agreed nationally for NHS junior doctors;

   c) Allocated a named educational supervisor, employed by the same NHS trust at which he was placed; and

   d) Appraised annually, by a process known as the Annual Review of Competence Progression (**ARCP**). The ARCP Panel was chaired by the Postgraduate Dean, an employee of the Second Respondent. The ARCP Panel had the power:

      (i) During the life of the training programme, to determine if he (and any other the junior doctor) would remain in the training programme or not; and

      (ii) At the end of that training programme, to determine whether the Claimant (and any other junior doctor) had satisfied the training programme's requirements, which would allow him (or them) to register as a consultant.

6. The First Respondent sent the Claimant an offer of employment on 6 August 2013, setting out the Claimant's terms and conditions of employment, and the Claimant signed that offer letter on 7 August 2013. The offer letter referred to national terms and conditions of employment.

7. When the Claimant was accepted onto the junior doctor training programme with the London Deanery he entered into an agreement with the Postgraduate Dean on behalf of the Second Respondent on 13 October 2011. By that agreement the Claimant agreed to meet certain conditions during the training programme, which included an agreement to share information about his performance with the Postgraduate Dean on a regular basis (the **Training Agreement**). A National Training Number was created for him by the Second Respondent.

8. At that time the Claimant was provided with access to a publication entitled "A Reference Guide for Postgraduate Speciality Training in the UK", known as the **Gold Guide**. He does not recall how this came about, but he confirmed that he

was aware of the Gold Guide from at least the time that he entered into October 2011 agreement with the Postgraduate Dean.

9. At the time with which the underlying claim against the Respondents is concerned the Claimant worked as a junior doctor undertaking training in the specialism of Emergency Medicine for the First Respondent pursuant to a 12-month fixed term employment contract for the period 6 August 2013 to 6 August 2014.

The arrangements between the First Respondent and the Second Respondent

10. The terms under which the Second Respondent agreed to commission and fund the Claimant's employment at each NHS trust were set out in a Learning and Development Agreement between the Second Respondent and the applicable NHS trust or LEP, which was based on a standard template (the **Template LDA**). That Template LDA was updated from time-to-time.

11. The Second Respondent used the then-applicable version of the Template LDA when contracting with any LEP in England so as to supply it with its junior doctors (each of whom would then enter into an individual fixed term employment contract with the NHS trust) and supervise their training.

12. In the time period with which these claims are concerned, there were two versions of the Template LDA – the 2012 version (the **2012 Template LDA**) and the 2014 version (the **2014 Template LDA**).

13. The Second Respondent had entered into a Learning and Development Agreement with the First Respondent prior to the commencement of the Claimant's employment by the First Respondent. That Learning and Development Agreement applied for the period 1 April 2011 to 31 March 2012, but also continued in force for any junior doctors working under it until the earlier of the completion of their training or a replacement learning and development agreement put in place (the **2012 R1 LDA**). The Tribunal understands that the 2012 R1 LDA is based on the 2012 Template LDA.

14. The 2012 R1 LDA was subsequently varied, and then replaced by a later Learning and Development Agreement that applied from 1 April 2014 to 31 March 2015, referred to by the parties as the **2014 R1 LDA**. The Tribunal understands that the 2014 R1 LDA is based on the 2014 Template LDA.

15. The Learning and Development Agreements entered into by the Second Respondent with any NHS trust are not, as a matter of course, published. A number of NHS trusts do publish their Learning and Development Agreements with the Second Respondent, but the First Respondent did not do so at the material time.

16. The Claimant was not aware of the terms of the Learning and Development Agreements between the Second Respondent and the First Responding during the period of his engagement by the First Respondent. He was, though, aware of the role of the Gold Guide in his employment, which he described as a statement

of expectations applicable to him, the First Respondent and the Second Respondent. The fact that there were arrangements between the First Respondent and the Second Respondent relating to his employment was plain from the terms of the Gold Guide. By way of example, the 2013 version of the Gold Guide provided, in paragraph 2.12, that:

"*[The Second Respondent] and NHS Education Scotland Regions and Deaneries in Northern Ireland and Wales are responsible for implementing speciality training in accordance with GMC approved specialty curricula. Postgraduate Deans work with Royal Colleges/Faculties and local healthcare providers to quality manage the delivery of postgraduate medical training to GMC standards. The standards that must be delivered are normally set out in educational contracts or Service Level Agreements between [the Second Respondent] and NHS Education Scotland Regions and Deaneries in Northern Ireland and Wales, and [LEPs]*".

17. HD were not involved in the drafting of the 2012 Template LDA, or the 2012 R1 LDA. HD's commercial department were involved in:

    a) Updating the 2012 Template LDA so as to produce the 2014 Template LDA; and

    b) Assisting the Second Respondent with the particularisation of the 2014 Template LDA to reflect its arrangements with a number of NHS trusts.

<u>The Claimant's disputes with the First Respondent and the Second Respondent; the Consent Order</u>

18. A dispute arose between the Claimant and the First Respondent in the period January to August 2014. In that period the Claimant says that he made protected disclosures to the First Respondent, and that he repeated those disclosures to the Second Respondent.

19. He presented a claim to the Employment Tribunal on 27 October 2014, given the case number 2303023/2014 (the **First Claim**), which included complaints against the Second Respondent that it had subjected him to detriments on the ground that he had made protected disclosures, pursuant to section 47B of the Employment Rights Act 1996 (the **1996 Act**) .

20. The Second Respondent brought a strike-out application as a preliminary issue on 25 November 2014, asserting that the Claimant had no reasonable prospect of succeeding in establishing that his relationship with the Second Respondent was one covered by section 47B (the **Strike Out Application**).

21. It was common ground that the Claimant did not fall within the definition of worker in section 230(3) of the 1996 Act in relation to the Second Respondent, but the question remained as to whether the Claimant was a worker of the Second Respondent within the extended definition in section 43K of the 1996 Act. If he could, he could pursue the protected disclosure detriment complaint against the Second Respondent.

22. The Claimant presented a second claim to the Employment Tribunal on 10 April 2015, given the case number 2301446/2015 (the **Second Claim**).

23. The Strike Out Application was:

    a) Determined and granted by the Employment Tribunal on 14 April 2015;

    b) Appealed to the Employment Appeal Tribunal and determined on 9 March 2016. The appeal was unsuccessful; and

    c) Appealed to the Court of Appeal.

24. The Claimant argued before the Employment Tribunal that he fell with section 43K(1)(a) in his relationship with the Second Respondent, i.e., that he worked for the First Respondent in circumstances in which both:

    a) He was introduced or supplied to do that work by a third person (the Second Respondent); and

    b) The terms on which he was engaged to do the work were in practice substantially determined not by him (the Claimant) but by the person for whom he worked, by the third person (the Second Respondent) or both of them (i.e., both the First Respondent and the Second Respondent).

25. The Tribunal concluded that this argument had no reasonable prospect of success, reasoning that, while the Second Respondent supplied the Claimant to work for the First Respondent, the Claimant's terms of employment were substantially determined by persons other than the Second Respondent. The Tribunal found there was a training relationship which ran alongside the employment relationship, but this was not material to the terms of engagement.

26. The EAT upheld that decision on 9 March 2016. Langstaff J in the EAT concluded that the opening language in section 43K(1) – "*For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who…*" – meant that, because the First Respondent was the Claimant's section 230(3) employer, consideration of section 43K(1) in relation to the Second Respondent was precluded.

27. Ahead of the Court of Appeal hearing, the Claimant and the Second Respondent agreed to a consent order on 27 October 2016 which provided that:

    "*… UPON the Appellant [the Claimant] and Second Respondent having agreed not to pursue costs against the other, whatever the outcome of the appeal*

    2. BY CONSENT IT IS ORDERED THAT:

    (1) Whatever the outcome of the Appellant's appeal, each of the Appellant and Second Respondent shall bear its own costs…"

    (the **Consent Order**).

28. The appeal against the Tribunal's approach in the Strike Out Application was determined by the Court of Appeal on 5 May 2017. The Court found that:

a) The opening language of section 43K(1) should be properly understood as meaning that that section does not apply to a person who is a section 230(3) worker *as against a given respondent*. The Court concluded that section 43K(1) *can* apply to render a person who is a worker of another person a worker of a third person if the substance of a subsection of section 43K(1) is satisfied. In other words, the Second Respondent could in theory be an employer of the Claimant by reason of section 43K(1) even though the Claimant was a worker of the First Respondent pursuant to section 230(3); and

b) There had been errors of law in the Tribunal's approach, as it assumed that only one person could substantially determine the terms of the Claimant's engagement. The Court considered that asking whether a person substantially determined the terms of engagement was not the same as asking which person played the greater role in determining the employment terms. More than one person can substantially determine the terms on which a person is engaged. It found that the Tribunal did not engage with the question of whether the Second Respondent substantially determined the terms on which the Claimant was engaged.

29. The Court disagreed with the Claimant's submission that, had the Tribunal considered the correct question, it would have been bound to find in the Claimant's favour that the Second Respondent had substantially determined the Claimant's terms of employment. Instead, it remitted the matter to be considered again by the Employment Tribunal, and that remitted hearing was scheduled to take place between 14 and 17 May 2018.

30. A Preliminary Hearing was held in in the Employment Tribunal on 10 July 2017, at which Regional Employment Judge P Hildebrand made various Orders in anticipation of the remitted hearing. One of those Orders included that the parties were to give further standard disclosure of any documents that had not already been disclosed.

31. The parties disclosed further documents to each other on 14 February 2018. In the Second Respondent's case, that further disclosure included the 2012 Template LDA. Neither the First Respondent nor the Second Respondent disclosed:

a) The 2012 R1 LDA;

b) The 2014 R1 LDA; or

c) The 2014 Template LDA.

32. The remitted hearing did not, in fact, take place, as the Second Respondent withdrew the Strike Out Application a few days before, on or around 11 May 2018, and conceded that the Claimant was a worker of the Second Respondent for section 43K(1) purposes.

Agreements and Orders

33. Employment Judge Freer made an Order on 17 May 2018 by the consent of the Claimant and the Second Respondent in which it was recorded that:

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

This is referred to as the **May 2018 Agreement**.

34. A final hearing before the Employment Tribunal to determine the substantive claims was listed to begin on 1 October 2018. That hearing commenced, but before it concluded a settlement agreement was entered into between the Claimant, the First Respondent and the Second Respondent on 15 October 2018 (the **October 2018 Agreement**). Paragraph 2.2 of the Settlement Agreement states:

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

35. An Order was made on 19 October 2018 dismissing the Claimant's complaints upon their withdrawal.

36. In May 2019 the Claimant learned (in response to a request made under the Freedom of Information Act 2000) that HD had acted for the Second Respondent at the time the 2014 Template LDA was drawn up.

37. A copy of the 2014 R1 LDA was provided to a journalist, Tommy Greene, in July 2019, in response to a further request for information made by him to the First Respondent.

The Claimant made a wasted costs application, 12 June 2019

38. The Claimant made a wasted costs application against HD on 12 June 2019, contending that:

    a) He had had to incur significant costs resisting the Strike Out Application as a result of the failure of the Second Respondent to disclose the 2012 Template LDA; and

    b) This involved an improper, unreasonable and/or negligent act or omission on the part of HD because, when the Second Respondent failed to disclose the 2012 Template LDA, that was in circumstances when the existence of that document was well known to HD, given it had worked on the 2014 Template LDA

    (the **Wasted Costs Application**).

39. On 26 September 2019 HD responded to the Wasted Costs Application, applying for the dismissal of that application. Specifically, HD argued that:

    a) The Wasted Costs Application was made out of time;

    b) The 2012 Template LDA, being a generic model agreement, was not relevant to the question of whether the Second Respondent was the Claimant's employer for section 43K purposes, and it was for that reason that it was not initially disclosed by the Second Respondent;

    c) There was no disclosure order made prior to the 2015 Employment Tribunal hearing to determine the Strike Out Application. The relevance of 2012 Template LDA and/or the 2012 R1 LDA only became clear after the decision of the Court of Appeal in May 2017, and it was disclosed following REJ P Hildebrand's Order for further standard disclosure on 10 July 2017;

    d) The 2012 R1 LDA was disclosed by the Second Respondent in February 2018, ahead of the parties agreeing terms and entering into the October 2018 Agreement, and the Claimant's representatives had made submissions on the 2012 R1 LDA as part of the litigation concerning the Strike Out Application;

    e) The effect of the May 2018 Agreement and the October 2018 Agreement is to preclude and compromise any costs claim, and each of these agreements was entered into after the disclosure of the 2012 R1 LDA;

    f) The Claimant is bound by the terms of the Consent Order and so cannot pursue the Wasted Costs Application; and

    g) The Wasted Costs Application did not comply with the requisite rules in that it did not quantify the alleged losses.

40. The matter was listed for a preliminary hearing to determine whether the Wasted Costs Application should be struck out, pursuant to Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 (the **ET Rules**) as having no reasonable prospects of success, having regard to:

    a) the nature and content of the relevant compromise agreements entered into between the Claimant and the Second Respondent (i.e., the May 2018 Agreement and the October 2018 Agreement); and/or

    b) the Consent Order.

41. That Preliminary Hearing took place before EJ Self on 5 and 6 December 2022, which concluded that the test to strike-out the Wasted Costs Application was not met.

42. The Wasted Costs Application then came before EJ Evans on 17 November 2023, and EJ Taylor on 21 March 2024, both for case management. EJ Taylor listed this hearing and set out the relevant list of issues to be considered in it in her Orders of 12 April 2024.

The application

43. As noted above, the Claimant made the Wasted Costs Application against HD on 12 June 2019.

44. The amount the Claimant seeks by way of wasted costs is £65,415.48 inclusive of VAT.

45. EJ Taylor, at the second Preliminary Hearing for the case management of the Wasted Costs Application, listed the issues to be considered in this hearing as follows:

    a) Does the settlement agreement dated 15 October 2018 preclude the making of a wasted costs order or may it be set aside for negligent or fraudulent misrepresentation?

    b) If the 15 October 2018 settlement agreement does not preclude the making of a wasted costs order, does the 2016 Court of Appeal no costs Consent Order preclude the making of a wasted costs order?

    c) Does the May 2018 agreement preclude the making of a wasted costs order?

    d) Can and should the tribunal consider making a wasted costs order of its own initiative?

    e) If it is open to it to do so, should the tribunal make a wasted cost order and in what amount?

    f) Has there been any improper, unreasonable or negligent act or omission on the part of HD?

    g) If so, then what extra costs was the claimant caused to incur?

The hearing

46. The Claimant (and applicant in this matter) was represented at the hearing by Mr Allen KC and Ms Grace. HD was represented by Mr Basu KC.

47. The parties had prepared an agreed hearing bundle of 1640 pages, and the following further documents were provided to the Tribunal by way of documentary evidence:

    a) An index with a link to a bundle of archived Learning and Development Agreements, with that bundle running to 527 pages;

    b) A bundle of invoices related to the Claimant's costs if 54 pages;

    c) A letter from the Claimant to Tribunal dated 28 June 2024, which provided the further information he was Ordered to provide by EJ Taylor on 12 April 2024; and

d) A copy of a witness statement apparently relied upon by the Claimant in the Preliminary Hearing before the Employment Tribunal on 25 February 2015. This was presented to the Tribunal by HD, but no reference was made to it by Mr Basu.

48. The Claimant gave evidence in support of his application, and relied on a written witness statement dated 16 September 2024 together with a supplementary witness statement made 11 October 2024. Michael Wright, a Partner of HD, gave evidence resisting the Claimant's application.

49. Each of the Claimant and HD made oral submissions in support of their respective positions, also relying on a written opening note and closing submissions in the Claimant's case, and a written skeleton argument in HD's.

Law

Wasted Costs Orders

50. Costs in the Employment Tribunal are awarded by exception, rather than as a matter of course (*Yerrakalva v Barnsley Metropolitan Borough Council* [2012] ICR 420).

51. Rule 80 of the ET Rules provides the Tribunal with the power to make a wasted costs order:

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

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

(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as "wasted costs"."

52. The amount that may be the subject of the order is described in Rule 81:

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

53. The procedure for applying for a wasted costs order is set out in Rule 82:

"*A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make*

representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative."

54. Where a party makes an application for a wasted costs order against another party's representative under Rule 80(1)(a), there are three questions that should be asked and answered, and answered positively for an order to be made:

    a) Has the legal representative acted improperly, unreasonably or negligently?

    b) If so, did such conduct cause the applicant to incur unnecessary costs?

    c) If so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

    (*Ridehalgh v Horsefield* [1994] 3 All ER 848; *Ratcliffe Duce and Gammer v Binns (t/a Parc Ferme)* EAT 0100/08)

The first question, or the "gateway" condition: Has the legal representative acted improperly, unreasonably or negligently?

55. The meaning of the terms "*improperly*", "*unreasonably*" and "*negligently*" in this gateway condition was considered in *Ridehalgh*, and the Court's conclusions were approved by the House of Lords in *Medcalf v Mardell* [2002] 3 All ER 721:

    "*the words "improper, unreasonable or negligent" bore their established meaning; that "improper" applied to conduct which amounted to any significant breach of a substantial duty imposed by a relevant code of professional conduct and included conduct so regarded by the consensus of professional opinion; that "unreasonable" described conduct which did not permit of a reasonable explanation; that "negligent" was to be understood in an untechnical way to denote a failure to act with the competence reasonably to be expected of ordinary members of the profession*".

56. The context in which a wasted costs order is considered is significant in at least two respects:

    a) A representative is not a party in its own right – a representative acts on instructions. They should not be held to have acted improperly, unreasonably or negligently simply because they act on behalf of a party whose claim or defence is doomed to fail and they have not dissuaded them from so doing (*Ratcliffe*); and

    b) A representative may be hampered by privilege from presenting the full facts.

57. On the latter point the Court in *Ridehalgh* found that this meant tribunals should be cautious to make wasted costs orders where privilege may impede the representative's ability to resist the application:

"*The privilege is not theirs to waive... So the respondent lawyers may find themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and warnings they gave, what instructions they received… Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of the respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order.*"

The second question, or the "causation" condition: If so, did such conduct cause the applicant to incur unnecessary costs?

58. The usual principles of causation apply, but it is recognised that, in the case of an application for wasted costs, privilege may also hamper the answering of this question.

The third question, or the "discretion" condition: If so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

59. If the first two "gateway" and "causation" questions are answered in the affirmative, it remains for the applicant to persuade the tribunal that it is right and proper to exercise its discretion to award costs, having regard to all the relevant factors (*Haydar v Pennine Acute NHS Trust* EAT 0141/17).

60. The relevant factors in a given case, and the relative weight to be appropriately given to them, will be case-specific (*FDA v Bhardwaj* [2022] ICR 1541).

61. If all three questions are answered in the positive, an award should be made, and judicial discretion should be applied to determine the appropriate amount, in the context that the purpose of any costs award is to compensate rather than to punish.

<u>Disclosure between parties to Employment Tribunal litigation prior to disclosure being Ordered</u>

62. Waite J in the EAT decision of *Birds Eye Walls Ltd v Harrison* [1985] ICR 278 held that:

"*no party is under any obligation, in the absence of an order from the industrial tribunal, to give discovery in the tribunal proceedings. That is subject, however, to the important qualification that any party who chooses to make voluntary discovery of any documents in his possession or power must not be unfairly selective in his disclosure. Once, that is to say, a party has disclosed certain documents (whether they appear to him to support his case or for any other reason) it becomes his duty not to withhold from disclosure any further documents in his possession or power (regardless of whether they support his case or not)*

if there is any risk that the effect of withholding them might be to convey to his opponent or to the tribunal a false or misleading impression as to the true nature purport or effect of any disclosed document."

63. The High Court in *Square Global Ltd v Leonard* [2020] EWHC 1008 (QB) has stated that where a party is advised by solicitors, "*It is fundamental that the client must not make the selection of which documents are relevant*", and cited with approval passages from the fifth edition of Matthews and Malek, "Disclosure", which include:

"*A solicitor's duty is to investigate the position carefully and to ensure so far as is possible that full and proper disclosure of all relevant documents is made. This duty is owed to the court…*".

Construction of contracts, settlement agreements and consent orders

64. The House of Lords in the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] All ER 98 held that:

a) The starting point is that a court will normally apply the presumption that words in a contractual document are to be given their natural and ordinary meaning;

b) The factual matrix relevant to the construction of that document is anything which would have affected the way in which the language of the document would have been understood by a reasonable man; and

c) If it was clear from the background that the parties, for whatever reason, had used the wrong words or syntax or that something must have gone wrong with the language used, the court was not obliged to attribute to the parties an intention which they plainly could not have had.

65. Norris J's decision in *Alliance and another v Tishbi and others* [2011] EWHC 1015 (Ch) considered the use of language in agreements settling a dispute between parties. In that case, the terms reached were the subject of negotiation between Leading Counsel with contributions from their respective instructing solicitors, and Norris J noted:

"*Such people are able users of language, and it may be expected that in general they will have used words in accordance with their ordinary and natural meanings. But on the other hand given the short space of time within which and the pressure under which the bargain was made there is the possibility that what would have appeared obvious to the negotiators at the time will not be so readily apparent to a third party coming to the document afresh in very different circumstances.*"

66. This was not a case where the Judge was persuaded by arguments that the parties were proceeding under a common mistake, but rather a situation where the Court needed to construe what the parties commonly intended by an unclear term in the settlement agreement they agreed to. Norris J considered that

construing the settlement agreement they reached during the course of the trial of their dispute should be done in its "*practical context*", which in that included:

a) The state of the litigation at the time the agreement was reached (e.g., what was agreed, what was disputed);

b) The arguments that were presented at trial (for example, if a particular construction of the contract at the heart of the dispute was not part of the argument made in the hearing that may be a point against interpreting the settlement agreement as providing for that construction);

c) The correspondence between the parties that immediately preceded the trial; and

d) The material that was available to be deployed at trial.

67. The House of Lords in *Bank of Credit and Commerce International SA v Ali and others* [2001] ICR 337 held that:

"*there were no special rules of interpretation applicable to a general release, which was to be construed in the same way as any other contract, the question being the intention of the parties ascertained objectively in the context of the circumstances in which the release had been entered into;"*

and

"when the employees' agreements had been entered into neither party could realistically have supposed that a claim for damages in respect of disadvantage on the labour market was a possibility; and that, accordingly, the parties could not be held to have intended the releases to apply to such claims".

68. Lord Bingham in *BCCI* observed that "*a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware*".

69. The EAT in the case of *Royal National Orthopaedic Hospital Trust v Howard* [2002] IRLR 849 concluded that:

"*As a matter of public policy, there is no reason why a party should not contract out of some future course of action. The law does not decline to allow parties to contract that all or any claims, whether known or not, shall be released. The question in each case is whether, looking at the compromise agreement objectively, that was the intention of the parties, or whether in order to correspond with their intentions some restriction has to be placed on the scope of the release. If the parties seek to achieve such an extravagant result that they release claims of which they have and can have no knowledge, whether those claims have already come into existence or not, they must do so in language which is absolutely clear and leaves no room for doubt as to what it is they are contracting for.*"

70. While this did not form part of the Court's *ratio*, Lord Nicholls in *BCCI* gave consideration to the situation where a party to whom the release is given knew that the other party had or might have a claim, and knew that that party was ignorant of this. He considered that: "*In some circumstances, seeking and taking a general release in such a case, without disclosing the existence of the claim or possible claim, could be unacceptable sharp practice. When this is so, the law would be defective if it did not provide a remedy.*" That was not the case on the facts of *BCCI*, and so this "sharp practice" concept was not discussed further in it.

Circumstances in which a settlement agreement should be set aside for false misrepresentation

71. The Employment Tribunal does have the jurisdiction to determine if a compromise or settlement agreement is unenforceable, including on the basis of misrepresentation (*Industrious Ltd v Horizon Recruitment Ltd (in liquidation)* [2010] ICR 491).

72. A party seeking to rescind a settlement agreement on the basis of alleged misrepresentation must show that the other party had made "*a materially false misrepresentation which had been intended to induce, and had induced, the claimant to act to his detriment*". It is not necessary for that party to prove that they had believed the misrepresentation to be true. The misrepresentation needed to be a "*material cause*" which induced the decision to enter into the contract, but need not be the sole cause (*Zurich Insurance Co plc v Hayward* [2017] AC 142).

Negligent misrepresentation and remedies

73. A claim of negligent misrepresentation is based on the Misrepresentation Act 1967. That Act concerns both negligent misrepresentation and innocent misrepresentation. Section 2(1) concerns negligent misrepresentation, and provides that where:

    a) A person (A) has entered into a contract after a misrepresentation has been made by another party to that contract (B);

    b) If A has suffered loss a result and B would be liable to A in damages if the misrepresentation had been made fraudulently;

    c) B shall be so liable unless B proves that they had reasonable ground to believe, and did believe up to the time the contract was made, that the facts represented were true.

74. If negligent misrepresentation has occurred, the remedies available to A are:

    a) Damages (section 2); or

    b) Rescission of the contract (section 1).

Making a wasted costs order "*on its own initiative*" when a party has made an application

75. In the context of applications for reconsideration, the EAT has held that:

    a) Reconsideration on application by a party under Rule 71 and reconsideration on the tribunal's own initiative under Rule 73 are separate and alternative routes to reconsideration;

    b) Where a claimant applied for reconsideration outside the prescribed time limit, the tribunal could not then consider the same issue 'on its own initiative' under Rule 73, because ET Rules do not provide for both types of reconsideration taking place at the same time, far less some kind of hybrid process whereby an application is made by a party but is then taken on by the tribunal. The proper course should have been for the tribunal to consider whether time should be extended in respect of the late application

    (*TCO In-Well Technologies UK Ltd v Stuart* [2017] ICR 1175).

76. In the same case the EAT observed that a situation could arise where, in dealing with an application from reconsideration from a party, the tribunal notices an entirely separate issue that may merit reconsideration, and there was nothing inherently wrong with the tribunal considering reconsideration on that distinct basis.

77. Lord Summers, sitting alone in the case of *Banerjee v Royal Bank of Canada* UKEAT/189/19, noted that the primary purpose of the tribunal's ability to use "*its own initiative*" to reconsider its decision was to enable the tribunals to act on their own initiative without the involvement of the parties. Where a party asked the tribunal to reconsider "*on its own initiative*", as opposed to making its own application for reconsideration, that inherent power of the tribunal to reconsider was not vitiated by the respondent's submissions that it was appropriate for the tribunal to take that initiative. However, he "*entirely [agreed]*" with Lady Wise in *Stuart* that, as he put it, "*a request or application from outside the tribunal should be treated as excluding a tribunal reconsidering 'on its own initiative'.*"

The Tribunal's ability to vary a prior Tribunal Consent Order

78. Rule 1 of the ET Rules contains various interpretative provisions, including, and subparagraph (3):

    "*An order or other decision of the Tribunal is either-*

        (a) a "case management order", being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment; or

        (b) a "judgment", being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19) which finally determines-

(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs);

(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue);

(iii) the imposition of a financial penalty under section 12A of the Employment Tribunals Act."

79. The Employment Tribunal does have the power to review a consent order made by it (*Larkfield of Chepstow Ltd v Milne* [1988] ICR 1). The consent order is not a "*decision*", and so any variation, suspension or setting aside of that consent order falls to be considered under Rule 29 of the ET Rules.

80. Rule 29 of the ET Rules includes the following:

"*The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order… A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.*"

81. HHJ Hand QC in the EAT decision of *Serco Ltd v Wells* [2016] ICR 768 found that:

a) The integrity of judicial decisions and orders meant it was usually appropriate for any challenge to an order of the tribunal to be determined by way of an appeal to a superior tribunal; and

b) The requirement in Rule 29 that any variation, suspension or setting aside of an earlier order should be "*necessary in the interests of justice*" is to be interpreted as requiring:

"*a material change of circumstances since the order was made, or that the order had been based on a material omission or misstatement, or some other substantial reason necessitating the interference*",

But the situations where doing so is "necessary in the interests of justice" will be "*rare*" and "*out of the ordinary*" cases.

82. The rare and out of the ordinary nature of the cases where this will be appropriate will be even more so, considered the EAT *in Liverpool Heart and Chest Hospital NHS Foundation Trust v Poulis* [2022] ICR 785, where a party has taken significant steps or expended costs in reliance on the order.

Application to the claims here

83. The Tribunal's findings are set out below, largely in response to the list of issues set out in EJ Taylor's Orders of 12 April 2024.

Does the Tribunal have jurisdiction to consider the Claimant's wasted costs application? (Not in the Orders of EJ Taylor)

84. Rule 82 provides that an application for a wasted costs order may be made by a party:

"*… at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties*".

85. There has been no judgment made finally determining the proceedings in this matter. Instead, the parties asked the Tribunal to make a consent *order* in the terms they had settled upon, which is referred to as the May 2018 Agreement, but that order did not represent a "*decision*" of the Tribunal, and so does not amount to a "*judgment*" (as described in Rule 1(3) of the ET Rules).

86. The Tribunal therefore does have jurisdiction to consider the Claimant's application for a wasted costs order, as the 28-day time limit for making a wasted costs application had not started to run at the time when the Claimant made his application.

Does the settlement agreement dated 15 October 2018 preclude the making of a wasted costs order or may it be set aside for negligent or fraudulent misrepresentation? (Issue 1.1 in the Orders of EJ Taylor)

87. The Tribunal finds that the terms of the October 2018 Agreement *do* preclude the Claimant making an application for wasted costs, as paragraph 2.2 of that agreement provides:

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

88. The Claimant makes two arguments that the October 2018 Agreement does not preclude an application for wasted costs:

a) *The construction argument*: The October 2018 Agreement should be construed as not applying to the Wasted Costs Application he now makes, as the terms of the October 2018 Agreement would not have been understood by a reasonable person, in all the circumstances surrounding the making of that contract, as including those costs. This, the Claimant says, is because the bargain he struck in entering into the October 2018 Agreement was on the understanding that all documents relevant to the issues in the case had been disclosed to him – a reasonable understanding in light of REJ P Hildebrand's 10 July 2017 Order to that effect. The Claimant says that he was actively misled by the Second Respondent's failure to disclose the 2014 R1 LDA to him, given it knew the relevance of that document to his prospects of demonstrating how his relationship with the Second Respondent satisfied the conditions in section

43K(1)(a). That failure, the Claimant says, was well-known to HD, because they had advised on the amendments to that document that culminated in the 2014 LDA.

b) *The misrepresentation argument*: He entered into the October 2018 Agreement on the basis of a materially false or negligent representation (that all relevant documents had been disclosed to him), that that misrepresentation had either been intended by the Second Respondent to induce him into acting to his detriment or …, and the Claimant had been induced to act to his detriment in reliance on that materially false misrepresentation by entering into the October 2018 Agreement (*Zurich Insurance*). This, the Claimant says, is supported by his uncontested evidence in his witness statement that he would not have entered into the October 2018 Agreement had he known of the existence and terms of the 2014 R1 LDA.

89. Specifically, the Claimant says that the failure to disclose the 2014 R1 LDA misled him in two respects:

a) Under the 2012 Template LDA the Director of Medical and Dental Education was a representative of the First Respondent, whereas under the 2014 R1 LDA the Director of Medical and Dental Education was a representative of the Second Respondent; and

b) While the Gold Guide provided (at paragraphs 4.7 to 4.9) that day-to-day management of training programmes for junior doctors rested with the Postgraduate Dean, the Claimant needed the 2014 R1 LDA to understand that this meant that the Second Respondent had day-to-day management of doctors training to be consultants.

90. The Tribunal can see that the 2012 Template LDA provides that the Director of Medical Education was representative of the First Respondent, but it has not been made clear how that difference affected the Claimant's understanding of the arrangements between the parties in a way relevant to his ability to establish that he was employed by the Second Respondent for the purposes of section 43K(1).

91. In addition, the 2012 Template LDA provided that the Postgraduate Dean was a representative of the London Deanery (and the Second Respondent assumed the London Deanery's responsibilities under that agreement from April 2013) (paragraph 34 of Schedule C).

92. On the broader arguments the Claimant makes, the Tribunal finds the Claimant's position entirely unconvincing.

93. In relation to the construction argument:

a) The principle demonstrated by the *Investors Compensation Scheme* case and others is that the starting point in construing a contract is that words are to be given their natural and ordinary meaning. The natural and

ordinary meaning of the words "*full and final settlement of all or any claim or application for costs / expenses… against any other party or parties representative*" include the Wasted Costs Application the Claimant now makes.

b) The Claimant was professionally advised by solicitors and Counsel at the time of entering into that agreement, and the concept of wasted costs would have been very familiar to them if not him. There is no ambiguity in the drafting, and there is no reason to suppose that the Claimant, with the benefit of professional advice, did not understand the costs protection this provision afforded the Second Respondent's representatives, including HD.

c) As for the fact that the Claimant did not, at that time, have a copy of either the 2014 R1 LDA or the 2014 Template LDA (or indeed the 2012 R1 LDA), this is accepted, as is the fact that he did have a copy of the 2012 Template LDA. It is evident, though, that the Claimant and his advisers knew that:

   (i) Learning and Development Agreements governed important aspects of the relationship between the Respondents relating to the employment and training of the Claimant. Indeed, in a skeleton argument presented on behalf of the Claimant in anticipation of the May 2018 hearing (which did not go ahead because the Second Respondent withdrew its strike-out application a few days before it was scheduled to begin) the Claimant:

      - Argued that the relationship between the Second Respondent and the Claimant was governed by a Learning Development Agreement; and
      - Cited provisions of the 2012 Template LDA as showing that the Second Respondent determined the terms on which the Claimant was to be engaged to work.

      This shows that the Claimant knew and appreciated the significance of the Learning and Development Agreement as regards the appropriate characterisation of the relationship between him and the Second Respondent before he entered into the October 2018 Agreement;

   (ii) The 2012 Template LDA was a template, and the fact that the template would have formed the basis for the actual Learning and Development Agreement entered into by the Respondents would have been clear to the Claimant, not least because of his familiarity with the Gold Guide and its reference to "*educational contracts or Service Level Agreements between [the Second Respondent]… and [LEPs]*"; and

(iii) The applicable Learning and Development Agreement between the Respondents, based as it was on the 2012 Template LDA, was expected to be in place for a year before being replaced by a subsequent agreement (that is stated in its terms).

If the Claimant was concerned that he needed to see the specific version of the Learning and Development Agreement entered into between the First Respondent and the Second Respondent at any time during the events he complained about before agreeing to the terms of the October 2018 Agreement, he could have asked for it. These considerations are important aspects of the "*practical context*" in which the October 2018 Agreement was entered into (*Tishbi*).

d) Other important parts of the "*practical context*" relevant to the construction of the October 2018 Agreement were:

(i) The state of the litigation at the time the agreement was reached:

- the Court of Appeal, in May 2017, had agreed with the Claimant that it was possible that the Second Respondent was also the Claimant's "*employer*" for section 43K(1) purposes; and
- The October 2018 Agreement was reached during the hearing before the Employment Tribunal to determine the Claimant's substantive claims. The Second Respondent had already acknowledged that it was the Claimant's employer for section 43K(1) purposes by that point;

(ii) The arguments that were presented at trial:

- As described above, the skeleton argument presented by the Claimant ahead of the May 2018 hearing, based on the 2012 Template LDA, showed that the Claimant knew and understood the significance of the Learning and Development Agreement(s) between the Respondents;

(iii) The correspondence between the parties that immediately preceded the trial:

- The only information the Tribunal has about this is that the inclusion of the wording specifically around parties' representatives was sought by the Claimant, given a concern on that side that the Claimant and his solicitors were at risk of costs awards. The fact that the reference to parties' representatives was included at the request of the Claimant does not mean that the Claimant and his advisers did not contemplate the possibility of the benefit of the clause working the other way. The Claimant's solicitors and his Counsel were perfectly capable of drafting this provision so as to only provide

protection extending to the Claimant's side representatives (as Norris J put it in *Tishbi*, advisers such as the Claimant had at the time of entering into the October 2018 Agreement "*are able users of language*"), but that is not the drafting that was agreed upon; and

(iv) The material that was available to be deployed at trial:

- The material included the 2012 Template LDA, but did not include the 2012 R1 LDA, the 2014 Template LDA, or the 2014 R1 LDA.

e) The Claimant's argument that he has been the victim of "sharp practice" on the part of the Second Respondent by its failure to disclose the 2014 R1 LDA or the 2014 Template LDA to him cannot be sustained. His own representations to this Tribunal maintain that 2014 R1 LDA, "*while structured differently*" to the 2012 Template LDA, "*sets out a number of similar terms, which would have been the material terms for C's employment (though C did not discover this LDA until [Mr Greene's Freedom of Information Request was answered]*". It is evident that, at the time of entering into the October 2018 Agreement, the Claimant had a clear appreciation of the claims available to him such that the absolutely plain language in the October 2018 Agreement binds him now and precludes him from pursuing the Wasted Costs Application (as is consistent with the EAT decision in *Howard*).

94. As for the misrepresentation argument:

a) Whilst a misrepresentation can be made by silence, or non-disclosure, here the Claimant knew in October 2018 of all the matters listed in paragraph d) above. There was no "silence" or other kind of misrepresentation by the Second Respondent – the 2012 Template LDA and the Gold Guide communicated significant information to the Claimant which he used effectively when he established that the Second Respondent did employ him for section 43K(1) purposes before entering into the October 2018 Agreement.

b) The Claimant has averred that he would not have entered into the October 2018 Agreement had he known of the 2014 R1 LDA. HD *has* challenged this assertion (despite the Claimant's assertion that it did not) - by pointing to numerous provisions in the Gold Guide which described the Claimant's relationship with the Second Respondent and brought to the Claimant's attention that there was an educational contract or a service level agreement between the Respondents.

c) Tellingly, when asked about his understanding of the significant differences between the 2012 Template LDA and the 2014 R1 LDA, besides pointing to the fact that the 2012 Template LDA is a template

which does not name the First Respondent whereas the 2014 R1 LDA does (and upon seeing the 2012 Template LDA, the Claimant would have known it would have been particularised for use with the First Respondent), the Claimant could not point to any difference which the Tribunal considers at all material between the understanding he had of his relationship with the Second Respondent:

(i) from the combination of the Gold Guide and the 2012 Template LDA, which he had when he entered into the October 2018 Agreement; and

(ii) upon seeing the 2014 R1 LDA, which post-dated his entry into the October 2018 Agreement.

The Claimant's position that he would not have entered into the October 2018 Agreement had he known of the 2014 R1 LDA is not supportable.

95. The Tribunal finds that the October 2018 Agreement precludes the Claimant from bringing the Wasted Costs Application.

96. The Claimant argues that HD cannot rely on the terms of the October 2018 Agreement, as it was not a party to that agreement, and express rights for HD to enforce it were not given by its terms to HD pursuant to the Contracts (Rights of Third Parties) Act 1999. This is misconceived: HD is not looking to *enforce* the October 2018 Agreement - the Claimant is looking to set it aside so he can pursue his Wasted Costs Application.

<u>If the 15 October 2018 settlement agreement does not preclude the making of a wasted costs order, does the 2016 Court of Appeal no costs Consent Order preclude the making of a wasted costs order? (Issue 1.2 in the Orders of EJ Taylor)</u>

97. This need not be considered in light of the answer to the previous question, but in any event the Tribunal finds that the Consent Order also precludes the making of the Wasted Costs Order to the extent that the wasted costs sought were incurred up to the time when the Court of Appeal delivered its judgment.

98. Again, the Claimant argues that the Consent Order should be construed so as not to preclude the Wasted Costs Application. The Claimant does not contend that the Second Respondent intentionally induced the Claimant to enter into the Consent Order on the basis of a false misrepresentation that it knew to be false, or that he was the victim of negligent misrepresentation on the part of the Second Respondent.

99. At the time of the Consent Order, no order for disclosure had yet been made (the first such Order was not made until REJ P Hildebrand's Orders of 10 July 2017) but, disclosure had occurred in connection with the strike-out litigation. It is accepted that, by this time, none of the 2012 Template LDA, the 2012 R1 LDA,

the 2014 Template LDA or the 2014 R1 LDA (together, the "**LDAs**") had been provided to the Claimant by the Second Respondent.

100. The Claimant says both that:

a) The Second Respondent had disclosed some documents to it, but had failed to comply with its duty not to withhold from that disclosure any further documents in its possession or power where there was a risk that the effect of withholding them might be to convey to the Claimant a false or misleading impression as to the true nature purport or effect of any document that had been disclosed (as per the *Birds Eye Walls* case). The Claimant avers that the failure to disclose the 2014 R1 LDA gave the Claimant a false and misleading impression; and

b) This failure was continuing at the time the Consent Order was entered into.

101. In relation to the construction argument:

a) The terms of the Consent Order are clear on their face – the kind of costs that each of the Appellant (the Claimant) and the Second Respondent was and is to bear is not confined to any particular category.

b) As for the factual matrix relevant to the construction of the Consent Order, the Tribunal notes that:

(i) The Consent Order was made ahead of the Court of Appeal hearing, when neither party knew the outcome of that appeal, each was aware that the decision could go their way or the way of the other party, and each was aware that the rationale of the Court could follow or depart from either or both parties' submissions. The terms of that order, made on 27 October 2016, stated that: "*Whatever the outcome of the Appellant's appeal, each of the Appellant and the Second Respondent shall bear its own costs*". These words were chosen in that context.

(ii) The possibility of a wasted costs order would have been known and understood by both of those parties, both of which were professionally represented.

(iii) There was no provision of any significance in the LDAs as regards the Claimant's relationship with the Second Respondent that the Claimant was not already aware of from the guidance set out in the Gold Guide. When asked in evidence what further detail the 2014 R1 LDA provided to his argument that he was employed by the Second Respondent, the Claimant's only answer was that the Gold Guide was "*nothing more than guidance*" – he could not point to any different understanding of his relationship with the Second Respondent gleaned from the 2014 R1 LDA than he already had from the Gold Guide.

(iv) The Gold Guide explicitly referred to the fact that there were "*educational contracts or Service Level Agreements*" between the Second Respondent and the relevant employing NHS trust (i.e., the First Respondent in the Claimant's case), and it summarised in those parts of those agreements that were relevant to junior doctor employment and training. The Claimant was aware at the time of asking the Court to make the Consent Order that such an educational contract or service level agreement existed between the Respondents and that that was the source of the description of some of the responsibilities in the Gold Guide.

c) In relation to the arguments presented at trial:

(i) The Claimant has argued in this wasted costs hearing that the Employment Tribunal in April 2015 was unpersuaded of the significance of the Gold Guide, and that that is relevant factual context to whether the Gold Guide provided him with a sufficient understanding of the relationship between him and the Second Respondent for the purpose of making his argument that he was a section 43K(1) worker of the Second Respondent. However, that is inconsistent with the argument that he took and won before the Court of Appeal – he established that more than one person could substantially determine the terms of the Claimant's engagement for section 43K(1) purposes, and he did so in May 2017 using the Gold Guide when none of the LDAs had yet been disclosed. The Claimant believed that he was a section 43K(1) worker of the Second Respondent in the absence of seeing the LDAs.

d) These findings do not support the Claimant's argument that the Consent Order would be construed by a reasonable person as excluding the wasted costs application he now pursues, nor that he has been the victim of a "sharp practice" on the part of the Second Respondent or HD. The terms of the Consent Order are absolutely clear and leave no room for doubt (*Howard*). It is far from unconscionable that the Consent Order precludes the Claimant from pursuing his Wasted Costs Order – it is part of exactly what the parties envisaged when they entered into it. The Claimant should be held to the bargain he made in asking (alongside the Second Respondent) the Tribunal to make the Consent Order.

102. There is one caveat to this conclusion – the terms of the Consent Order evidently apply to costs incurred by the Claimant and the Second Respondent up to the point of the Court of Appeal's judgment. The part of the Wasted Costs Application that relates to sums incurred after that point (which relates to the Claimant's preparation for the remitted hearing that was due to take place before the Employment Tribunal between 14 and 17 May 2018), the Consent Order does not apply to that part.

103. As above, the argument the Claimant makes that the Consent Order is not enforceable by HD is not applicable. The Claimant needs to satisfy the Tribunal that the Consent Order does not preclude his Wasted Costs Application.

Does the May 2018 agreement preclude the making of a wasted costs order? (Issue 1.3 in the Orders of EJ Taylor)

104. This question does not need to be addressed given the answers to the two previous questions, but the Tribunal has considered it in any event.

105. The May 2018 Agreement, providing for full settlement "*of all the Claimant's claims for costs in respect of the "worker" issue*", was entered into after the 2012 Template Agreement had been disclosed to the Claimant, but before the Claimant saw the 2014 R1 LDA (which was provided to him by Mr Greene after the same was provided to him in response to a Freedom of Information request).

106. As for the October 2018 Agreement and the Consent Order, the Claimant asserts that the May 2018 Agreement should be construed so as to exclude from its scope the Wasted Costs Application as he did not understand that he had the basis for making a wasted costs application at the time of entering into the May 2018 Agreement (because he was unaware of the 2014 R1 LDA due to the Respondents' failure to disclose it to him). In the alternative, similarly to his position as regards the October 2018 Agreement, he says that he was induced to enter into the May 2018 Agreement by a false or negligent misrepresentation from the Second Respondent, and so it would be unconscionable to hold him to that agreement.

107. As above, the Tribunal is unpersuaded that:

    a) The May 2018 Agreement would be construed by a reasonable person having the relevant factual matrix so as to exclude claims arising from the failure to disclose the 2014 R1 LDA;

    b) The failure to disclose that document (or the 2014 Template LDA) was an example of "sharp practice"; or

    c) That the Second Respondent made a false or negligent misrepresentation to the Claimant that induced him to enter into the May 2018 Agreement, and that it would be unconscionable not to provide him a remedy.

108. The construction argument does not succeed given:

    a) The Claimant knew of the 2012 Template LDA, and that document was evidently a template, and was evidently envisaged to be updated after around a year;

    b) The Claimant knew from the Gold Guide that there was an educational contract or a service level agreement between the Respondents, and that

that agreement formed the basis for the arrangements between him and the Second Respondent described in the Gold Guide; and

c) The Claimant understood the significance of his relationship with the Second Respondent, and the Second Respondent had, by this time, conceded that it employed him for section 43K(1) purposes.

109. A reasonable person construing the May 2018 Agreement would take these matters into account, and would not exclude from the construction of the May 2018 Agreement wasted costs. Nor would such a reasonable person, being aware that the Claimant was advised by solicitors and Counsel at the time of entering into the May 2018 Agreement, consider that the reference to "*the Claimant's claims for costs*" would exclude wasted costs – wasted costs are a category of costs, and if there was a desire to exclude them, that would have been stated explicitly.

110. The Claimant's knowledge of those matters means there was no "sharp practice" on the part of the Second Respondent. The Claimant entered into the May 2018 Agreement, as "*full settlement of all the Claimant's claims for costs in respect of the "worker" issue*" aware of those matters. The Claimant knew there was an underlying Learning and Development Agreement, and he knew he only had a template, and that that template had likely been superseded (given its terms anticipated an updated version after around a year). There was no concealed claim of the type envisaged by Lord Nicholls in *BCCI*. The words of the Order should be given their natural and ordinary meaning.

111. The misrepresentation argument also does not succeed:

a) There was no misrepresentation – the Claimant knew the relevant information of significance; and

b) The Tribunal finds the Claimant's contention that he would not have entered into the May 2018 Agreement had he known of the 2014 R1 LDA implausible.

112. The argument made by the Claimant that HD cannot enforce the May 2018 Agreement because HD were not a party to that Order is misconceived – the relevance of the May 2018 Agreement is that it precludes the Claimant's application for wasted costs from succeeding.

<u>Can and should the tribunal consider making a wasted costs order of its own initiative? (Issue 1.4 in the Orders of EJ Taylor)</u>

113. On the face of it, the Tribunal's power to consider whether to make a wasted costs order in Rule 82 could be used to consider whether, in the circumstances advocated for by the Claimant, it is appropriate to make a wasted costs order.

114. The *Stuart* and *Banerjee* cases cited above each arose in the context of an application for reconsideration, but in analogous circumstances to the situation here. Each stands for the propositions that where a party has made an out-of-time application for reconsideration:

    a) The tribunal should not circumvent the time limit applicable to that application and assess the merits of that application pursuant to its distinct power to reconsider the matter "*on its own initiative*"; and

    b) The application excludes the tribunal reconsidering the decision on its own initiative.

115. Here, the Claimant's application was made in time, but is precluded by each of the October 2018 Agreement, the Consent Order and the May 2018 Agreement. This prompts the question, therefore, of whether the Tribunal is precluded from considering the Claimant's Wasted Costs Application pursuant to its power to make a wasted costs order on its own initiative, given that the Tribunal is not bound by the terms of those agreements/order.

116. In *Banerjee*, Lord Summers observed that a party, without making an application, may ask the tribunal to reconsider "*on its own initiative*" – but that is not the case here - the Claimant has clearly made an application for wasted costs.

117. In *Stuart*, the EAT acknowledged that there could be a situation where, in dealing with an application for reconsideration from a party, the tribunal notices something else, an entirely separate issue, which merits reconsideration. Arguably following, and finding merit in the argument made as part of the Claimant's application would not satisfy the description of an "*entirely separate issue*". The Tribunal finds that it is precluded from making a wasted costs order "*on its own initiative*" given it would do so having considered the Claimant's application.

118. The second reason why it is not appropriate for the Tribunal to make a wasted costs order on its own initiative is that the interests of justice do not point to the tribunal doing so in a situation where the Claimant and the Second Respondent entered into three different arrangements each of which the Tribunal has found precludes the success of the Claimant's application, where is there is no unjust result created by the parties adhering to the bargains they made.

119. The third reason why it is not appropriate for the Tribunal to make a wasted costs order on its own initiative is that this Tribunal is the same level as the Tribunal which made the order that is referred to in this judgment as the May 2018 Agreement. In light of the Tribunal's finding that the Gold Guide provided the Claimant with a good understanding of the significant terms of the Learning and Development Agreement between the Respondents, the Claimant's subsequent uncovering of the 2014 R1 LDA does not represent: a material change of circumstances, or a material omission or misstatement, or some other substantial

reason necessitating interference, and so the Tribunal has no power to reconsider that May 2018 Agreement under Rule 29 of the ET Rules (*Serco*).

If it is open to it to do so, should the tribunal make a wasted costs order and in what amount? (Issue 1.5 in the Orders of EJ Taylor)

120. It is not open to the Tribunal to make a wasted costs order, because:

a) The Claimant's application is precluded by the October 2018 Agreement, the Consent Order and the May 2018 Agreement; and

b) The Tribunal cannot and will not make such an order on its own initiative.

c) The second question, or the "causation" condition: If so, did such conduct cause the applicant to incur unnecessary costs?

d) The third question, or the "discretion" condition: If so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

Has there been any improper, unreasonable or negligent act or omission on the part of HD? (Issue 1.6 in the Orders of EJ Taylor)

121. This is the first question, or "gateway" condition.

122. The Claimant's Wasted Costs Application avers that HD's conduct, by not disclosing the 2012 Template LDA (described in the third paragraph of his Wasted Costs Application under the hearing "Background" as being the document disclosed to the Claimant on 14 February 2018) was unreasonable, further or alternatively improper, and further or alternatively, negligent – and that this was abusive conduct in the face of the court.

123. In the course of his submissions to this Tribunal, the Claimant has expanded on that argument to include the 2012 R1 LDA, the 2014 Template LDA and the 2014 R1 LDA in his arguments as to why wasted costs should be awarded.

124. Mr Wright of HD gave evidence to the Tribunal on its behalf. He made it clear that HD is not authorised by the Second Respondent to discuss any privileged matters, and nor did Mr Wright purport to waive any legal professional privilege subsisting in any communication. Throughout this period, the supervising partner at HD was Phillip Farrar, who has since retired. Mr Wright's account is best summarised by reference to the different time periods which relate to the Wasted Costs Application:

a) *The period up to 27 June 2016:* Throughout this period, neither he nor any of the HD team working on this case was aware of the existence of the LDAs, despite the fact that their commercial colleagues had worked on the

2014 Template LDA and some of the particular Learning and Development Agreements which used that template.

b) *27 June 2016 to 20 March 2017*: On 27 June 2016 Mr Wright became aware of a Learning and Development Agreement in another region, between the Second Respondent and a different NHS trust to the First Respondent. At that time, the Second Respondent provided the 2015 version of the template Learning and Development Agreement to him. Mr Wright noted that, at this time in the chronology:

   (i) The EAT had found the opening language of section 43K(1) to mean that, because the Claimant was a section 230(3) worker of the First Respondent, he could not also be a section 43K(1) worker of another person.

   (ii) The Claimant's argument in his appeal was that the Tribunal had erroneously focused on *which* body, as between the First Respondent and the Second Respondent, played the greater role in determining his terms of engagement, and the Tribunal thereby failed to appreciate that both may do so.

   (iii) It was not for the Court of Appeal to make relevant findings of fact regarding whether the Second Respondent and/or the First Respondent substantially determined the terms on which the Claimant worked.

   (iv) Around this time Mr Farrar was providing the Second Respondent with advice on another matter (in respect of which the Second Respondent does not waive privilege). Mr Wright said that nothing he had seen in relation to that matter causes him concern that Mr Farrar, or Counsel instructed on that matter, took the view at the time that the Learning and Development Agreements might be material to the Claimant's status as a section 43K worker of the Second Respondent. In the context of discussing the matter Mr Farrar was advising on with him, Mr Farrar gave Mr Wright copies of "similar" Learning and Development Agreements to the 2015 template that had been sent to Mr Wright.

c) *21 March 2017 to 9 July 2017*: The Court of Appeal handed down its judgment on 21 March 2017, concluding that:

   (i) A person could be both a section 230(3) worker of one person and a section 43K worker of another; and

   (ii) The question of whether a person substantially determined an individual's worker's terms and conditions did not require that person to determine the individual's terms more than any other person.

The Court did not determine whether the Claimant was in fact a section 43K worker of the Second Respondent, but remitted that matter to the Employment Tribunal to determine as a matter of fact.

d) *10 July 2017 to 23 November 2017*: In preparation for the remitted hearing, the Employment Tribunal made an order on 10 July 2017 for standard disclosure, which was to be complied with by 24 August 2017, and an extension was agreed between the parties to that deadline to 28 November 2017. Mr Wright's evidence was that it was following this hearing that HD and Counsel appreciated that further disclosure was necessary because of the Court's conclusion and the issues that were now to be determined by the Employment Tribunal at the remitted hearing. They put together a list of additional documents that should be disclosed by the Second Respondent, and attached that list to an email sent to their client on 13 October 2017.

e) *24 November 2017 to 13 February 2018*: The Second Respondent provided HD with a copy of the 2012 Template LDA on 24 November 2017. Disclosure did not take place within the timeframe previously agreed as there was a change in fee-earner handling the Claimant's case, and so a revised deadline for disclosure was agreed upon by the parties, being 15 February 2018.

f) *14 February 2018*: HD, on behalf of the Second Respondent, disclosed the 2012 Template LDA to the Claimant, along with other documents, including a variation agreement from 2013 to the 2012 Template LDA. None of the 2012 R1 LDA, the 2014 Template LDA nor the 2014 R1 LDA was disclosed.

g) *15 February 2018 to 11 June 2019*: No complaint was made about the documents disclosed to the Claimant on the Claimant's behalf in this period, including in the Claimant's skeleton argument for the (ultimately aborted) May 2018 hearing.

h) *12 June 2019*: The Claimant made the Wasted Costs Application, and Mr Wright saw the 2014 R1 LDA for the first time as part of that application.

125. The Tribunal's view on whether HD's conduct in this period, in not disclosing the 2012 Template LDA (the document that was the focus of the Claimant's Wasted Costs Application), was unreasonable, improper or negligent is as follows:

a) *The period up to 27 June 2016:*

(i) It is regrettable that the HD team working on First Claim and the Second Claim were unaware of the work that had been performed by their commercial colleagues on developing the 2014 Template LDA and tailoring it for specific NHS trusts.

(ii) However, the Gold Guide made it plain that there were "*educational contracts or Service Level Agreements between [the Second*

Respondent]… and [LEPs]", and it is unclear why HD did not know of the existence of the Learning and Development Agreements upon enquiry of its client (which the Tribunal would have expected to have been made) as to what these contracts or agreements were. It must not be forgotten, though, that HD is unable to tell the Tribunal about the advice it gave the Second Respondent at this time, as the Second Respondent maintains, as is its right, its privilege in that advice.

(iii) At this point in the chronology, there had been no Order for disclosure, and so the duty not to mislead (as per the *Birds Eye Walls* case) applied to the Second Respondent (and all parties). Very significantly, the Tribunal has not been persuaded by the Claimant that there was any difference of any materiality between the summary of the relationship between him and the Second Respondent provided by the Gold Guide and the information to be gleaned from the LDAs (or the "*educational contracts of Service Level Agreements*" as HD would have understood them to be at this time). The Claimant has not shown that the duty, that rested on the Second Respondent, not to withhold from disclosure any document the suppression of which would render a disclosed document misleading, was engaged in relation to the LDAs.

(iv) There is no basis for finding that, in this period, HD acted in any way that was unreasonable, improper or negligent.

b) *27 June 2016 to 20 March 2017*: From this point in time, Mr Wright and his team knew of the existence of Learning and Development Agreements.

(i) Even though they had not seen the LDAs, the relevant HD team advising on the Claimant's claim would have known that there was at least one Learning and Development Agreement between the Respondents in the period with which the Claimant's claim was concerned, and that such an agreement would have governed the legal obligations between the parties on matters relevant to the argument the Claimant was making.

(ii) While Mr Wright's position is that he would not have considered such agreements "*material*" to the legal issues given the state of the law, that is not the applicable test for whether material is disclosable. At this point in time, as (still) only voluntary disclosure had taken place, the relevant test for whether further disclosure was required was that described in the *Birds Eye Walls* case: the duty not to withhold from disclosure any document the suppression of which would render a disclosed document misleading.

(iii) The Tribunal finds HD's position – that because the state of the law as it was then understood after the EAT decision on 9 March 2016,

neither the Second Respondent nor HD understood the applicable Learning and Development Agreement(s) between the Respondents to be relevant documents - unpersuasive. However ambitious the Claimant's argument (that both the First Respondent and the Second Respondent could employ him for the purpose of "whistleblowing" protection) seemed to the Second Respondent at the time, that was the position the Claimant was taking. If standard disclosure had been Ordered, all the documents relevant to that argument should have been disclosed, including the LDAs.

(iv) However, as there had been no Order for disclosure at this time, the relevant Learning and Development Agreement(s) needed to be disclosed only if such document(s) would render a disclosed document, such as the Gold Guide, misleading. The Tribunal has not been persuaded that there was any difference of significance vis-à-vis the Claimant's relationship with the Second Respondent between the Gold Guide and the LDAs, so finds that at this point in time there was no duty to disclose the LDAs.

c) *21 March 2017 to 9 July 2017*: This period post-dated the Court of Appeal judgment. Again, no Order for disclosure had been made, and the duty not to mislead did not require the disclosures of the LDAs.

d) *10 July 2017 to 23 November 2017*: Disclosure had been Ordered to take place by a deadline which was extended. This was therefore again a period of voluntary disclosure. The duty to not mislead did not require the disclosure of the LDAs.

e) *24 November 2017 to 13 February 2018*: HD was aware of the 2012 Template LDA, and therefore was aware of (although had not seen) the 2012 R1 LDA, and would have expected there to be a 2014 Template LDA and the 2014 R1 LDA. In this period, given the extension to the disclosure deadline, the obligation to disclose was confined to the duty not to mislead, which did not require disclosure of any of the LDAs.

f) *14 February 2018*: The 2012 Template LDA, the document which has formed the basis for the Wasted Costs Application, was disclosed.

126. In light of these findings, there is no basis for a finding that HD acted unreasonably, improperly or negligently. Significantly, the Gold Guide was in evidence, and had been heavily relied upon by the Claimant throughout the litigation concerning the Strike-Out Application. While the Tribunal finds that the 2012 Template LDA was a relevant document to the issues in play, there is no evidence to support any argument that the Second Respondent's duty not to withhold from disclosure any document the suppression of which would render a that Gold Guide, or any other disclosed document, misleading, was breached, or that HD acted unreasonably, improperly or negligently in advising the Second Respondent or its duties to the tribunals or court.

127. Moreover, the Tribunal notes that HD is not authorised by the Second Respondent to discuss privileged matters. As per the decision in *Ridehalgh*, it would only be if, with all allowances made for the inability of HD to tell the whole story, HD's conduct of proceedings was quite plainly unjustifiable, that it can be appropriate to make a wasted costs order. The evidence before the Tribunal about HD's conduct is very, very far away from that threshold.

128. Although the Wasted Costs Application was not based on the non-disclosure of any of the 2012 R1 LDA, the 2014 Template LDA or the 2014 R1 LDA, even if those documents had been the subject of that application, the Tribunal's view is that:

    a) There was no obligation to disclose any of those documents before the date when Ordered disclosure took place, on 14 February 2018, given the Tribunal has found that the Claimant has not shown that there was any difference of any significance between:

        (i) The relationship between each of the Respondents and the Claimant as described in the Gold Guide; and

        (ii) The relationship between each of the Respondents and the Claimant as shown in the 2012 R1 LDA, the 2014 Template LDA or the 2014 R1 LDA.

    The duty not to mislead did not require any of those documents to be disclosed.

    b) It is not clear to the Tribunal why none of the 2012 R1 LDA, the 2014 Template LDA or the 2014 R1 LDA was disclosed by the Second Respondent on 14 February 2018. At this point, the Order to disclose all documents relevant to the issues in the case required the disclosure of the 2012 R1 LDA, the 2014 Template LDA and the 2014 R1 LDA. However, the Tribunal is <u>not</u> persuaded, after making all allowances for the inability of HD to tell the whole story (because the Second Respondent does not waive privilege), that HD's conduct of proceedings was quite plainly unjustifiable (*Ridehalgh*). The threshold for making a wasted costs order in respect of the failure to disclose these documents is not met.

<u>If so, then what extra costs was the claimant caused to incur? (Issue 1.7 in the Orders of EJ Taylor)</u>

129. Again, this question need not be addressed given the answers to the questions that precede it, but the Tribunal notes that the Claimant successfully persuaded the Court of Appeal that he *could be* a worker of the Second Respondent for section 43K purposes without being in possession of the 2012 Template LDA (or any other Learning and Development Agreement). The Claimant may speculate that had the Court of Appeal seen the LDAs it may have decided that he was, in

fact, a worker of the Second Respondent in its conclusions on 5 May 2017, without the need to remit the matter to the Employment Tribunal – but that is speculation. The Claimant cannot make any causative link between the Second Respondent's failure to disclose the 2012 Template LDA until 14 February 2018 and any costs he incurred.

130. Once the disclosure Order applied to require the Second Respondent to disclose all documents relevant to the issues in the case (when the 2012 R1 LDA, the 2014 Template LDA and the 2014 R1 LDA should have been disclosed), the Claimant was in possession of the 2012 Template LDA, and he did not raise concerns about not having been provided with:

    a) The specific version of that agreement entered into between the Second Respondent and the First Respondent (i.e., the 2012 R1 LDA);

    b) Any updated version of that template (i.e., the 2014 Template LDA), which was anticipated by the terms of the 2012 Template LDA; or

    c) An updated specific contract between the Second Respondent and the First Respondent (i.e., the 2014 R1 LDA)

    (Mr Wright's evidence on this was unchallenged). Nor did the Claimant do so in his skeleton argument to the Employment Tribunal ahead of the (ultimately vacated) May 2018 remitted hearing. The Claimant has not demonstrated that the non-disclosure of these documents in the period 14 February 2018 to 17 May 2018 resulted in any additional costs being incurred by him.

Conclusions

131. While the Claimant was able to make the Wasted Costs Application on 12 June 2019, he is precluded from succeeding in it by:

    a) The October 2018 Agreement;

    b) The Consent Order; and

    c) The May 2018 Agreement.

132. The Tribunal is not precluded by those agreements from making a Wasted Costs Application "*on its own initiative*", but:

    a) It cannot consider the Claimant's Wasted Costs Application under the guise of using its own initiative;

    b) Analysing the Claimant's Wasted Costs Application has not resulted in the Tribunal finding an entirely separate issue which would render the making of any wasted costs order appropriate; and

    c) There is no material change of circumstances, material omission or misstatement, or some other substantial reason necessitating interference with the prior Order of the Tribunal that was the May 2018 Agreement, and

so the Tribunal has no power to reconsider that May 2018 Agreement under Rule 29 of the ET Rules (*Serco*).

133. In any event, even if the Wasted Costs Application were not precluded by the October 2018 Agreement, the Consent Order and the May 2018 Agreement:

a) The Tribunal is not satisfied that there has been any unreasonable, improper or negligent conduct on the part of HD; and

b) Neither the failure to disclose the 2012 Template LDA, nor the failure to disclose the 2012 R1 LDA, the 2014 Template LDA and the 2014 R1 LDA, has caused the Claimant to incur any additional costs.

134. In light of the above, the Tribunal finds that the Wasted Costs Application does not succeed.

Employment Judge Ramsden

Date 14 December 2024

Judgment and reasons sent to parties on:

17th December 2024

Grace T

For the Tribunal Office

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