APPEAL NO:

ON APPEAL FROM THE LONDON SOUTH EMPLOYMENT TRIBUNAL

CASE NOS: 2303023/2014 and 2301446/2015

IN THE MATTER OF A WASTED COSTS APPLICATION AGAINST THE SECOND RESPONDENT'S REPRESENTATIVES, HILL DICKINSON LLP

BETWEEN:

DR C M DAY

Appellant

-and-

(1) LEWISHAM & GREENWICH NHS TRUST
(2) HEALTH EDUCATION ENGLAND

Respondents in the Substantive Litigation

HILL DICKINSON LLP

Interested Party (Respondent to the Appeal)

NOTICE OF APPEAL

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1. The Appellant is Dr Christopher Day, of [redacted]

2. Any communication relating to this appeal may be sent to Edward Cooper, Partner, Slater & Gordon, [redacted]

3. The Appellant appeals from the wasted costs decision of Employment Judge Ramsden, sitting in the London South Employment Tribunal as set out in the written reasons sent to the parties on 17 December 2024.

4. The parties to the proceedings before the Employment Tribunal were as follows:

    a. The Appellant was the Claimant before the Tribunal;

    b. The Respondent to the Appeal is Hill Dickinson, against whom a wasted costs application was brought by the Claimant. It follows that Hill Dickinson was not a party to the proceedings below, but instead represented the Second Respondent, Health Education England. Hill Dickinson was represented by Leading Counsel instructed by Fiona McLellan, Partner, Hill Dickinson LLP, The Broadgate Tower, 20 Primrose Street, London EC3A 2EW. [redacted]

5. Copies of the following documents are attached to this Notice of Appeal:

    a. The written record of the Employment Tribunal's wasted costs judgment ("**the Judgment**") and the written reasons as to costs of the Employment Tribunal ("**the Reasons**");

    b. Original Wasted Costs Application dated 12 June 2019 and additional information dated 2 August 2019;

    c. The Claimant's Schedule of Loss in respect of wasted costs;

    d. The Claimant's closing submissions.

6. The Appellant has not applied for reconsideration of this decision.

7. The grounds upon which the Appeal is brought are that the Tribunal has erred in law, and/or has otherwise failed to give adequate reasons for its decision. This is explained further below in the Numbered Grounds.

8. Hereafter, the Appellant is referred to as "the Claimant", and the Respondent to the Appeal is referred to as "Hill Dickinson".

RELEVANT BACKGROUND

9. A summary of the background facts to this appeal are set out here for convenience, and to enable the Appeal Tribunal to contextualise the grounds.

10. On 12 June 2019, supplemented by further letter dated 2 August 2019, the Claimant made an application for wasted costs against Hill Dickinson following the discovery that Hill Dickinson had not only failed to disclose the Learning Development Agreements ("**LDAs**") which determined the Claimant's status as an employee of the Second Respondent, Health Education England ("**HEE**"), but that they had been responsible for drafting the LDAs on which that preliminary point had turned. The Claimant discovered the existence of the relevant LDA, which was known as "the 2014 LDA", via responses to FOI requests made by a journalist, Tommy Greene.

11. Key to the application brought by the Claimant was Hill Dickinson's failure to disclose at any point the 2014 LDA. This was the contractual agreement which set out the terms upon which the Second Respondent, Health Education England ("HEE"), employed the Claimant at the point of time relevant to his claim. HEE had insisted over the course of a number of years that they were not and could not be the Claimant's employers for the purposes of s43K Employment Rights Act 1996 ("the s43K point") arguing that it was "fanciful" for the Claimant to have asserted that they determined the terms on which the Claimant was engaged; and that the documents that they did selectively disclose (in particular the 'Gold Guide') supported HEE's position and made the Claimant's position "unarguable" and

"irreconcilable with the undisputed contemporaneous documentation". HEE maintained this position both on the facts and on the law, and pursued the s43K point up to the Court of Appeal, where despite the Claimant being successful, HEE still did not concede the point on the facts (despite on the findings of this tribunal at ¶¶124(b) the individual solicitors involved having been aware of the existence of LDAs). Hill Dickinson having drafted the 2014 LDA, would have known those submissions to have been misleading.

12. The 2014 LDA (which was never disclosed during the litigation see ¶128 of this tribunal's Reasons) was important because:

    a. It was the contract that governed the terms and conditions of the Claimant's employment with HEE, and showed that on the facts themselves HEE substantially determined the terms upon which the Claimant was employed;

    b. It was drafted by HEE's representatives, Hill Dickinson;

    c. It covered the period during which the Claimant said he was subjected to detriment by HEE;

    d. It showed a change in the relationship between HEE and the First Respondent, Lewisham and Greenwich NHS Trust ("**the Trust**"), which gave HEE even more control over a post-graduate doctor's training and career progression by embedding the powers of a Post Graduate Dean employed by HEE at the Trust.

13. But-for the non-disclosure of the 2014 LDA, it would have been untenable for HEE to contend (as they had done) between 2014 and 2018 that it was "fanciful" for the Claimant to suggest that HEE was his employer.

14. The Claimant, being entirely unaware of these factors, entered into a series of consent orders and settlement agreements, both in relation to the s43K point and in relation to his underlying claims.

15. Hill Dickinson were not a party to any of these agreements, and at no point did the Claimant have any reason to consider that he may have grounds for a wasted costs application against Hill Dickinson, because he was simply unaware of the failure to disclose the 2014 LDA until 2019.

16. The agreements and their relevant wording is as follows:

    a. The October 2016 Consent Order in relation to the costs of the Court of Appeal hearing relevantly provided:

        "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"

b. On 14 May 2018 the Claimant and HEE agreed to a consent order in the Employment Tribunal incorporating a £55,000 contribution towards the Claimant's costs ("**the May Agreement**"). The relevant wording in respect of the May Agreement was as follows:

> "*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*"

c. On 15 October 2018, C entered into a settlement agreement against R1 and R2, withdrawing his claims in exchange for not being pursued for costs by R1 and R2 ("**the October Agreement"; together, "the Agreements**") [336 – 342]. The circumstances of the October Agreement are highly contentious. Clause 2.2 of the October Agreement provides [338]:

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

17. Further detail as to the above as it was put before the Tribunal may be found in the parties' written submissions and in the Reasons.

NUMBERED GROUNDS

GROUND 1: ERRORS IN RELATION TO THE CONSTRUCTION OF CONSENT ORDERS / SETTLEMENTS

18. The Tribunal erred in its application of the relevant law in construing the settlement agreements as precluding a wasted costs application against Hill Dickinson. On a proper construction of the agreements, the Claimant is entitled to bring an application for wasted costs.

19. In particular:

a. The Tribunal has incorrectly or otherwise inadequately applied the dicta of Lord Bingham in **BCCI v Ali** [2001] UKHL 8 at ¶10; that 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. This is reflected in the EAT's decision in **Royal National Orthopaedic Hospital Trust v Howard** [2002] IRLR 849 at [6];

b. The Tribunal has further incorrectly applied the analysis of Lord Nicholls in **BCCI** at ¶32, such that where a general release would result in unfairness, it would be unconscionable to allow the other party to rely upon it.

c. The Tribunal has failed to view the agreements in their practical context, and has therefore incorrectly applied the tests in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1997] UKHL 28 (reaffirmed by the House of Lords in **Chartbrook Ltd v Persimmon Homes Ltd & Ors** [2009] UKHL 38), as well as the guidance given in **Alliance and another v Tishbi and others** [2011] EWHC (Ch) 1015;

d. The Tribunal has failed to consider in respect of the October 2018 Agreement the statutory requirements of a settlement agreement, and in particular that it must relate to the particular proceedings to be valid;

e. The Tribunal has failed to properly construe the scope of s1 Contracts (Rights of Third Parties) Act 1999.

20. While the Tribunal has correctly directed itself as to the law at ¶¶64 - 70, it has erred in its application of the law to the facts at ¶93 and ¶¶95 – 96, ¶¶97 – 103, and ¶¶104 – 112.

21. A proper application of the law to the Agreements and their factual matrices would have resulted in the Tribunal finding that HD was not entitled to rely on any of the Agreements as precluding a wasted costs application, because on a true construction of those Agreements:

a. A reasonable observer apprised of the background facts would not have known that a wasted costs application against Hill Dickinson for failing to disclose the 2014 LDA was covered by any of the Agreements;

b. It cannot be inferred from the facts that the Claimant was aware that he had a claim for wasted costs against Hill Dickinson and therefore it cannot be inferred that he intended to surrender rights of which he was not aware;

c. The practical context of the Agreements, as per **Tishbi** ¶15, demonstrates that these were agreements concluded in extraordinary circumstances (including during trial or just before a hearing), and that therefore on a proper construction the Agreements were not drafted so as to preclude wasted costs against Hill Dickinson;

d. That to construe the Agreements as validly settling a wasted costs application against Hill Dickinson is unconscionable on the facts as presented and contrary to the dicta of Lord Nicholls in **BCCI**; and,

e. That in any event it is an error of law to allow Hill Dickinson to take the benefit of contracts to which they were not a party, and in relation to which there was no intention for them to benefit in relation to documents which, unknown to the Claimant, Hill Dickinson had drafted and failed to disclose.

Specific errors in relation to the construction of the 2016 Consent Order

22. It was clear from the evidence before the Tribunal that the 2016 Consent Order related to the costs of the Court of Appeal proceedings only given that the evidence showed that the 2016 Consent Order was made in place of an application under CPR 52.19.

23. This is a common application when parties move into a costs jurisdiction from a non-costs jurisdiction, and it relates to the costs of appeal only. It follows that the Tribunal at ¶96 has either erred in its interpretation of the scope of CPR 52.19, has erred in its construction of the 2016 Consent Order, or that the Tribunal has made an impermissible finding on the evidence before it.

GROUND 2: ERRORS IN RELATION TO THE 2014 LDA

24. The Tribunal further erred in law in relation to its construction of the 2014 LDA, by failing to grasp at ¶¶89-91 that the 2014 LDA:

    a. Was the agreement which in fact governed the employment relationship between the Claimant and HEE at the relevant time (and thus even if HEE had disclosed the 2012 LDA in any form prior to February 2018, it would still have been open to HEE to argue that this was not the relevant agreement in place at the time);

    b. Demonstrated a distinct change in how HEE controlled the Claimant's career progression by embedding the powers of a Post Graduate Dean, an employee of HEE, at the Trust. Had HEE disclosed the 2014 LDA, it would have been untenable for them to argue that the Claimant was not a worker of HEE for the purposes of the s43K point;

    c. Was distinct from the Gold Guide, upon which the Tribunal places impermissible emphasis. The Gold Guide, a non-contractual document, cannot, both as a matter of law and a matter of fact, be used as an extrinsic aid to the interpretation of contractual relationship between the Claimant, the Trust, and HEE, when a contractual document (the 2014 LDA) existed.

GROUND 3: ERRORS IN RELATION TO THE DOCTRINE OF PRECEDENT

25. At ¶16, ¶93, ¶94, ¶101, ¶108, ¶119, ¶125, ¶128, the Tribunal repeatedly emphasises that Hill Dickinson's failure to disclose the LDAs, and in particular the 2014 LDA, was not relevant because the Claimant had access to the Gold Guide. These statements disregard the doctrine of precedent, and contradict the factual

findings of the Employment Tribunal and the findings of the Employment Appeal Tribunal in this case.

26. At ¶¶45 - 46 of the Employment Tribunal's 2015 Reasons, EJ Hyde found as follows:

> "*45. The parties did not dispute that the 2013 Reference Guide for Postgraduate Specialty Training in the UK (the "Gold Guide") was a relevant source for determination of the terms governing the training of doctors.*
>
> *a. It stated at para 1.1 that it set out the arrangements agreed by the four UK Health Departments for specialty training programmes.*
>
> *b. The Gold Guide expressly provided however at para 1.6, p118 of the Bundle, that it did not address issues relating to terms and conditions of employment of doctors in specialty or general practice training, such as pay or the 'period of grace'.*
>
> *c. At para 2.12 (p123) it stated that the role of the Respondents was to manage the quality of training and to conclude education contracts with NHS providers.*
>
> *d. At para s 4.7 - 8, the Gold Guide made it plain that the relationship between the Trusts and the Respondents was governed by educational agreements.*
>
> *e. Paragraph 4.15 provided that the supervision of training was a key responsibility of the trusts Paragraphs 8.1 - 8.37 made plain the division of responsibilities between the Respondents and the Trusts. In particular at para 8.2, the Gold Guide stated: 'Trainees therefore have an employment relationship with their employer and are subject to their employing organisations' policies and procedures'.*
>
> *46. The Tribunal accepted that the Respondent's submission that the document which set out the detail of the relationship between the Claimant and the Respondents overwhelmingly pointed to the First Respondent as the body which was substantially responsible for determining the Claimant's terms and conditions of work*"

27. This is a finding on the facts that the Gold Guide was not sufficient for the Claimant to establish that he was HEE's employee. It was not overturned by the EAT or the Court of Appeal. It was therefore not open to EJ Ramsden to find in her Reasons that the contrary was correct.

28. At ¶14 of the EAT Judgment, Langstaff J found that

> *"the Claimant did not offer any clear factual basis for asserting that the terms were determined by HEE (the Tribunal said at paragraph 44 that he had not explained his case on this); and the Tribunal accepted that the terms governing the training of doctors were set out in what was known as the "Gold Guide", (the 2013 Reference Guide for Post Graduate Specialty Training in the UK). It was not suggested that HEE was responsible for the Gold Guide"*

29. At ¶¶41 – 42, Langstaff J further found that:

"*Though HEE here plainly made the decision as to where the Claimant was to work, it kept his training under review, and supplied much of his salary, this did not mean that the tribunal was obliged to hold that it had determined 'the terms on which [the Claimant]…was engaged to do the work', let alone done so substantially […] the Claimant had no employment with HEE. He was not a worker in respect of HEE. HEE did not introduce or supply him so far as their relationship was concerned, but only in respect of the work he did for Lewisham*"

30. These findings of Langstaff J in the EAT were similarly not overturned by the Court of Appeal. Therefore, this is a further or alternative basis upon which it was not open to the learned judge to find in her Reasons that the Gold Guide was all the Claimant needed access to in order to establish on the facts that he was a worker for the purposes of s43K as regarded HEE.

31. It follows that the Tribunal has erred in law in respect of its findings in relation to the Gold Guide.

32. In addition, the Tribunal has failed to engage with the Claimant's arguments on this point at ¶¶35 – 40 and ¶¶86 – 96 of the closing submissions, and has further failed to take into account relevant factors set out there in its findings in respect of the Gold Guide.

GROUND 4: FAILURE TO ENGAGE WITH THE CLAIMANT'S ARGUMENTS AND/OR FAILURES TO TAKE INTO ACCOUNT A RELEVANT FACTOR

33. Further or alternatively, Grounds 2 and 3 above are examples of the Tribunal failing to engage with the arguments as put by the Claimant, and in a further alternative, are examples of the Tribunal's failures to take into account relevant factors in its decision.

34. In addition to the above, the following paragraphs of the Reasons demonstrate the Tribunal's failure to engage with the Claimant's arguments as put, or to take into account a relevant factor:

    a. The statement at ¶89(a) that the Claimant says that he was misled in that: "*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 Direct of Medical and Dental Education was a representative of the Second Respondent*" is an incorrect articulation of what the claimant said that the difference was. The correct articulation of the key difference was set out in writing in the Claimant's closing submissions at ¶¶35 – 40.

    b. The finding at ¶90 that the Claimant has not made clear how the relationship between the parties changed as between the 2012 LDA and the 2014 LDA for the purpose of the s43K point runs contrary to the finding at ¶89(a) in any event.

c. At ¶93(d)(iii) the Tribunal relies upon the weight that was placed on the 2012 LDA in the Claimant's skeleton argument which was to have been used in the May 2018 hearing, while also placing weight on the Claimant's knowledge of the Gold Guide (as to which, see Grounds 2 and 3 above).

d. A t¶ 94(b) the Tribunal fails to engage with the nuance of the point that not only was the Claimant unaware of the 2014 LDA, but was also unaware that Hill Dickinson had drafted it. The Claimant emphasised to the Tribunal that had he been aware of these factors, he would not have agreed to the relevant clause in the October 2018 Agreement.

e. At the end of ¶94, the Tribunal's summary of the Claimant's position at the end of para 94 "*that he would not have entered into the October 2018 Agreement had he known of the 2014 R1 LDA*" again fails to grasp that the basis of the Claimant's application was that the 2014 LDA had been drafted by Hill Dickinson themselves. At ¶94(a) the Tribunal finds that there was no silence on the part of HEE; however, the relevant factor for the Tribunal (which was not taken into account) was that there *was* silence as to Hill Dickinson's drafting of the 2014 LDA.

f. At ¶96 the Tribunal finds that Claimant's argument that Hill Dickinson could not benefit from the October 2018 Agreement because they are not party to it "is misconceived" because "*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*". This essence of this finding is repeated at ¶¶103 and 112. This illustrates that the Tribunal has entirely failed to grasp the Claimant's arguments as to construction and scope of the 2018 Agreement.

g. At ¶¶110 and 111(b) in relation to the May 2018 agreement, the Tribunal further fails to take account of the Claimant's argument that a relevant factor in the application was his lack of knowledge of Hill Dickinson's involvement in drafting the 2014 LDA.

h. At ¶119 in relation to the contention that the tribunal could consider wasted costs of its own initiative even if there were bars in the October 2018, May 2018 or 2016 agreements, the Tribunal repeats the same error of ignoring the Claimant's lack of knowledge of Hill Dickinson's involvement in the drafting of the 2014 LDA.

i. At ¶128, the Tribunal ignores the correspondence dated 2 August 2019, sent subsequent to the initial wasted costs application in asserting that it was not based on the non-disclosure of any of the 2012 R1 LDA, the 2014

Template LDA or the 2014 R1 LDA. Further or alternatively, this finding is not **Meek** compliant.

GROUND 5: ERRORS IN RELATION TO THE LAW ON WASTED COSTS

35. At ¶125 and ¶128 of the Reasons, the learned judge finds that:

    a. Hill Dickinson were unable to tell the Tribunal about advice given to HEE due to privilege; and,

    b. there was no obligation on HEE to disclose the LDAs before 14 February 2018, and that in any event the reason that Hill Dickinson did not explain "the whole story" was because HEE did not waive privilege.

36. This is an error of law. A refusal to waive privilege does not preclude a finding of abuse "*when the particular conduct admits of no reasonable explanation*" (**Morris v Roberts (HMIT)** [2005] EWHC 1040 (Ch); see also **Ridehalgh v Horsfield** [1994] CH 205 (approved in **Medcalf v Mardell** [2002] UKHL 27).

37. In concluding at ¶133(a) that it was not satisfied that there had been any unreasonable, improper, or negligent conduct on the part of Hill Dickinson, the Tribunal has misapplied the test in **Ridehalgh**. In particular, the Tribunal appears to have failed to consider "negligence" in a non-technical sense; and has further failed to consider whether it was necessary for HEE to waive privilege in order for the Claimant's wasted costs application to succeed. It has simply assumed that privilege is the reason as to why Hill Dickinson could not explain their failure to disclose the 2014 LDA.

GROUND 6: INSUFFICIENT REASONING

38. The Claimant further contends that the Tribunal has given insufficient reasons as to its decisions at ¶¶125 – 127, ¶¶129 – 130 and ¶133. The success of this Ground will depend in part on the success of the previous grounds.

39. At ¶¶125 – 127 the Tribunal has not given adequate reasons for the Claimant to understand what reasonable explanation there could be in not disclosing the 2014 LDA at any point between 2015 and 2019, or the extent to which it is envisaged that this could be a permissible consequence of something protected by legal professional privilege.

40. In addition, at ¶¶129 – 130 and ¶133, the Tribunal has found that even if the wasted costs application was not precluded by the Agreements, that the conduct had not resulted in the Claimant incurring any additional costs. Given the costs set out in the Claimant's schedule of loss, it was incumbent upon the Tribunal to explain precisely why it considered that those costs were not attributable to Hill Dickinson's conduct.

Andrew Allen KC