IN THE EMPLOYMENT TRIBUNAL **Case Number: 2302023/2014**
LONDON SOUTH
B E T W E E N :-

Dr. CHRISTOPHER DAY

-and-

HILL DICKINSON LLP

DRAFT / LIST OF ISSUES

INTRODUCTION

In this list we refer to Hill Dickinson as "HD" and to the Claimant as "C".

Throughout C's litigation against Health Education England ("HEE"), the Second Respondent, HD has represented HEE. The First Respondent was Lewisham and Greenwich NHS Trust ("the Trust").

This List of Issues sets out the material factual issues between the parties in this wasted costs claim by C against HD.

For the avoidance of any doubt, while reference is made within this List of Issues to what the C asserts were false and materially misleading submissions made in skeleton arguments submitted on behalf of HEE, C does not contend that counsel for HEE knew that those submissions were false and materially misleading, but he does contend that HD knew or should have known they were false and materially misleading.

Fundamentally, HD's case is (as expanded upon below) that:-

(1) until the decision of the Court of Appeal, at all material times, the law was (wrongly – it is now known) thought to be that the opening words of s.43K ("*(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by Section 230(3) but who* …") meant that C, who was a worker as defined by section 230(3) (as an employee of the Trust) could not rely on the extended definition of 'worker; set out in s.43K, regardless of any influence HEE had in practice on the terms on which C was engaged to do the work. In essence, being a s.230(3) worker (as C plainly was) constituted a legal bar to his also being a s.43K extended definition worker, due to the specific words of s.43(K)(1);

(2) furthermore, until the decision of the Court of Appeal, at all material times, the law was (wrongly – it is now known) thought to be that the relevant question was **which**[1] of the parties (here, Lewisham and Greenwich NHS Trust and HEE) in practice determined the terms on which C was engaged to do his work more than the other and that the answer to that question had to be the Trust, rather than the correct question, which is **whether** (regardless of whether Lewisham and Greenwich NHS Trust substantially determined them, as they did – under a contract of employment) HEE) in practice **also** substantially (that is, more than trivially) determined the terms on which C was engaged to do the work. HD says that its skeleton arguments and position before the ET, the EAT and the CoA reflected this understanding of the law which was corrected by the CoA in its judgment and that, on this understanding of the law, any agreement between HEE and the Trust, including the LDA and specific LDA, was irrelevant;

[1] see §46 of the employment tribunal's judgment [95] and §§40 – 41 of the judgment of Langstaff J in the EAT [148]

(3) once the Court of Appeal had given judgment setting out the correct legal test, the '*Gold Guide*' – of which C and his advisers were very well aware – made plain that the degree to which HEE determined the terms on which C was engaged to do his work was more than sufficient for him to amount to a worker employed by HEE, within the meaning of ss.43K(1)(a)(ii) and 43K(2)(a) ERA.

HD contends that this is exactly the sort of satellite litigation which the Courts deprecate.

EFFECT OF THE SETTLEMENT AGREEMENT

1. 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?

Claimant's case

2. It is C's case that HD knew or ought to have known that the 2014 LDA between HEE and the Trust ["the specific 2014 LDA") (which they had drafted) was relevant to the determination of whether HEE was the employer of C for the purposes of section 43K of the Employment Rights Act and/or that the documents before, and representations made on behalf of HEE about the position to , the Employment Tribunal by HEE were incomplete and materially misleading.

3. C's position is that the settlement agreement should be set aside:-

(i) For negligent misrepresentation on the part of HD in failing to disclose the specific 2014 LDA or the fact that it had been drafted by it on which it was reasonable to believe that C would rely and C would not have entered into the settlement agreement had this representation not been made; alternatively

(ii) For fraudulent misrepresentation on the part of HD in failing to disclose the specific 2014 LDA or the fact that it had been drafted by it on which it was reasonable to believe that C would rely and that C was materially influenced by the said fraudulent misrepresentation;

(iii) C contends that that there would have been a negligent misrepresentation by reason of HD having drafted the 2014 generic and/or specific LDA;

(iv) In addition to failing to disclose the specific 2014 LDA or the fact that it had been drafted by it, because it was represented by HEE when HD were their solicitors:

(a) In their skeleton argument for the Employment tribunal dated 24 February 2015 it was stated that " it is submitted that it is fanciful to state that the party which substantially determines the terms and conditions of the claimants engagement is or could be the respondents" (see paragraph 26 of the HEE skeleton argument for the employment tribunal)

(b) Further at paragraph 30 of the ET skeleton argument, it is stated: "..Thus on the wording of the Gold guide it is submitted to be unarguable that the body which is responsible substantially for determining the claimant's terms and conditions as regards work is other than R1" [R1 being the Trust}

(c) At paragraph 34 of the ET skeleton argument : "… it is submitted that the effect of all of the above is to render fanciful any suggestion (which for the avoidance of doubt the claimant has not made) that the respondents are the entity which "substantially determines or determined the terms of which he is always engaged….". Any other case is simply irreconcilable with the undisputed contemporaneous documentation."

(d) In context these representations were false and materially misleading, and either negligent in that HD ought to have known that they were false or fraudulent in that they knew them to be false at the time they were made.

(v) In addition, this misrepresentation was further relied on and maintained in the skeleton argument of HEE before the EAT dated 25th January 2016 (see para 26) which stated that: "On the basis of the Employment Tribunal's findings of fact it was an entirely permissible conclusion that the Respondent was not the (or a) substantial determiner of the Claimant's terms of work." In context this representation was false and materially misleading, and either negligent in that HD ought to have known at the time it was made that it were false or fraudulent in that they knew it to be false at the time it was made

(vi) In addition, this misrepresentation was further maintained in the skeleton argument of HEE before the Court of Appeal, which

(a) at paragraph 19 asserted that "the appellant does not meet all the requirements of section 43K in any event as the respondent was never the substantial determinant of his terms in which he undertook the said work on the unimpeachable findings of the employment tribunal"

(b) At paragraph 20, the HEE skeleton maintained that despite the repeated and sustained attempts throughout this appeal to suggest the central control of the respondent over the appellant, on the employment tribunals findings of fact as the EAT correctly found them to have been such a categorisation of the respondents role is submitted plainly to be incorrect. It is submitted and on the employment tribunal's findings of

fact the only permissible conclusion was that the substantial determiner of the terms on which the appellant performed the work was to trust

(c) In context these representations were false and materially misleading, and either negligent in that HD ought to have known at the time they were made that they were false or fraudulent in that they knew them to be false at the time they were made.

4. C's position is that the agreement is between the parties to the litigation and is not an agreement entered into with those parties' legal representatives and this application for wasted costs is not an attempt by the Claimant to re-open his litigation against the Respondents – but rather a separate but related application against HD, the 2nd Respondent's solicitor. The Claimant did not know as at October 2018 that HD had drafted the specific and generic 2014 LDA (and indeed drafted many such documents in relation to HEE's relationship with various Trusts). Had the Claimant known then what he knows now, he would not have entered into an agreement which could stop him applying for costs against HD.

5. C disputes HD's paragraph 7(iv) below including:-

(i) that then counsel for C, Chris Milsom, instigated a discussion about settlement while C was part-way through his evidence in the hearing because there was a significant chance that C would not be successful with a finding of untruthfulness. C is concerned that HD make this assertion despite evidence from Mr Milsom given to the employment tribunal in June 2022 rejecting the suggestion that he did or conveyed anything to HEE or the Trusts lawyers to signal he viewed C to be regarded as an untruthful witness. No credible example from C's pleadings or witness statement as been provided as an example of his alleged untruthfulness.

(ii) concerning Mr. Milsom's reference to C (in a conversation with Angus Moon QC, counsel for HEE) as having "whistleblowerits", though accepting Milsom admitted making the comment, C will say that Angus Moon recorded such language from Mr Milsom in a file note that was disclosed to the C during a Data Subject Access Request. HD also fail to reflect that C's protected disclosures in this case , concerned serious issues of patient safety and deliberate concealment, were conceded in November 2020 (after 6 years of resistance), and that but for the resilience and determination of C the protection provided under the Employment Rights Act 1996, section 43K may not have been recognised by the courts and tribunals as applying to some 54,000 doctors across the country. C would question the appropriateness of such language in these circumstances.

Hill Dickinson's position

6. HD's position is that the settlement agreement dated 15 October 2018 does preclude the making of a wasted costs order.

7. HD's position on misrepresentation is that:

(i) the suggestion that the settlement agreement may be '*set aside*', as C contends, in the face of the rights of third parties (HEE and the Trust and – in relation to wasted costs – Tim Johnson Law), and presumably reopening those proceedings, is misconceived.

(ii) HD is not a party to the settlement agreement but is a third party with a right, pursuant to the Contracts (Rights of Third Parties) Act 1999, to enforce the term of the settlement agreement referred to below;

(iii) it was the clear intention of the parties to the settlement agreement that it would bring to an end any question of costs, ordinary or wasted;

(iv) those within HD's Employment Department, acting for HEE in relation to Dr. Day's claims, namely, Rachel Spink, Orla French, Michael Wright and Philip Farrar, for whom HD may be held liable, were unaware of the LDA which had been drafted by those within HD's Commercial Department;

(v) the first draft settlement proposal was sent by Chris Milsom, counsel for C, to his opponents on 11th October 2018 at 20h07, having spoken to them about a 'drop hands' offer while C was giving evidence due to his concern (of which he must have advised C) that there was a significant chance that he would not be successful with a finding of untruthfulness and with a significant chance that costs would be awarded against him. C's solicitors have informed HD that, during settlement discussions, Mr. Milsom referred to C, in a conversation with Angus Moon QC, counsel for HEE, as having "*whistleblowerit*is" (HD refers to an email (10.12.21 @ 09:02), from Edward Cooper, Head of Practice OMS Employment, Slater and Gordon, to Fiona McLellan, Partner, HD, saying, "***I am able to inform you that Mr Milsom accepted speaking to Angus Moon QC and referring to a case of "whistleblowitis"***";

(vi) Mr. Milsom's proposal included the term, "*Forbearance from any side pursuing costs (both ordinary and wasted)*", seeking to confer on all of the parties lawyers the benefit that other parties would not seek wasted costs against them, partly to protect C's then solicitors, Tim Johnson Law, as a result of their failure to disclose furtive recordings made by C of senior colleagues in meetings;

(vii) a contract of compromise such as this one is not, in law, one requiring uberrimae fidei so that mere non-disclosure of the specific 2014 LDA or HD's

involvement in drafting it (as opposed to false representation of a fact, for example) could permit a party to impeach it (see §§4.37 – 4.41 of *Foskett on Compromise, 9th Ed)*;

(viii) C was not induced to enter into the settlement agreement, or to proffer the wasted costs term through his counsel, by any misrepresentation by HD about the LDA. He and his lawyers were plainly concerned (as the employment tribunal, Employment Judge Martin, Ms J Forecast and Ms C Edwards, found in case number 2300819/19, when dismissing his third claim against his former employer) about the risk of his being ordered to pay costs and his lawyers being ordered to pay wasted costs;

(ix) no material misrepresentation was made by HD. A proper reading of the 2013 edition of the "*Reference Guide for Postgraduate Speciality Training in the UK*" (the 'Gold Guide') made clear on its own (1) that the terms on which C was engaged to do his work were in practice substantially determined by HEE and (2) the existence of the specific 2014 LDA. Greater detail in relation to HD's position on this point is set out below;

THE 2016 COURT OF APPEAL NO COSTS CONSENT ORDER

8. 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?

The Claimant's position

9. C's position is that the 2016 Court of Appeal no costs Consent Order does not preclude nor was it intended to preclude any claim for wasted costs against HD (in contrast to a claim for costs by one party against the other). If, contrary to this

primary submission, it was intended to exclude any claim for wasted costs , C submits it should not be capable of being relied on by HD the grounds of the negligent or fraudulent misrepresentation in failing to disclose the specific 20-14 LDA or the fact that HD had drafted it.

Hill Dickinson's position

10. HD's position is that the 2016 Court of Appeal no costs Consent Order does preclude a claim before an employment tribunal for wasted costs against HD which predates that Order and notes that C accepts that the tribunal may not set aside or disapply the effect of that Order.

11. HD's position on misrepresentation is that:

(i) the suggestion that the Consent Order "*is not capable of being relied on by HD*", given that it cannot be set aside (as C accepts) or ignored by the tribunal, in the face of the rights of HEE, 7½ years after it was agreed upon and made, is misconceived;

(ii) a Consent Order of the Court of Appeal cannot be set aside by an employment tribunal. HD is not a party to the Consent Order and its validity – if it may be questioned at this stage – is a matter for the parties before the Court of Appeal and for the Court of Appeal, while its legal effects extend beyond those parties;

(iii) C was not induced to enter into the agreement embodied in the Consent Order by any misrepresentation by HD about the LDA;

(iv) those within HD's Employment Department, acting for HEE in relation to Dr. Day's claims, namely, Rachel Spink, Orla French, Michael Wright and Philip

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

(v) no material misrepresentation was made by HD. A proper reading of the 2013 edition of the "*Reference Guide for Postgraduate Speciality Training in the UK*" (the 'Gold Guide') made clear on its own (1) that the terms on which C was engaged to do his work were in practice substantially determined by HEE and (2) the existence of the 2014 LDA and the specific 2014 LDA. Greater detail in relation to HD's position on this point is set out below.

THE MAY 2018 AGREEMENT BY HEE TO PAY C'S COSTS

12. Does the May 2018 agreement preclude the making of a wasted costs order?

The Claimant's position

13. C's position is that the May 2018 agreement does not preclude nor was it intended to preclude any claim for wasted costs against HD (in contrast to a claim for costs by one party against the other)

14. If contrary to the primary submission, it was intended to exclude any claim for wasted costs, C submits it should not be capable of being relied on by HD on the grounds of the negligent or fraudulent misrepresentation in failing to disclose the specific 20-14 LDA or the fact that HD had drafted it,

Hill Dickinson's position

15. HD's position is that the May 2018 agreement does preclude the making of a wasted costs order.

16. HD's position on misrepresentation is that the 15 October 2018 settlement does preclude the making of a wasted costs order and that:-

(i) the suggestion that the May 2018 agreement may be ignored or not relied on, given that C accepts that it cannot be set aside, in the face of the rights of HEE, is misconceived;

(ii) if the agreement could not be relied on, C would be obliged to repay the £55,000 that HEE paid to him under it;

(iii) HD is not a party to the May 2018 agreement and its validity – if that is possible at this stage – is a matter for HEE and C – while its legal effects extend beyond those parties;

(iv) it is now far too late to seek to question the validity (including reliance on) the May 2018 agreement, 5½ years after it was agreed upon and made;

(v) C was not induced to enter into the May 2018 agreement by any misrepresentation by HD about the LDA;

(vi) those within HD's Employment Department, acting for HEE in relation to Dr. Day's claims, namely, Rachel Spink, Orla French, Michael Wright and Philip Farrar, for whom HD may be held liable, were unaware of the LDA which had been drafted by those within HD's Commercial Department;

(vii) no material misrepresentation was made by HD. A proper reading of the 2013 edition of the "*Reference Guide for Postgraduate Speciality Training in the UK*" (the 'Gold Guide') made clear on its own (1) that the terms on which C was engaged to do his work were in practice substantially determined by HEE and

(2) the existence of the specific 2014 LDA. Greater detail in relation to HD's position on this point is set out below.

MAKING A WCO OF THE TRIBUNAL'S OWN INITIATIVE

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

The Claimant's position

18. C contends that, even if the settlement agreement is valid as between him and HD on the question of a wasted costs order, the tribunal can and should make an order of its own initiative; If C is prevented from making an application (because of the operation of time limits or the agreed order(s) or settlement agreement) then the tribunal are not going to determine C's application at all – and that C is inviting the tribunal to use its own initiative.

Hill Dickinson's position

19. HD's position is that the tribunal cannot and should make a WCO on its own initiative in these circumstances:-

(i) Rule 82 of the Employment Tribunals Rules of Procedure 2013 provides:-

"**Procedure**

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. …"

(ii) it is clear that this Rule is an 'either or' provision, enabling the tribunal to act of its own initiative, if the party in question has not made an application. Were the tribunal to consider making a wasted costs order now, 4½ years after C applied (out of time) for such an order, it would plainly not be acting "*on its own initiative*". You do something on your own initiative without being prompted by another. The cases where an employment tribunal is considering making a WCO on its own initiative will involve an obviously improper, unreasonable or negligent act or omission which is apparent to the tribunal itself, rather than being told about it by a party, and for which no party asks;

(iii) furthermore, if the parties agreed that there be no wasted costs orders, even if the tribunal could act of its own initiative, it should not make a wasted costs order.

IF IT IS OPEN TO IT SO TO DO, SHOULD THE TRIBUNAL MAKE A WCO AND IN WHAT AMOUNT?

20. **A**: Has there been any improper, unreasonable or negligent act or omission on the part of HD?

The Claimant's position

21. C contends that the improper, unreasonable or negligent act or omission on the part of HD was a deliberate failure to disclose the specific 2014 LDA and to make false and/or materially misleading representations in the skeleton arguments submitted on behalf of HEE to the Employment Tribunal, Employment Appeal Tribunal and Court of Appeal;

Hill Dickinson's position

22. HD contends that:-

(i) those within HD's Employment Department, acting for HEE in relation to Dr. Day's claims, namely, Rachel Spink, Orla French, Michael Wright and Philip Farrar, for whom HD may be held liable, were unaware of the LDA which had been drafted by those within HD's Commercial Department;

(ii) the legal position was thought to be as set out below; there were no false or materially misleading representations in the skeleton arguments filed on behalf of HEE to the ET, the EAT or to the CoA, the representations relied on by C being ones which were entirely justified by the law as it was understood, prior to the decision of the Court of Appeal, to be;

(iii) C and his specialist employment law solicitors and counsel were aware, from the Gold Guide, of the significance of the LDA and indeed relied on it. That reliance was only ineffective because of the incorrect understanding of the law prevalent until corrected by the CoA; and

(iv) there was no disclosure order in place until after the decision of the Court of Appeal and it was complied with.

23. **B**: If so, then what extra costs was C caused to incur?

The Claimant's position

24. C contends that he incurred the costs of and incidental to:-

A. the Employment tribunal hearing in 2015 (which were limited to incidental costs),
B. the Employment Appeal Tribunal hearing in February 2016.

C. the Court of Appeal in 2017 and

D. the May 2018 Employment Tribunal hearing

as a result of the actions of HD.

C's costs, including counsel fees and disbursements, incurred in respect of each (by reference to invoices submitted to, and paid by, him) as follows.

A. the ET hearing on 25.02.15 . As the Clamant was represented pro bono for that hearing and only incidental costs were incurred, he does not seek any costs related to this hearing.

B. the EAT : £13000 plus VAT

C. Court of Appeal £101,803 plus VAT

D. May 2018 hearing £54,488 plus VAT

C will give credit for the sum of £55k paid by the HEE under the consent order of May 2018 "in full and final settlement of all the claimants costs in respect of the "worker" issue", that is in respect all of the costs above. This payment was agreed after "*the claimants representative expressly referred to seeking costs relating to the alleged late disclosure of the LDA in this hearing* [in May 2018] *and in correspondence"*. (See letter from HD to ET dated 26 September 2019]

In these proceedings before the ET, C seeks wasted costs from HD of the costs of and incidental to the May 2018 Hearing, estimated at £54,488 plus VAT, by reference to invoices submitted to, and paid by, him.

C will provide disclosure of the invoices paid but contends that details of what was raised through crowd funding are not relevant.

Hill Dickinson's position

25. HD contends that C's receipts in relation to crowd funding of his legal costs through Crowd Justice Limited (www.crowdjustice.com) totals **£470,490** and have made a formal request for disclosure in relation to this. HD will rely on the indemnity principle (see ***Harold v Smith*** 1860 5 H&N 381).

26. HD contends that it is not just to require it to compensate C for any of the costs claimed.

C'S FACTUAL ISSUES

[**Note that HD does not accept that these issues are relevant but, in the interests of proportionality and saving costs leaves them in this list of issues**]

27. Was the 2014 LDA between the First and Second Respondent and/or the generic LDA relevant to the question as to whether the claimant was a worker for the purposes of section 43K(1) of the Employment Rights Act 1996 of the Second Respondent ?

28. When in and by whom were HD first instructed to advise and assist in the preparation of the generic LDA.

29. When in and by whom were HD first instructed to advise and assist in the preparation of the 2014 LDA (or any amendment to the same prior to October 2018).

30. In respect of each of the following matters who in HD , at any time prior to 15 October 2018, during the conduct of each matter had conduct of the matter, worked on the matter and/or was aware about of the matter; the matters being:-

    (i) The preparation of the generic 2014 LDA (and any amendment thereto)

    (ii) The specific relevant 2014 LDA (and any amendment thereto)

31. When was the specific 2014 LDA signed for on behalf of HEE and by whom, and when was it signed for on behalf of the Trust and by whom?

32. Who in HD , at any time prior to 15 October 2018, had conduct of these proceedings, worked on these proceedings and/or was briefed on these proceedings?

33. Was the Second Respondent advised by HD prior to or after the application to strike out the claimants' claim that the 2014 LDA and/or the generic LDA (both of which they had drafted) were germane documents evidencing the relationship between the first and second respondents at the material time? If not, why not?

34. Why did HD not include either the 2012 LDA, the generic 2014 LDA or the specific 2014 specific LDA between the First and Second Respondent in the bundle of documents for the hearing of the application to strike out the claimant's claim?

35. Why it was that the 2012 LDA was only disclosed on 14 February 2018 in response to orders made on 10 July 2017 following the Court of Appeal decision of 5 May 2017, and why did HD not then disclose the specific 2014 LDA?.

36. Why were neither the generic 2014 LDA nor the 2014 LDA between the First and Second Respondent disclosed by HD in these proceedings ?

37. Did the Claimant incur more that £55k in resisting the application to strike out the claim (including costs incurred in Employment Tribunal , the Employment appeal tribunal and the court of Appeal?

38. When and how did the Claimant become aware of the existence of the specific 2014 LDA and the generic 2014 LDA and that HD had drafted each?

39. When HD's Head of NHS Employment negotiated the £55k payment of costs to the Claimant in May 2018, were they aware that the firm had failed to disclose the specific 2014 LDA and the generic 2014 LDA?

40. In May 2018, when HD's Head of NHS Employment stated that the failure to disclose the 2012 LDA earlier was because their client, the Second Respondent, had failed it to disclose to them before, were they aware that HD had drafted the generic 2014

LDA and LDAs with numerous NHS Bodies including the specific 2014 LDA with the First Respondent

41. How much was paid by HEE to the Trust under the specific 2014 LDA in each year from its commencement up to October 2018?

42. Why did Philip Farrar write to the EAT by letter dated 1 August 2019 to say that "the specific Lewisham LDA was disclosed in February 2018" when what was disclosed was an earlier version of the LDA dated 2012, and not the version stated to commence on 1 April 2014 (the specific 2014 LDA drafted by HD)?

43. Were HD instructed by HEE to advise on and/or draft the HEE/BMA agreement which was intended to grant trainee doctors express third party contractual protection against whistleblowing detriment (referred to HD's letter to Tim Johnson Law dated 10 October 2016). If so, who at HD advised on or worked on that and were they made aware of the generic 2014 LDA and/or the Specific 2014 LDA for that purpose?

HD'S NOTE ON THE LEGAL POSITION PRIOR TO THE DECISION OF THE COURT OF APPEAL

44. Until the decision of the Court of Appeal, at all material times, the law was (wrongly – it is now known) thought to be:-

(i) that the relevant question was **which**[2] of the parties (here, Lewisham and Greenwich NHS Trust and HEE) in practice determined the terms on which C was engaged to do the work more than the other and that the answer to that question had to be the Trust, rather than the correct question, which is whether (regardless of whether Lewisham and Greenwich NHS Trust substantially determined them, as they did – under a contract of employment) HEE) in

[2] see §46 of the employment tribunal's judgment [95] and §§40 – 41 of the judgment of Langstaff J in the EAT [148]

practice substantially (that is, more than trivially) determined the terms on which C was engaged to do the work; and

(ii) that the opening words of s.43K ("*(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by Section 230(3) but who* …") meant that C, who was a worker as defined by section 230(3) could not rely on the extended definition of 'worker; set out in s.43K, regardless of any influence HEE had in practice on the terms on which C was engaged to do the work. In essence, being a s.230(3) worker (as C plainly was) constituted a legal bar to his also being a s.43K extended definition worker, due to the specific words of s.43(K)(1).

45. In their response below, C and his advisers demonstrate that they have completely misunderstood the above point in relation to the law as it was (wrongly) understood to be, prior to the CoA's decision correcting that understanding. They 'put the cart before the horse' by suggesting that the point should be considered in the light of the skeleton arguments before the tribunal and Courts. In fact, the reverse is obviously the case.

46. HD and counsel referred to the 2013 edition of the "*Reference Guide for Postgraduate Speciality Training in the UK*" (the 'Gold Guide') at the strike out hearing before EJ Hyde, on behalf of HEE. It was within the bundle before the tribunal on that occasion. As more particularly set out below, the Gold Guide showed that HEE in practice substantially (that is, more than trivially) determined the terms on which C was engaged to do the work. The LDA was not the revelation that C claims that it was.

47. The Gold Guide provided for HEE's Postgraduate Deans (see below) to set out standards to be delivered in educational training in educational contracts or service

level agreements between HEE and Local Educational Providers (such as at the Trust which employed C) – see §2.12:-

"**Health Education England and NHS Education Scotland Regions and Deaneries in Northern Ireland and Wales**

2.12 **Health Education England** and NHS Education Scotland Regions and Deaneries In Northern Ireland and Wales **are responsible for implementing specialty 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 Health Education England** and NHS Education Scotland Regions and Deaneries In Northern Ireland and Wales, **and Local Educational Providers (LEPs)**." [emphasis added]

LEPs are defined in the Gold Guide thus:-

"**Local Education Provider**. The organisation in which a trainee is placed In order to gain clinical experience so that they can meet the requirements of their specialty curriculum. These are **usually hospital trusts** or general practices, but other organisations can also be LEPs." [emphasis added]

Neither C nor his advisers appear to have thought to ask for a copy (either from HEE or from the Trust) of the educational contracts or service level agreements between HEE and the Trust.

48. At §§4.7 and 4.8, the Gold Guide provided:-

"**Managing specialty training**

4.7 The day to day management, Including responsibility for the quality management of specialty training programmes, **rests with the Postgraduate Deans who are accountable to the Health Education England regions** …

4.8 The responsible agencies above **require Postgraduate Deans to have in place an educational contract or agreement with all providers of postgraduate medical education which sets out** the number of potential training posts within the provider unit, **the standards to which postgraduate medical education must be delivered in accordance with GMC requirements and the monitoring arrangements**. …" [emphasis added]

C and his advisers could have asked for a copy of the applicable "*educational contracts or agreements*" referred to in the Gold Guide (i.e. the LDA), but did not – doubtless because of their understanding of the law prior to the Court of Appeal decision.

49. At §6.4, the Gold Guide described the training agreement HEE had with each doctor in training (such as C) and provided that HEE undertook selection processes:-

"**Offers of employment**

A doctor in training will have a training agreement with the Health Education England … **that entitles them to continue in a training programme subject to satisfactory progress**. They will also be offered an employment contract for the placement they will be working In. Some training programmes will Involve more than one employer so doctors may have a series of contracts of employment through a

training programme. **Employers participate in selection processes for training <u>but these are normally administered by Health Education England</u>** …"

50. At §6.7, the Gold Guide provided that it was HEE who selected and offered placement on a training programme and required the Trust to show valid reason for not then employing the doctor:-

"If an applicant is selected and offered a placement on a training programme by the Health Education England … region …, the employing organisation ultimately has the right to refuse employment **but it must have valid reasons** such as no GMC registration, failed CRB check, occupational health checks, unacceptable references etc. Offers for places on 6.7 training programmes are subject to satisfactory pre-employment checks. If the employing organisation is unwilling to offer employment then the offer of a training programme to the applicant will be withdrawn." [emphasis added]

51. On taking up an appointment, the trainee was required to sign an agreement with HEE's postgraduate dean (§6.27), who had the power (§6.39) to remove their training number on educational grounds.

52. §§8.4 and 8.5 of the Gold Guide refer again to an <u>educational contract</u> (**<u>the LDA</u>**) with the unit providing postgraduate training:-

"**Roles and responsibilities**

8.4 The Postgraduate Dean is responsible for the trainee's training and education while In recognised training posts and programmes. **The Postgraduate Dean does not employ postgraduate trainees, but commissions training from the employer <u>normally through an educational contract with the unit providing postgraduate education</u>**. Through this contract the Postgraduate

Dean has a legitimate interest in matters arising which relate to the education and training of postgraduate trainees within the employing environment.

8.5 Health Education England and NHS Education Scotland regions and Deaneries in Northern Ireland and Wales are responsible for;

- organising training programmes/posts for postgraduate trainees
- recruiting trainees through nationally defined processes
- the Annual Review of Competence Progression process (ARCP)."

Note that it was the ARCP which formed a considerable portion of C's complaint to the tribunal (against HEE). The ARCP panel is convened by HEE (§7.61)

53. At §§7.40 and 7.44 of the Gold Guide shows the way in which HEE exerts close control over the doctor in training in relation to her or his ARCP:-

"7.40 Health Education England … will make local arrangements to receive the educational portfolio from trainees and will give them and their trainers at least six weeks notice of the date by which it is required so that trainees can obtain all required components. The educational portfolio must be made available to the Health Education England or NHS Education Scotland region and Deaneries in Northern Ireland and Wales at least two weeks before the date of the ARCP panel. **Trainees will not be "chased" to provide access to their educational portfolio by the required date but should be aware that failure to do so could result In the panel awarding an outcome 5**. **As a consequence, the trainee will not be able to document attained competences or progress in the specialty for the period under review.**

Failure to comply with the requirement to present evidence is dealt with In paragraph 7.44.

…

7.44 Where the documentary evidence submitted is incomplete or otherwise inadequate so that the panel cannot reach a judgement, no decision should be taken about the performance or progress of the trainee. **The failure to produce timely, adequate evidence for the panel will result in an Incomplete outcome (Outcome 5) and will require the trainee to explain to the panel and Health Education England** or NHS Education Scotland region and Deanery in Northern Ireland and Wales **in writing the reasons for the deficiencies in the documentation**. **The trainee will also be required to provide the relevant evidence within a specified time** once the relevant evidence has been submitted then a new outcome will be added according to the evidence evaluated by the assessment panel." [emphasis added]

54. The ARCP panel convened by HEE must immediately bring the attention of HEE's Postgraduate Dean in writing all allegations of an inappropriate learning and working environment for the specialist trainee that were raised to them for further consideration and investigation by HEE's Postgraduate Dean as necessary (see §7.48 of the Gold Guide).

55. The Postgraduate Deans are agents of HEE, as C well knew. In his case, the Postgraduate Dean for Health Education South London ("***HESL***") – part of HEE South London was Dr. Andrew Frankel (in his claim form (§54) [**26**], he described Dr. Frankel as "*the Dean of HESL*". §4.18 of the Gold Guide provides as following in relation to Postgraduate Deans and others who, in practice, substantially determined the terms on C was engaged to do his work:-

"Postgraduate Deans will need to be satisfied that those involved in managing and postgraduate training have the required competencies. This includes Training Programme Directors, educational supervisors, clinical supervisors **and any <u>other</u> agent** who works on behalf of Health Education England …, or employers to deliver or manage training."

It is clear from the Gold Guide alone that the Training Programme Directors, educational supervisors and clinical supervisors – as agents of HEE – also, in practice, substantially determined the terms on which C did his work.

56. The Gold Guide said at §8.27:-

"The Postgraduate Dean will seek assurance from the employer **<u>through the educational contract</u>** that trainees will be managed in accordance with best employment practice";

This "*educational contract*" is the LDA.

57. The Gold Guide told C everything he needed to know about how HEE, in practice, substantially determined the terms on which C did his work. The LDA did not change anything – the Court of Appeal did.

<u>C'S RESPONSE TO HD'S NOTE ON THE LEGAL POSITION PRIOR TO THE DECISION OF THE COURT OF APPEAL</u>

58. C will respond in full to this note at the hearing of the application for wasted casts, with which C does not agree, but makes the following comment at this stage:

59. HD's assertion (which is not accepted by C) that, "the Gold Guide showed that HEE in practice substantially (that is, more than trivially) determined the terms on which C was engaged to do the work" , needs to be considered in light of the skeleton arguments of the HEE to the ET, EAT and Court of Appeal as referred to above, including paragraph 30 of the ET skeleton argument, in which it is stated: "..Thus on the wording of the Gold guide it is submitted to be unarguable that the body which is responsible substantially for determining the claimant's terms and conditions as regards work is other than R1" [R1 being the Trust}. It should also be noted that the Respondent sent a schedule of costs to the claimant prior to the EAT hearing indicating the Claimant's position that HEE determined terms was unreasonable.