IN THE EMPLOYMENT TRIBUNAL **Case Number: 2302023/2014 and 2301466/2015**

LONDON SOUTH

B E T W E E N :-

Dr CHRISTOPHER DAY

-and-

HILL DICKINSON LLP

Smear/Misinformation Submission

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1. The Skeleton argument Hill Dickinson has chosen to submit for this case management hearing contains numerous smears and false statements about the Claimant and his whistleblowing case. Although not relevant to this hearing they may have a powerful effect on the Tribunal (as in previous hearings) if they are not exposed and challenged.

2. It is necessary to have a dedicated bundle to support this submission which includes 2 Notices of Appeal and an EAT order dated 1 March 2024 granting a hearing for 6 separate grounds of appeal for Claimant's Claim 2300819. Hill Dickinson chooses to make numerous comments about this claim. The appeal papers and the appeal Judge's comments are a good lens to view much of the Hill Dickinson skeleton argument. The so-called 'Smear and Misinformation Bundle' accompanying this submission will be abbreviated to ("SMB").

3. For the purposes of time, three examples of misleading factual statements and two examples of smears will be set out in the hope that it encourages Hill Dickinson to be more focused on the issues of substance in this wasted cost application. The Claimant looks to the Judge for support on this.

Misleading Factual Statements about the Claimant's Case

Example One – Paragraph 5

"Over 9 ½ years ago, on 15 July 2014 Dr Day emailed Lewisham and Greenwich NHS Trust to say he was resigning his employment from them"

4. The above is an objectively false statement attempting to give the impression that the Claimant resigned or stated he would resign from his clinical duties at Lewisham and Greenwich. In particular it is alleged that he did this or was threatening this in the middle of his one year fixed term contract with the Trust. It is an extremely serious matter for a doctor to resign during a rotation at an NHS Trust where the doctor has important commitments to his colleagues and patients. This is a robust example of the numerous lies told about the Claimant in this case.

5. Lewisham and Greenwich's own human resources record confirms the Claimant worked every day of his one year fixed term contract at Lewisham and Greenwich NHS Trust from August 2013 to August 2014 **[see SMB page 103]** . The record also confirms the Claimant did not take 19 days of annual leave that he was entitled to take as a result of his commitment to the Trust's anaesthetic department**.** The Claimant has never stated to Lewisham and Greenwich NHS Trust that he would withdraw or resign from any clinical duties for any reason including as a result of this dispute and is proud of that fact.

6. This Claimant's supervising consultant at Lewisham and Greenwich, Dr Sauer also confirmed in his 2018 Tribunal statement that every day of the fixed term contact at the Trust was worked by the Claimant and includes in his statement a quote from his glowing supervisor report and reference to glowing reports about the Claimant from other staff at the Trust. These reports were ignored by the two NHS formal investigations of the Claimant's case **[see SMB page 100-101]**

> *" He was very conscientious, absolutely reliable and always attended punctually. He took very little sick leave and was always willing to work flexibly to enable the department to cope with the clinical workload and was unfailingly cheerful and as a consequence a popular colleague."*

7. The Claimant did not wish to sign another fixed term contract at another NHS Trust (Guy's and St Thomas) until serious issues had been investigated by HEE including a number of false allegations made against the Claimant. HEE delayed this process for a few months and even suspended their formal complaint policy when Guy's sent it to the Claimant to assist him. The Claimant's supervisor at Lewisham and Greenwich, Dr Sauer also commented on this situation in his Tribunal statement **[see SMB page 101]**

> "*the Claimant has informed me that the Second Respondent and senior managers at the First Respondent have made allegations about his performance, state of mind, engagement with supervisors and personal, as well* 40 *as, professional conduct. I find these allegations extremely surprising as during the whole period of my engagement with the Claimant I never noticed any basis for such allegations. It is also surprising that these allegations were never discussed with me. As the Claimant's clinical supervisor, I would expect to hear about such concerns as a matter of urgency. I confirm that I clearly do not support these allegations and believe they have no grounds. It is also not consistent with anything that has been written in the Claimant's Eportfolio by the over 30 health professionals that have worked with or assessed the Claimant during his training "*

Example 2 - Paragraph 5

"He ceased to be a doctor training, at least by 10 September 2014, when he confirmed his resignation to his Post Graduate Dean who had urged him to reconsider"

8. The principle detriment in the Claimant's whistleblowing case was Health Education England's deletion of the Claimant's National Training Number (path to consultant) on 10 September 2014 by their most senior doctor Dr Frankel. This occurred on the same day as a robust email sent to Dr Frankel's Department in HEE from the British Medical Association. The email raised a number of serious issues about the Claimant's case with an explicit reference to pursuing BMA supported whistleblowing Tribunal claims **[see SMB page 96-97].** 3 days previously the Claimant had sent a letter dated 7 September 2014 asking for the serious issues in his case to be investigated but ending with the words **[see SMB 94-95]**;

> *,"I have not given up on seeking a resolution to this situation and I am grateful for your input in navigating this difficult scenario. I would like to thank you again for your kind words and concern at the meeting"*

9. Any suggestion that a legal threat from the BMA on the same day as the Claimant's National Training Number being deleted is not connected is absurd.

10. The facts relating to the what caused the BMA to make a legal threat of whistleblowing claims and the resultant deletion of the Claimants National Training Number on 10 September 2014 are set out in the Claimant's Grounds of Claim dated October 2014 between paragraph 21-56 **[see <u>main</u> bundle page 22-27].**

11. The Tribunal may also wish to consider the concessions that Health Education England have been forced to make on these issues which were set out in detail in the Claimant's June 2022 statement in paragraph 178 **[see SMB 73-75]**

> *"[178]b Concession that formal investigation was terrible and misleading*
>
> *[178]c Conceding a false account of my protected disclosure in a formal report;*
>
> *[178]d Conceding that the Claimant's formal ARCP/Appraisal document was inappropriate*
>
> *[178]e Conceding that a briefing document sent by former Post Graduate Dean, Dr Frankel was misleading*
>
> *[178]f Conceding use/sharing of my personal data described by Judge Andrews in a Judgment dated 16 February 2022 as ""wholly inappropriate"*
>
> *[178]g Concession on "perhaps being deceitful" from Dr Frankel (recorded in a Judgment by Judge Andrews dated 16 February 2022 but no action taken)*

<u>Example 3 False Statement – Paragraph 17</u>

<u>Reference to audio recording *"furtively made of senior doctors with whom he had meetings near the end of his employment"*</u>

12. It has been made clear on numerous occasions that the Claimant resorted to covert audio recording only after his employment at Lewisham and Greenwich NHS Trust had ended. This was done during formal investigations meetings only once a whistleblowing claim had been lodged with ACAS following several examples of the Claimant's dialogue

being fabricated. The covert audio proved further fabrications of the Claimant's dialogue. **[See Claimants Ground of Claim October 2014 paragraph 57 see main bundle page 27]**

13. When considering what Hill Dickinson say about wasted costs arising from covert audio both now and back in 2018 through their client HEE, the Claimant asks the Tribunal to consider Judge Martin's findings at paragraph 123 **[SMB page 36]** and what Mr Cooper KC states in his Tribunal statement **[[SMB page 91-92].**

Examples of smears

"The diagnosis of whistleblowerits is a pithy way of describing a man who had developed an obsessive belief in his own victimhood to the point of being prepared to dishonest and underhand in pursuit of what he saw as the virtue of his cause as Mr Cooper described him"

14. Given what has now been established about this case and who and what evidence supports it such language is astonishing **[See SMB page 54-57]** .

15. The above insulting language and allegations of dishonesty made against the Claimant by Mr Cooper, the former barrister of Lewisham and Greenwich is relied on by Hill Dickinson in paragraph 11-13 of the skeleton argument which will now be dealt with broadly.

16. The above content from Mr Cooper was discredited by a supplementary statement by the Claimant to the June 2022 hearing **[SMB page 79-93**]. This statement forced remarkable concessions from Mr Cooper that his sworn witness statement to June 2022 statement was not accurate. Mr Cooper's cross examination was then cut short by the Judge which prevented the inevitable further concessions that would have been obtained had this halting not occurred. This is a point that has been taken on appeal as a violation of the fundamental principle of adversarial litigation.[1]. It is being contested on the basis that Mr Cooper's strong language was not taken into account by the Tribunal. The Claimant is contesting this as the quote appears in a public Judgment. The Claimant

[1] Permission to appeal has been granted to the Claimant by Order dated 1 March 2024 for 6 out 10 Grounds of Appeal for the liability and cost appeals. This order is now also subject to an application for Rule 33 Review **[See SMB pages 2-72]**

is also using on appeal the fact this content from Mr Cooper is being relied on by Hill Dickinson in this wasted cost application **[See SMB page 63-64].**

17. The reference to whistleblowerits refers to a serious dispute between the Claimant and his former barrister Chris Milsom that Mr Milsom's head of chambers Mr Donavan states ""*the Settlement Allegations raised issues of professional conduct and/or professional negligence*". They were found to be *"too serious"* to be handled under an internal chambers complaint policy **[see SMB 76-77].** Clearly such serious allegations deserve to be handled properly and not just casually referred to in a skeleton argument with misleading spin.

18. The dispute between the Claimant and Mr Milsom has been exacerbated by a seriou serious and troubling discrepancy in accounts between Mr Milsom and the Respondents barristers on how the 2018 settlement came about [see SMB Page 65-66]. This ground of misrepresentation has finally been acknowledged by the EAT in an order dated 1 March 2024 granting permission to appeal **[SMB see Page 38-43]** following the Claimant emailing the Judge after the oral Judgment **[SMB page 34-37]** to point a significant mistake in his understanding which the Judge has now accepted.

<u>Smears about Setting Aside the Settlement</u>

19. Paragraph 21 to 32 of the Hill Dickinson skeleton argument is devoted to smearing the Claimant's reasonable complaint about the way his 2018 application to set aside the settlement agreement was handled by the legal system.

20. The Claimant has advanced a simple point that when Judge Martin dealt with his application to set aside the settlement agreement in 2018 the actual ground of misrepresentation was ignored and re-invented to a futile application grounded on duress. This involved Judge Marin ignoring not just the ground of the application but also the obvious evidence there is of misrepresentation among the lawyers involved **[SMB page 65-67] .** This evidence (ignored in 2018) is now even reflected to some extent in the findings of Judge Martin in her June 2022 judgment at paragraph 155,130 and 123 **[SB page 35-36].**

21. Deputy High Court Judge Andrew Burns KC when giving the Claimant permission to appeal on 1 March 2024 commented on how he had been led to the wrong conclusion by

Judge Martin's approach on this point and agreed to correct his Judgment accordingly. The Claimant's submission on 'material change in circumstances' in his EAT Rule 33 review sets this out **[SMB page 51-52 in particular paragraph 10-13].**

22. If the Claimant has a valid or at least logical and reasonable complaint against Judge Martin then it follows that this complaint extends to the 3 appeal Judges that endorsed Judge Martin's decision. The Claimant can't just be insulted and smeared for holding such a position.

23. Much is made in the Hill Dickinson skeleton argument of the Claimant publicly expressing criticism of the various Judges involved in his settlement agreement. In particular, Lady Justice Simler is emphasised. Simler LJ, initially granted leave to appeal to the Claimant on his settlement agreement. The order was signed and sealed on 10 March 2020 and then revoked nearly a month later on 8 Aspril 2020 as an apparent clerical error.

24. Hill Dickinson state this mistake was quickly corrected and accuse the Claimant of wrongly imputing the error to Lady Justice Simler. If it was this Judge that signed and sealed the wrong order then the Claimant holds the view that a Judge cannot simply blame a court clerk for such a significant professional mistake.

25. Whatever view is taken on the alleged clerical error versus professional mistake point the Claimant does not feel it is appropriate for him to be smeared at an unrelated case management hearing on his view . Moreover, the Claimant is reasonably entitled to question, criticise and wonder why Lady Justice Simler has endorsed Judge Martin's reinvention of the ground of his 2018 application from the clearly stated ground of misrepresentation to duress.

26. The 54000 Doctors tweet, retweeted by the Claimant, is a blunt way of saying what the Claimant has set out to Judge Andrew Burns KC in a letter dated 18 March 2024 **[SMB 68-69].**

"

<u>Conclusion</u>

27. Given the history of this case, in particular the allegations being made in this wasted cost application, it is surprising to say the least Hill Dickinson would choose to adopt the approach set out above particularly for a private case management hearing.

28. Hill Dickinson has a track record in this litigation of pushing hard with smears and misinformation for this Tribunal to make isolated decisions in this case at focused Preliminary Hearings **[see paragraph 25-31 of Claimants Further and Better Particulars main bundle page 1042-3].**

29. As can be seen from the above and Hill Dickinson's requests for yet more Preliminary Hearings history may be repeating itself.

Dr Chris Day
20 March 2024