IN THE EMPLOYMENT APPEAL TRIBUNAL

Appeal Numbers: EA-2022-001347-NLD

EA-2023-000545-NLD

ON APPEAL FROM THE LONDON SOUTH EMPLOYMENT TRIBUNAL

Case Number: 2300819/19

B E T W E E N:

DR. CHRISTOPHER DAY

Appellant

-and-

LEWISHAM AND GREENWICH NHS TRUST

Respondent

APPELLANT'S SKELETON ARGUMENT

For full appeal on 1 and 2 July 2025

References:

- **[X]** are to the Core Bundle and **[SUPPX]** to the Supplementary Bundle.
- ¶X are to paragraphs in the Liability Reasons or the Costs Reasons dated 15 November 2022 and 6 March 2022 unless otherwise indicated.
- to the parties are as they were at first instance – Claimant (**'C'**)/Respondent (**'R'**).

INTRODUCTION

1. This is C's skeleton argument for the full appeal hearing in support of the following appeals:
    a. The Claimant's appeal EA-2022-001347-NLD (where relevant, "**the Appeal**") of the substantive liability judgment ("**the Liability Reasons**") dated 15 November 2022 and sent to the parties on 16 November 2022 [4 - 70];
    b. The Claimant's appeal EA-2023-000545-NLD (where relevant, "**the Costs Appeal**") of the costs judgment dated 6 March 2023 and sent to the parties on 26 April 2023 ("**the Costs Reasons**") [71 - 76].

2. In both cases, the decisions under appeal were made by Employment Judge Anne Martin sitting with Ms J Forecast and Ms C Edwards ("**the ET**").

3. In the Liability Reasons, the ET found that C had not been subjected to detriment for making a protected disclosure because (with one exception ¶155 [43] –[44]):
    i. If something is true then it is not a detriment (¶154 [43], ¶213 [56]);
    ii. C was not "acting 'in employment'" at the time he alleged he was subjected to detriment (majority decision; ¶191 [52]) and therefore the one detriment found at ¶155 [43] –[44] did not attract protection;
    iii. The alleged detriments were not made in response to the protected disclosures (¶179 [49]).

4. The ET also found at ¶168 [48] that there was no reason to doubt the evidence of Mr Cocke or Mr Travis, despite Mr Cocke destroying 90,000 documents on the morning of his cross-examination and then failing to attend, and despite Mr Travis telling the ET various things under oath, only for those to later be contradicted by R's own late disclosure (¶198 [53]). The ET also gave no reasons as to its decision not to draw an adverse inference in relation to this and other conduct by R (which also included inadequate discovery; and other deletion of documents (including relating to Mr Travis, Ms Lynch and Dr Brook).

5. In the Costs Reasons, the ET dismissed C's costs application in relation to R's conduct during the trial. The Tribunal found at ¶11 [73] that R acted unreasonably in respect of its disclosure obligations; however, the Tribunal ultimately finds at ¶20 that "whilst the threshold test for the Claimant's application for costs against the Respondent is met, that it would not be just and equitable to award costs" because there had been unreasonable conduct by C. For the avoidance of doubt, the ET's Liability Reasons made no reference at all to unreasonable conduct by C.

6. By Notices of Appeal sealed on 22 December 2022 [77 – 97] and 1 August 2023 [98 - 108] respectively, C sought permission to appeal against these findings.

7. In respect of the Liability Appeal, the relevant grounds of appeal are found in the Amended Notice of Appeal dated 14 March 2024 [109 – 114]. The relevant grounds in respect of the Costs Appeal are those found at [98 – 108].

8. C seeks an order quashing the findings of the Tribunal on the issues set out above and remitting those matters to a fresh tribunal for reconsideration.

BACKGROUND

9. The background to this matter is complex and is set out in detail in the two Notices of Appeal (see in particular [80 – 84] and [100 – 103]).

10. By way of summary, C's claim was brought on 6 March 2019. It dealt with post-employment detriment suffered following the contentious settlement of the earlier whistleblowing claims during the final hearing after the prospect of costs had been raised.

11. It was not in issue that a number of protected disclosures had been made.[1] The key issue for the ET was whether C had suffered detriments on the ground of having made those protected disclosures. The alleged detriments turned on comments made about C to various influential stakeholders and local MPs, as well as three public statements published on R's website and forwarded to journalists following the settlement of the First and Second Claims.

12. C alleged that it was a detriment that R had materially misrepresented to MPs, the press, and key stakeholders the substance and seriousness of the underlying disclosures C had made in his earlier whistleblowing claim. Another detriment alleged was that R had materially misrepresented the scope and findings of formal investigations into the disclosures.

13. During the hearing of C's claim, there were serious disclosure issues. These ultimately led to the destruction of 90,000 documents by one of R's witnesses [SUPP 115 - 116], who was then not produced for cross-examination on the basis that effectively his own actions had made him unwell.

14. The parties adopted the common approach that there were three central legal issues for the Tribunal to approach at the liability stage:

    a. Whether the matters at paragraph 4 of the list of issues are detriments for the purposes of s47B ERA 1996 ("**the Detriment Issue**");

    b. Whether the detriment was caused by the protected disclosure, such that the protected disclosure materially influenced (in the sense of more than

[1] There remained an issue whether the Claimant reasonably believed that five of the disclosures tended to show concealment (s43B(1)(f) ERA 1996).

trivially) the deliberate doing or failure to do of an act ("**the Causation Issue**");

c. Whether the detriment was suffered in the field of employment ("**the Field of Employment Issue**").

15. There were numerous other issues subsidiary to the key legal issues. Key amongst these were the use of privileged material and the conduct of R's witnesses and its impact on their credibility.

16. C maintains that the Liability Reasons reveal severely flawed decision making. This may be related to the complexity of the underlying facts and law, as well as the extraordinary conduct of R's witnesses.

17. Unsurprisingly, this is not accepted by R. However, R cannot sensibly contend that, among other things, having a witness irretrievably delete an archive of 90,000 potentially relevant emails the morning before he was due to be cross-examined is anything other than conduct of the utmost severity. This is just one of the matters in relation to which C contends the Tribunal has erred.

RELEVANT LAW

Statutory Framework: detriment

18. By s43B Employment Rights Act 1996 ("**ERA 1996**"), a worker is protected from detriment done on the ground of having made a protected disclosure:

> ***Protected disclosures***
>
> *(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*
>
> *(1A) A worker ('W') has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done— (a) by another worker of W's employer in the course of that other worker's employment, or (b) by any agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.*
>
> *(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer …*

(2) This section does not apply where— (a) the worker is an employee, and (b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, 'worker', 'worker's contract', 'employment' and 'employer' have the extended meaning given by section 43K."

Detriment in whistleblowing claims

19. It is well-established that detriment is a very broad concept which is judged from the position of the worker. Detriment will be found if a reasonable worker would consider that he or she has been subjected to a detriment (see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL, ¶¶33 to 35).

20. It is a broad test, and there is no test of seriousness or severity: an objective observer may consider that the detriment is very minor, but that is not relevant at the liability stage. As set out in *Shamoon* at ¶¶34E – 35G, detriment is very broad, and once the Tribunal finds that treatment may amount to detriment in the sense of disadvatage, "the only other limitation that can be read into the word is whether the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment". No tangible consequence need be demonstrated.

21. A public statement may amount to a detriment even if it is true. Giving judgment in the Court of Appeal in *Beatt v Croydon Health Services NHS Trust* [2017] ICR 1240, Underhill LJ said this (at ¶110):

"*What is likely to have been damaging to the claimant is not so much the trust's use of this particular phrase as the public statement that 'following a disciplinary procedure' he had 'left the trust' - a rather mealy-mouthed formulation which would however clearly be understood (correctly) to mean that he had been dismissed - and also that he had been 'referred to the General Medical Council for further investigation'. Even if those statements were literally true, it is not clear why they needed to be made in a press release about the outcome of the inquest (still less if the trust believed that the claimant's departure was indeed for unrelated reasons)*"

22. Underhill LJ went on to say that it was not necessary for a tribunal to make a finding that a statement was untrue and its aim was to cause damage to a whistleblower in order for that statement to amount to a detriment (see *Beatt* at ¶111).

23. The Court of Appeal revisited these issues in *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] ICR 1226, in the context of post-employment detriment. Sir Patrick Elias held that it was "manifestly wrong" that an employer simply attempting to "set the record straight" could not subject a worker to detriment in a public statement (see *Jesudason* at ¶61). He went on:

> *"A detrimental observation about a whistleblower, claiming for example that he is a liar or a troublemaker, may be made in a letter whose purpose is to put the employer's side of the story. It does not cease to be a detriment because of the employer's purpose or motive. That purpose - why the letter was written in that way - will be relevant at the later causation (in the sense of the 'reason why') stage when the question is whether the detriment was by reason of the protected disclosures, but it is irrelevant to the question whether a detriment was suffered at all"*

24. At ¶64, the Court further explained that the issue for the tribunal is "*not the reason why the letters rebutting the appellant's allegations were written but why the offending passages which caused the detriment were included in those letters*".

25. The court emphasised that even if a public statement is genuinely believed to be truthful by the person making it, that does not preclude a finding of detriment (per Sir Patrick Elias at ¶75).

Causation in whistleblowing claims

26. As explained by the Court of Appeal in *Fecitt v NHS Manchester* [2012] IRLR 64, s47B will be infringed if the protected disclosure materially influences, in the sense of being more than a trivial influence, the employer's treatment of the whistle-blower (per Elias LJ at ¶45).

27. In *Jesudason*, the Court of Appeal held at ¶62 that it was an error of law to conflate the factual question of whether a worker was subjected to a detriment with the question of causation.

Field of Employment

28. The leading case on post-employment detriments is *Woodward v Abbey National Plc (No1)* [2006] EWCA Civ 822; [2006] ICR 1436. In that case, Ward LJ in the Court of Appeal explained at ¶28 the rationale behind whistleblowing detriment extending beyond the contract of employment after *Rhys-Harper v Relaxion* [2003] ICR 867 in which the House of Lords held that the discrimination legislation extended to detriments

suffered by former employees. His Lordship went on at ¶68 to emphasise that whistleblowers were afforded broad protection in the public interest noting that:

> *"It simply makes no sense at all to protect the current employee but not the former employee, especially since the frequent response of the embittered exposed employer may well be dismissal and a determination to make life impossible for the nasty little sneak for as long thereafter as he can. If it is in the public interest to blow the whistle, and the Act shows that it is, then he who blows the whistle should be protected when he becomes victimised for doing so, whenever the retribution is exacted"*

29. *Woodward* was applied by the EAT in *Onyango v Berkley* UKEAT/0407/12/ZT in the context of post-employment protected disclosures.

30. In *Tiplady v City of Bradford MDC* [2019] EWCA Civ 2180; [2020] ICR 965, Underhill LJ considered the position of a council employee who alleged that she had made protected disclosures when she had raised concerns to the council in a private capacity about a property owned by her; and that she been subjected to unlawful detriments as a result of raising those concerns. In describing the episodes relied upon by the claimant in *Tiplady*, in para 1(2) of the judgment, Underhill LJ stated: "*It will be apparent that neither episode had, as such, anything to do with the employment relationship between Mrs Tiplady and the Council: they concerned the exercise of the Council's powers as a local authority*."

31. *Woodward* was expressly cited with approval by the Court of Appeal in *Tiplady* (at ¶¶29 – 31). At ¶45 of *Tiplady* Underhill LJ stated:

> "*I do not think the boundaries of the employment field should be drawn narrowly […] It may be a useful thought-experiment to ask whether, if the claim had been based on a protected characteristic under the 2010 Act rather than on the making of a protected disclosure, it would fall under a Part of that Act other than Part 5 : if, say, the detriment was suffered by the claimant as a consumer of services or as a student or as an occupier of premises and thus would fall under Parts 3, 4 or 6 , it could not be suffered as a worker. But I am chary about suggesting that that is a touchstone which will provide the answer in every case*".

Drawing adverse inferences

32. The Court of Appeal in *Keefe v Isle of Man Steam Packet Co* [2010] EWCA Civ 683 articulated the principle at ¶19 of its judgment that "*a defendant who has, in breach of duty, made it difficult or impossible for a claimant to adduce relevant evidence must run*

the risk of adverse factual findings." In these circumstances, "*the court should judge a claimant's evidence benevolently and the defendant's evidence critically*".

33. In **Active Media services Inc v Burmester, & ors** [2021] EWHC 232 (Comm), a witness for the claimant company deliberately destroyed emails in the week before the trial. There were also "critical gaps" in the disclosure and a failure to call relevant witnesses. As held by Culver J at ¶¶309 – 311, if a fair trial is still possible, then the court is entitled to rely on inferences drawn from the destruction of documents or the failure of witnesses to provide evidence which is otherwise absent, concluding that the destruction of documents and the absence of witnesses, when combined, are two factors which "*make the case for the drawing of an adverse inference without other supporting evidence an extremely strong one, at least so far as establishing a defence to a claim is concerned*"

34. The EAT recently considered the law on inadequate disclosure, destruction of evidence and the drawing of adverse interests in **Kaur v Sun Mark** [2024] EAT 41 in the context of a strike out application. Eady P, reviewed the law at ¶¶42 – 50, and further set out the pertinent sections of the **Active Media** case addressing the destruction of documents.

Costs in the ET

35. At the relevant time, where an ET was considering awarding costs, Rules 76(1)(a) and 76(2) of the then applicable 2013 ET Rules were engaged. The relevant parts of Rule 76 stated:

> ***76 When a costs order or a preparation time order may or shall be made***
>
> *(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *[…]*
> *(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.*

36. The proper approach to be taken by the ET in assessing a costs application is to consider (1) whether the threshold is met; (2) whether to exercise the discretion; and (3) the proper amount for any costs award, as set out in *Radia v Jefferies International Ltd* UKEAT/0007/18.

37. In *Yerrakalva v Barnsley MBC* [2011] EWCA Civ 1255; [2012] ICR 420, the Court of Appeal said, regarding the exercise of the discretion:

> "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances*"

Standard to be expected of ET Reasons/threshold for EAT interference

38. A Tribunal Judgment should have a coherent narrative and structured analysis – see *Co-operative Group Ltd v Baddeley* [2014] EWCA Civ 658 at ¶24.

39. The principles to be applied to the exercise of the appellate jurisdiction have been recently set out by HHJ Tayler in *Leicester City Council v Parmar* at ¶¶49-54.

ERRORS IN RELATION TO WHISTLEBLOWING

The Detriment Issue

Ground 1: Taking into account irrelevant information and failing to take into account relevant information regarding the Claimant's pleaded detriments

40. In reaching its conclusion on detriment, the ET focussed on numerous irrelevant factors.

41. First, at ¶154 the ET makes a finding that the statements published by R simply set out R's position, and they are therefore not detriments. The Tribunal further finds at ¶178 that the four doctors to whom C had made protected disclosures merely "*wish[ed] to set the record straight from their point of view*" and that this did not indicate any malice on their part.

42. The ET goes on to find again ¶156 that because it was (unbeknownst to C at the time) C's own barrister who asked R to put forward an offer while C was still under cross-examination, the public statement made by R to the same effect is true and not capable of amounting to a detriment.

43. This is where the ET falls into error: the truthfulness or otherwise of a statement, along with its motivation, is not determinative in the assessment of detriment. This was emphasised by the Court of Appeal in *Beatt* and *Jesudason*, both of which were NHS whistleblowing cases where NHS trusts took it upon themselves to "*set the record straight*". While C contended (and maintains) that the statements R made about him were false and defamatory, the ET has effectively set about proving C wrong. That is not the exercise the ET is tasked with when assessing whether a worker has been subjected to detriment. In particular, the ET has impermissibly focussed on R's perspective as to the truthfulness of the statements, and in so doing it commits the error the Court of Appeal warned against in *Jesudason* at ¶75 (see above at paragraph 27).

44. In neither case has the ET asked itself how the statements made by R, regardless of their truth, would be perceived by the reasonable worker, despite both C and R directing the ET to the law on this in their submission (see, for example [SUPP 24] and [SUPP 45], though note that at [SUPP 45] R told the ET the test for detriment is objective: it is not, as per *Jesudason* at ¶28H). The focus should be on the effect of the statement on the worker: not whether the statement is true. The worker's contention that the statement is untrue is part of the assessment of the worker's perception, but it is not the whole picture.

45. Thirdly, in assessing detriment, the ET has inexplicably disregarded its own findings as to the content and tone of R's statements. This is illustrated by the finding at ¶155 [43 – 44] that the point at which R had decided not to pursue C for costs was "on settlement". The ET does not appear to have taken into account that the effect of its findings on the public statements was that R had in fact departed from the agreed

statement in relation to all of the public statements it made; nor whether the fact that what R said at this point was inaccurate casts any light on R's other statements.

46. Fourthly, the ET has not given any or any sufficient weight in its assessment of detriment to the fact that in C's case, even the CQC had expressed concerns about the statements R had made publicly. This is reflected in the Liability Reasons at ¶210 [56], where the ET finds that the CQC had shared concerns with R about the content and tone of the public statements, but that, following legal advice, R intended to keep the statements on the website.

47. In addition, at ¶211 [56], the ET finds that the CQC had not asked R to remove the public statements, and therefore the detriment was not made out, when C's case (and issue 4.3) was that it was a detriment not to remove the public statements once the Respondent was *contacted* by the CQC with concerns. C submits that this is capable of being a detriment and the ET has not considered this point.

48. Fifthly, the ET has not given any real consideration or weight to the highly unusual step taken by the trust to send letters to MPs and public officials about C. It takes only two paragraphs in a 67-page judgment to deal with this element of R's conduct. Again, the ET finds at ¶213 [56] that the public statements themselves were true, which seems to implicitly displace its finding at ¶212 [56] that:

> *"This issue refers to Mr Travis writing to several local MP's and local public officials on 4 December 2018. In these letters he enclosed the 23 October 2018 and 4 December 2018 statements. The issue as agreed states 'This material, that was purportedly to fully brief those MPs and public officials, contained untrue and detrimental material (as particularised in paras. 33 and 36 of the Amended Grounds of Complaint)'".*

49. Finally, the ET appears to have afforded no or no adequate weight to the references to costs and wasted costs made at and around the time of the settlement, including in the period immediately before the 15 October 2018 settlement agreement and statement, when compared with how R represented those matters in its public statements. Any proper analysis of detriment would require the ET to assess this from the viewpoint of the worker. The evidence before the tribunal about the pressure put on the Claimant to agree to certain wording in the agreed statement in the settlement agreement is relevant to the question of whether or not the

Respondent's public statements were accurate; and whether or not they were detrimental.

50. A key example is the finding at ¶156 [44] that because it was true that Mr Milsom approached R (which R would have known at the time but which C did not then know, because he was not told), R publishing a statement which read: "Dr Day's legal representatives indicated that it would be helpful to them for the Trust: To state what our position would be if the Tribunal were to dismiss Dr Day's claims and make findings that he had not been truthful in his evidence" could not amount to a detriment. There are a number of issues with this:

    a. First, even assuming that every word of that statement is accurate (on which see further below), it is plain on the face of the statement that a reasonable worker would consider this to be a detriment because it implies that C's own legal team had no faith in his case and there was nothing to the whistleblowing whatsoever. That goes far beyond the statement which was agreed in the settlement (see ¶46 [37] – [38]);

    b. Secondly, the Tribunal did not undertake any analysis of whether, even if the statement could purely be described as putting R's side of the story, that was enough to mean that the statement was not a detriment;

    c. Thirdly, the Tribunal heard no evidence at all, from Mr Cooper KC or from Mr Milsom, that there was any agreement from Mr Milsom that C's evidence was to be regarded as *untruthful*. Indeed Mr Milsom gave unchallenged evidence that that was not a matter that he conveyed [SUPP 120, lines 2 – 7; and 8 - 9]. Therefore not only is ¶156 detrimental to C, it *is* also untrue and the ET gave this evidence no weight at all.

51. C therefore contends that had the ET undertaken the requisite analysis, it would have reached a different conclusion on the detriments.

Ground 2: Failure to draw inferences from the Respondent's misconduct

52. This ground centres on R's extraordinary conduct of the litigation, which ranged from the deliberate destruction of documents to inadequate and extremely late disclosure. C says it is an error of law in the circumstances for the ET to draw no inferences whatsoever in respect of R's conduct:

a. the destruction of the 90,000 documents by Mr. Cocke in the middle of the hearing [SUPP 115 - 116], and the evidential impact of Mr. Cocke not attending for cross-examination as a result of his conduct (the Tribunal having been supplied by the Claimant in submissions with the questions that would have been put to Mr Cocke in cross examination [SUPP 7 - 17]);

b. Mr. Travis having stating in his cross-examination that he had written to no other NHS stakeholders personally setting out the public statements the Respondent had made in relation to the Claimant was followed by late disclosure demonstrated that there were in fact more letters to stakeholders: 4 CEOs of neighbouring Trusts: Amanda Pritchard, CEO, Guy's and St Thomas', Peter Herring, Interim CEO, Kings, Matthew Trainer, CEO, Oxleas, Dr Matthew Patrick, CEO, South London and Maudsley; and additionally to Steve Russell at NHSI and Jane Cummings at NHSE;

c. Mr Travis having told the Tribunal that there was no note of the board meeting prior to the settlement of the earlier claims was followed by late disclosure of a note of the meeting;

d. Mr Travis had advanced a position in his witness statement that at the time of settlement he advised the Board of the Respondent that he wanted the case to run its course - but the record of Board meeting that approved the settlement (that was withheld from disclosure, its existence having been denied by the Respondent for 4 years) showed the opposite and that he stated to the Board that he favoured settlement and that the four doctors has expressed concerns about giving live evidence [SUPP 121 – 123];

e. Mr Cocke's witness statement evidence about there being no record of his meeting with Sir Norman Lamb was shown to be inaccurate by the subsequent late disclosure of exactly such a record.

53. In respect of Mr Cocke's mass deletion of evidence, the ET has further erred in law by failing to draw an inference despite having directed itself at ¶¶84 and 86 in accordance with *Active Media services Inc v Burmester* [2021] EWHC 232 (Comm), and despite finding that the Tribunal would need to make inferences (at ¶¶ 85 - 86 [25]).

54. Further or alternatively, the Tribunal has failed to give any reasons as to why an inference was not drawn in relation to the Respondent's conduct set out above.

55. The ET's failure to join up the dots in respect of this issue highlights some of the difficulties with the Liability Reasons read as a whole. For example, in declining to strike out R's defence, the ET finds at ¶85 that it would "still need to draw inferences" even if the strike out were successful. It goes on at ¶86:

> "*Whilst we take a dim view of the disclosure issues, we find that a fair trial is possible and there is no substantial risk of injustice. The Tribunal can evaluate the evidence and the defects in the Respondent's disclosure exercise and make such inferences as it deems fit*" [25]

56. The ET did not in fact then go on to undertake the evaluation that it had proposed it should do. In C's submission the ET should – at the very least – have set out its reasons as to why R's misconduct should not lead to adverse inferences or to the ET rejecting elements of R's evidence.

57. In fact, the ET went on to accept the evidence of Mr Travis and Mr Cocke in full, making the surprising finding at ¶168 that:

> *"Both Mr Travis in his written and oral evidence, and Mr Cocke in his statement explained the effect that the negative publicity surrounding this case was having on the Respondent's ability to recruit junior doctors onto its training programme and morale more generally. Mr Travis gave evidence on oath about this. The Tribunal has no reason to doubt this evidence"* [48].

58. Not only does this finding betray a clear link between R's statements and C's protected disclosures (which was not considered by the ET) but it accepts entirely unproblematically what were, in practice, extremely problematic circumstances. At the very least C deserves to understand why the ET felt able to accept the untested evidence of a witness who had admitted to the deliberate destruction of documents and then failed to attend for cross examination without drawing an adverse inference, and why it rejected C's submissions on those points.

59. The language used by the ET to describe the circumstances in which C invited the Tribunal to draw inferences by reference to *Active Media* is telling in that it uses language which diminishes the severity of R's conduct. For example:

a. At ¶80, the ET describes Mr Cocke's conduct in providing limited late disclosure and then in deleting 90,000 emails as simply having "opened a can of worms" [20];

b. At ¶197, the ET describes Mr Travis' evidence, which was completely contradicted by the late disclosure after his cross-examination, as having "*some issues"* but that *, "not withstanding this, the Tribunal found his evidence to be credible*" [53].

60. C contends that the ET has plainly erred in law in its approach to the drawing of inferences.

The Causation Issue

Ground 3: Application of the wrong legal test in respect of causation

61. The test of causation in whistleblowing detriment is not a simple but-for test. Section 47B will be infringed if the protected disclosure materially influences, in the sense of being more than a trivial influence, the employer's treatment of the whistleblower (per Elias LJ in *Fecitt v NHS Manchester* [2012] IRLR 64 at ¶45).

62. Although the ET directs itself correctly as to *Fecitt* at ¶¶69, 81 and 100 of the Liability Reasons, its application of the material influence test illustrations that the ET has erroneously taken a binary approach to the question of causation. Alternatively, the ET has sought out what it considers to be the primary influence or reason for the treatment. The ET has therefore applied a higher but-for threshold in circumstances where the test it should have applied was whether the protected disclosure had a material influence on the detriment in the sense of being more than trivial. This is a lower threshold.

63. The ET's key finding on causation is at ¶179 of the Liability Reasons. The ET finds that the statements were not made "*because the Claimant made protected disclosures*" but in response to media interest in the case as part of a "*PR battle*" [49], and "*a desire to put the Trust's side of the story*" [49]. There are a number of difficulties with these findings, not least that the ET appears to have misdirected itself and applied a single cause test rather than address whether the protected disclosures had a material influence on the detriment.

64. In C's submission, the findings at ¶179 illustrate that the ET has not in fact taken into account all the important causation evidence which demonstrates that C's protected disclosures had more than a material influence on the alleged detriments. Looking at the ET's judgment as a whole:

    a. At ¶26, the ET fails to grasp that Dr Smith's relevant oral evidence that "*there was a clear and present danger to patient safety*" inherent in C's protected disclosures may have had more than a trivial influence on the alleged detriments. Dr Smith also made the point in her evidence that the matters which were the subject of C's disclosures were not usual or common place in the NHS;

    b. At ¶79, the ET finds that Mr Travis had made assertions in cross-examination that the Respondent's subsequent disclosure had shown to be untrue in relation to the record of the Board meeting and additional stakeholder letter – but then the Tribunal makes nothing of this untruth;

    c. At ¶155, the Tribunal makes a finding as to the timing of the Respondent's decision definitely not to pursue costs against the Claimant – but then the Tribunal makes nothing of this timing;

    d. At ¶173 the ET finds that the Daily Telegraph Article of 2 December 2018 was the reason the Respondent published the statement of 4 December 2018 without considering whether the publication of the statement (and its tone and content) was more than trivially influenced by the protected disclosures;

    e. At ¶176 the ET finds that the emails in late disclosure which show that there in fact had been communications between Ms. Lynch, Mr. Cocke and the four doctors do not show that they were feeding false and tainted information to be included in the statement. There is no requirement for the information to be "*false and tainted*", simply that it was materially influenced by the protected disclosures;

    f. At ¶177 that the ET had concluded that "*the official sign off and authority to publish the statements was made by Mr. Travis*". The relevance of this conclusion is unclear and the reasoning is incomplete;

g. At ¶178 the ET's finding that the late disclosure of the emails between Ms. Lynch and the four doctors "*does not indicate any malice on the part of the doctors, merely a wish to set the record straight from their point of view*". R did not in fact produce these individuals as witnesses at this hearing and R strongly resisted (successfully, until the end of the trial) even identifying them. The finding that there was no malice is not a determinative consideration; there is no statutory requirement for a detriment to be founded by malice toward a whistleblower.

65. It follows from the above that the ET has erred in law in its approach to causation. It has not undertaken any examination of the influence that the protected disclosures had on R's actions in making public statements and writing to MPs and stakeholders. The ET has further not asked itself whether any influence was more than trivial.

66.. The ET was specifically directed in submissions for the Claimant to ¶64 of the Court of Appeal's judgment in *Jesudason*: the ET did not follow that guidance.

67. Further, having found that the four doctors who had been involved in receiving some of the original protected disclosures were also involved in approving the public statements about the settlement *and* that this was only revealed by late disclosure, the ET erred in law in failing to go on to consider whether the involvement of the four doctors could have had a more than trivial influence on the decision to publish the statements and on their tone and content.

68. Further or alternatively, the ET has failed to give adequate reasons for its findings in those paragraphs.

69. In a further alternative, the decision reached by ET is perverse. C contends that no reasonable tribunal presented with the evidence of R's conduct, both in making the public statements and during the trial itself, could conclude that the detriments alleged by C were not linked to the protected disclosures he made in the sense of having had more than a trivial influence on what R chose to do following the settlement of the earlier claims. This is neatly illustrated by the notes of the Board Meeting that R did not disclose until the latest possible moment, which even includes the statement that if C were to breach the terms of the agreed statement, he would "*have to answer to the GMC*" [SUPP 122]. In practice, of course, it was R who breached the terms of the statement to C's detriment. C says therefore that even taking the evidence and the

findings above at paragraph 64 together, no tribunal properly directed could have failed to see the link between the protected disclosures and the detriments.

The Field of Employment Issue

Ground 4: Incorrect application of the law

70. C contends that the "field of employment" question was misunderstood by the Tribunal, which applied the Court of Appeal's recent decision in *Tiplady v City of Bradford MDC* [2019] EWCA Civ 2180; [2020] ICR 965**:**
    a. C's primary submission is that *Tiplady* does not make new law, nor is it a case about post-employment detriment; it simply reiterates that a detriment must be suffered by an individual in their capacity as a worker. It is an obvious point.
    b. If that is wrong, and *Tiplady* has the effect of narrowing rather than broadening the protections provided to whistleblowers, then C says in the alternative that the findings in *Tiplady* as to field of employment are obiter;
    c. In a further alternative, if *Tiplady* changes materially the scope of protection for whistleblowers, then it is incorrect and incompatible with *Woodward*, or it is incorrect. As such, C reserves his position on further appeal.

71. In his closing submissions, C invited the Tribunal to consider *Tiplady* alongside *Woodward* [SUPP 38 - 41]. The ET's majority decision on this point suggests that, contrary to *Woodward* (and, C says, *Tiplady*), whistleblowers are not in fact protected whenever the retribution is exacted.

72. In C's submission, it cannot be right that simply because a whistleblower has litigated previous detriments, he is debarred from bringing a further claim because once he has, the detriment is somehow suffered in his capacity as a litigant rather than as a worker. This is, however, the effect of ¶186 of the Liability Reasons.

73. The ET focuses at ¶¶182 and 191 on the fact that C crowd-funded his claim as being evidence that C was not acting as an employee, but was acting in a role the ET described as "crowd-funded litigant". Again, it cannot be right that merely because a claimant must raise funds in order to bring a whistleblowing claim that the very manner of funding his litigation debars him from protection under ERA 1996. Without

prejudice to the matters set out above at paragraph 70, C says that this is plainly a misapplication of what the Court of Appeal was saying in *Tiplady.*

74. The Tribunal further erred in those paragraphs by relying entirely on the decision in *Tiplady* as though it were authority for a new test, and disregarding *Woodward,* despite the Court of Appeal in *Tiplady* agreeing with the Court of Appeal in *Woodward.*

75. Again, had the ET followed the guidance in *Woodward,* it would have been bound to conclude that C was acting as an employee, and C would have succeeded, at the very least, on the detriment that the ET found at ¶155 [43 – 44].

ERRORS IN RELATION TO COSTS

76. C made a limited costs application which related solely to R's conduct in respect of disclosure issues, which in this case were extraordinary and of the utmost seriousness. They are set out in detail in C's costs application [225 -233]; however, in very brief summary, during the final hearing:
    a. Discovery and disclosure failures became abundantly clear, including the fact that R had put forward an untruthful case in relation to the existence of notes or minutes of a board meeting;
    b. Mr Cocke, admitting to permanently deleting an archive folder which "contain[ed] over 90,000 emails" [SUPP 115] during the course of the hearing upon it having become apparent during the course of the hearing that he had not undertaken a proper search and that there were undisclosed documents. He did this on the day that he was due to give evidence, and ultimately claimed thereafter to be too unwell to give evidence [16];
    c. It transpired that R was in serious breach of the ET's orders as to disclosure dated 13 November 2020, 2 September 2021, and 4 July 2022.

77. This conduct was serious and had costs implications for C, particularly since the manner in which the disclosure failures were revealed happened piecemeal over a two-week period. The late disclosure was drip-fed to the ET and C during the hearing between 1 July 2022 and going up to 13 July 2022, well after the evidence had finished, creating considerable additional work for C's lawyers over and above the work that would have taken place had R complied with its discovery and disclosure obligations from the outset.

78. C attacks the Costs Reasons on the following grounds:

    a. That the ET erred in law in its failure to exercise its discretion in C's favour by disregarding relevant factors and giving impermissible weight to irrelevant factors and failing to make findings on each of the issues raised in C's costs application and/or failing to engage with C's arguments in respect of the same.
    b. Further or alternatively, the ET failed to give any or any adequate reasons as to the same; and
    c. Further or alternatively, the ET erred in law by considering in isolation R's submissions as to C's own conduct at stage three of its assessment by:
        i. Failing to factor in R's conduct, which was the basis of the application, and instead considering C's conduct; and/or
        ii. Reaching conclusions in respect of C's conduct which were not corroborated by the Liability Reasons; and/or,
        iii. Reaching a perverse decision.

Ground 1: Failure to exercise or improper exercise of the discretion

79. The relevant findings in the Liability Reasons which underpin C's costs application are found at ¶¶55, 75, 78, 80, 83, and 86, all of which deal with R's conduct. In these paragraphs, the ET records that R accepted it could be criticised for its conduct, that the ET had "serious concerns" about disclosure (which also included inadequate discovery; deletion of documents (including relating to Mr Travis, Ms Lynch and Dr Brook), that Mr Cocke had deleted documents and had "owned up only because he had been found out". The Tribunal also reflected on the earlier criticism of EJ Kelly at ¶76 [20], R's admission that there had been no instruction to preserve documents, and that the destroyed documents may have been relevant to the claim. The ET concluded at ¶76 that it took a "*dim view of the disclosure issues*" [25].

80. The ET did not take any of these matters into account or into account adequately in its Costs Reasons. Although the ET found that the threshold of unreasonable conduct was met, the ET devotes ¶¶14 – 21 of the 22-paragraph Costs Reasons to R's submissions, which focussed entirely (and, C says, impermissibly) on C's conduct, in respect of which the ET had made no relevant findings.

81. Given the substance of C's case on liability, which was that R had materially misrepresented its investigations and the seriousness of C's protected disclosures, the disclosure issues, and the gravity of R's conduct of the trial, the ET had ample material before it which allowed it to exercise the discretion. These factors were simply not taken into account.

82. The ET further does not consider, in its short Costs Reasons, the impact of R's conduct, which resulted in a hearing which was longer than it needed to be, and caused significant extra billable work for C's legal team. It does not consider that the disclosure during the trial was piecemeal, took place over a two-week period, and continued even after the evidence had completed.

83. The factors that the ET does take into account are irrelevant. C says that the following are findings which illustrate the incorrect approach taken by the ET in evaluating C's costs application:

    a. There is no finding in the underlying Reasons that the Claimant had conducted his case unreasonably; in fact, there is only one mention of unreasonableness in relation to the Claimant's conduct (see Liability Reasons at ¶157 [44]) and relates to one sentence. Despite this the ET finds that C had been unreasonable in his conduct of the litigation (¶20) [74];
    b. The Tribunal has taken new post-facto evidence adduced by the Respondent in its submissions in response to the Claimant's costs application as being relevant to all the circumstances of the case, which it plainly cannot be, because it post-dates the case (see ¶21 [75]);
    c. Further, as set out in the Claimant's reply dated 28 February 2023 [242 – 247], R has in any event mischaracterised that evidence. C's reply does not appear to have been considered by the Tribunal at all. It is not referenced in the Costs Reasons on a single occasion;
    d. At ¶17 of the Costs Reasons [74], the ET refers to findings it had made about the scope of C's claim; however, the ET made no findings to this effect in the Liability Reasons, nor did it refer to *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96;
    e. There is no finding in the Liability Reasons at ¶197 [53] that the Claimant's conduct in cross-examination amounted to unreasonable conduct of proceedings;

f. The findings at ¶¶18 and 19 of the Costs Reasons [74] do not correlate in any way with the ET's findings in the Liability Reasons; instead, the Liability Reasons show that the Tribunal curtailed the evidence (see, for example, Liability Reasons at ¶38 [12]), which meant that absent R's unreasonable conduct, there was considerable leeway in the trial timetable. In fact, the only findings regarding the length of the trial were directly caused by R's unreasonable conduct (see Costs Reasons at ¶11 [73]). This further fails to take into account the increased demands placed upon C's legal team in dealing with the late disclosure and consequential issues (see C's schedule of costs [233]);

g. The finding at ¶19 of the Costs Reasons [74] is an impermissible reference to another claim which could not possibly be relevant C's conduct at the hearing in question. C contends that this is an entirely unsafe finding;

h. The finding of unreasonable conduct at ¶20 [74] is entirely new, and does not correlate with any finding in the underlying Reasons;

i. At ¶21, the ET plainly takes into account C's social media activity, despite saying that it will not do this (¶15 [73] and ¶21 [75]). This cannot be relevant to C's conduct at the hearing given that the tweets did not exist at that time. C contends that this is another example of an entirely unsafe finding.

84. C contends that it was an error of law for the ET to fail to exercise the discretion to award costs. Alternatively, the Costs Reasons simply do not set out why C's application failed, and C is entitled to understand this. There is no explanation in ¶¶14 -21 as to what factors (other than R's submissions) the ET has taken into account, no balancing exercise in respect of those relevant factors (whatever they may be) and no adequate explanation as to how the ET determined it should not exercise the discretion.

Ground 2: The Tribunal erred in law by considering in isolation the Respondent's submissions as to the Claimant's conduct at stage three of its assessment

85. C accepts that there are circumstances where the ET may take into account the conduct of both parties; however, in the Costs Reasons, the ET appears to criticise C for bringing his claims in the way he did, despite there being no basis for this in the Liability Reasons. The ET was instead taking into account new factual submissions made on the paper by R.

86. In short, the correct approach to be applied by the Tribunal was to:

    a. take into account the costs caused by the paying party's unreasonable conduct as found in the Liability Reasons;
    b. take into account the conduct of the receiving party in light of any relevant finding of fact in the Liability Reasons;
    c. depending on those relevant findings of fact in respect of each party, to assess the proper amount of a costs order.

87. The ET did not do this. It therefore erred in law in concluding that no order of costs should be made against the Respondent because of the Claimant's conduct without having identified any factual basis to support that decision, and without having considered the Respondent's conduct, which was the subject of the Claimant's costs application, at the second stage of its assessment.

88. Taken together, the findings set out at paragraph 83 above demonstrate a clear error of law. The ET has failed to consider all the circumstances of the case in relation to the Costs Reasons, and has focussed impermissibly on C's conduct and R's submissions, resulting in an unbalanced and unsafe decision. There was no proper factual basis for a conclusion that as a result of C's conduct, no costs should be awarded. C says that further or alternatively, and for all the reasons outlined above, the ET's decision on this point was also perverse.

ORDER SOUGHT AND DISPOSAL

89. The EAT is respectfully invited to make the following orders:

    a. In respect of the Liability Appeal, quashing the ET's findings that the C was not subjected to detriment and that his protected disclosures were not made in the field of employment and remitting those matters to a fresh Tribunal for reconsideration;

    b. In respect of the Costs Appeal, quashing the ET's finding that R's conduct did not meet the requisite threshold for costs, and remitting those matters to the fresh Tribunal for reconsideration.

90. C submits that remission to a fresh Tribunal is appropriate on the basis of the principles in **Sinclair-Roche & Temperley v Heard** [2004] IRLR 763, and particularly

on the basis of the extent of the flaws in the decision and because it is clear that the Tribunal has already made up its mind (see **Sinclair-Roche** ¶¶46.4 and 46.5).

91. C respectfully submits that the errors in the ET's approach were fundamental and that that the EAT cannot therefore be confident that the Tribunal will be prepared to look at matters afresh. There would be the "*very real risk of the appearance of pre-judgment or bias*" described in **Sinclair-Roche** if this matter were remitted to the same Tribunal.

92. Further, C understands that EJ Martin has now retired, and therefore she may in any event be unable to hear any matters which the Appeal Tribunal elects to remit.

Andrew Allen KC

Elizabeth Grace

Outer Temple Chambers

17 June 2025