EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	v	RESPONDENT
Dr Christopher Day		Lewisham And Greenwich NHS Trust

Heard at:	**London South Employment Tribunal By CVP**	**On:**	**20 June to 8 July 2022, 12 July 2022, and 14 July 2022 and in chambers 25-28 July 2022. 28 October 2022 and 3 November 2022.**

Before: **Employment Judge Martin**
Ms J Forecast
Ms C Edwards

Appearances:
For the Claimant: **Mr Allen KC**
For the Respondent: **Mr Tatton-Brown KC**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's claims of detriment for having raised protected disclosures are not well founded and are dismissed

RESERVED REASONS

1. The Claimant presented a claim on 6 March 2019 claiming detriments for making protected disclosures. The claim was defended by the Respondent in its response dated 23 May 2019. During the progress of the proceedings, there were various amendments to the particulars of claim and the response resulting in the agreed issues which are set out in appendix 1. These findings of fact and conclusions are confined to what is set out in the list of issues and what is

necessary to explain the decision reached. Even if not specifically set out below, all evidence was heard and considered by the Tribunal.

2. In summary, the Tribunal found that all bar one of the detriments set out in the list of issues, were not detriments and that even if they were, they were written because of the publicity following the settlement of the Claimant's 2014 claim which is discussed in detail below and not because the Claimant had made protected disclosures.

The hearing

3. This is a highly unusual claim with two barristers, one a KC, giving evidence in relation to their representation of the parties in previous litigation arising from a claim presented in 2014 and settled in October 2018 after the Claimant had given his evidence. There were an abundance of substantial applications and other matters to deal with during the hearing, with an order for disclosure being made in the last week of the hearing. Each application was hotly contested and the Tribunal, in addition to hearing the evidence and determining the issues had many complicated decisions to make. It was agreed that the full reasons for the decisions made in these applications would be left to this judgment so that the evidence could be completed in the time allocated.

4. This hearing was listed for 15 days. The Tribunal did not sit on Friday 24 June 2022. For reasons which will be explained, the Tribunal also did not sit on Tuesday 5 or Wednesday 6 July 2022.

5. There is reference to four doctors who attended the 2018 Tribunal and were to give evidence. They are Dr Harding, Dr Luce, Dr Patel and Dr Aitkens. They are collectively referred to as 'the four doctors' in this judgment.

6. The first part of this judgment deals with the various and numerous applications made by the parties during the hearing. The evidence and matters relating to the agreed issues start at paragraph 100.

Witnesses and evidence before the Tribunal

7. The evidence was extensive with the Claimant providing an extremely long witness statement comprising 91 pages, an additional witness statement of 15 pages and two further supplementary statements. There was a main bundle comprising 2,244 pages and the Claimant provided a supplementary bundle comprising 345 pages. There were further documents produced during the hearing contained in a separate 'late disclosure' bundle. There were witness statements as follows:

8. For the Claimant:

    a. The Claimant's main witness statement and three supplementary statements

b. Rt Hon Jeremy Hunt – his statement was taken as read and he did not attend the Tribunal.

c. Sir Normal Lamb who attended under a witness order

d. Dr Sebastian Hormaeche

e. Dr Megan Smith

f. Mrs Melissa Day (the Claimant's wife)

g. Mr Christopher Milsom (barrister for the Claimant in previous proceedings who attended under a witness order)

9. For the Respondent

h. Mr Ben Travis – CEO

i. Mr David Cocke – Associate Director for Communications – witness statement and supplementary statement – he did not attend to give evidence.

j. Mr Ben Cooper KC (barrister for Respondent in previous proceedings).

k. Mr Andrew Rowland – Solicitor for the Respondent. He did not give evidence.

10. The Tribunal considered the evidence of those witnesses who provided statements but were not required to attend to be cross-examined. The Tribunal accepted at face value the statement of Mr Rowland. The reason for his statement being provided is set out below. Rt Hon Jeremy Hunt's witness statement comprised three paragraphs, which relate to what he was told by the Claimant about the protected disclosures he had made. It does not refer to the statements made by the Respondent which are the subject of this hearing. The Tribunal does not understand why his witness statement was put forward.

Applications and other matters arising during the hearing

11. There were numerous preliminary matters and applications made during the hearing and additional documents adduced at various times. By agreement, decisions were made during the hearing with more detailed reasons being reserved for this decision so the hearing could progress without undue delay. Below are the various applications made, other matters discussed, and the reasons given for the decisions reached.

Jurisdiction

12. Within the list of issues is a jurisdictional point (see paragraph 4 in list of issues Appendix 1). The Tribunal asked at the outset whether this should be considered before the evidence was heard. Both parties wanted this to be considered with other matters suggesting that to understand this point properly the evidence needed to be heard. This is discussed below in the section on "in employment"

Legal advice privilege/without prejudice communications

13. As Mr Milsom and Mr Cooper were legal representatives of the Claimant and Respondent respectively in the Claimant's 2014 proceedings, the question of legal advice privilege and without prejudice communications arose. The parties set out their positions on legal advice privilege and without prejudice communications by email prior to the hearing as follows:

    i. Neither party waives legal advice privilege.

    ii. Legal advice privilege covers the content of legal advice but not the fact of giving, seeking, or taking legal advice. Therefore, a witness can be asked 'was legal advice given, sought, or taken?' but not 'what was the advice?'

    iii. Neither party is asserting without prejudice privilege in relation to the without prejudice communications between the Claimant and the Respondent during the 2014 proceedings which took place at the hearing in 2018.

    iv. Neither party is seeking to exclude reference to the fact or content of without prejudice communications between Health Education England ("HEE") (a former Respondent to these proceedings and a Respondent to the proceedings presented in 2014 and heard in 2018) and the Claimant.

CVP or in person hearing

14. The hearing had originally been listed as an in-person hearing. However, due to resourcing issues it was converted to be heard by CVP just before the hearing. The Claimant objected and asked that it be converted back to an in-person hearing in an email to the Regional Judge on Friday 17 June 2022. He was told that there was no other option available.

15. The Claimant made a further application on the first day of the hearing. His objections to a hearing by CVP were that the reasons for the change in hearing venue was due to judicial resources rather than public health and that this was a complicated case with many witnesses and numerous documents. The Tribunal was referred to the Presidential 'Road Map' which says that whistleblowing cases should be heard in person by default. It was submitted

that two barristers, one a KC were to give evidence and the Claimant does not have a home office and will need to travel elsewhere to do a CVP hearing.

16. The Respondent's position was that the overwhelming priority was that the case could be heard by whatever means. The Tribunal made enquiries to see if there was another panel available for the hearing who could attend the Tribunal for an in-person hearing. There was no other panel available. There was no application for a postponement and so the hearing proceeded by CVP.

17. Although not part of the initial decision to proceed by CVP, the Claimant tested positive for Covid-19 before the hearing concluded and on 12 July 2022, the Claimant was able to attend by CVP and was willing to be cross-examined if required on his supplemental statements. This would not have been possible had the hearing been in person.

18. Additionally, there were upwards of 50 people observing, on some occasions more than 60. This access to justice would not have been possible if the hearing had been in person.

19. There were initially some interruptions from those observing who for example, did not turn off their microphone or who inadvertently used the presenter mode. However, EJ Martin worked out a way to mute all, and then unmute only those participating so this was not a problem after the first couple of days. There were a couple of incidents when those observing put comments in the chat box. One such incident was when Mr Milsom was giving evidence. The comment was entirely inappropriate. EJ Martin made it clear that the chat box was not to be used and after this, the chat box was not used save maybe for one or two more occasions. These interruptions and comments which whilst unacceptable, did not affect the fairness of the hearing or hinder the parties from putting their respective cases forward.

20. In ideal circumstances, the Tribunal would have preferred the hearing to be heard in person rather than by CVP. However, there was no panel available who could sit in the same venue, so CVP was the only option for the hearing to progress as timetabled. There would have been a very considerable delay if the hearing had to be postponed to another date. It was in the interests of justice that the hearing proceeded especially given the time it has taken to get to a hearing, the time it would take for the matter to be relisted and in any event there was no application to postpone the hearing.

Transcription

21. On the first morning of the hearing, the Claimant made an application for the proceedings to be transcribed by a third-party commercial transcription service. The Respondent had no objection in principle, but did object to contributing to the costs. The Claimant said he was happy to share the transcription with the Tribunal and with the Respondent. The Tribunal allowed the transcription, including the recording of the proceedings for the purpose of the transcription provided that the Judge's note remained the official record of the proceedings, the recording was deleted each day, the Tribunal was notified that it had been

deleted, and the transcript was for the use of the Claimant, the Respondent, and the Tribunal only. There was no order that the Respondent should share the costs.

Witness statements of Dr Smith and Dr Hormaeche

22. The Respondent made an application in relation to the statements made by Dr Smith and Dr Hormaeche, witnesses for the Claimant. The application was to disallow the statements on the basis that they were giving quasi expert evidence which was not relevant to the issues the Tribunal were to determine and that they were not independent expert witnesses. The Tribunal gave its decision on day three.

23. It is not proportionate to set out the application and response in detail. What is set out below is a summary of the arguments put to the Tribunal.

24. The Respondent's position is that the statements are not adduced as expert evidence but appear to be expert evidence in their content. It was put forward that the evidence was based on a review of documentary evidence, and gives the doctors' opinions on them. The evidence they based their statements on was provided by the Claimant and did not have the balance required by the De Keyser decision. Both doctors were supporters of the Claimant on his crowdfunding pages so could not be said to be impartial. In support of this the Respondent referred to the following:

- **De Keyser Ltd v Wilson [2001] IRLR 324** which provided guidelines to provide a framework as to how expert evidence should be collected in employment tribunal cases. The specific guidance is not set out here.

- **Mansion Place Ltd v Fox Industrial Services Ltd [2021] EWHC 2747** in which the court considered issues as to the interpretation and requirements of PD 57AC (Trial witness statements in the Business and Property Courts)

- **Gallagher v Gallagher [2022] EWFC 53** a family case which considered impartiality of experts.

- **Kennedy v Cordia (Services) LLP [2016] UKSC 6** – A case from Scotland dealing with health and safety which concerned the admissibility of evidence given by the expert witness.

- **Practice Direction 57AC of the CPR (together with Appendix)** – Trial witness statements in the Business and Property Courts

- **CPR Rule 35** – Experts and Assessors

25. It was submitted that the statement of Dr Hormaeche read as someone hoping to assist the Tribunal in the capacity of an expert. Additionally, much of what he says is irrelevant (e.g., how he got to know the Claimant), and he gives a commentary which comprises opinion-based observations about documents he

relies on with his expertise as a doctor. His statement makes his 'findings' on the documentary evidence he has seen.

26. In relation to Dr Smith's evidence, it was submitted that she got to know about the case only from what the Claimant had told her, and she was not independent. It was suggested that she was trying in effect, to re-argue the 2014 litigation. She was not at the Trust at that time and has never worked there. Whilst she says that she is providing key factual evidence to assist the Tribunal to understand how those claims arose (i.e. the protected disclosures he made), this is not what this case is about.

27. The Respondent submitted that the Tribunal has a discretion as to whether to include or exclude these statements and urged the Tribunal to take a pragmatic approach. It was submitted that there was prejudice to the Respondent if the statements were admitted.

28. The Claimant responded to the application pointing out that the statements had been exchanged on 24 May 2022 and the Respondent had had ample time to prepare. The Claimant relied on **HSBC Asia Holdings BV and another v Gillespie UKEAT/417/10**, para 13(1) which summarised the position regarding admissibility of evidence in the employment Tribunals. This is partly set out below.

    l. To be admissible the evidence must be relevant, if irrelevant it is not admissible.

    m. The degree of relevance needed for admissibility is not some fixed point on a scale, but will vary according to the nature of the evidence.

    n. There must be 'sufficient relevance'

    o. There is no distinction in principle between the powers in this regard of the civil courts and those of the employment tribunal. It is arguable that employment tribunals while guided by the same principles, should be rather more willing to exclude irrelevant, or marginally relevant, evidence.

29. It was submitted that the doctors' evidence was relevant to the issue of concealment which are disclosures that the Respondent has not accepted as protected disclosures. Further it was suggested that the Respondent is over-relying on the CPR which is not the guiding star for Employment Tribunal practice, and that whistleblowing cases are akin to discrimination cases and there should therefore be a different approach to that taken in the property courts.

30. It was denied that the statements were expert or quasi expert statements but were statements from people who had expertise and experience. The Claimant discounted the Cordia case as this was a Scottish case and they do things

differently there.

The Tribunal decision

31. The Tribunal was concerned that the statements did appear to give expert evidence as they provide commentary and opinion on documents put before the witnesses by the Claimant. Dr Hormaeche not only offered his opinion but purported to make findings on what the documents meant.

32. Whilst the Tribunal had its concerns about these statements, it decided not to exclude them and allowed them subject to what is set out below. The Tribunal was referred to the CPR in some detail by the Respondent. The CPR do not have direct effect on the Employment Tribunals - the Employment Tribunal has its own rules of procedure. However, they are not without relevance and can be considered in deciding how to exercise discretion.

33. The main thrust of the two statements is that they say how serious the disclosures that the Claimant made were. This is not a matter the Tribunal needs to determine. The Respondent has largely agreed that the disclosures are qualifying disclosures, and the Tribunal does not need to be told that disclosures about serious matters concerning patient safety of critically ill people are serious. Given the acceptance of most of the disclosures, and given that these statements do not refer to the disputed parts of the disclosures, namely concealment, the Tribunal considered that the evidence was not relevant.

34. The Tribunal considered its options. Either it decides that one or both statements should not be admitted, or it allows the one or both statements and the witnesses to give evidence. The Tribunal was concerned about the proportionality of allowing this given the matters raised above and the time it would take to hear the evidence given that Counsel for the Respondent may wish to cross examine on each point in issue.

35. To overcome this, the Tribunal took a pragmatic approach and allowed the statements to be admitted in evidence. What weight that evidence would be the subject of submissions by both parties, and it would be up to the Tribunal what weight to give. To assist in achieving the overriding objective, and to conclude the case within the allocated time, the Respondent was not required to cross examine on every point in contention. In this instance the Tribunal will not assume, as it normally does, that the Respondent tacitly agrees with points if they are not challenged. The Tribunal left it up to the Respondent to decide what to cross examine on, and it was directed that this cross examination should be limited to those matters that are relevant to the agreed issues.

Supplementary statement from the Claimant

36. There was an application to admit a supplementary statement provided by the Claimant in response to Mr Cooper's witness statement, in particular paragraphs 11 to 16. The Claimant said that Mr Cooper's witness statement gave a one-sided account of the Claimant's evidence at the October 2018

hearing, and he wanted to correct that. It was said on the Claimant's behalf that Mr Cooper's witness statement did not refer to any document to back up what he was saying. The Claimant submitted that the Respondent had been given advance notice and can cross-examine the Claimant on what he says in his supplementary statement. It would be then up to the Tribunal to determine relevance as the case went along.

37. The Respondent resisted the application on the basis that what Mr Cooper said in his statement gave the background and context to the without prejudice negotiations and the settlement reached and that if he had not done this, he would have been criticised. The Respondent argued that the Claimant's supplementary statement being 15 pages long would take time to deal with in cross-examination. This is on top of the Claimant's main statement which is 91 pages long. It was put forward that it would be disproportionate to allow this statement, as this is not an issue for the Tribunal to determine.

38. The Tribunal considered both parties arguments and decided that it was just and equitable to allow the Claimant to respond to the criticism in Mr Cooper's witness statement. However, this was not to be taken as an invitation to go through the evidence in forensic detail given that it had been agreed that the Tribunal was not required to make findings of fact about the quality or demeanour of the evidence the Claimant gave in the previous proceedings. It was clear that the Claimant and Mr Cooper will not agree. The Tribunal considered that Mr Cooper was entitled to his view and the Claimant entitled to his view. To allow a blow-by-blow examination of the evidence given in the 2018 hearing would unnecessarily lengthen the hearing which was not in accordance with overriding objective. As with the statements of Dr Smith and Dr Hormaeche, if a point is not challenged in cross examination there would be no automatic assumption that the point was agreed with.

39. The Claimant provided two further supplementary statements following the disclosure that took place in the second week of this hearing (see below). The Respondent did not object and the statements were admitted. The Respondent did not wish to cross-examine the Claimant on these statements as it said they contained evidence that was opinion rather than factual. The Tribunal agreed to continue as it had with the previous supplementary statement from the Claimant and the statements of Dr Smith and Dr Hormaeche. The Claimant was sworn in and confirmed the contents of his statement were true to the best of his knowledge and belief. The Claimant had tested positive for Covid but wanted the Tribunal to record that he felt well enough to give evidence if there were questions to answer. The Respondent confirmed it did not want to cross-examine the Claimant.

Application for information

40. The Claimant made an application that the Respondent provide the names of those people that Mr Cocke obtained information from for the purpose of writing the press statements that are the subject of this claim.

41. The Claimant's application was made under rule 29 Employment Tribunal Rules

of procedure – case management orders. It was submitted that the parties seems to be fighting different cases. Part of the Claimant's case is that he made several protected disclosures in 2013 and 2014 to medical professionals at Trust and HEE (para 2 list of issues) this was accepted in part as disclosures covered matters of doctor/patient ratios, medical supervision, patient safety, and a failure to investigate patient safety issues. There was also concealment of issues raised by the Claimant. The Claimant submitted that there were attempts to discredit him and wrongly call his competence and medical proficiency in question in the statements made in 2018 and 2019. These were made by the Respondent with input of the same medical professionals he made disclosures to, including accusations of concealment to detriments set out para 4 of the list of issues.

42. It was submitted that was very relevant to this application. The Claimant applied to the Tribunal on 14 June 2022 for an order that the Respondent reveal who comprised the senior team at all material times referred to in paragraph 4 of Mr Cocke's witness statement and who the senior clinicians were from whom he got understanding as set out in paragraph 14, and which senior doctors gave internal sign off as referred to in paragraph 15 of Mr Cocke's statement. The references were vague, and the Claimant suspects they are same or overlapping with people he made disclosures to and the alleged concealment. This was relevant to causation, and whether there were detriments on grounds of protected disclosures having been made.

43. It was submitted that it was for the Respondent to determine who would give evidence, but none of medical professionals or senior clinicians, doctors team members were giving evidence. Many of them were present at the 2018 hearing and were likely to be involved in decision making leading to the detriments.

44. It was submitted that it is surprising that there is no documentary record disclosed of this information. If it had been disclosed at the outset, it may resolve the issue, but also may open a request for further disclosure. It was submitted that it would be best to address it early in the hearing, rather than nearly at the end of the evidence.

45. The Claimant does not find it easy to accept that they were not involved. It was submitted that the Respondent has history of failure to disclose documents at all, or in timely fashion. The Respondent's failure to volunteer the information when asked for it heightened the Claimant's desire to know who they were, and it would it help to clarify matters.

46. Respondent objected to the Claimant bolstering his application by making criticisms about the Respondent's alleged failures. The only alleged failure to the current claim is the failure to provide the letters to the 18 stakeholders. The Respondent does not accept that they fall within standard disclosure, and that when the request was made for them they were produced. The Respondent says these documents are supportive of the Respondent's pleaded case. It was said that the Claimant failed to provide documents regarding Mr Milsom.

47. In relation to the substance of the application, The Respondent was not aware of any request for information as to who was the author or authors of the public statements made prior to exchange of witness statements so to say this information is necessary for determination of the proceedings, is a surprising one. The Respondent submitted that the questions asked are reasonable to ask the relevant witness, but it is not appropriate to cherry pick some questions that should properly be viewed as cross-examination questions, and get answers before the cross-examination begins, this will add to expense and formality of the proceedings. Mr Cocke will answer the questions. The Claimant said it needs the information before Mr Cocke gives evidence as it may inform questions to be asked of other witnesses. It is not appropriate to hive off several questions in this fashion.

The Tribunals conclusions

48. The Tribunal considered the submissions and decided not to make an order on the basis that, further information could be asked in cross-examination and if necessary, the Claimant could be recalled after Mr Travis and Mr Cocke had given evidence. Given where we were in the proceedings, it was not necessary to have this information at that time.

49. At the time this decision was made there was no expectation on the part of the Tribunal that there would be a need for further disclosure. However, what happened was that on the evening of Friday 1 July 2022 further disclosure was given by the Respondent which confirmed that the four doctors had been consulted at the least about the statements. Whether they had 'signed them off' was a matter in dispute. This is dealt with in more detail below.

Application for additional discovery

50. On Monday 4 July 2022 the Claimant made an application for additional discovery. There was a written application running to eleven pages. The background to this application was that the Respondent provided the Claimant with additional documents on the evening of Friday 1 July 2022. This arose following the evidence of Mr Travis. Mr Cocke was observing. He could hear the issues that arose about who had 'signed off' the statements, and could see that Dr Harding was also observing. He contacted Dr Harding to ask if he had any documents relating to the issues that were under consideration on that Friday. Dr Harding provided some emails which were in turn provided to the Claimant. This led to the Respondent conducting a further search for documents over the weekend with further documents being disclosed.

51. To progress the hearing, the Tribunal gave a general indication of its views on this, which was that disclosure was necessary in relation to the four doctors, and invited the parties to draft and agree an appropriate order. There were two matters which the parties could not agree on.

52. The first was in relation to the emails from three people namely Richard Breeze, Peter Roberts, and Mick Jennings. The Tribunal did not consider that these three people were relevant, and noted that none of these three people were

central enough to the matters in issue to have been included in the cast list prepared for this hearing. The Tribunal considered this to be a 'fishing expedition'. It therefore refused the Claimant's application for disclosure in relation to Richard Breeze, Peter Roberts, and Mick Jennings.

53. The second matter on which there was disagreement was in relation to the Claimant wanting a statement from the Respondent solicitors about how it conducted the discovery process. The Claimant wanted a very detailed list of matters to be included following the detail in CPR 31. The Respondent resisted saying that this was disproportionate given that the CPR does not have direct applicability in the Employment Tribunal which has its own rules of procedure.

54. The Tribunal referred to its previous decision where it decided that the CPR had no direct effect on Employment Tribunal proceedings but could be considered. Therefore, it decided not to make an order as requested by the Claimant but to make an order that a statement was written bearing in mind, as relevant, the provisions of the CPR. The parties drafted an order in those terms which was approved by the Tribunal. It is noted that the Claimant was now relying on the CPR, which it objected to the Respondent doing in relation to the admissibility of Dr Smith's and Dr Hormaeche's statements and vice versa.

55. The reason the Tribunal ordered additional disclosure at this point in the hearing was because the involvement of the four doctors became more focussed, and given the evidence already heard (the Claimant's case had closed, and Mr Cooper and Mr Travis had given evidence), it appeared that there may be evidence that contradicted what had been said by Mr Travis. It was important to see what the documentation was to determine the issue of causation. This was relevant to the issues, necessary and proportionate.

56. The Tribunal did not sit on Tuesday or Wednesday 5th and 6th July 2022 to enable the additional discovery and disclosure to take place.

The Claimant's application to strike out the Respondent's response

57. On 6 July 2022, the Claimant made a written application to strike out the Respondent's response. The basis for this application was that:

    - The manner in which the proceedings have been conducted by or on behalf of the Respondent has been scandalous, unreasonable or vexatious (rule 37(1)(b));

    - The Respondent has not complied with ET rules or with an order of the tribunal (rule 37(1)(c));

    - It is no longer possible to have a fair hearing (rule 37(1)(e)).

58. This application followed the discovery and inspection process described above. A part of the order made by the Tribunal was the provision of statements setting out the methodology used for discovery given that the Claimant was

alleging that the Respondent had used the wrong methodology and its discovery process was not reasonable. Mr Rowland, from Capsticks solicitors, representing the Respondent, provided a witness statement which inter alia said that there had been no instruction to people at the Respondent to preserve documents relating to the issues in this claim. There was also a witness statement by Mr Cocke. In this statement he described feeling anxious and depressed and how he deleted emails from his archived email account and current email account on the Monday morning of that week. He described doing this in a panic at a time when he when he was unwell and not thinking straight.

59. At the parties' request, the Tribunal convened a private preliminary hearing to discuss the issues surrounding the disclosure, Mr Cocke's medical situation and his ability or otherwise to give evidence. The Respondent wanted time to finish preparing a written response and this was granted. Given this turn of events it was agreed that the application to strike out would be heard on Friday, 8 July 2022. It was anticipated that the application and response would take the morning and the Tribunal would be able to give its decision at about 3 pm. It was further agreed, as with all other applications, that to speed matters along and to get a decision on that day, that full reasons would not be given but would form part of this judgment.

60. The Tribunal had planned to sit in chambers the week of 11 July 2022 and were therefore available the following week. Luckily both Counsel had some availability, and it was agreed that closing submissions could be given the following week.

61. The Respondent had decided that Mr Cocke would not give evidence as he was unwell and not fit to give evidence. His statement would therefore be taken as read and the Tribunal would attach whatever weight it deemed appropriate to its contents. However, on the afternoon of Friday 8 July 2022, the Tribunal was told that Mr Cocke had seen his GP and was now fit to give evidence and wanted to give evidence. It was agreed that his evidence could be heard the following week before submissions.

62. The Tribunal heard the application to strike out the Respondent's response on Friday 8 July 2022. The Tribunal had reached its decision when the news came in that Mr Cocke was now available to give evidence due to his mental health issues improving. This did not change the decision which had already been reached.

63. The Claimant and Respondent both provided detailed written submissions which were carefully considered by the Tribunal together with oral submissions. This is a summary of their respective positions it does not set out all the case law referred to for reasons of proportionality.

The Claimant's application

64. The basis of the application was around the discovery process carried out by the Respondent. Reference was made to the order for discovery made during this hearing and to the history of discovery, including the criticism of the

Respondent in a previous case management order. It was submitted that the discovery process following that order was inadequate in that the relevant search terms were not employed, there was no explanation for the unavailability of some emails from Mr Travis, and there was no interrogation of Dr Brook's emails for the relevant period.

65. Further it was revealed that Mr Cocke had deleted a substantial amount of potentially relevant material while this hearing was ongoing, and what had been said about emails was inconsistent. This is set out elsewhere in this judgment.

66. Additional documents were sent to the Claimant on 5 July 22 comprising 76 emails and 3 other documents which were in addition to 14 emails sent earlier. Some of the material sent was new to the Claimant. The Claimant said he had genuine and concrete concerns about the Respondent's behaviour in relation to disclosure.

67. Reference was made to:

Rule 37 of the 2013 Employment Tribunal Rules of Procedure:

> Striking out (only the parts relevant to the application are set out)
>
> 37.— (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (a) …..
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d) ……
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
>
> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

The overriding objective - Rule 2 of the Employment Tribunal Rules of Procedure 2013

> 2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

> (a) ensuring that the parties are on an equal footing;
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Article 6(1) Of the European Convention on Human Rights, replicated at Part 1, Schedule 1 to the Human Rights Act 1998

> Right to a fair trial
>
> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

68. The Claimant submitted that the issues regarding discovery which are discussed elsewhere in this judgment, had been riddled with omissions. The issues relating to Mr Cocke and the deletion of emails during the proceedings may amount to a civil or criminal contempt or perverting the course of justice, and he would need to be cautioned about his right to remain silent if he gave evidence which could be an artificial mechanism for the delivery of any evidence that he could give. This coupled with the Respondent's inadequate disclosure means that a point has been reached at which the Respondent's response should be struck out.

69. It was further submitted that in a whistleblowing case causation is the main issue and direct explicit evidence of whistleblowing detriment is rare. Reference was made to **Fecitt and ors v NHS Manchester [2012] ICR 372** paragraph 45.

> 45 In my judgment, the better view is that 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 whistle-blower. If Parliament had wanted the test for the standard of proof in section 47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so.

70. It was submitted that the events during the hearing and the statements supplied on 5 July 2022 demonstrated that a proper discovery exercise did not take place in 2020 and now can not take place given the materials deleted.

71. Reference was made to **Bolch v Chipman** [2004] IRLR 140 paragraph 55

which said that when considering a strike out the Tribunal should consider:

a. Have the proceedings been conducted in a manner that was scandalous, unreasonable, or vexatious?

b. If so, is a fair trial possible, nonetheless?

c. If not, is strike out proportionate

72. It was put forward that the impact on other litigants is significant given the judicial resource which has been taken up on these claims to date and that this expenditure could no longer be justified. Reference was made to **Harris v Academies Enterprise Trust [2015] IRLR 208** paragraph 33 which said:

> "Overall justice means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court".

73. The Respondent has failed to comply with the disclosure orders made by EJ Andrews on 13 November 2020 and failed to comply with the overriding objective. Even now full disclosure had not been made.

74. A fair hearing is not possible due to the way the relevant material has been disclosed. It is now over three years since the matters complained of.

The Respondent's submissions

75. The Respondent accepted that it could fairly be criticised for aspects of the way in which it conducted its disclosure obligations and made apologies for those failures. Its position is that this did not show a desire to withhold relevant and damaging documents and there is no evidence this has happened. The disclosure is extensive and gives a full picture of the relevant events. It is absurd to suggest that a fair trial is not possible

76. The written submissions give details of the background to this application which are not set out here for reasons of proportionality.

77. Reference was made to the CPR and the obligation to conduct a reasonable search for (a) documents that adversely affect the Respondent's case or (b) support the Claimant's case, but there is no obligation to search for documents that form part of the background to the case or even for documents that might in a general sense be deemed to be relevant. To support this, Santander UK PI and Ors v Bharaj [2021] ICR 580, Tesco Stores v Element (UKEAT/0228/20/AT) and Frewer v Google UK ltd and Ors [2022] IRLR 472 were cited.

Judgment on strike out application

78. The overriding consideration is whether a fair trial is possible. The object of

rules as to discovery is to secure a fair trial. The Tribunal has serious concerns about the disclosure exercise carried out by the Respondent and has noted the previous issues around discovery, for example the order made by Employment Judge Kelly on 2 September 2021 in which it is recorded "*We also consider that the 18 Letters sent by R1 to the claimant on 22 January 2021 were relevant to the issues; had they not been relevant, we consider R1 would have resisted supplying them on the basis that they were irrelevant, in the face of the claimant's request for specific discovery. To that extent, R1 failed to comply with its discovery obligations. If the amendment is not allowed, R1 may be seen to be benefitting from its failure*." The Respondent resisted giving details of the doctors who were involved in the drafting of the public statements (see below).

79. There is also the issue of the board meeting note (authorising settlement in the 2014 case) which was only disclosed during the hearing after Mr Cocke's request of Dr Harding to find relevant documentation which led to this application being made. There were positive assertions both in Mr Travis's evidence before this Tribunal and as recorded in the record of the preliminary hearing before Judge Kelly on 19 March 2021: *"By the claimant, for specific discovery of documents relating to an alleged Board Meeting of R1 of 14 October 2018, including its organisations. R1 said there were no such documents; there was no board meeting. R1 accepted there was a telephone discussion, but does not accept that communications setting up the meeting were not relevant*." This was incorrect as a note of the meeting has now been produced. Although there was a note from a private GP on 12 July 2022 which references serous mental health issues and Mr Cocke saying he was stressed about this case and having to give evidence. This was the day after he destroyed the documents. Whether or not there is any potential legal action against him for the destruction of the documents, (which is not for us to determine) does not in itself determine the issue of whether a fair trial is possible. We note the disclosure that has happened this week.

80. We also note that it was Mr Cocke who opened this can of worms. It was he who contacted Dr Harding and he who forwarded the emails provided by Dr Harding to the Claimant. He has been open about deleting the documents. It was not a situation where he owned up only because he had been found out. This does not strike the Tribunal as the actions of someone who is mindset on concealing documents and lends some credence to his explanation.

81. We have considered all case law referred to in detail, in addition to what is set out above the following case law was referred to:

Bolch v Chipman –

"55 There must be a conclusion by the tribunal not simply that a party has behaved unreasonably but that the proceedings have been conducted by or on his behalf unreasonably.

……

"assuming there be a finding that the proceedings have been conducted scandalously, unreasonably or vexatiously, that is not the final question so far as leading on to an order that the notice of appearance must be struck out

……..

But in ordinary circumstances it is plain from Lindays P's judgment[1] *that what is required before there can be a strike out of a notice of appearance or indeed an originating application is a conclusion as to whether a fair trail is or is not still possible.*"

Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684

"*21. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences.*"

Harris v Academies Enterprise Trust and ors – UKEAT/0097/14/KN

"33. I accept, in line with Mr Milsom's submissions, that justice is not simply a question of the court reaching a decision that may be fair as between the parties in sense of fairly resolving the issues; it also involves delivering justice within a reasonable time. Indeed, that is guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms. It must also have regard to cost. Even if the employment tribunal is not in the same position as the civil courts because there is no cost-shifting regime, it was designed as a cost-free forum in so far as party-and-party costs were concerned. That is true of most Tribunals; it is a particular feature of most tribunals. I would accept, too, that overall justice means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. If a case drags on for weeks, the consequence is that other cases, which also deserve to be heard quickly and without due cost, are adjourned or simply are not allotted a date for hearing."

Fecitt and others v NHS Manchester (Public Concern at Work intervening) [2011] EWCA Civ 1190

"41 Once an employer satisfies the tribunal that he has acted for a particular reason here, to remedy a dysfunctional situation that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the tribunal considers that the reason given is false (whether consciously or unconsciously) or that the tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the principles in Igen Ltd v Wong…"

……

45 In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a

[1] De Keyser Ltd v Wilson [2001] IRLR 324

trivial influence) the employer's treatment of the whistleblower. If Parliament had wanted the test for the standard of proof in section 47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so."

Active Media services Inc v Burmester, & ors [2021] EWHC 232 (Comm):

"Deliberate destruction of documents

302. This is, however, not merely a case about inferences to be drawn from the absence of relevant witnesses. It is a case where the Claimant is guilty of the deliberate destruction of relevant documents, knowing that it was under a legal duty at the time to preserve them.

303. The starting point in a case of deliberate destruction of documents is that if a fair trial of the action cannot then take place, the destroying party's case should be struck out. And of course, the later that the destruction take place, the worse the position; it may make a fair trial of the action less likely. The very late destruction of the documents by Mr. Quinn in this case meant that the Guarantor Defendants had little or no time to properly to investigate the position.

304. As the Vice-Chancellor stated in Douglas v Hello! [2003] EWHC 55 at [90]: "The issues are whether the rules have been transgressed, if so whether a fair trial is achievable and if not what to do about it. See Logicrose Ltd v Southend United Football Club Ltd (The Times 5th March 1988) and Arrow Nominees Inc v Blackledge [2001] BC 591 para 54 where Chadwick LJ, with whom Roch LJ agreed, said: "I adopt, as a general principle, the observations of Mr. Justice Millett in Logicrose Ltd v Southend United football Club Limited (The Times, 5 March 1988) that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules – even if such disobedience amounts to contempt for or defiance of the court – if that object is ultimately secured by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold bound – to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."

305. As is stated in Hollander, Documentary Evidence (13th Edn), there are only a limited number of cases where applications have been made to strike out proceedings for concealment or destruction of documents. In Logicrose v Southend United Football Club [1988] 132 S.J. 1591, the responsible director of the claimants was alleged to have deliberately suppressed a crucial document and for a time successfully concealed its existence from the court. Millett J did not find the allegation proved, but said that if it had been, it might have given rise to a contempt sanction but should not lead to the action being struck out unless the failure rendered it impossible to conduct a fair trial.

306. In Dadourian Group v Simms [2009] EWCA Civ 169 Arden LJ stated at [233]: " …[A] litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial is [not] to be taken to have forfeited his right to a fair trial in every case. …[if] the litigant's conduct ha[s] put the fairness of the trial in jeopardy … the court's power to strike out the proceedings was not a penalty for disobedience with the rules."

307. The Court must always consider, therefore, whether a fair trial is possible and to this end have regard to the defaulting party's ECHR art.6 rights of access to the Court, and whether the remedy of a strike out would be proportionate and fair in all the circumstances of the case (which is much less likely in a case where the trial has concluded and the Court is in a position to assess the effect of the destruction of the documents and/or failure to call relevant witnesses), or whether some other remedy will safeguard the position of the innocent party.

308. Hollander suggests in paragraph 11-16 that "where the defaulting party has been less than candid about the destruction exercise, the court may consider it cannot be sure exactly how widespread the destruction has been, and what its effect will be, and thus may find it more difficult to reach a conclusion that a fair trial is still possible." I respectfully agree with that general sentiment but in a case where the trial has concluded the position is, as I explain above, somewhat different. Indeed, it is for this reason no doubt that as Hollander goes on to state: "it would be a very rare case in which, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way". I agree.

309. If a fair trial is still possible, or if (as here) the trial has concluded, the next question is how should the Court approach the issue of the deliberate destruction of documents and a deliberate void of evidence. I agree with the approach adopted in Earles v Barclays Bank [2009] EWHC 2500, which also deals with the failure to call relevant witnesses, where HHJ Simon Brown QC stated that:

> *"28… in this jurisdiction as in Australia, there is no duty to preserve documents prior to the commencement of proceedings: British American Tobacco Australia Services Limited v. Cowell [2002] V.S.C.A. 197, a decision approved in this country by Morritt V.C. in Douglas v. Hello [2003] EWHC 55 at [86]…*
>
> *29. After the commencement of proceedings the situation is radically different. In Woods v. Martins Bank Ltd [1959] 1 Q.B. 55 at 60, Salmon J. said "It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court to make sure, as far as possible, that no relevant documents have been omitted from their client's list".*
>
> *30. In the case of documents not preserved after the commencement of proceedings then the defaulting party risk "adverse inferences" being drawn for such "spoliation": Infabricks Ltd v. Jaytex Ltd [1985] FSR 75.*
>
> *31. In cases where there is a deliberate void of evidence, such negativity can be used as a weapon in adversarial litigation to fill the evidential gap and so establish a positive case. In British Railways Board v. Herrington [1972] 1 AER 786, Lord Diplock stated:*
>
> > *"The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to*

> *whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold."*

310. It follows that if there is no evidence on a particular point, the Court could rely on the inferences drawn from the destruction of documents or the failure to call relevant witnesses to provide evidence which is otherwise absent.

311. Indeed, in my judgment, the fact that in the present case both (i) documents have been deliberately destroyed and (ii) witnesses have not been called by the guilty party whose evidence would likely bear upon the (presumed) contents of the destroyed documents, takes this case a step further forward than in the case of drawing inferences from the mere absence of witnesses. Although it might rarely arise in practice (and it does not arise in this case as there is other material to support the adverse inferences to be drawn), I consider that the court is entitled in such a case, depending upon the particular facts, to draw adverse inferences as to (i) what the destroyed documents are likely to have shown on the issue on question, and (ii) the evidence that the witnesses are likely to have given on the issue in question but which was withheld, without the need for some other supporting evidence being adduced by the innocent party on that issue. The two factors combined 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.

Analysis

312. I consider that the Court should draw inferences adverse to Active from the combined effect of (a) the deliberate destruction of documents by Mr. Quinn immediately before the trial began (and on the Court's reading day); (b) the absence of documentation passing between Active, Mike Sears and Jason Moring, and (c) Active's failure (i) to call any of the M3 witnesses, and in particular Mr. Sears and Mr Jason Moring; (ii) to obtain and disclose the emails/documents of any of the M3 witnesses; (iii) to call Mr. Steinbeck or search his emails/documents; (iv) to call Mr. Trantina."

82. Active Media has been considered in detail along with the other case law referred to. We have set out the parts of the judgment the parties took us to.

83. We had in our minds the criticism of Judge Kelly as set out above, the admission by the Respondent that there was no instruction to preserve relevant documents, that all emails of Ms Lynch (who was the instructing client in the 2014 litigation) were apparently deleted when she left the organisation, that despite it being categorically stated both in the preliminary hearing and in Mr Travis's evidence that there were no note of the board meeting that took place to discuss possible settlement of the 2014 claims, a note has now been belatedly produced. Also, the late destruction of documents that may have been relevant, by Mr Cocke.

84. The Tribunal is well used to making inferences in discrimination and whistleblowing claims. It is something we do regularly. The fact that the

Respondent has failed to comply with its obligations regarding disclosure and the destruction of documents, is something the Tribunal can consider when determining the merits of a case.

85. We had heard most of the substantive evidence in this case by the time this application was made, and the time saved by striking out is not great most of the time has already been spent. As it transpired there were no further witnesses called. At the time of making this decision it was anticipated that the Claimant may provide a further supplementary witness statement giving his comments on the disclosure received during this hearing. If he did, it was unlikely that there would be any substantial cross examination about it. At the time we made this decision it was expected that Mr Cocke would give evidence as he said he was medically fit and that he wanted to give evidence. The only practical difference if we were to strike the Response out at this stage would be that we would not have submissions on behalf of the Respondent or have the evidence from Mr Cocke. We would still have to determine the issues, we would still have to make inferences about the disclosures, the deletion of documents (both by Mr Cocke and of other email accounts such as Ms Lynch), we will still need to determine causation and the other matters set out in the list of issues.

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. The Claimant's application was dismissed.

87. It was agreed that the Tribunal would sit on Tuesday 12 July 2022 (when it was anticipated that Mr Cocke would give evidence and Thursday 14 July 2022 when submissions would be given. In the event Mr Cocke did not give evidence for reasons which are referred to below.

Application by a journalist to have a copy of the bundle

88. A journalist who was observing the hearing made an application to see the witness statements and the bundle of documents. Witness statements were made available as witnesses gave evidence by the Claimant's solicitors. The Claimant's representative asked the Tribunal to determine whether the bundle should also be made available.

89. There is a recent decision from the Employment Appeal Tribunal in the case of **Guardian News and Media Ltd v Dimitri Rozanov and Others [2022] EAT 12**. The factual background in that case is different to the current case. In the Guardian case, the journalist had not attended the hearing and it was some time later that the request was made.

90. If we were sitting in a physical setting, rather than a virtual setting, then the usual practice is that there is a bundle made available that journalists and members of the public can look at, but only while they are in the hearing room, and they can not take them away. The Guardian case held that the only documents which were to be disclosed were those documents which were referred to in the judgment rather than the whole bundle.

91. We were not taken to any presidential guidance on this point and are not aware of any. Our decision is that once judgment has been promulgated, then it is open for the press to request copies of the documents which have been referred to it. This preserves the concept of open justice. The decision was that the bundle would not be provided during the hearing and that a separate application could be made once the judgment had been promulgatged.

Mr Cocke's evidence

92. Mr Cocke had contacted the Tribunal on Friday 8 July 2022 to say he was fit to attend the Tribunal to give evidence and wanted to do so. It was therefore arranged that his evidence would be heard on Tuesday, 12 July 2022. On that morning, the Tribunal received a letter from Kingsley Napley Solicitors who had been instructed by Mr Cocke, to say that he was in fact too unwell to give evidence and was seeking medical treatment. Mr Tatton Brown on behalf of the Respondent said that it was not seeking an adjournment as this would not be proportionate given that it was not known if Mr Cocke could give evidence in the future or what the likely time scales would be. The Tribunal was asked to accept his evidence.

93. Mr Allen on behalf of the Claimant pointed out what he saw as various contradictions in the information received regarding Mr Cocke's health. The contradictions were him first saying he was too unwell to give evidence, then saying he would give evidence and then saying he was too unwell. This meant that the Claimant could not accept what was being said as too many assertions turned out not to be true. The only medical evidence we have is from Mr Cocke's GP who said he was fit to give evidence. The Claimant reiterated that he did not feel a fair trial was possible.

94. The Tribunal's view at that time was that considering the medical evidence from Mr Cocke's GP there was no medical reason Mr Cocke could not give evidence and if he did not give evidence then this was a decision of the Respondent. Further medical information was then obtained which said that Mr Cocke was too unwell to attend to give evidence. Mr Cocke did not give evidence. On balance the Tribunal is satisfied that Mr Cocke was unfit to give evidence. Whilst the members of this Tribunal are not medically trained, it appeared that the apparent contradictions raised by the Claimant were indicative of a progressing mental health issue and this taken together with the irrational act of deleting emails points to Mr Cocke being quite unwell especially as it was he who first provided extra documents that had not been disclosed. We do not doubt that Mr Cocke is ill, but accept that there is no independent medical information explaining the nature of his illness and how it manifests. He was clearly thinking rationally when asking Dr Harding about any further information after listening to Mr Travis give evidence. He had the wherewithal to contact Dr Harding and speak to him, and Dr Harding then found the email chain leading to the disclosure process during the hearing. A potential scenario is that the deletion was deliberate and an act of concealment. There are potentially a huge number of emails missing from disclosure. How much of this would be relevant to these issues is unknown.

The Issues

95. The Issues were agreed by the parties and are set out in full in appendix 1.

The relevant law

96. The Employment Rights Act 1996 is the relevant statute.

97. ERA 1996 Act, s47B(1), a worker has the right not to be subjected to a detriment by any act "done on the ground that [he or she] has made a protected disclosure".

98. If there was one or more protected disclosures then the Tribunal will consider the claims of having suffered detriments. Section 47B(1) of the 1996 Act is as follows:

47B 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.

99. Once a protected disclosure has been established, the enquiry of the Tribunal will therefore initially be whether there was in fact any detriment, and then whether that detriment was 'on the ground' of a protected disclosure having been made. Section 48 provides so far as is relevant:

48 Complaints to employment tribunals

(1) – (1ZA) . . . .

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(1B) . . .

(2) On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

100. In ***Fecitt-v-NHS Manchester*** **[2012] IRLR 64**, the Court of Appeal held that, for the purposes of a detriment claim, a claimant is entitled to succeed if the Tribunal finds that the PID materially influenced the employer's action.

101. The test is the same as that which applies in discrimination law. This, in the context of the PID jurisdiction, separates detriment claims from complaints for unfair dismissal under s103A: there, as we have stated, the question is whether the making of the disclosure is *the* reason, or at least the principal reason, for dismissal.

The Tribunals findings of fact and conclusions

102. The Tribunal has come to the following findings of fact on the balance of probabilities having considered the evidence, documents referred to and submissions. For proportionality, these findings are limited to those matters which are set out in the list of issues and are necessary to explain the decision reached.

The background to this claim (the 2014 proceedings)

103. In 2014 the Claimant presented claims of unfair dismissal and whistleblowing against the Respondent and Health Education England. The hearing was listed for 2018 and settled at the conclusion of the Claimant's evidence. The settlement was by way of a non-confidential settlement agreement with agreed statement forming part of it. There was no money paid to the Claimant as part of the settlement agreement. This claim arises from statements made by the Respondent following the settlement.

104. The Tribunal spent some time considering the settlement in the 2014 proceedings, how this settlement came about and the terms of the settlement.

105. The Respondent was represented by Mr Cooper KC. The Claimant was represented by Mr Milsom. The Claimant asked for a reconsideration of the dismissal judgment on the basis that he entered into the settlement agreement under duress following costs threats from the two Respondents.

106. Employment Judge Martin (who is the judge in this case) was appointed by the then Regional Judge Hildebrand to consider this application as the Claimant requested that Employment Judge Freer (as he then was) who was the judge in that case should not consider it as it related to without prejudice communications between the parties, which the Claimant did not want Judge Freer to hear if he was to rehear the case. Judge Martin refused this application after due consideration.

107. The Claimant appealed to the Employment Appeal Tribunal. The appeal was dismissed by Heather Williams, QC (as she then was). The Claimant appealed to the Court of Appeal and HHJ Simler dismissed the application for permission to appeal. The Claimant is highly critical of the appeal processes in the Employment Appeal Tribunal and the Court of Appeal and of the judges who dealt with his appeal. The Tribunal is mindful of comments made by the Claimant on his crowdfunding website which were referred to in this hearing:

"My experience of this case over the last 5 years is the healthcare and then legal establishment closing ranks. It seems when the establishment wants to cover something up it will, and in this case was prepared to spend £700k smearing and silencing a junior doctor……it is obvious that setting aside my settlement agreement would expose a number of senior people which now includes, judges, lawyers and politicians. I always had faith in the British legal system but it seems there are a number of people that are either too weak or corrupt to do their duty".

This was posted just after the Court of Appeal had rejected his appeal against the refusal to reconsider the judgment dismissing the 2014 proceedings.

108. This Tribunal has approached this case with an open mind and has discharged its obligations without fear or favour. Given that the Claimant's appeal was not successful, the Tribunal considered this case on the basis that the 2014 case was lawfully settled by the parties.

109. Following the settlement, the Respondent published three statements in response to what it perceived as adverse comments in the press which it said had a detrimental impact on the Trust. The Claimant says that some of the content of the statements were detrimental to him. Neither party waived legal advice privilege. It is the Claimant's case that he was pressured into a 'drop hands' settlement by both Respondents in that case (the other Respondent was HEE). The pressure he refers to is alleged costs threat against him if he lost the case.

110. The Claimant gave evidence over 6 days in the 2018 hearing. His evidence started on Wednesday 3 October 2018. The Claimant was represented by Mr Milsom, barrister, and the Respondent by Mr Cooper KC. On Friday 5 October 2018 (when the Tribunal was not sitting) Mr Milsom sent an email to Mr Cooper:

"*You around for a chat this afternoon*?".

There was no indication of what Mr Milsom wanted to chat about. There was a telephone conversation later that afternoon. Mr Cooper produced a handwritten note he made both during and immediately after the conversation and he sent an email to his instructing solicitors, Capsticks, setting out what had been said. At this time, neither Counsel had any instructions from their clients about settlement. The Tribunal has no reason to doubt what Mr Cooper put in his note.

Mr Cooper's evidence

111. Mr Cooper says that he had not known what Mr Milsom wanted to chat about and that Mr Milsom began by saying words to the effect that he wanted to speak, without instructions, on a without prejudice basis and he asked whether Mr Cooper would agree to speak on that basis. The Tribunal finds the purpose of Mr Milsom contacting Mr Cooper was to explore the possibility of settlement. Mr Cooper was content to discuss this on the basis he would share what was said with the Respondent and it was on a without prejudice basis.

112. Mr Cooper recalled Mr Milsom saying something like

'*We are all going along like a freight train with this 20-day hearing without anyone pausing to think, "Where's this all going?*'

"*that he imagined that any monetary settlement would be difficult in light of the need for Treasury approval, and perhaps more so in light of the evidence heard so far*".

Mr Milsom then suggested a "*soft landing*" which he explained meant a drop

hands with an agreed joint statement.

113. Mr Cooper said that he understood that it was implicit in the approach made by Mr Milsom that the Claimant's claim was unlikely to succeed. His view was that if the Claimant did lose and that if he was found to be untruthful in his evidence then an adverse costs award could result. There was then a discussion to test the water about the possible parameters of any settlement. The indication Mr Cooper gave was that if the Claimant was to withdraw at that stage the Respondent would not make an application for costs but that if he continued and were to lose with findings he had been untruthful, the Respondent would make a costs application. Again, this was without instructions which was made clear.

114. Mr Cooper had already considered the possibility of seeking instructions to make a drop hands offer because of how he perceived the Claimant's evidence to have gone, but was decided not to take instructions from his client until after the Claimant had completed his evidence. Mr Milsom's approach meant that he addressed this issue earlier that he had been intending to do.

115. Mr Cooper sets out why he was considering making such an approach to the Claimant after his evidence had completed. His witness statement sets out his impression of the Claimant's evidence. His impression was that the Claimant had an "*obsessive belief in his victimhood*" resulting in him making a "*progressively more elaborate re-writing of history by him to fit his narrative*". He considered that the Claimant's evidence was "*dishonest and underhand in pursuit of what he saw as the virtue of his case*".

116. Mr Cooper gives examples in his witness statement of how he says the Claimant's evidence went. The Claimant disagrees with this as set out in his first supplemental statement.

117. At 13.48 that day Mr Milsom sent Mr Cooper a text message:

'Hi Ben, Chris here. It would be handy for him to have the weekend as thinking time: would you object to me speaking to my client along the lines we discussed? I would understand if you did but it would be handy to make use of the hiatus'.

As the Claimant had not finished his evidence this was an unusual request. However, all parties were concerned that negotiations could take time and would eat into the time allocated for the hearing which was already tight. Mr Cooper and Mr Moon KC for HEE, having consulted their respective clients, allowed Mr Milsom to talk to his client about the settlement, but not, for obvious reasons about the evidence the Claimant had given thus far. Mr Milsom had suggested that Mr Cooper set out a proposal for him to take to the Claimant as it would then be easier to "*sell*" to the Claimant.

118. Later that day Mr Cooper sent a text message to Mr Milsom:

"Hi Chris – I can confirm that I now have instructions to offer a drop hands if your client agrees to it before we start our evidence, but if he continues and loses with adverse findings as to his truthfulness then there would be an issue as to costs. We are also content for you to speak to

your client about this so he can reflect over the weekend, but on the basis that you don't discuss any specific aspect of his evidence and that you stick to (i) conveying the drop hands offer; and (ii) giving your advice, in general terms only, as to the overall risk that he may lose and have adverse credibility findings, and consequently on the merits of drop hands at this stage. Finally I haven't been in touch with Angus [Mr Moon] today but assume you will also get his consent before discussing anything with your client. Best wishes, Ben.'

119. Mr Cooper emphasised that whatever Mr Milsom may have communicated to the Claimant, there was never any definite proposal to make an application for costs, but it was "an issue" depending on the Tribunal's findings.

120. Having got agreement from Mr Moon, Mr Milsom spoke to the Claimant on Sunday. This is dealt with below in relation to Mr Milsom's evidence. This was by any view going to be a difficult conversation given the limitations of the advice Mr Milsom could give the Claimant, as the Claimant was still being cross-examined. The result of the conversation was that the Claimant rejected the offer to settle and completed his evidence. Mr Cooper had told Mr Milsom that the offer of settlement remained open until the first witness for the Respondent was called at which time it would lapse. The Claimant's evidence finished on 11 October 2018.

121. As far as Mr Cooper was concerned, the only other communication he had regarding costs was a discussion on 11 October 2018 initiated by Mr Milsom who wanted to get confirmation of the Respondents respective positions before advising the Claimant when his evidence had finished. Mr Cooper then received an email from Mr Milsom that evening at 8.07 pm:

'Dear all,

I am instructed to offer as follows:-

1. Withdrawal of all claims

2. Forbearance from any side pursuing costs (both ordinary and wasted)

3. Confidentiality as to terms

4. Mutual non-derog clauses. We would wish this to encompass any disclosure of the circumstances of settlement/withdrawal of the claim

5. Agreement that no referrals shall be made to the GMC as regards any individual in relation to the circumstances of the claim and/or litigation

6. A written understanding that there is no known basis on which Cs application for a return to training on an open competition basis would be precluded. Any matters relating to the facts of this claim or its conduct shall not be regarded as an impediment to training

I appreciate that finalising ts and cs may take time tomorrow. We will be coming tomorrow in negotiating rather than litigation mode so cannot envisage any need for witnesses to be present: this includes Dr Brooke."

122. Mr Cooper called Mr Milsom to say the Respondent would have a difficulty with the settlement being confidential. There were then continued without prejudice discussions between the three counsel in various

combinations. These were held in the Tribunal in waiting rooms and in the corridors and were not minuted or noted. Mr Cooper could not recollect the exact sequence of the conversations but in his statement he sets out his recollection of the substance of them. He is clear that the position he set out on behalf of the Respondent was consistent, namely that costs would be an issue if the Claimant lost and was found to be untruthful. He emphasised that by rejecting the drop hands offer and losing at trial may lead to an application by the Respondent for the remaining trial costs and that he maintained that there would be an issue about costs, not that costs would definitely be asked for. There was discussion about what costs were being referred to and Mr Cooper's recollection is that he did not say the Respondent would apply for any particular type of costs.

123. During this hearing there were several references to wasted costs in the previous litigation. Wasted costs is an award against legal representatives. There was a possibility of wasted costs in relation to the late disclosure of covert recordings the Claimant had made which came out during his evidence. Mr Cooper says it was HEE that raised this and not the Respondent. Given that this would be an order against the Claimant's then solicitors, Mr Cooper says it made no sense to raise it as part of without prejudice negotiations.

Mr Milsom's evidence

124. Mr Milsom's witness statement was not prepared for this hearing but was prepared in support of the Claimant's application to set aside the settlement agreement and was adopted for this hearing. Mr Milsom approved the statement on 11 December 2018 before some of the statements were published by the Respondent. Mr Milsom was constrained, as was Mr Cooper, by legal advice privilege that had not been waived. His explanation for contacting Mr Cooper on 5 October 2018 was to discuss trial schedule and wider issues and it was during this conversation that the prospect of settlement was raised.

125. In cross-examination Mr Milsom said *"I was concerned as to the direction of travel, and clearly I couldn't speak to Dr Day about his evidence because he was in purdah. On the express footing that I had no instructions and could take no instructions, I explored the possibility of what I described as the "safe landing". The reason that I used that phrase is because there was a lot of publicity about all of this, that had been going on for some years, and I had concerns as to the reputational risk of an adverse judgment to Dr Day."* Mr Milsom's evidence is that in the discussions about costs there was no specific link to the truthfulness or otherwise of the Claimant's evidence.

126. During the course of the Claimant's cross examination by Mr Moon in the previous proceedings when he was being asked about covert recording he had made, the Claimant was asked questions about his integrity in making covert recordings, and it was put to him that integrity was part of the GMC standards of the expectation on all registrants. Mr Milsom, in his evidence to this Tribunal, said he did have concerns about this and that it was possible he overestimated that risk. Mr Cooper said that during the without prejudice negotiations his Junior Ms Motraghi who has experience in this type of work, said that a published judgment would fall under the radar of the GMC without a specific referral or complaint.

127. Mr Milsom took issue with the term 'threat' in relation to the costs part of the without prejudice negotiations. Mr Milsom said that he told the Claimant that the wasted costs order was not something he (the Claimant) should worry about as it would be an order against his solicitors and not him personally. His evidence could not go into any detail because of legal advice privilege. The Claimant's position is that he believed that it would be an order against him personally.

128. The Claimant sent a letter before action for negligence to Mr Milsom arising out of the settlement agreement. Mr Milsom responded to that letter and said *"He [that is the claimant] confirmed in cross-examination that he had purchased a recording device some days prior to the meeting and then asserted that his decision to record the meeting had been impulsive. He had to accept that this was not the case.*" From the transcript of this hearing the following question and answer is recorded:

> "Q. Just so we are all absolutely clear, this is a separate issue to the integrity/lack of integrity/appropriateness, et cetera, of making the recording; this is an issue about whether the claimant's evidence on oath about that fact was accurate?
>
> A. Yes. It was about the disconnect between purchasing equipment and asserting that it was an impulsive decision to record."

129. Mr Milsom accepted there was no threat to refer the Claimant to the GMC if the Claimant did not settle the case although he accepts that the GMC was mentioned by Mr Moon KC in a line of questioning on behalf of HEE about the Claimant concealing the fact he was recording a conversation.

130. It was difficult for Mr Milsom to say much more about what caused the Claimant to decide to settle as he was constrained by legal advice privilege. Mr Milsom candidly said that some of the emails he sent at the time of the settlement process were not entirely accurate.

131. On Friday 12 October 2018 there was agreement between the parties set out above, pending the Respondent's board approving it, which it did on Sunday 14 October 2018.

The Tribunal's findings

132. The Claimant lodged complaints about Mr Milsom, Mr Milsom had to recall in detail what had happened at that time and this information was available to the Tribunal. In circumstances where not all conversations were documented it is inevitable that there may be some minor differences in recollections of those participating in the conversations. At the time of the discussions, neither Mr Cooper nor Mr Milsom anticipated that they would have need to give evidence on these matters.

133. Whilst accepting there are some differences in the recollections of Mr Milsom and Mr Cooper. the Tribunal finds that there is no doubt that it was Mr Milsom who first approached Mr Cooper about the possibility of settlement even though at that time he did not have instructions. Mr Milsom asked Mr Cooper

to put the offer to him as it would then be easier for him to 'sell' it to the Claimant. He clearly did not want the Claimant to know that he had approached Mr Cooper first. There were discussions about costs if the Claimant proceeded with his claim and lost. These are described by the Claimant as 'threats' which could have left him in the position of losing his house. Mr Cooper does not accept they were 'threats' nor does Mr Milsom. The Tribunal is experienced both in its judicial capacity and as practitioners and takes notice of how litigation is usually conducted and how settlement negotiations are usually conducted.

134. It is inevitable, especially when the Respondent is a public body that it will consider whether to make an application for costs if the Claimant in a particular case is not successful. This is part and parcel of the litigation process. It is also not unusual for costs warnings to be given. Often this happens before the hearing in a letter marked "without prejudice save as to costs" or it happens in without prejudice negotiations. What happens is that one party sets out what might happen if the Claimant lost. Often it is done some time before the hearing starts during the preparation phase of the litigation. In this case there was no such costs warning letter sent before the hearing took place in 2018. In this case, the Respondent set out that if the Claimant continued and cross examined the Respondent's witnesses, and subsequently lost with findings of untruthfulness, then costs would be an issue, once the question of settlement and costs was raised by Mr Milsom. We do not make a finding that the Respondent said it would pursue costs in any event, on whatever basis the Claimant lost. We are satisfied that the offer put to the Claimant was based on him losing and being found to be untruthful.

135. It is difficult to know what was in the Claimant's mind when he settled the proceedings in 2018 as he has not waived legal advice privilege. This is his right, and no inferences are drawn by him not waiving it. This leaves the Tribunal to consider the evidence it has before it.

136. First the Tribunal considered why Mr Milsom approached Mr Cooper when he did to open discussions about settlement. What we have is the Claimant's barrister, who is a very experienced employment law practitioner, initiating settlement during his client's evidence. He goes further than simply asking whether settlement might be possible, he asks to speak to his client about the prospect of settlement notwithstanding he is still being cross-examined. This is highly unusual. Why would he do this? Mr Milsom says he was worried about the publicity emanating from the proceedings and the damage it might do to the Claimant's reputation. He did not go as far as saying the Claimant's evidence was not good or that he told untruths. However, he did accept that what the Claimant said about covertly recording impulsively was not accurate.

137. We have Mr Cooper's evidence about the quality of the Claimant's evidence. He gives several examples. We note the Claimant's rebuttal of what Mr Cooper says. Mr Cooper is a very experienced KC. In addition to what is set out above, his statement says:

"It is relevant to describe some of my impressions of Dr Day's evidence because his

performance as a witness is an important part of the context against which settlement discussions took place. These are, of course, my own impressions, but I believe (and believed at the time) that they are features which came across so strongly that any objective person hearing Dr Day's evidence would have formed a similar impression. They are therefore relevant to understanding the settlement discussions because the dreadful impression that Dr Day created as a witness was the implicit starting point for the conversations that I had with Mr Milsom about settlement and costs – certainly, it was my starting point and therefore helps to explain both my approach and the inferences which I drew as to Mr Milsom's position."

138. The Tribunal considered why Mr Milsom initiated the without prejudice discussions. The Tribunal finds that the only reason Mr Milsom could have for seeking without prejudice discussions with Mr Cooper as and when he did, was that the Claimant's case was not going well. The Claimant does not agree and says he thought his case was going well. Mr Milsom says he was worried about the Claimant's reputation but was reluctant to say the Claimant was lying. The Tribunal asked itself why, if the Claimant's case was going well, would his reputation be at risk? If it was at risk more generally because of the strength of his case then the Tribunal would have expected Mr Milsom or the Claimant's solicitors to have appreciated that and have advised the Claimant accordingly, and/or sought to hold without prejudice conversations with the Respondent before the hearing began. As the timing was two days into the Claimant's cross-examination, the inevitable conclusion is that the Claimant's evidence was not going well and raised the prospect that he might be unsuccessful.

139. The request to speak to the Claimant while he was in purdah, is further evidence of the seriousness which Mr Milsom took about the Claimant's prospects of success and possible costs consequences. Whilst saying the timing was in order not to eat into time after the Claimant's evidence with settlement discussion starting after the Claimant's evidence had concluded an inference is that he did not want the Claimant to continue with his evidence at all. The only reason for this would be that his evidence was damaging to him and his case.

140. The Claimant has characterised the Respondent's position on costs as them being threats. The Tribunal disagrees and finds them to be part and parcel of the normal process of litigation and therefore not threats as such. When litigating, the issue of costs must always be considered even though in the Employment Tribunals costs are not routinely awarded. On balance the Tribunal is satisfied that Mr Cooper's evidence is accurate. There is nothing that Mr Milsom has said to materially contradict it. What is not known is what Mr Milsom told the Claimant at the time. The Tribunal would expect, given Mr Milsom's experience, that he relayed the costs situation appropriately but obviously we can not be sure given the constraints of legal advice privilege. We are however satisfied that Mr Milsom considered that there was a significant possibility that the Tribunal would find that the Claimant's evidence was unreliable and that this could well lead to reputational damage if the case went on to judgment.

141. We hear what the Claimant and Mrs Day says about why they settled and their belief that they may be subject to a costs order of about £500,000. It is unlikely that any costs order, had one been made, would have been of this

magnitude as means are considered when assessing costs. Whilst we have no direct evidence of this, we would have expected Mr Milsom and the Claimant's solicitor to tell the Claimant this, and in any event, it would have been easy for the Claimant to have looked this up for himself if he was unsure. The Claimant had some knowledge of costs as he was awarded costs to be paid to him by HEE in respect of litigation about worker status. The Tribunal notes that the Claimant not only had Mr Milsom's legal advice but also the advice of his solicitors.

142. The other question the Tribunal considered is why the Claimant would believe he was at such a risk of costs if, as he says, he considered his case to have good prospects and his evidence to have been honest and good. If this had been his belief, then why would he have believed that there was a significant chance that costs would be awarded? The only conclusion is that he had advice from Mr Milsom which made him believe or consider that there was a significant chance that he would not be successful, with a finding of untruthfulness.

143. The Tribunal notes the issue about a referral to GMC as being a reason to settle. However, this does not fit well with the issue of costs threats being made.

144. The Tribunal does not find that there was a costs threat in the way the Claimant has put forward. It was however not just that Mr Milsom approached the Respondent about settlement, but that there was an explanation of the genuine risk of costs should the Claimant be unsuccessful with a finding of being untruthful. The inference to be drawn of Mr Milsom approaching Mr Cooper was the way the Claimant's case was going. The way the costs issue was made was that if the Claimant pursued his claim, lost and had adverse findings as to truthfulness then costs would be an issue. (The Tribunal's emphasis)

The terms of settlement

145. The settlement agreement did not contain a confidentiality clause. The Claimant had initially requested one, but the Respondent did not agree. Mr Travis said that was because the Trust wanted openness and transparency about the litigation.

146. The relevant parts of the agreement are as follows:

"WHEREAS

A. The Claimant brought claims against the Employer and HEE in the South London Employment Tribunal for unlawful detriment on grounds of having made protected disclosures in connection with his participation in and departure from a specialist training programme provided by HEE and in connection with his employment with the Employer between August 2013 and August 2014.

B. The final hearing of those claims commenced on 1 October 2018 and in the course of that hearing the parties have reached agreement for the withdrawal and settlement of those claims on the terms set out herein.

C. This Agreement is in full and final settlement of those claims and all or any claims the Claimant has and/or may have against the Employer and/or HEE, their directors, officers, agents and/or employees arising out of or in connection with his employment and/or training and/or their termination.

D. The parties intend this Agreement to be an effective waiver of any such claims and agree that it constitutes a valid settlement agreement under section 203 of the Employment Rights Act 1996."

"2. FULL AND FINAL SETTLEMENT

2.1 This Agreement is in full and final settlement of all or any claims or other rights of action (whether under the laws of England and Wales, European Union or any other law) that the Claimant has or may have against the Employer and/or HEE, their directors, officers, agents or employees arising out of or in connection with the Claimant's employment and/or training and/or their termination whether under common law, contract, statute, or otherwise including but not limited to:

a. claims for unlawful detriment on grounds of public interest disclosures under Parts IVA and V of the Employment Rights Act 1996, whether the subject of the Claims or otherwise;

b. constructive and/or unfair dismissal under the Employment Rights Act 1996;

c. breach of contract, including without limitation wrongful dismissal;

d. any other claim under the Employment Rights Act 1996;

e. any claim, including a claim for damages for harassment under the Protection from Harassment Act 1997;

f. any personal injury claim associated with any of the aforementioned claims; and

g. any other personal injury claim save where the Claimant is reasonably not aware of the facts and matters giving rise to such claim.

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

……."

"SCHEDULE 2

AGREED POSITION STATEMENT

After six days of evidence at the Employment Tribunal brought by Dr Day against Lewisham and Greenwich NHS Trust and Health Education England it has been agreed by all parties that:

- *Dr Day blew the whistle by raising patient safety concerns in good faith.*
- *Dr Day has performed a public service in establishing additional whistleblowing protection for junior doctors.*
- *The Tribunal is likely to find that both the Trust and HEE acted in good faith towards Dr Day following his whistleblowing and that Dr Day has not been treated detrimentally on the grounds of whistleblowing.*
- *Dr Day's claims are dismissed upon withdrawal."*

147. The agreement had all the usual legal technicalities to be found in any settlement agreement.

148. In the process before the 2014 case was heard in October 2018, the Claimant achieved a significant judgment from the Court of Appeal in relation to the worker status of junior doctors with HEE. This is an important judgment and one which will benefit junior doctors throughout the country. This is acknowledged in the agreed statement forming part of the settlement agreement.

149. The Claimant set up a crowdfunding website to fund his litigation for the original proceedings and it provided funding support for subsequent actions. There was no anticipation of the current proceedings at the point the website was set up. He has many supporters. He extensively uses twitter to tweet and retweet items related to his litigation. The Tribunal has been told that his crowdfunding page includes items relating to the current litigation. He has also received support from the BMA.

The published statements

150. Following the settlement, the Respondent made statements on its website and communicated with various stakeholders. It is these communications which are the subject of this hearing. The Claimant believes parts of the statements to be false and detrimental to him. The parts underlined are the parts of the statements that the Claimant takes issue with. They are taken from the agreed list of issues.

a) **Statement 1 – 24 October 2018**

"Statement from performing Lewisham and Greenwich NHS Trust

We employed Dr Chris Day as a junior doctor organisations (Emergency Medicine, Core Training Year 2) at Queen Elizabeth Hospital (QEH), under a fixed-term training

contract from August 2013 until August 2014.

Dr Day raised a number of concerns related to a night shift in January 2014, when he was working in the intensive care unit (ICU) at QEH. The concerns were about whether there were enough doctors working on the night care shift covering the medical wards. On the night in question, two doctors who had been scheduled to work on the medical wards had failed to come in. As a result, our site PALS manager took action to deal with this unexpected staffing shortage, including arranging for the on-call consultant to come in and provide additional cover.

Dr Day wrote to the Trust Chief Executive in August 2014, just before leaving the Trust at the end of his fixed term contract detailing complaints about how his concerns had been handled. As a result we commissioned an external investigation into all the issues he had raised. The external investigation found it had been[2] appropriate for Dr Day to raise his concerns and that the Trust had responded in the right way by calling in the on-call consultant to provide additional support. The investigation also found that there was no evidence that there were patient safety issues as a result of what had been an unexpected situation. We wrote to Dr Day to let him know the outcome of the investigation.

In October 2014, Dr Day submitted an Employment Tribunal claim for unfair dismissal and whistleblowing detriment (i.e. Treating Dr Day unfairly because he had raised whistleblowing concerns). He submitted a further claim for additional whistleblowing allegations in April 2015. He subsequently withdrew his unfair dismissal claim in 2015.

Dr Day's claims were also submitted against Health Education England (HEE). Originally Day's case against HEE was rejected on the grounds that HEE was not his employer. However, this was overturned after Dr Day appealed the decision. Following this, HEE has worked with the British Medical Association and NHS Employers to ensure whistleblowers can take legal proceedings against HEE for detriment.

The Employment Tribunal hearing for whistleblowing detriment brought by Dr Day commenced on 1 October 2018 against the Trust and HEE. After six days of evidence. Dr Day withdrew his case. The following statement was agreed by all parties:

"Dr Day blew the whistle by raising patient safety concerns in good faith.

Dr Day has performed a public service in establishing additional whistleblowing protection for junior doctors.

The Tribunal is likely to find that both the Trust and HEE acted in good faith towards Dr Day following his whistleblowing and that Dr Day has not been treated detrimentally on the grounds of whistleblowing.

Dr Day's claims are dismissed upon withdrawal."

The claim brought against the Trust was settled on the basis of Dr Day withdrawing his case, the agreed statement (above), and the parties agreeing not to seek any award for legal costs. No financial payment will be made by the Trust as part of the settlement and the settlement is not subject to confidentiality. At the point that Dr Day withdrew his claim, we decided that we should not pursue Dr Day for costs and we have been clear from the outset that the Trust does not want to discourage other colleagues raising matters of concern.

We are pleased that this matter has been resolved for all concerned and that Dr Day accepted that the Tribunal was likely to find that the claims against the Trust would have been dismissed had they not been withdrawn. It is very sad that matters got to

[2] Issue 4.1.c

this stage. We have always been clear that we did not treat Dr Day unfairly on the grounds of whistleblowing and that we investigated his concerns thoroughly and appropriately.

This process has been stressful for those involved, especially for our staff who had been called to provide evidence. This was exacerbated by the lengthy gap between the claims being made and the hearing, due to related legal proceedings to include HEE in the Employment Tribunal.

[3]Some of this publicity around this case has incorrectly made a link to the findings of a peer review of the critical care unit at QEH undertaken by the South London Critical Care Network in February 2017. This review found a range of concerns, including the number of consultants employed in critical care. It is important to be clear that these were not the same issues that Dr Day had raised in January 2014. which related to junior doctor cover on the medical wards. We responded to the peer review immediately, appointing additional medical and nursing staff and introducing a range of other safety measures. These improvements were noted by a subsequent peer review of critical care at QEH, undertaken by the South London Critical Care Network in February 2018.

However, much of the publicity and social media activity around Dr Day's case has created a negative impression of the Trust, and this does not reflect how we are fully committed to supporting anyone who raises concerns. or our commitment to continually improving the quality and safety of our services.

Recent work to support staff has included arranging regular staff drop-in sessions, engagement sessions with junior doctors. Who are also now supported by a guardian for safe working hours (a senior member of staff who champions safe working hours for junior doctors). We have also appointed Freedom to Speak up Guardians, who are independent from the Trust and provide confidential advice and support. We will continue to review the effectiveness of these routes and to listen to, and act on, the views of our staff."

b) Statement 2 – 4 December 2018

"Statement on the Chris Day whistleblowing case
4 December 2018

Dr Chris Day withdrew employment tribunal claims (for detriment to his career as a result of whistleblowing) against Lewisham and Greenwich NHS Trust and Health Education England (HEE) in October 2018. As outlined in the statement we issued after the Tribunal, his claims related to staffing on a night shift at Queen Elizabeth Hospital (QEH) in January 2014. It is very sad that legal proceedings were required, as we have always been clear that we did not treat Dr Day unfairly on the grounds of whistleblowing; we investigated his concerns thoroughly and appropriately and he completed his contract with the Trust, as planned. Indeed, Dr Day accepted that the employment tribunal was likely to find that the claims against the Trust would have been dismissed had they not been withdrawn.

We are extremely disappointed to see that Dr Day has subsequently claimed on social media and in the press that he was forced to withdraw his case as he claims [4]that the Trust threatened him with the prospect of paying our legal costs. All of this is simply untrue: we did not threaten Dr Day with legal costs to pressure him to drop his claim[5] – his legal representatives approached us to settle the claim on Dr Day's behalf. This is because it was clear to them that Dr Day's case was not going well. Dr Day had a solicitor and a barrister representing him throughout and was always able to take advice

[3] Issue 4.1.(d)
[4] Issue 4.1 a i
[5] Issue 4.1.(a).ii

before making any decisions.

[6]On the issue of costs, we had decided not to pursue Dr Day for legal fees before he withdrew his case. In any case, it is worth noting that costs at employment tribunals are only awarded in exceptional cases. As the Citizens Advice Bureau advises, a judge is only likely to order someone to pay costs if they think they have lied or misled the tribunal or have not cooperated at every stage. In addition, when the employment tribunal does order someone to pay costs, they take into account their personal circumstances and how much they can afford to pay – so full costs are rarely awarded.

When they approached us about agreeing to settle the case, Dr Day's legal representatives proposed having a confidentiality clause in place as part of the settlement. We rejected this as we want to be clear and open on the facts. Much of the publicity and social media about this case has created a negative impression of the Trust, and has not reflected how we are fully committed to supporting anyone who raises concerns, or our commitment to continually improving the quality and safety of our services.

It is also important to note that no financial payment was made by the Trust as part of the settlement. Dr Day has commented on social media about the NHS legal costs relating to this case. The reason we required legal representation was because Dr Day had made serious accusations against the Trust and was claiming for loss of career earnings of £5.5 million."

c) Statement 3 – 10 January 2019

"Dr Christopher Day withdrew employment tribunal claims for detriment to his career as a result of whistleblowing against Lewisham Greenwich NHS Trust (LGT) and Health Education England (HEE) in October 2018. A spokesperson for Lewisham and Greenwich NHS Trust said:

"Since issuing a statement on this case last month, we have been asked to comment on allegations that Dr Day dropped his employment tribunal case against the Trust because four specific threats were made against him. We deny these allegations".

"Throughout these employment tribunal proceedings, in which Dr Day sought career loss earnings of £5.5 million, Dr Day was represented by solicitor and a barrister. It is important to note that, while Dr Day was giving evidence, his legal team approached our legal representatives to ask if we could discuss settling the case on the basis of:

- Dr Day withdrawing his claims
- LGT and Health Education England (HEE) agreeing not to apply for costs
- Dr Day, LGT and HEE issuing a joint position statement.

"We the have stated before that we believe this approach was made because it was clear to Dr Day's legal team that his case was not going well and was going to fail. Certainly, no pressure whatsoever to start settlement discussions had been placed on Dr Day or his legal representatives by the Trust or our legal representatives.

"It is standard practice in settlement negotiations for the parties to discuss the risks and possible outcomes on all sides. When they made their approach about settlement discussions,[7] Dr Day's legal representatives indicated that it would be helpful to them for the Trust:

- To state what our position would be on costs if the tribunal were to dismiss Dr Day's claims and make findings that he had not been truthful in his evidence

[6] Issue 4.1 (a) iii
[7] Issue 4.1 (b)

- To confirm whether we were prepared to agree not to make a costs application if Dr Day withdrew his application at that stage

- To indicate whether the Trust would agree to allow them to discuss these matters with Dr Day before he had finished his evidence (as an exception to the normal rule that a party may not discuss the case whilst giving evidence).

"In response to this request, [8]the Trust's legal representatives confirmed that if the tribunal were to dismiss Dr Day's claims and make findings that his evidence was untruthful, then there would be an issue as to costs. This reflects that we are an NHS body responsible for public funds. In the discussions about a settlement, the Trust also confirmed that if Dr Day withdrew his claim at that stage, we would agree not to make any application for costs, and agreed to the request by Dr Day's representatives to be allowed to discuss those matters with him even though he had not finished giving evidence.

"Dr Day's legal representatives would have been well aware that costs are only awarded in exceptional circumstances, usually requiring some unreasonable conduct in bringing or conducting the claim. such as relying on a misleading or untruthful account. Their assessment of this risk would no doubt have influenced their decision to start settlement discussions with the Trust. Dr Day's legal representatives would also been aware that when the employment tribunal does order someone to pay costs, they take into account their personal circumstances and how much they can afford to pay - so fullcosts are rarely awarded.

"No financial payment was made by the Trust as part of the settlement, and our Board agreed to a joint statement with everyone involved, including Dr Day. This is included in our original statement. We do agree that Dr Day raised patient safety concerns in good faith."

Editors' notes

* Specifically, we confirm that the Trust and our legal representatives:

- Did not issue an ordinary costs threat in respect of the entire 21 day hearing if Dr Day cross-examined any of the Trust's witnesses and lost the case

- Did not threaten a wasted costs application against Dr Day's legal representatives

- Did not threaten Dr Day's legal representatives with a referral to their
- legal regulator

- Did not threaten referring Dr Day to the GMC and have no intention of doing so."

151. Having set out the statement and the terms of the settlement agreement The Tribunal went on to consider the agreed issues. Given the nature of this claim it has considered matters in a thematic way rather than a chronologically. There is a chronology appended to this judgment which sets out when matters happened.

Are the statements a detriment? (Issues 4 to 4.1.(d))

152. The list of issues identifies the parts of the statements that the Claimant considers to be detriments, and which are underlined in the statements set out above.

[8] Issue 4.1 (b)

153. Both parties referred to Shamoon and the Respondent also relied on the three other cases set out below.

p. **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR, HL**, paras 33 – 35 held: 'A detriment exists 'if a reasonable worker would or might take the view that [the treatment or action of the employer] was in all the circumstances to his detriment'.

q. **R (Interim Executive Board of Al-Hijrah School) v HM Chief Inspector of Education [2018] 1 WLR 1471 (CA)** at [48], the touchstone of a detriment is 'reasonableness of perception of adverse detriment'.

r. **Pothecary Witham Weld v Bullimore [2010] ICR 1008 (EAT),** Underhill J considered authorities concerned with "cases of a very particular type, namely cases where the employer has taken action in order to protect his position in current litigation". "In considering whether the act complained of constituted a detriment the starting-point is how it would have been perceived by a reasonable litigant; but such a litigant could not properly regard as a detriment conduct by the employer which constituted no more than reasonable conduct in defence of his position in the litigation."

s. **Moyhing v Barts and London NHS Trust [2006] IRLR 860 (EAT)** held that if an alleged detriment is trivial it will not amount to a detriment for the purposes of s.47(B)(1) of the ERA 1996 on the basis that it will be de minimis.

154. If something put in one of the published statements is true, then it is not a detriment. The Tribunal has made findings which are set out above about the process leading to settlement in 2018. It has found that the Respondent did not make costs threats as such, although it acknowledges that the Respondent's position on costs was put to the Claimant. Therefore, issue 4.1.(a)(i), 4.1.(a)(ii) are true and are not detriments. They set out the Respondents position.

155. The Tribunal finds that the wording of issue 4.1.(a) (iii) is interesting. The wording is that the Respondent decided not to pursue the Claimant for its legal fees before he withdrew his case. It does not say that legal fees were not discussed in the without prejudice discussions leading to the settlement. However, even taking this into account, the Tribunal finds that it was on settlement that the Respondent decided definitively not to purse costs. The stated position was that if the Claimant lost and was found to be untruthful, then costs would be an issue. This is accurately reflected in the statement published on 24 October 2018 (the first statement) which says *"At the point that Dr Day withdrew his claim, we decided that we should not pursue Dr Day for costs and we have been clear from the outset that the Trust does not want to discourage other colleagues raising matters of concern."* The Tribunal considered whether this was something that was substantial or trivial rendering this de minimus and of course, whether this was said because the Claimant made a protected disclosure. The Tribunal finds

that in the eyes of the Claimant's Crowdfunders this would be significant. They inevitably had concerns and questions about why the Claimant settled and did not go on to conclude the case that they had funded. The impression given here is that the Claimant knew that the Respondent was not going to pursue costs when the Claimant was saying that it was the costs matters that meant he settled. The Tribunal finds that this is a detriment.

156. The Tribunal has found that Mr Milsom approached the Respondent to ask the Respondent to put forward an offer for him to take to his client. The Tribunal has found that the costs would have been an issue if the Claimant lost with adverse findings as to his truthfulness. Therefore, what is written in the statement published on 10 January 2019 (issue 4.1.(b)) is correct and not a detriment.

157. The Tribunal considered issue 4.1.(c). It is of note that the Claimant has objected to one part of this sentence, and has not put the whole sentence in his objection to what is said. This is the section referred to by the Claimant.

> The external investigation found it had been[9] appropriate for Dr Day to raise his concerns and that the Trust had responded in the right way by calling in the on-call consultant to provide additional support.

The Claimant has taken words out of context. This is unreasonable. The sentence starts with a positive, namely that the external investigation found it appropriate for the Claimant to raise concerns. The way the Respondent was said to have responded was qualified by the rest of this sentence which is not underlined. When looking at the statement as a whole, there is nothing that the Tribunal can see to be detrimental, even considering the Claimant's submissions. It should be abundantly clear to any objective reader that the assertion is the Trust behaved in the right way in its specific act of calling the on-call consultant to provide additional support and that no other claim of appropriate behaviour is being made here. This is not a detriment.

158. In relation to issue 4.1.(d), the Claimant's complaint about this is that the Respondent has actively misrepresented the substance, scope and validity of his protected disclosures throughout the 8 year history of this case. His position is that his disclosures were not limited to January 2014 and his January 2014 disclosures were not limited to junior doctor cover on the medical wards.

159. The published statements were made in response to the publicity following the conclusion of the 2014 proceedings. Inevitably the focus was on the issues raised in the litigation itself. The Respondent accepts that the Claimant made other disclosures which were not part of that litigation. The fact that it only refers to one disclosure is in the context in which the statement was made. As such, and read in the context of the statement itself, the Tribunal does not consider this to be a detriment.

160. The other detriments in the list of issues are set out under the section

[9] Issue 4.1.c

dealing with issues relating to Sir Norman Lamb, the Care Quality Commission (CQC) and letters to stakeholders.

Perception by others

161. The Tribunal also considered whether the statements were perceived to be detrimental by others. In closing submissions Mr Tatton Brown challenged Mr Allen to come up with the Claimant's best examples. Mr Allen rose to the challenge:

a. In his oral submissions, Mr Allen said this: *"We have got so many accusations on social media of the claimant being a liar that Norman Lamb had to interrupt to warn people that they shouldn't be making defamatory accusations".* He then referred to the following pages.

b. P38 oral subs electronic page 10 - line refers to what C saying about lying not the commentators view ????

c. Page 1207 of the main bundle. This is a tweet by Dr Sebastian Hormaeche to Mr Travis:

"*Please can you confirm whether or not the trust or its solicitors or its barristers made the 4 threats mentioned by @drcmday in the attached screen shot below?*

The screen shot was of something written by the Claimant and said:

"Last month I was emailed by a Telegraph Journalist with evidence that the Trust and HEE were not only referring to the 'Without Prejudice' discussions but also that they were not telling the truth about them. These actions and the recent publication of the Telegraph and HSJ articles have enabled me to speak openly for the first time about' the various threats made that led to the settlement agreement.
https://www.telegraph.co.uk/.../nhs-whistleblower-forced-wit...l

The threats were as follows.

'I. An ordinary costs threat against me for the entire 21-day hearing if I cross examined any of the witnesses and lost the case. (Payable by me)

2. Reference to a wasted costs application against my lawyers (payable by them).

lhttp:l/www.gwslaw.co.uklwp-conte.../.../-2-012/01/Wasted-costs.pdf)

3. Reference to a referral to the legal regulator for my lawyers.

4. Reference to a referral for me to the GMC.

The Tribunal does not find that this shows that Dr Hormaeche thought

badly of the Claimant. He is seeking confirmation that what the Claimant said was correct. He was asking the Trust for their side of the story. The Tribunal heard evidence from Dr Hormaeche, and he did not say that he thought less of the Claimant because of the statements put out by the Respondent. His witness statement does not comment on the published statements at all let alone whether he thought less of the Claimant having read them. There is no date for this tweet, and it is assumed it was written after the statements were published as it refers to the Daily Telegraph article which was published on 2 December 2018.

d. Page 225 of the supplementary bundle. This is a tweet by someone called Dan Wilson which says, "I don't think it's unreasonable for the trust to pursue costs against him if it was found he lied…call it a threat if you want but there needs to be some deterrent for lying". To which Sir Norman Lamb responded *"PLEASE DO NOT risk making the assumption he lied. This could be defamatory*". The Tribunal does not understand the response from Sir Norman Lamb as Mr Wilson is not saying the Claimant was lying but that if he lied then it would not be unreasonable for the Trust to pursue costs. There is nothing here that suggests that Mr Wilson perceived the Claimant to be lying. This is a legitimate debate on the question of costs.

e. Page 226-227 of the supplementary bundle. These two pages consist of a discussion on Twitter about the costs threats that the Claimant alleged made him decide to settle the 2014 proceedings. They are between Mr Wilson and Mr Lamb and presumably follow on from the tweets at 225. Again, on reading these tweets, there is nothing to suggest that the debate about the costs issue was because of the statements published by the Respondent. For example, one tweet says "*But there is a world of difference between possibility of costs being sought (sic) and this being used as an active threat outside the ET. Day took ~£50k costs off HEE during their withdrawal during ET Prelim, so the fact that costs discussed not a surprise."* Again, the participants in this conversation were asking for evidence about the costs threat issue.

f. Page 1279 of the main bundle. This page was referred to, but the Tribunal was not taken to the precise part of this document. It is presumed that Mr Allen was referring to the following paragraph:

"The Trust are now causing Dr Day further detriment by publicly denying that they even made any threats at all against him. After causing all this harm to the Doctor, they now want to make him out to be a liar. They have done this in the Sunday Telegraph recently for the whole country to read and our profession which has done him great harm".

The Tribunal finds that it is unsurprising that there was discussion and speculation from the Claimant's crowdfunding community about why the Claimant settled his claim. This was inevitable given the unusual way the Claimant's case was funded. This comment is in the context of numerous comments in a thread about the 2018 case and its conclusion.

This particular comment is supportive of the Claimant, and does not show that the author thought badly of the Claimant because of the statements.

How were the statements prepared? (Issue 6)

162. One feature of this case is how the three statements were prepared by the Respondent and who 'signed them off'. This is relevant to issue 6 namely whether the Respondent subjected the Claimant to a detriment on the ground that he had made protected disclosures.

163. Mr Travis said that in his position as CEO he was the only person able to 'sign them off'. The term 'sign them off' was also attributed to the four doctors by the Claimant and also in emails submitted by the Respondent in late disclosure.

164. David Cocke did not give live evidence but in his witness statement (which is unsigned) he described the process as he saw it. The Tribunal has been very careful in the way that it has dealt with Mr Cocke's witness statements given that they are unsigned, and the Claimant did not have the opportunity to cross examine him.

165. It is common ground that Mr Cocke had no direct knowledge or involvement with the Claimant during his employment with the Trust. He was not aware of the protected disclosures the Claimant made at the time they were made. His first involvement was in 2016 when media outlets approached him for statements on the 2014 case.

166. His statement said that even though he knew the Claimant had made disclosures, he did not know of the specific nature of the complaints until the 2018 proceedings. His role was to oversee the Respondent's response to media queries. There was intense media interest in this case even before the hearing in 2018 because of the litigation with HEE regarding employment status. There were articles in the Daily Mail, The Mirror, Public concern at Work, and the Guardian together with broadcast media coverage in 2017 which mentioned the Respondent (even though it was not a party to the employment status dispute with HEE). There was also a raft of tweets and other online comment on this case, from the Claimant and his supporters.

167. His witness statement said that statements made by the Respondent prior to the settlement were made in reaction to media queries when asked to comment and were not proactively given. He described the process as the Communications team liaising with the relevant teams or individuals to get relevant information, a statement is then drafted, and before it is issued there is final sign off from relevant member(s) of the Trust's Executive Team. He mentioned the then Chief Executive and Janet Lynch (Deputy Chief Executive at the time). Ms Lynch was not called to give evidence. Mr Cocke acknowledged that he would liaise with clinical leads when gaining information with which to draft the statement. He did not name the individuals he asked for

information. Once Mr Travis was employed as Chief Executive he 'signed off' the statements. These were the three statements published after the 2014 case was settled.

168. 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.

169. Mr Cocke was not involved in the settlement of the Claimant's 2014 claim in 2018. Ms Lynch was involved in this. The settlement agreement was not confidential and contained an agreed statement. However, despite this, the Respondent was concerned about the negative publicity both in the press and on social media believing it was largely one-sided, negative and gave a misleading view of the Trust.

170. Mr Cocke says in his statement that he was contacted by a journalist, Mr Martyn Halle on 18 October 2018. Mr Halle had also written an article about the 2014 proceedings for The Mirror in August 2017. His statement says that Mr Halle pushed him to give a categorical denial that the trust had threated the Claimant with substantial costs. There is documentary evidence to corroborate this. Mr Cocke says he responded with an additional statement about costs which was agreed by Ms Lynch and Mr Travis. Mr Cocke refers to increasing speculation on social media and the press about the settlement process including allegations that the Respondent had made costs threats to force the Claimant agree to settle. There is evidence of this in the bundles of documents.

171. Ms Lynch prepared a statement to be published and liaised with the four doctors. Mr Cocke says that his only involvement with the first published statement was to make sure it was in plain English, and he revised the language but not the content. He was involved in drafting the other two statements but did not liaise with the four doctors.

172. In relation to the first published statement, Mr Cocke says *"Janet Lynch told me she had obtained internal sign off on the statement from the senior doctors who had been involved in the Tribunal case, from the Trusts Medical Director and Chief Executive*. He did not name the senior doctors. It later became clear that these were the four doctors who were the recipients of the protected disclosures and who had attended the Tribunal when the Claimant was giving evidence in 2018 and were to give evidence. Mr Cocke drafted responses to various journalists who were making enquiries.

173. As already said, there was a great deal of attention in the press and social media about the case. There were further articles for example on social media by Private Eye. On 5 November 2018 Mr Tommy Greene a freelance journalist working on an article about this case for the Daily Telegraph asked the Respondent for its comments about a proposed article. The article was

published on 2 December 2018 in the Sunday Telegraph. The Respondent considered this article was one sided and had taken the Trust's response out of context. The Tribunal finds this is what prompted the Respondent to publish a further statement on 4 December 2018.

174. The Tribunal did not hear evidence or have a statement from Ms Lynch. We can see from the documents that she was instrumental in drafting the statements and liaised with the four doctors.

175. The Claimant's case is that the four doctors were feeding tainted information about the Claimant because he had raised protected disclosures which in turn meant that the statements were detrimental on the ground of making protected disclosures. The four doctors were not called to give evidence. The late disclosure bundle provided near the end of the hearing has email communications between Ms Lynch, Mr Cocke and the four doctors. The Tribunal has considered these emails carefully. They show that the four doctors were consulted about the statements and made comments and asked questions. There was a difference of opinion about how fulsome the information should be and whether or not to refer to an earlier disclosure the Claimant had made. The decision to narrow the statement to just the night shift one in January, was in context of knowing there was an earlier one. Mr Cocke's statement says he drafted it just to include this one as this was the one that the legal case was about.

176. Having considered these emails the Tribunal concludes that they do not show that the four doctors were feeding false and tainted information to be included in the statement. Dr Harding says in one email "*I personally think that the more is written the better as it gets the fact out there, and the facts exonerate the Trust*".

177. It is the Tribunals conclusion that the official sign off and authority to publish the statements was made by Mr Travis. Whilst there is reference to the words 'sign off' by Ms Lynch and Mr Cocke says Janet Lynch told him she had internal sign off from the four doctors, this was not in the Tribunal's view, an official 'sign off' but just their indication they were happy with the content of the statements to be published. The decision to use the statements was made by Mr Travis.

178. The Tribunal finds that contrary to what the Claimant says, the late disclosure between Ms Lynch and the four doctors which contains emails relating to the settlement does not indicate any malice on the part of the doctors, merely a wish to set the record straight from their point of view.

179. The Tribunal therefore does not find that the statements were made because the Claimant made protected disclosures but were made in response to the media interest in this case, and a desire to put the Trust's side of the story. The Tribunal agrees with the Respondent's submission that this was essentially a PR battle. The Claimant had to explain to his supporters who had

funded his litigation, why he had settled without receiving any compensation. The Tribunal accepts the Respondent's evidence that it felt had to respond to the publicity in the press and social media to protect its reputation and put the record straight. The protected disclosures had no material influence on the way the statements were drafted.

The Protected disclosures (Issues 2 to 3.2)

180. In the 2014 litigation, the Respondent accepted most of the disclosures made by the Claimant to be protected disclosures. They did not agree that the disclosures pertaining to concealment were protected. Item 2 of the list of issues addresses this. Of the disclosures not accepted by the Respondent, only one is relevant as the others (2.1 (xi) to (xv) relate to HEE. The only disclosure not accepted which is relevant to the Respondent is at 2.1 (x).

181. It is not necessary for the Tribunal to make findings about this one outstanding disclosure or the issue of concealment. The fact that the Respondent accepts that a protected disclosure was made is sufficient. This is not a situation where a particular disclosure has been ascribed to a particular detriment. Instead, all the disclosures are relied on for all the detriments. Therefore, without making any findings, the Tribunal has simply taken this part of the Claimant's case at its highest and considered this case on the basis that all the disclosures relating to the Respondent apply.

The 'in employment' issue (Issue 5)

182. S47B Employment Rights Act 1996 deals with "Protection from suffering detriment in employment". If any detriments found are not in the employment context then the Tribunal does not have jurisdiction to hear them. s47B(1) provides: "*A worker has the right not to be subject 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.*"

183. The Respondent's position is that any detriment that may be found was not in the employment context but in the context of the Claimant as a crowdfunded litigant. It relies in part on the terms of the settlement as evidence that any detriment found was not in the employment context as set out above.

184. The Respondent relied on **Tiplady v City of Bradford MDC [2019] EWCA Civ 2180**. This case held that the best approach was that the individual must have suffered the detriment 'as an employee' with the emphasis being the individual's position, and not the functions of the employer. It was held that this should not be construed too narrowly given the protective nature of s 47B. It is not necessarily confined to actions at the place of work or during hours of work and it is not to be identified with 'in the course of employment'.

185. The Respondent argued that the Courts approach to whistleblowing detriments has been influenced by discrimination case law. The Respondent cited **Woodward v Abbey National Plc (No. 1) [2006] ICR 1436** which held that *"in employment" meant "in the employment relationship"; Aston v The Martlet Group Ltd*

[2019] ICR 1417 which held "protection from discrimination after an employment relationship had ended depended on satisfying section 108 of the Act, which required that the discrimination "arises out of and is closely connected to" the relationship and, on the facts, the withdrawal of the goodwill offer could not be said to have been "closely connected to" the claimant's former employment; and that, accordingly, there was no jurisdiction to entertain the post-termination victimisation claim."

186. It was submitted that whilst the statements would not have been made but for the fact that the Claimant was previously employed by the Respondent, the three statements complained of were not made in the capacity of a former employee but as an opponent in litigation, about litigation. It was said that the Claimant's employment was only for a year and had ended some four years before these statements were made and his relationship with the Respondent had changed from employment to a litigant and his role as a Crowdfunder.

187. It was also submitted that the Claimant's main witness statement (paragraph 242) in relation to him making a covert recording of conversations supports the Respondent's argument. He said:

> "*It should also be noted that the covert audio was taken by me of formal meetings after my employment at the Respondent had ended and whistleblowing claims were registered with ACAS. At the point of me taking covert audio, I had commenced the process of adversarial litigation and my trade union had made legal threats of whistleblowing claims. That is very different from an employee recording an informal interaction with no justification which is very much how the Respondents wished to paint the covert audio.*"

188. The Respondent also relies on paragraph 8 of the Claimant's witness statement where he says: "*the focus of the present claim is on what the First Respondent has chosen to say publicly and to MPs about the substance of my first whistleblowing case and about how it settled"*.

189. The Respondent said that the Claimant did not invoke the bullying and harassment policy or raise a formal grievance as he would have done if he was in employment. It was submitted that the Claimant's claim arises out of the Respondent's alleged reaction to what the Claimant said in the October 2018 hearing and that the detriments he now complains of are closely connected to that hearing and not to his previous employment with the Respondent.

190. The Claimant also relied on the Woodward case and distinguished this case from the Tiplady case which he considered had been wrongly decided and that if necessary he would argue this in the appellate courts. The Claimant submitted:

"Dr Day relies on PDs made whilst he was an employee. His case heard in October 2018 was about detriments suffered whilst he was an employee. His present case relies on those same PDs and in part upon the allegedly false characterisation of those PD's and detriments by R.

In addition, C is a doctor. As a professional his reputation is important to him (as tacitly is acknowledged by R, given their reference to GMC referral e.g. in the late disclosed note of the board meeting [Late Disclosure bundle 50-53]. To attack his reputation and

his credibility is to attack him 'in the employment field'.

When it was put to C that he made critical comments about R in his capacity as a 'crowdfunder', C responded clearly and emphatically: "No I do so in my capacity as a doctor". In any event he didn't stop being a doctor when he (by necessity caused by R's actions became a crowdfunder.

191. The Tribunal considered this point and could not agree. Ms Edwards and Judge Martin found that the Claimant was not acting "in employment" but was acting as a crowdfunded litigant. They accepted the arguments put forward by Mr Tatton Brown. Ms Forecast however preferred the argument put forward by Mr Allen that the Claimant was acting "in employment" in this litigation. Therefore by majority the Tribunal found that the Claimant was not acting 'in employment'. The outcome of this case does not turn on the Tribunal's finding on this point so no further detail is required.

The Settlement agreement

192. The settlement agreement which the Claimant entered in 2018 is set out above. The Claimant had tried to set aside this agreement, but this was refused first by the Employment Appeal Tribunal and then by the Court of Appeal. The issue relating to the settlement agreement in this case is whether this agreement precludes the Claimant from pursuing this claim.

193. The Claimant submitted that "*For R to suggest in para 16 of its opening Submissions that for C to agree to clause 3.1 (a) excludes him for arguing that things that hadn't yet happened amounted to detriments in the field of employment is to propose a discriminator's charter. The words 'or in the future' in clause 3.1.(a) are clearly for the purpose of preventing the Claimant from bringing a claim in the future about something that had already happened at the date of the settlement agreement but was not already the subject of litigation.*"

194. The Respondent submitted in paragraph 16 of its opening statement: *"It is also to be noted that in the Settlement Agreement [992] that the C agreed to when withdrawing the 2018 claim, the C provided a warranty at clause 3.1(a) that he was aware of no additional claim (other than those referred to in clause 2.1 which he expressly settled) at the time of the Agreement or in the future "arising out of or in connection with" his employment. He further warranted (clause 3.1(b)) that he would not bring any claim "arising out of or in connection with" his employment, including a claim for detriment on the grounds of his having made public interest disclosures. It is assumed that the C therefore accepts that the current claim does not arise out of and is not connected with his employment.*" The one reference to the settlement agreement in the Respondent's closing submissions is in relation to the 'in employment' issue.

195. Having read these parts of the parties' submissions, the Tribunal considers that they are talking about different issues. The Respondent is not arguing here that the Claimant is precluded from bringing this claim, indeed that is not in the agreed list of issues. The Respondent uses the settlement agreement to back up its case that the detriments are not in the employment field as set out in issue 5 of the agreed list of issues.

196. In coming to its conclusions, the Tribunal had to consider the way that evidence was given and presented to it. The Tribunal is not intending to comment on all the witnesses it heard from.

197. The Tribunal found the Claimant to be evasive when being cross examined. On many occasions he did not answer the question put to him, instead saying what he wanted to say. The same question was frequently put several times without the Claimant answering it. Rather than engaging with the issues in this case, the Claimant appeared to be wanting to rerun the 2014 case which he settled. The only relevant part of that case were the protected disclosures he made when working for the Respondent which had largely been agreed by the Respondent as being protected.

198. The Tribunal found that Mr Travis gave answers to the questions he was asked. Whilst there were some issues for example saying there was no board meeting note of the agreement to settle the 2014 case, overall, the Tribunal found his evidence to be credible. The issues relating to disclosure have been set out above together with the Tribunals criticism of that process. However, notwithstanding this, the Tribunal broadly accepts the evidence given by Mr Travis.

Sir Norman Lamb (issue 4.2)

199. The Tribunal had a 9-page statement from Sir Norman Lamb, and he attended to give evidence. Sir Norman was a supporter of Dr Day and had met him on several occasions both prior to and after the 2018 hearing. It can be seen from his statement, and he confirmed this in cross examination, that his knowledge of the 2018 case and how it settled came from the Claimant. The documents he saw were also provided by the Claimant. Sir Norman was an employment lawyer before entering parliament and would therefore be aware of how Employment Tribunals run and how costs feed into the process. He is right, that in many cases costs are not mentioned, but it is the Tribunal's experience that in many cases costs are mentioned especially where the Respondent is a public body.

200. Sir Norman was not aware of the legal advice that the Claimant had received leading up to his decision to settle the case. He was not aware that it was Mr Milsom who first approached the Respondent to ask if settlement might be a possibility. He accepted in cross examination that if there was a basis for raising the issue of credibility then there could be costs consequences. He then said his issue was that it was denied by the Respondent.

201. Sir Norman met with Mr Travis with the Claimant and his wife. This meeting was initiated by Mr Travis. After this meeting Sir Norman sent Mr Travis a letter on 28 January 2019 saying:

"Thank you for coming to meet with Dr Chris Day and myself on 14 January. I refer you to the enclosed letter sent to me from Dr Chris Day on 23 January. I have read through Dr Day's letter very carefully. Your urgent response would be appreciated. It

is very important that you confirm whether, in the light of the contents of Chris's letter, you stand by all the statements made by the Trust and publicly available on your Trust website. Further, is there anything in Chris Day's letter which you believe is in any way inaccurate?

It is my belief that aspects of the Trust's public statements (as referred to in Chris Day's letter) are severely defamatory and should be withdrawn forthwith and that there should be a full apology. I should stress again that the inaccuracies in the public statements by the Trust are not only defamatory but are deeply distressing. They are damaging to Chris Day's reputation."

202. By this time the Claimant had made his application for reconsideration of the judgment dismissing the 2014 proceedings. Mr Travis responded to Sir Norman's letter as follows:

"Since our recent meeting, I have spent a considerable amount of time looking into the matters you and Dr Day put to me at the meeting, as well as points raised within subsequent correspondence. Further to this, I have recently made comments on a details written response to you. However, in light of Dr Day's email dated 5 February to the London South Employment Tribunals, in which he as included our recent correspondence, I do not feel it would be appropriate for me to respond in writing to you or Dr. Day at the current time.

Noting the need to allow legal proceedings to progress, I remain keen to meet with you as planned on the 6 March. At this meeting, I will provide further context on the points raised at our last meeting and by Dr Day in his subsequent letter to you. I am also keen for us to have a wider conversation to identify how me might move the current situation forward in a constructive way. This may include discussion of the steps that the Trust could now take to Assist Dr Day with a return to the national training programme, and how I plan to provide assurance to a future generation of junior doctors at my Trust that any concerns they raise will be effectively resolved in a supportive way."

203. On 18 February 2019 Sir Norman replied expressing his concern that the Trust had failed to address the "*clear inaccuracies in the public statement made by the Trust*" and "*I would urge you again to seriously consider the analysis I enclosed with my previous letter from Chris Day and to act upon it so as to bring to an end what we believe to be defamatory comments in respect of Chris Day*."

204. On 6 March 2019 Mr Travis sent Sir Norman a 4-page letter in which, amongst other things he said:

"The Trust recognises that it was an unusual step to make these statements, but considered that this actions was necessary in light of the very extensive level of interest and discussion in the public domain in respect of Dr Day's Employment Tribunal claim, and the wider circumstances of the case. Each statement was in response to questions raised and very serious allegations about the Trust, notably on social media following the settlement of Dr Day's claim in October 2018.

……..

I have considered carefully whether or not the Trust should add anything by way of further clarification or detail in relation the three statements published. I have

concluded that it is not necessary or appropriate to do so, and this is for two reasons. The first is that I am satisfied that, taken together, the three statements are accurate and to comment further would not be in either side's interests. The second is that there are ongoing legal proceedings by reason of Dr day's outstanding application to the Employment Tribunal for reconsideration of the dismissal judgment and to set aside the settlement agreement for his £5.5m claim. ……"

205. There was a further meeting between Mr Travis (who was accompanied by his colleague Ms Anderson) and Sir Norman on 6 March 2019. This was followed up with a letter from Mr Travis to Sir Norman dated 3 April 2019. By this time the Claimant had presented his claim in relation to this case. Mr Travis again reiterated that the statements would not be changed. In this letter Mr Travis explained that Ms Anderson had carried out a review and explained the outcome of that review.

206. The Claimant submitted that the issue was not whether Mr Travis was silent but whether he responded to Sir Norman's request to justify or remove the statements. The Respondent submitted that Mr Travis disagreed with the Claimant's suggestion that the reason he did not engage with the points raised by the Claimant and to diminish the seriousness of the concerns that the claimant had raised and to portray him as someone who brought a vexatious claim. It was also submitted that this was not the detriment complained of which was that the Respondent deliberately failed to respond to Sir Norman's request on 28 January to justify or remove the public statements on the website.

207. The Tribunal notes that the list of issues has been agreed by both parties and that the Claimant is represented by Mr Allen KC. In these circumstances the Tribunal must consider the issue as it has been drafted. The way it is drafted is in relation to a response to the request. The Respondent did respond to the request albeit not in the way that the Claimant had hoped. This detriment is therefore not made out.

The CQC (issue 4.3)

208. This issue states "*Deliberately fail to remove and /or update their public statements once contacted with concerns about the statement from the Care Quality Commission and or Sir Robert Francis KC*". The Claimant accepted that Sir Robert Francis had not contacted the Respondent and withdrew this aspect of his claim during his evidence.

209. Mr Travis' evidence is that he met with the CQC on 29 March 2019. His evidence was that he was imparting information to the CQC that Ms Anderson had conducted an informal investigation and that he was comfortable with her conclusions. He accepts that there may have been a discussion about whether he was going to remove the statements, but was adamant that there was no such request from the CQC. The Claimant referred to page 1426, which is the document referred to in the preceding paragraph. The Tribunal finds that this does not support the Claimant's case as he suggests. Nowhere in that document does it say that the CQC asked the Respondent to remove or update the statements.

210. On 29 May 2019 Ms Ellen Armistead, Deputy Chief Inspector of Hospitals wrote a letter to Sir Robert Francis KC. This dealt with several other matters which were redacted. In this letter it is said that the CQC shared the concerns about the content and tone of the statements and that they have taken up their concerns with the Trust, who told the CQC that following the advice from their lawyers they intended to keep the statements on the website as the case was having a negative impact on those considering applying for jobs and that Mr Travis was confident the statements reflected the version of events as they happened.

211. There was no evidence that the CQC asked the Respondent to remove or update the statements. The Tribunal accepts that there is evidence of the CQC having concerns but that is a different matter.

Letters to MPs and local public officials (Issue 4.4)

212. 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) ("AGOC"). Paragraph 33 and 36 of the ACOC refer to the alleged detriments as underlined in the statements as set out earlier in this judgment.

213. As the Tribunal has found, all the underlined parts of the statements were not detriments as they were true save for the one point about the Respondent deciding not to pursue the Claimant for costs before he withdrew. The Tribunal has found this to be a detriment but that it was not written because the Claimant had made protected disclosures. It therefore follows that this part of the Claimant's claim fails.

Time Limits (Issue 1.2)

214. The Respondent's case is that all alleged detriments that took place prior to 1st November 2018 are out of time as ACAS received the Early Conciliation notification on 31st January 2019. Given the Tribunal's finding, the issue of time is not determinative and consequently the Tribunal did not spend time deliberating on this issue. However, given the Tribunal only found one of the matters complained of to be a detriment and that detriment was in the statement published on 4 December 2018 that detriment was presented within the statutory time limits.

215. In all the circumstances, the Claimant's claims fail and are dismissed.

……

Employment Judge Martin

15 November 2022

JUDGMENT AND REASONS

Appendix 1

Agreed list of issues

Jurisdiction

1. In respect of the claim against R1, if any of the alleged detriments occurred outside the primary three-month time limit pursuant to section 48(3) of the Employment Rights Act 1996 ('ERA') as extended by s207B:

   1.1. Did that/those detriment(s), together with any or all of the other alleged detriments, form a series of similar acts or failures to act for the purposes of ERA, s48(3)(a) and/or an act extending over a period for the purposes of ERA, s48(4)(a) which ended within the primary time limit (as extended)?

   1.2. If not, was it not reasonably practicable for the complaint to be presented in time and if so was it presented within such further period as the Tribunal considers reasonable for the purposes of ERA, s48(3)(b)?

Protected disclosures

1.3. To the extent not admitted (as to which see paragraph 3 below)

Did the Claimant make any or all of the following communications:

Alleged communications to R1

(i) Statements made by the Claimant to Dr Roberts in a phone call and email on 29 August 2013 that, inter alia, doctor/patient ratios and medical supervision was inadequate and a risk to patients at Woolwich ICU (**D**);

(ii) Statements made by the Claimant in an email forwarded to Dr Harding, Assistant Medical Director for Professional Standards, on 3 September 2013 that, inter alia, doctor/patient ratios and medical supervision were inadequate and a risk to patients at Woolwich ICU (**D**);

(iii) Statements made by the Claimant to Joanne Jarrett, the off-site duty manager, in a phone call and email on 10 January 2014, that, inter alia, the Trust's arrangements at Woolwich hospital for that night were putting patient safety at risk (**D**);

(iv) Statements made by the Claimant to Joanne Jarrett in an email on 14 January 2014 that managers were providing false information and failing to investigate and deal with patient safety issues at Woolwich ICU (**D/F**);

(v) Statements made by the Claimant to Joanne Jarrett in an email on 14 January 2014 about attempts to create confusion about the patient safety issues he raised and present what had actually happened as a consequence of his competence rather than a matter of patient safety (**D/F**);

(vi) Statements made by the Claimant to Dr Harding during a meeting on 21 January 2014 that the Trust was failing to investigate and deal with patient safety issues at Woolwich ICU (**D/F**);

(vii) Statements made by the Claimant to Dr Harding and Dr Ward in an email on 29 April 2014 to complain about the level of risk patients and the Claimant were exposed to, giving false information and attempts to confuse and discredit the safety concerns the Claimant had raised (**D/F**);

Alleged communications to R1 and R2

(viii) Statements the Claimant made to Dr Brooke in a meeting on 29 August 2013 where escalation of the ICU safety concerns within HEE were discussed and a subsequent email on 30 August 2013 reflecting the 29 August meeting (**D**);

(ix) Statements the Claimant made in an email to Dr Brooke, his Educational Supervisor and the Health Education South London (HESL) Emergency Medicine Training Programme Director, on 2 September 2013 that, inter alia, doctor/patient ratios and medical supervision was inadequate and a risk to patients at Woolwich ICU (**D**);

(x) Statements made by the Claimant on 3 June 2014 to the ARCP panel (which included a senior doctor from the Trust, Dr Brooke) about patient safety at Woolwich ICU, the hospital arrangements for 10 January 2014, the events of that night and subsequently and attempts by Trust management to discredit him and present the issue as his competence rather than patient safety (**D/F**);

Alleged communications to R2

(xi) Statements made to Dr Lacy in an email on 5 June 2014 about, inter alia, patient safety at Woolwich ICU and the false statements included in his ARCP report (**D/F**);

(xii) Statements made to Dr Lacy in a meeting on 6 June 2014 about, inter alia, patient safety at Woolwich ICU and attempts by Trust management to discredit him and present the issue as his competence rather than patient safety (**D/F**);

(xiii) Statements made by the Claimant to Dr Chris Lacy, Deputy Head of School of Emergency Medicine, in a letter on 12 June 2014, that HESL was failing to investigate why false statements had been made about his ability to cope, need for support, counselling and psychiatric assistance and lack of engagement with his Education Supervisor (**D/F**);

(xiv) Statements made by the Claimant to Gary Waltham in a letter on 13 August 2014, that HESL was failing to investigate why false statements had been included in his ARCP report (**D/F**);

(xv) Statements made to Dr Andrew Frankel and Gary Waltham during a meeting on 2 September 2014 that, inter alia, doctor/patient ratios and medical supervision were inadequate and a risk to patients at Woolwich ICU, the Trust and HESL had failed to investigate and deal with this and the Trust and HESL had failed to investigate and report what had been said to the ARCP panel about him (**D/F**)?

1.4. In respect of each such communication made by the Claimant:

(a) Did it constitute a disclosure of information for the purposes of s.43B ERA?

(b) Did the Claimant reasonably believe that it tended to show (as indicated in paragraph 3.1 above by letters '**D**' and/or '**F**'):

D: "*that the health or safety of any individual has been, is being or is likely to be endangered*" (s.43B(1)(d) ERA)

F: "*that information tending to show any matter falling within … paragraphs (b) or (d) has been, is being or is likely to be deliberately concealed*" (s.43B(1)(f) ERA)?

(c) Did the Claimant reasonably believe that it was made in the public interest?

(d) Were any disclosures to R2 made to the Claimant's employer within the meaning of s43C ERA?

2. The parties' positions are as follows:

2.1. R1's position is that:

(a) It is accepted that, to the extent that they relate to information tending to show that the health and safety of any individual has been, is being or is likely to be endangered (**D**), disclosures (i), (ii), (iii), (iv), (v), (vi), (vii), (viii) and (ix) were protected disclosures made to R1;

(b) To the extent that the alleged disclosures relate to information tending to show that matters are being or are likely to be deliberately concealed (**F**) (and to the extent that this matters in view of R1's admission in (a) above), R1 denies that any belief by held by the Claimant that any information disclosed tended to show such concealment was reasonable;

(c) In respect of alleged disclosures (x), (xi), (xii), (xiii), (xiv) and (xv), any such disclosures were not made to R1 and R1 makes no admissions in respect of them.

2.2. C's position is that all of the disclosures were protected:

(a) all of the disclosures (i) to (xv) relate to information tending to show that the health and safety of any individual has been, is being or is likely to be endangered;

(b) disclosures (iv), (v), (vi), (vii), (x), (xi), (xii), (xiii), (xiv) and (xv) relate to information tending to show that matters are being or are likely to be deliberately concealed.

Detriments

Alleged detriments by R1

3. Did R1 do any of the following and thereby subject the Claimant to a detriment:

3.1. Publish, fail to remove from its website and/or circulate to a Member of Parliament false and defamatory statements. The Claimant relies on the following:

(a) In respect of the without prejudice discussions:

(i) *'he claims that the Trust threatened him with the prospect of paying our legal costs . . . All of this is simply untrue'*;

(ii) '*we did not threaten Dr Day with legal costs to pressure him to drop his claim*';

(iii) '*[o]n the issue of costs, we had decided not to pursue Dr Day for legal fees before he withdrew his case*';

(b) In respect of the without prejudice discussions: *'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. The Trust's legal representatives confirmed that if the Tribunal were to dismiss Dr Day's claims and make findings that his evidence was untruthful, then there would be an issue as to costs. This reflects that we are an NHS body responsible for public funds'*;

(c) In respect of the Claimant's whistleblowing case: *'The external investigation found it had been appropriate for Dr Day to raise his concerns and that the Trust had responded in the right way'*;

(d) In respect of the Claimant's whistleblowing case: *'Some of the publicity around this case has incorrectly made a link to the findings of a peer review of the critical care unit at QEH undertaken by the South London Critical Care Network in February 2017… It is important to be clear that these were not the same issues that Dr Day had raised in January 2014, which related to junior doctor cover on the medical wards'*;

3.2. Deliberately fail to respond to the Right Hon. Norman Lamb's request on 28 January 2019 to either justify or remove the public statements published on the Trust's website.

3.3. Deliberately fail to remove and / or update their public statements once contacted with concerns about the statements from the Care Quality Commission and or Sir Robert Francis QC.

3.4. On 4 December 2018, the First Respondent's Chief Executive, Mr Travis wrote 18 letters to local MPs and local public officials enclosing the 23 October 2018 and 4 December 2018 public statements about the Claimant's case. 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 AGOC).

4. If so, were they detriments in the employment field such that they are complaints over which the employment Tribunal has jurisdiction or in respect of which the Claimant can make complaint under the ERA 1996?

5. If so, did R1 subject the Claimant to such detriment(s) on the ground that he had made any of the protected disclosures set out above?

6. Further, can the Claimant's complaints about statements made by R1 about the without prejudice communications be fairly determined by the employment Tribunal while he continues to refuse to waive privilege in respect of the advice that here received at the time.

APPENDIX 2

AGREED CHRONOLOGY

DATE	EVENT [with relevant Bundle Pages]
29.08.13	PD (i) - C's phone call and email to Dr Roberts [1396-1397]
29.08.13 30.08.13	PD (viii) – statement from C to Dr Brooke email from C to Dr Brooke
02.09.13	PD (ix) – C's email to Dr Brooke
03.09.13	PD (ii) – C's email to Dr Harding [626-627]
07.11.13	SI 596 [SB 30-58]
05.12.13	SI 656 [SB 59-84]
10.01.14	PD (iii) – C's phone call and email to Joanne Jarrett [SB 87]
14.01.14	PDs (iv) and (v) - C's phone call and email(s) to Joanne Jarrett
21.01.14	PD (vi) – statement from C to Dr Harding
29.04.14	PD (vii) – C's email to Dr Harding and Dr Ward
03.06.14	PD (x) – statements from C to ARCP panel (including Dr Harrison and Dr Brooke)
05.06.14	PD (xi) – email from C to Dr Lacy

06.06.14	PD (xii) – statement from C to Dr Lacy
12.06.14	PD (xiii) – letter to Dr Lacy
13.08.14	PD (xiv) – statement from C to Gary Waltham
15.08.14	C's Fixed Term Contract at the First Respondent ends.
10.09.14	BMA email with reference to PIDA Claims [referred to at SB 275, para 123]
10.09.14	Dr Frankel deleted C's national training number
02.09.14	Meeting with Dr Frankel [SB 92-128] PD (xv) – statements from C to Dr Frankel and Gary Waltham
18.09.14	Roddis Investigation meeting with C and BMA Representative [xx]
15.10.14	Conversation of Concern Visit [634-636, 637-650]
17.10.14	Roddis Investigation meeting Joanne Jarrett [SB 129-143]
27.10.14	C presents first claim against Respondents (2302023/14) [1-12]
Dec 14	Plummer Report [SB 154-175]
03.12.14	Roddis investigator informed of SI 656 [**SB 151**]
30.01.15	C sent Roddis reports [651-654, 655-714, 715-758]
10.04.15	Claimant presents second claim against Respondents (2301446/15) [60-71]
16.04.15	Tribunal determines preliminary issue in favour of Second Respondent on worker status, striking out Claimant's claim against it
09.02.17	R2 threatened C with a costs application in relation to his appeal to the EAT [SB **186-187**]
19.02.16	R1 statement to Evening Standard [**759**]
08.02.17	Peer Review Report [770-830]
05.05.17	Judgment handed down by the Court of Appeal in ***Day v Lewisham & Greenwich NHS Trust & HEE*** [2017] EWCA Civ 329, [2017] ICR 917 overturning strike out against Second Respondent
28.06.17	R1 statement to HSJ [839]
21.07.17	R1 statement to Martyn Halle [845]

14.02.18	R2 disclosed LDA dated 1 April 2012 between R1 and R2's predecessor organisations
20.02.18	Peer Review Report Revisit [872-906]
May 18	R2 conceded worker status point just prior to preliminary hearing and paid £55,000 towards C's costs
23.05.18	C and Norman Lamb met Jeremy Hunt
01.10.18	Commencement of full merits hearing, listed for 4 weeks
	During the hearing, R confirmed its position regarding PDs. All accepted bar 2.1.vi of the agreed list of issues for this claim. That was accepted during the current proceedings.
05.10.18 12:59 – 13:10	Email from Chris Milsom to Ben Cooper [**943**] and subsequent email exchange [**945-946**]
05.10.18	Phone call between Chris Milsom and Ben Cooper [947, **948**]
05.10.18 13:38	Email Ben Cooper to R1's solicitors [**949**]
05.10.18 13:42	Email to Tim Johnson from Chris Milsom [**938**]
05.10.18 13:48	Text from Chris Milsom to Ben Cooper [**952**]
05.10.18 13:58	Email Ben Cooper to R1's solicitors [**951**]
05.10.18 16:14	Text Ben Cooper to Chris Milsom [**952-953**] and subsequent exchange [**954**]
05.10.18 16:18	Email Ben Cooper to R1's solicitors [**957**]
05.10.18	Discussion between Angus Moon and Ben Cooper [960-961, **962**]
05.08.18	Phone call between Chris Milsom and Angus Moon
06.10.18	Angus Moon email agreeing that Chris Milsom can speak to C [968]
07.10.18	Conference call with C and his lawyers [971-973]

07-11.10.18	(according to Chris Milsom – denied by Ben Cooper) counsel for R1 and counsel for R2 spoke to him about a two tier approach in relation to costs [1123]
11.10.18	End of Claimant's cross examination
11.10.18	Conference call with C and his lawyers [974-979]
11.10.18	Email from Chris Milsom to Respondents' barristers [980]
12.10.18	Settlement negotiation between the parties in Croydon
12.10.18 19:09	Email from Janet Lynch to R1's Board [**985-986**]
14.10.18 18:30	R1 Board Meeting
14.10.18 19:17	Text Ben Cooper to Chris Milsom [**955**]
15.10.18	Hearing ends in 'drop hands' settlement and agreed position statement [**990- 996**]
15.10.18	HEE website statement [182-184]
16.10.18	BMJ article [1011-1012]
18.10.18	Email from Martyn Halle to David Cocke re Mail on Sunday article **[1025]**
19.10.18	Email from David Cocke to Martyn Halle re statement for Mail on Sunday **[1028]**
24.10.18 09:59	***R1 website statement [169-172] Alleged Detriments 4.1 (c) and (d)***
30.10.18	R1 Board Briefing [**1052-1053**]
05.11.18	Email from Tommy Greene to David Cocke [1058-1061]
12.11.18	Letter from Ben Travis to Norman Lamb [1062-1063]
16.11.18	Email from Martyn Halle to David Cocke and response [1094-1095]
20.11.18	HSJ article [**1111-1114**]
28.11.18	ET Judgment dismissing claims upon withdrawal sent to parties [132]
30.11.18	Chris Milsom account to C by email [**1123**]

02.12.18	Daily Telegraph article [1141-1142]
03.12.18	R2's internal comment on R1's public statement [1146]
04.12.18	***R1 additional statement on website [173-175] Alleged detriments 4.1 (a) (i), (ii), (iii)***
04.12.18	Mr Travis wrote to 18 MPs and public officials [**1179-1182, 1183**] Alleged detriment 4.4
	R1 briefed the HSJ – R1 says deleted [**SB 241**]
11.12.18	C makes an application to the tribunal to set aside the settlement [133-151]
19.12.18	Briefing from Alex Wallace at R1 [1235, 1236-1241]]
20.12.18	Report into bullying and harassment at R1 (extracts) [1243, 851-871]
21.12.18	HSJ article about bullying and harassment report [1250-1253]
21.12.18	Letter from R1's solicitors to Ben Travis and Janet Lynch [**1283**]
22.12.18	Letter from R1's solicitors to Ben Travis and Janet Lynch [**1284-1285**]
31.01.19	Days A and B: C requests and receives an ACAS conciliation certificate [363]
03.01.19	R1 sends intended statement to C (ultimately not issued on website) [**176-177**]
02.01.19	C responds to R1 [**1296**]
08.01.19	Meeting Norman Lamb, Dr Frankel and C
10.01.19 09:35	***R1 website statement [178-181] Alleged detriment 4.1 (b)***
14.01.19	Meeting Norman Lamb, Ben Travis, C, Melanie Day
23.01.19	C's letter to Norman Lamb following 14.01.19 meeting [1386-1397]
28.01.19	Norman Lamb requested R1 to either justify or remove its public statements [**1402-1403**] alleged failure to respond is alleged detriment 4.2
07.02.19	Letter from Ben Travis to Norman Lamb [**1404**]
18.02.19	Letter from Norman Lamb to Ben Travis [**1413**]
18.02.19	Tribunal decision sent to the parties rejecting C's application to set aside [185-186]

26.02.19	C writes to the Regional Employment Judge to request reconsideration [187- 189]
06.03.19	Draft unsent letter from Ben Travis to Norman Lamb [**1416-1417**]
06.03.19	**C presents third (and current) claim against Respondents (2300819/2019) [365-379]**
28.03.19	C appeals to the EAT against the refusal to reopen settlement [276-284]
03.04.19	Letter from Ben Travis to Norman Lamb [**1422-1423**]
29.04.19	Acting REJ effectively refuses request for reconsideration [275]
29.05.19	Letter from CQC to Sir Robert Francis [**1425-1426**]
19.07.19	R2 disclosed LDA dated 1 April 2014 between R1 and R2
14.11.19	Hearing before the EAT, Heather Williams QC (as she then was), sitting alone. Appeal is refused [291-314]
30.12.19	C appeals to the Court of Appeal [315-352]
10.03.20	Court of Appeal (Simler LJ) refuses permission to appeal, but the wrong order is initially sent out by the Civil Appeals Office in error [359-360, 361- 362]
27.08.20	Shakespeare Martineau letter to Chris Milsom [1485-1500]
01.10.20	Preliminary hearing in relation to this claim [443-447]
11.11.20	C's Further and Better Particulars [481-488]
13.11.20	Preliminary hearing [489-493] at which C was given permission to amend claim (with agreement of Rs) and R2 accepted that C's communications to it were PDs
18.01.21	Letter from CQC to C [**1532**]
01.03.21	Full merits hearing of this claim due to commence for 3 weeks but postponed
19.03.21	Preliminary hearing at which the tribunal accedes to HEE's application for a preliminary hearing on Dr. Frankel's status as an alleged worker or agent [533-541]
29.03.21	CQC raised concerns with R1 at an engagement meeting with Chief Executive, Chief Nurse and Deputy Director of Governance [1532]
10.05.21	Preliminary hearing [551-554]

26.05.21	Case Management order [561-562]
27.07.21	Letter from Womble Bond Dickinson on behalf of Chris Milsom to C [1560-1582]
02.09.21	Preliminary hearing at which C given permission to amend claim against R1 [**581-588**]
24.09.21	R1 re-amended Grounds of Resistance [**589-597**]
17.01.22 19.01.22	Preliminary hearing on Dr. Frankel's status
16.02.22	Judgment sent to the parties following preliminary hearing on Dr Frankel's status [**607-624**]
20.06.22 - 08.07.22	This hearing (liability only)