Neutral Citation Number: [2025] EAT 123

Case No: EA-2022-001347-NLD
EA-2023-000545-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 August 2025

Before :

THE HONOURABLE MR JUSTICE SHELDON

Between :

DR CHRISTOPHER DAY

Appellant

- and –

LEWISHAM AND GREENWICH NHS TRUST **Respondent**

- -
- -

Mr Andrew Allen KC, Ms Elizabeth Grace (instructed by **Slater and Gordon**) for the **Appellant**
Mr Daniel Tatton Brown KC (instructed by Capsticks) for the **Respondent**

Hearing dates: 1-2 July 2025
- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 19 August 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SUMMARY

Whistleblowing, Protected Disclosures, Practice and Procedure, Costs

The Employment Tribunal dismissed the whistleblowing claim of Dr Christopher Day (the Claimant) against Lewisham and Greenwich NHS Trust (the Respondent), and dismissed the Claimant's application for costs. The claim concerned statements made by the Respondent, and other actions of the Respondent, around the time of, and shortly after, an employment tribunal hearing in October 2018. That hearing concerned a whistleblowing claim brought by the Claimant in 2014, which was settled after he had given his evidence. The Claimant alleged that the Respondent's statements and other actions of the Respondent amounted to a detriment on the ground of the protected disclosures that he had made during his employment with the Respondent.

The Employment Tribunal found that while one of the statements made by the Respondent was a detriment, it was not caused by the Claimant's protected disclosures. The Employment Tribunal also concluded that the claim fell outside the scope of section 47B of the Employment Rights Act 1996 (ERA), as the alleged detriments occurred after the employment relationship had ended and were not "in the employment field."

The Claimant appealed on several grounds, including that the Employment Tribunal:

- Misapplied the legal test for detriment and causation.
- Failed to draw inferences from the Respondent's misconduct in disclosure.
- Incorrectly concluded that the claim was not "in employment" under section 47B ERA.
- Erred in dismissing his costs application despite finding the Respondent's conduct to be unreasonable.

The Employment Appeal Tribunal dismissed the appeal. The Employment Appeal Tribunal upheld most of the Employment Tribunal's findings, including its conclusions on detriment, causation and the dismissal of the costs application. However, it found two errors:

1. The Employment Tribunal had failed to determine whether the Respondent's refusal to remove public statements after concerns from the Care Quality Commission constituted a detriment.
2. The Employment Tribunal wrongly concluded that the claim fell outside section 47B ERA.

Despite these errors, the appeal was dismissed. The Employment Appeal Tribunal concluded that the errors were immaterial to the outcome, as the Employment Tribunal had correctly found that the protected disclosures did not materially influence the Respondent's actions. The appeal against the Costs Judgment was also dismissed, with the Employment Tribunal's reasoning found to be within its discretion and supported by the evidence.

THE HONOURABLE MR JUSTICE SHELDON:

Introduction

1. Dr Christopher Day (who I shall refer to as the Claimant) appeals from two decisions of the Employment Tribunal (London South) (Employment Judge Martin, Ms J Forecast and Ms C Edwards): (i) the dismissal of his claims of detriment against the Lewisham and Greenwich NHS Trust (who I shall refer to as the Respondent) for having raised protected disclosures ("the Liability Judgment"), and (ii) dismissing his application for costs arising from the hearing on liability ("the Costs Judgment"), (collectively "the Judgments"). The Liability Judgment was promulgated on 16 November 2022, following a hearing over several weeks in June and July 2022. The Costs Judgment was promulgated on 26 April 2023.

2. The detriment that the Claimant alleged that he suffered related to statements that were made by the Respondent between October 2018 and January 2019, and to correspondence sent by the Respondent around that time, in connection with employment tribunal proceedings that had been brought by the Claimant against the Respondent and Health Education England ("HEE") in 2014. The claim was settled after the Claimant had given evidence at a hearing before an employment tribunal in October 2018.

3. On this appeal, the Claimant challenges the Judgments on a number of grounds. Some of the grounds can only be understood and analysed by carrying out detailed consideration of the submissions made to the Employment Tribunal and the evidence that was, and was not, before the Employment Tribunal. It will be necessary, therefore, to set out the Factual Background to this appeal at some length.

Factual Background

4. In October 2014 and April 2015, the Claimant presented claims of unfair dismissal and whistleblowing against the Respondent and HEE ("the 2014 claim"). The claims related to the period in 2013-2014 when the Claimant was employed by the Respondent as a specialist registrar in medical training arranged by HEE. During that time, the Claimant had made a number of disclosures relating to patient safety at the hospital where he worked. The disclosures were accepted by the Respondent as being qualifying, protected disclosures for the purposes of the whistleblowing regime in the Employment Rights Act 1996 ("the ERA").

5. The hearing of the 2014 claim commenced on 1 October 2018 ("the 2018 hearing"). The considerable delay between issuing the claims and the substantive hearing resulted from the fact that HEE challenged the finding that it fell within the definition of an employer for the purposes of the whistle-blowing regime. In *Day v Lewisham & Greenwich NHS Trust* [2017] ICR 917, the Court of Appeal found against HEE, deciding that the fact that an individual was a "worker" within the meaning of the ERA for one employer did not mean that they could not also fall within the extended meaning of "worker" for another employer.

6. From the appellate stage, the Claimant funded the litigation of the 2014 claim against the Respondent and HEE via a crowdfunding website. The litigation attracted significant publicity in the national media. Before the Claimant had finished giving

evidence to the employment tribunal and with the permission of the employment tribunal, Mr Milsom, Counsel for the Claimant, made contact with Mr Cooper KC, Counsel for the Respondent. During the course of their conversation, and without instructions, the prospect of settlement was raised. With the permission of the employment tribunal, Mr Milsom discussed settlement with the Claimant, even though he was still giving evidence and would otherwise have been unable to speak to his legal representatives. After the Claimant had concluded his evidence, and before the Respondent's witnesses had given their evidence, the claims against the Respondent and HEE were settled.

7. The terms of the settlement agreement included what was described as an "Agreed Position Statement". This stated that:

> "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."

Mr Milsom had initially sought confidentiality of the terms of settlement on behalf of the Claimant, but this was not agreed to by the Respondent.

8. Following the settlement, the Respondent made statements on its website and communicated with a number of persons and entities. I shall set out the statements. The underlining reflects the parts of the statements that the Claimant regards as a detriment. The numbering from the parties' agreed list of issues for the respective alleged detriments has been inserted in bold format to the text.

(a) Statement 1 – 24 October 2018

> "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 appropriate for Dr Day to raise his concerns and that the Trust had responded in the right way [**Issue 4.1.c**] 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 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.

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. **[4.1(d)]**. 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 **[issue 4.1(a)(i)]** 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 **[issue 4.1(a)(ii)]** – 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 before making any decisions.
>
> **[issue 4.1(a)(iii)]** 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, **[issue 4.1(b)]** 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

• 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, **[issue 4.1(b)]** 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 full costs 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."

9. On 6 March 2019, the Claimant brought proceedings against the Respondent ("the 2019 claim"). He claimed that some of the content of the statements published by the Respondent and some of the Respondent's conduct caused him to suffer detriment between October 2018 and January 2019, and that this was on account of protected disclosures he had made when employed by the Respondent between August 2013 and September 2014. On 2 September 2021, an amendment to the claim was allowed, so that the Claimant could also rely on the impact of 18 letters that had been sent by the Respondent to Members of Parliament and public officials. These documents had been disclosed to the Claimant by the Respondent on 22 January 2021.

10. The list of issues to be decided by the Employment Tribunal in the 2019 claim was agreed by the parties. The list included issues relating to alleged detriments, as follows:

> 4. Did R1 do any of the following and thereby subject the Claimant to a detriment:
>
> 4.1. 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:
>
> *'he claims 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'*;
>
> *'[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'*;
>
> 4.2. 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.
>
> 4.3. 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.
>
> 4.4. 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).
>
> 5. 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?
>
> 6. 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?"

11. During the course of the proceedings for the 2019 claim, and at the substantive hearing, a number of case management issues arose. Of particular concern to the Claimant was the Respondent's approach to disclosure. The Claimant complained that the Respondent had failed to preserve evidence, had conducted an inadequate discovery exercise initially, there had been the destruction of emails, and there were various other ways in which evidence had been placed beyond the Claimant's reach.

12. At the hearing of the 2019 claim, the Employment Tribunal heard from a number of witnesses. For the Claimant, the Employment Tribunal heard from the Claimant himself, Sir Norman Lamb, Dr Sebastian Hormaeche, Dr Megan Smith, Mrs Day (the Claimant's wife), and Mr Milsom (the Claimant's Counsel for the 2018 hearing). For the Respondent, the Employment Tribunal heard from Mr Travis (the Respondent's Chief Executive Officer), and Mr Cooper KC (the Respondent's Counsel for the 2018 hearing). The Employment Tribunal read a witness statement from Rt Hon Jeremy Hunt MP (the former Secretary of State for Health) produced by the Claimant, as well as a witness statement from Mr Rowland (solicitor for the Respondent) and from Mr Cocke (the Respondent's Associate Director of Communication) produced by the Respondent.

13. Mr Rowland's witness statement dealt with issues relating to disclosure by the Respondent. Mr Cocke's witness statement dealt with his involvement in the making of the various statements that contained the offending passages. Mr Cocke was originally due to attend the hearing, but notified the Employment Tribunal that he was too unwell to give evidence. The Employment Tribunal was satisfied that he was unfit to give evidence, stating that there were indications of a progressing mental health issue, which along 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". The Employment Tribunal noted that "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".

14. During the course of the hearing, the Claimant made an application for *additional* discovery. This was described in the Liability Judgment at paragraphs 50-56:

> "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".

15. On 6 July 2022, the Claimant made an application to strike out the Respondent's response. This was heard by the Employment Tribunal on 8 July 2022. As explained by the Employment Tribunal in the Liability Judgment, the basis of the application was the defective discovery process carried out by the Respondent. The Claimant highlighted the various failures by the Respondent, including Mr Cocke's deletion of potentially relevant material while the hearing was ongoing, and inconsistencies about what had been said about emails. The Employment Tribunal refused the application and informed the parties of this decision.

16. In the Liability Judgment, the Employment Tribunal explained that it had "serious concerns about the discovery exercise carried out by the Respondent". Reference was made to the belated disclosure of 18 letters by the Respondent, as well as the note of the board meeting authorising settlement in the 2014 case. With respect to the latter note, the Employment Tribunal explained that this

> "was only disclosed during the hearing after Mr Cocke's request of Dr Harding to find relevant documentation . . . 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 . . . [that] there were no such documents; there was no board meeting. R1 accepted there

was a telephone discussion".

The Employment Tribunal observed that these assertions were "incorrect as a note of the meeting has now been produced".

17. The Employment Tribunal stated that it had in mind:

> "the criticism of Judge Kelly . . . , 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".

18. The Employment Tribunal explained at paragraph 84 that it was

> "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".

At paragraphs 85-86, the Employment Tribunal stated that:

> "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.
>
> 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.

The Liability Judgment

19. In the Liability Judgment, the Employment Tribunal dealt with the various preliminary matters as referred to above. It then went on to set out the relevant law: the statutory provisions (sections 47B and 48 of the ERA), and the decision of the Court of Appeal in Fecitt v NHS Manchester [2012] IRLR 64, which was said to be authority for the proposition that "for the purposes of a detriment claim, a claimant is entitled to succeed if the Tribunal finds that the PID [public interest disclosure] materially influenced the employer's action". (The Employment Tribunal had also referred to the test in Fecitt when setting out the Claimant's submissions on the strike out application at paragraph 69, and at paragraph 81 when reciting some of the case law that was referred to as part of that application).

20. The Employment Tribunal provided a pithy description of the claim at paragraph 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."

21. After describing the evidence of Counsel (Messrs Milsom and Cooper KC), the Employment Tribunal set out its findings as follows:

> "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.
>
> 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.

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.

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.

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."

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.

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.

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.
>
> 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.
>
> 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.
>
> 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.
>
> 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)".

22. In its judgment, the Employment Tribunal then set out the various statements that had been published by the Respondent, and identified the parts of those statements that were complained about by the Claimant. The Employment Tribunal then asked itself whether those statements were a detriment. First, the Employment Tribunal identified the case law that the parties had relied upon. A summary of the principles derived from those authorities was set out:

> "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".

23. Immediately after setting out this summary of legal principles, the Employment Tribunal stated at paragraph 154 that:

> "If something put in one of the published statements is true, then it is not a detriment."

24. The Employment Tribunal went on to say that:

> "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."

25. With respect to the wording of issue 4.1(a)(iii) -- "the Respondent decided not to pursue the Claimant for its legal fees before he withdrew his case" the Employment Tribunal found that this was a detriment. The Employment Tribunal found that "it was on settlement that the Respondent decided definitively not to purs[u]e costs. The stated position was that if the Claimant lost and was found to be untruthful, then costs would be an issue". The Employment Tribunal considered that the wording used by the Respondent in the statement would be significant to the Claimant's crowdfunders, as they had concerns about why the Claimant had settled and had not concluded the case that they had funded. The Employment Tribunal found that the impression given by the Respondent's statement was 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".

26. With respect to issue 4.1(b), the Employment Tribunal found that what was written in the 10 January 2019 statement was "correct". This was because:

> "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".

27. As for issue 4.1(c), the Employment Tribunal found that the Claimant had taken the words he objected to out of context, that the Respondent had stated that the external investigation had found that it was positive for him to have raised concerns, and the way in which the Respondent had responded was qualified by words that the Claimant had not underlined – and so did not form part of the alleged detriment – namely "by calling in the on-call consultant to provide additional support". The Employment Tribunal found that:

> "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".

28. With respect to issue 4.1(d), the Employment Tribunal identified that the Claimant's complaint was that the Respondent had "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". The Employment Tribunal found at paragraph 159 that:

> "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".

29. With respect to the other detriments in the list of issues, the Employment Tribunal stated that these were set out under the section dealing with issues relating to Sir Norman Lamb, the Care Quality Commission (CQC) and letters to stakeholders. In other words, they would be addressed later in the judgment: see paragraphs 42-45 below.

30. The Employment Tribunal then addressed the issue of how the statements were

prepared: paragraphs 162-179. The Employment Tribunal noted that Mr Cocke had not given live evidence, but his witness statement described the process as he saw it. The Employment Tribunal stated it "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".

31. The Employment Tribunal noted 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 at the time they were made, and that he first became involved in 2016 when he was approached by media outlets for statements on the 2014 case. The Employment Tribunal referred to what Mr Cocke said in his witness statement about the intense media interest in the case, as well as online comment about the case from the Claimant and his supporters, and that the statements made by the Respondent prior to settlement were in response to media queries. The Employment Tribunal referred to Mr Cocke's description of the process of drafting, which involved obtaining information from clinical leads, final sign off from the Chief Executive (initially someone other than Mr Travis, and then Mr Travis) and Janet Lynch (the Deputy Chief Executive). The Employment Tribunal noted that in the evidence of Mr Travis, and in Mr Cocke's witness statement, it was said that "the negative publicity surrounding this case" was having an effect "on the Respondent's ability to recruit junior doctors onto its training programme and morale more generally". The Employment Tribunal found that it had "no reason to doubt this evidence".

32. With respect to the references to costs in the statements published by the Respondent, the Employment Tribunal referred to Mr Cocke's witness statement where he said that he had been pushed by a journalist from *The Mirror* to give a categorical denial that the Respondent had threatened the Claimant with substantial costs. The Employment Tribunal noted that there was documentary evidence to corroborate this contention of Mr Cocke. Further, the Employment Tribunal noted that Mr Cocke had said that he responded with an additional statement about costs which was agreed by Ms Lynch and Mr Travis, and it was noted that there was evidence of this in the bundle before the Employment Tribunal.

33. With respect to the first published statement, the Employment Tribunal quoted from Mr Cocke's witness statement that "Janet Lynch told me she had obtained internal sign off from the senior doctors who had been involved in the Tribunal case, from the Trusts Medical Director and Chief Executive". The Employment Tribunal identified the doctors as the four doctors who were recipients of the protected disclosures and were due to give evidence at the 2018 hearing.

34. The Employment Tribunal referred to further press and social media attention. In particular, there was an article in the *Sunday Telegraph* on 2 December 2018, which the Respondent was said to have regarded as one-sided and not in context. The Employment Tribunal found that this was what prompted the Respondent to publish the statement on 4 December 2018. The Employment Tribunal identified from the documents that Ms Lynch had been instrumental in drafting the statements and had liaised with the four doctors.

35. The Employment Tribunal addressed the Claimant's case with respect to the preparation of the statements:

> "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".

36. At paragraphs 176-179, the Employment Tribunal reached its conclusions on the issue of causation:

> "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".

37. The Employment Tribunal then addressed the matter of the protected disclosures, noting that most of them had been accepted as such by the Respondent in the 2014 claim. With respect to the one disclosure that had not been accepted as protected, the Employment Tribunal assumed for the purposes of its decision that it was a protected disclosure.

38. The Employment Tribunal then addressed what was described as the "in employment" issue, which raised a question as to the proper scope of section 47B of the ERA. The Respondent's position was described as being that any detriment suffered by the Claimant would not have been in the employment context, but in the context of the Claimant as a crowdfunded litigant, and so fell outside of section 47B of the ERA. Reference was made to the Respondent's reliance on the case of Tiplady v City of Bradford MDC [2019] EWCA Civ 2180, and to Woodward v Abbey National Plc (No. 1) [2006] ICR 1436. At paragraph 186, the Employment Tribunal described the Respondent's submissions as follows:

> "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".

The Employment Tribunal also noted the Respondent's submission that the detriments complained about by the Claimant were closely connected to the 2018 hearing and not to his previous employment with the Respondent.

39. The Employment Tribunal set out the Claimant's submissions:

> "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".

40. At paragraph 191, it was explained that the Employment Tribunal could not agree on this point, but the majority (including Judge Martin) found that the Claimant was not acting "in employment" but as a crowd-funded litigant. It was said that the majority preferred the arguments put forward by the Respondent.

41. As part of its discussion about the relevance to the proceedings of the Settlement Agreement that had been entered into in 2018, the Employment Tribunal expressed its findings about the way in which witnesses gave their evidence:

> "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".

42. The Employment Tribunal considered the alleged detriment with respect to Sir Norman Lamb at paragraphs 199-207. The Employment Tribunal described the interactions between Sir Norman Lamb and Mr Travis, and quoted from a letter that he had sent to Mr Travis on 28 January 2019 in which Sir Norman Lamb stated that "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". Mr Travis' response to this letter was also quoted. This stated that in light of a recent email from the Claimant to the employment tribunal he did not feel it would be appropriate to respond at the current time, but that Mr Travis remained keen to meet with Sir Norman Lamb. On 18 February 2019, Sir Norman Lamb wrote again expressing concern that the Respondent had failed to address what he described as the "clear inaccuracies in the public statement made by the Trust" and in which he urged the Respondent to "bring to an end what we believe to be defamatory comments in respect of Chris Day." The Employment Tribunal quoted the Respondent's response to this letter, dated 6 March 2019. In that letter, Mr Travis stated that having considered carefully whether or not further clarification was required, he had concluded that it was "not necessary or appropriate to do so" and gave reasons why not. A further meeting

between Mr Travis and Sir Norman Lamb is referred to, as well as a follow-up letter from Mr Travis on 3 April 2019. In that letter, the Employment Tribunal observe that the statements would not be changed.

43. At paragraph 207, the Employment Tribunal stated that:

> "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".

44. With respect to the alleged detriment concerning the CQC, the Employment Tribunal discussed a meeting between Mr Travis and the CQC on 29 March 2019, and found that "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".

45. With respect to the letters that had been written by the Respondent to MPs and local public officials, the Employment Tribunal noted that this issue (issue 4.4) referred to Mr Travis writing to them on 4 December 2018, enclosing the statements of that date and of 23 October 2018. The Employment Tribunal concluded that it had found that:

> "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."

46. In summary, therefore, the Employment Tribunal had found that (i) only one of the alleged detriments suffered by the Claimant had been established; (ii) the Claimant had failed to establish "causation"; and (iii) the claim fell outside of section 47B of the ERA, in any event.

The Costs Judgment

47. After the Employment Tribunal promulgated the Liability Judgment, the Claimant made an application for costs. Submissions were made in writing and the Employment Tribunal sent out the Costs Judgment on 26 April 2023. In that judgment, the Employment Tribunal set out the basis for the Claimant's application for costs:

> "The Claimant contends that the Respondent's conduct in relation to disclosure leading up to and during the final merits hearing between 20 June – 8 July 2022 (not sitting on 24 June, 5 and 6 July); 12 July 2022, 14 July 20221 was unreasonable, and further or alternatively, was in breach of the Tribunal's orders. This conduct resulted in an increase to the Claimant's costs, as set out further below".

48. The Employment Tribunal explained that it had a discretion as to whether to award costs; that costs were the exception and not the norm. The three stages for deciding whether to exercise the discretion were set out:

> "Step 1: the Tribunal should assess whether it considers that the Respondent has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the way that the proceedings (or part) have been conducted (Rule 76(1)(a)); or that there has been a breach of an order or Practice Direction (Rule 76(2).
>
> Step 2 relates to the means of the paying party. Tribunals are not obliged by Rule 84 to take account of means, but may do so.
>
> Step 3: if the Tribunal considers that a costs order may be appropriate, the Tribunal should consider the amount of any costs order under Rule 78".

49. The Employment Tribunal concluded that the threshold test at stage one was met, saying that:

> "The judgment gives the Tribunal's view on the Respondent's disclosure. The Tribunal did not sit for two days whilst further disclosure was carried out. Submissions had then to be given on an extra day the week after evidence concluded. Taken at face value, the Tribunal finds that the Respondent acted unreasonably in failing to ensure that disclosure was adequately undertaken and that this resulted in the Tribunal sitting for extra days and the parties being required to attend on days that had been expected to be for the Tribunal's use".

50. Step 2 (the Respondent's means) were said by the Employment Tribunal not to be relevant, and so the focus was on Step 3. The Employment Tribunal quoted from Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420, [41]:

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had".

51. The Employment Tribunal set out the summary of the Respondent's submissions:

> " . . . it would be manifestly unfair and unjust (and hence contrary to the overriding objective set out in Rule 2 of the 2013 Rules of Procedure) for any costs order to be made in the Claimant's favour. The Trust's alleged unreasonable conduct has been exaggerated by the Claimant and any additional costs incurred as a consequence have been dwarfed by the costs occasioned by the Claimant's own unreasonable conduct. The ET is therefore invited to dismiss the application".

52. The Employment Tribunal described the Respondent's submissions with respect to the Claimant's own unreasonable conduct:

> "the Respondent relies on the length of the Claimant's first witness statement and his production of another two statements. It relies on the list of issues and the evidence adduced by the Claimant which went far beyond the issues that the Tribunal had to deal with and went back to the issues in the 2014 claim which was withdrawn. It cited the witnesses the Claimant had produced and the lack of relevance of those witnesses' evidence to the issues. The Respondent also submitted that the way in which the Claimant gave his evidence was unreasonable in that he would not answer straightforward questions. It also referred to the Claimant's own disclosure errors in particular the late disclosure of the letter before action sent to Mr Milsom".

53. At paragraphs 17-19, the Employment Tribunal stated:

> 17. The Tribunal has already made findings in its judgment about these matters. The Tribunal referred to *Hendricks*: "Attempts must be made by all concerned to keep the discrimination proceedings within reasonable bounds by concentrating on the most serious and the more recent allegations." As found in the judgment, the Claimant was wanting to present evidence about the disclosures themselves. This was not relevant to what the Tribunal had to determine. The case the Tribunal was to determine was solely related to any detriments that may have been made in the public statement made after the Claimant had withdrawn his 2014 case and whether there was a causal connection between any detriment found and the public interest disclosure the Claimant made and which the Respondent by and large accepted as being protected.
>
> 18. The seriousness of the disclosures was not relevant. Most of the disclosures were admitted to be protected disclosures, and those that had not been conceded as such would not make any difference to whether there were detriments in the public statements. The Claimant's evidence was exceptionally long. It did not confine itself to the issues. The Tribunal gave direction that not all parts of the Claimant's witness evidence was to be cross examined on, and that the Respondent should concentrate on those matters that had been agreed in the list of issues.
>
> 19. Inevitably this increased the costs for the Respondent and for the Tribunal which are both publicly funded bodies. The Tribunal has no doubt that if the Claimant had applied his mind to the actual issues in this case and had not sought to re-litigate his 2014 case, the hearing would have been significantly shorter and therefore less costly to the Respondent and the Tribunal. The Tribunal notes that the Claimant has presented another claim. It is hoped that in any future litigation the Claimant confines his

evidence to the issues which the Tribunal is to decide".

54. At paragraphs 20-22, the Employment Tribunal stated that:

> "20.The Respondent has also submitted that the Claimant's claim had no reasonable prospect of success. The Tribunal has not considered this in any detail given its comments regarding the Claimant and the way he conducted the proceedings. This is sufficient for the Tribunal to conclude that whilst the threshold test for the Claimant's application for costs against the Respondent is met, that it would not be just and equitable to award costs. In coming to this conclusion, the Tribunal has looked at the whole picture of what happened in the case and finds that there has been unreasonable conduct by the Claimant in conducting the case. The unreasonable conduct relied on is set out above together with its effects".
>
> 21. The Respondent referred to comments the Claimant made on social media about the Judgment and the Claimant responded to what the Respondent said. Having considered these comments (after the Tribunal had considered the matters set out above), the Tribunal finds that they reinforce its view that the Claimant engaged less with the agreed issues and rather more with trying to re-litigate his 2014 case which is why his evidence was so extensive which in turn led to an increase in Tribunal time and costs for the Respondent.
>
> 22. In all the circumstances the Claimant's application for costs against the Respondent is dismissed".

Grounds of Appeal

55. The Claimant appealed from the Judgments. At a preliminary hearing, Andrew Burns KC, sitting as a Deputy Judge of the High Court, granted permission for some of the grounds on the liability appeal and all of the grounds for the costs appeal. The Grounds of Appeal from the Liability Judgment were subsequently amended to reflect the order of Mr Burns KC.

A. Liability Judgment

56. The Grounds of Appeal were set out in 22 paragraphs. I summarise the Claimant's contentions with respect to the Grounds of Appeal as follows:

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

57. The Claimant contends that the Employment Tribunal erred by stating at paragraph 154 that if something in the Respondent's statements is true then it is not a detriment. This error was reflected in its findings on issue 4.1(a)(i) and (ii), and 4.1(b).

58. When determining whether the Respondent's statements amounted to detriments:

a) the Employment Tribunal have failed to take into account their own findings as to the content and tone of the Respondents' statements; and about the CQC concerns about the statements;

b) The Employment Tribunal erred in not taking into account that the taking of the unusual step of sending statements about the Claimant to a number of MPs and public officials was detrimental in itself;

c) The Employment Tribunal erred in not taking into account whether the references to costs and wasted costs made at and around the time of settlement are relevant to whether the public statements were detriments.

59. The Claimant's case with respect to issue 4.3 was that it was a detriment not to remove the public statements once the Respondent was contacted by the CQC with concerns. This point was not considered and/or an irrelevant matter (whether the CQC had asked the Respondent to remove the statement) was taken into account.

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

60. The Employment Tribunal failed to draw inferences in respect of the Respondent's conduct and failed to explain why. (I will deal with the various assertions about the Respondent's conduct when discussing this ground of appeal).

Ground 3 (Causation): *The Employment Tribunal applied the wrong legal test.*

61. The Employment Tribunal failed to apply the correct test of "material influence". It took a binary approach to the question of causation, or was erroneously looking for the primary influence. The Employment Tribunal failed to provide adequate reasons for its findings with respect to a number of matters (which I shall deal with when discussing this ground of appeal). Further, in any event, the conclusion was "perverse".

Ground 4 (Field of employment): *Incorrect application of the law.*

62. The Employment Tribunal should have applied the rationale in *Woodward* (protecting against post-termination detriment), and not an approach incorrectly derived from *Tiplady*. Further, the Employment Tribunal's reasoning was inadequate.

B. Costs Judgment

63. With respect to the Costs Judgment, the Grounds of Appeal were as follows:

a) Ground 1: error of law by the Employment Tribunal in failing to exercise its discretion to award costs in the Claimant's favour by disregarding relevant factors and giving impermissible weight to irrelevant factors and/or failing to make necessary findings or adequate reasons.

b) Ground 2: Error of law by failing to factor into stage 3 of its assessment the conduct of the Respondent, considering in isolation the Respondent's submissions as to the Claimant's conduct at stage 3 of its assessment; and reaching a conclusion as to the Claimant's conduct which was uncorroborated in the underlying reasons; and/or reaching a perverse decision.

Legal Framework

64. On this appeal, the parties were broadly agreed on the relevant legal framework within which the Employment Tribunal was required to operate when dealing with a whistleblowing claim, with the exception of the approach to the "in employment" question which I will address in my discussion of Ground 4.

65. The claim was brought under section 47B(1) of the ERA, which provides that:

> "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".

The definition of "worker" for a claim under section 47B of the ERA includes an extended definition (section 43K), but also the definition that applies generally to the term "worker" within the ERA as set out at section 230(3):

> "In this Act "worker" . . . means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment . . . "

66. The Courts have on a number of occasions defined the term "detriment" for the purposes of a whistleblowing claim. In Jesudason v Alder Hay Children's NHS Foundation Trust [2020] ICR 1226, one of the cases that both parties made reference to in their submissions, Sir Patrick Elias observed at [27-8] that:

> "27. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases.
>
> . . .
>
> 28. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective".

67. The test for causation in a whistleblowing claim – what the statute refers to as "on the ground that" – was set out by Sir Patrick Elias in Fecitt v Manchester NHS Trust [2012] ICR 372 at [45]:

> "In my judgment, the better view is that s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."

Sir Patrick Elias provided further explanation of causation in Jesudason at [31]:

> "Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under s 47B."

Discussion

A. Appeal from the Liability Judgment

68. The principles that should be applied by this tribunal when considering appeals were summarised by Popplewell LJ in DPP Law Ltd v Paul Greenberg [2021] I.R.L.R. 1016 at [57]-[58]:

> "57. The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:
>
> (1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In *Brent v Fuller [2011] ICR 806* , Mummery LJ said at p. 813:
>
> *"The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid".*
>
> This reflects a similar approach to arbitration awards under challenge: see the cases summarised by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE")* [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft-cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery repairs Ltd [1985] 2 EGLR 14* that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of employment tribunal decisions.
>
> (2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder.

Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be *Meek* compliant (*Meek v Birmingham City Council [1987] IRLR 250*). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. In *Meek* , Bingham LJ quoted with approval what Donaldson LJ had said in *UCATT v. Brain [1981] I.C.R. 542 at 551* :

> *"Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law …their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given."*

(3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in *RSPB v Croucher [1984] ICR 604 at 609-610* :

> *"We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well-established by the decisions of the Court of Appeal in Retarded Children's Aid Society Ltd. v. Day [1978] I.C.R. 437 and in the recent decision in Varndell v. Kearney & Trecker Marwin Ltd [1983] I.C.R. 683 ."*

58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the

> tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload".

69. A further point that I suggest should inform the benevolent reading of the judgment by this tribunal is that it should be read in the context of the arguments that were made to the employment tribunal. A phrase or purported proposition in an employment tribunal's judgment which might appear to constitute an erroneous statement of law, may not be an error when viewed in the light of the arguments and submissions made. The arguments may well explain why the employment tribunal said what it did.

Ground 1: detriment

70. Mr Andrew Allen KC who appears for the Claimant on this appeal, along with Miss Elizabeth Grace (Mr Allen KC and Miss Grace also represented the Claimant before the Employment Tribunal), focuses on the first sentence of the Employment Tribunal's Liability Judgment at paragraph 154, where it is stated that:

> "If something put in one of the published statements is true, then it is not a detriment".

Mr Allen KC also makes reference to other findings by the Employment Tribunal where it found that the particular language used by the Respondent did not amount to a detriment to the Claimant because it was true.

71. It was agreed by Mr Tatton Brown KC, who appears for the Respondent on this appeal as he did before the Employment Tribunal, that there would be an error of law if the Employment Tribunal had stated as a proposition of law that a statement could not be a detriment if it was true. That acknowledgment by Mr Tatton Brown KC is correct. As a matter of principle, a statement which was "literally true" can be a detriment in certain circumstances: see Croydon Health Services NHS Trust v Beatt [2017] ICR 1240 at [110], per Underhill LJ.

72. In the instant case, however, I do not consider that at paragraph 154 the Employment Tribunal was articulating a general proposition of law that if a statement is true then it cannot be a detriment. Rather, reading the Liability Judgment benevolently, it is clear that the Employment Tribunal was referring to how the Claimant had characterised some of the detriments that he suffered, and which were set out in the list of issues. This applied to all of the issues under 4.1, which had been described as the Respondent had "Publish[ed], fail[ed] to remove from its website and/or circulate[d] false and defamatory statements" (emphasis added). For these statements, the alleged detriment was not the fact of publishing, or failing to remove from its website and/or circulating statements whether they were true or not, but the fact that they were not true.

73. Similarly with respect to issue 4.4, concerning the letters sent by the Respondent to MPs and local public officials which enclosed the statements of 23 October 2018 and 4

December 2018. The agreed issue was that "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)". The alleged detriment was not the fact of sending the statements to the MPs and local public officials, but the sending of material that was untrue and detrimental.

74. Indeed, in oral argument before me, Mr Allen KC accepted that that is how the matter was put by the Claimant. Given, therefore, that the Claimant was contending that the language set out in the various statements identified under issue 4.1 (and by extension issue 4.4) was not true and therefore a detriment to him, it is not surprising that the Employment Tribunal stated: "If something put in one of the published statements is true, then it is not a detriment".

75. In these circumstances, therefore, it is clear that the Employment Tribunal did not err in law. Rather, it was describing the detriment alleged by the Claimant for a number of the issues that needed to be determined.

76. The Employment Tribunal went through the various allegations of detriment under 4.1 and found that in respect of one of the matters alleged – 4.1(a)(iii) – the allegation was made out. In respect of the other allegations, the Employment Tribunal found that the language used was true and was therefore not a detriment on the Claimant's case. The same applies to issue 4.4, which is derivative on the statements being untrue.

77. The Claimant has not contended in his detailed Amended Grounds of Appeal that any of the findings made by the Employment Tribunal in the Liability Judgment with respect to the issues under 4.1(a) was *perverse*. Accordingly, this tribunal is bound by the Employment Tribunal's findings that they were true.

78. As part of Ground 1, the Claimant has sought to argue that when determining whether the Respondent's statements amounted to detriments:

    a) the Employment Tribunal have failed to take into account their own findings as to the content and tone of the Respondents' statements; and about the CQC concerns about the statements;

    b) The Employment Tribunal erred in not taking into account that the taking of the unusual step of sending statements about the Claimant to a number of MPs and public officials was detrimental in itself;

    c) The Employment Tribunal erred in not taking into account whether the references to costs and wasted costs made at and around the time of settlement are relevant to whether the public statements were detriments.

79. The arguments at (a) and (b) are not open to the Claimant to pursue on this appeal. As already explained, the detriment alleged by the Claimant concerned the publication of "false" or untrue material in a number of statements. The detriment complained about was not the content and tone of the statements or what the CQC thought of them, or the mere fact that statements had been sent to the MPs and other public officials. The arguments at (a) and (b) were not, therefore, issues which the Employment Tribunal had to determine, and so it cannot be an error of law for the Employment Tribunal not to have done so.

80. With respect to the argument at (c), insofar as this was a contention that the Employment Tribunal did not take these matters (costs and wasted costs) into account when deciding whether the statements complained about were true or "false and defamatory", this could properly form the basis of an appeal. Nevertheless, this argument cannot be made out on even a cursory review of the Liability Judgment. The Liability Judgment contains numerous references to "costs" and "wasted costs", and it is not possible to say that this was not taken into account by the Employment Tribunal when making its findings. At paragraph 121, for instance, the Employment Tribunal quotes from an email sent by Mr Milsom to Mr Cooper KC on 11 October 2021 at 8:07pm, in which he stated that he was "instructed to offer" terms which included "Forbearance from any side pursuing costs (both ordinary and wasted)".

81. In his skeleton argument, and in oral argument, Mr Allen KC made a number of submissions that challenged the Employment Tribunal's approach to detriment. Strictly speaking these did not form part of the Amended Grounds of Appeal, and I do not have to deal with them. Nevertheless, as they were fully argued I will address them for completeness.

82. First, it was contended that a lot of pressure had been put on the Claimant about costs, and although the Employment Tribunal found that the Respondent had not made "threats as such" about costs, this was an example of where the Employment Tribunal wrongly analysed the issue of detriment. It was contended that detriment should have been looked at from the position of the worker (here, the Claimant): that is, whether or not the Claimant perceived that he had been threatened about costs by the Respondent. This contention is misconceived.

83. The issue that the Employment Tribunal had to determine was whether certain statements made by the Respondent – that they threatened him with costs – was "false and defamatory": in other words, was this statement true. This required the Employment Tribunal to consider and make findings about the objective facts: was there a threat or not? It was not a question of what the Claimant himself thought or perceived.

84. As for the Employment Tribunal's consideration of this matter, it is clear from a review of the Liability Judgment that this issue was examined in some considerable detail. The Employment Tribunal analysed the evidence given by Counsel (Mr Milsom and Mr Cooper KC), as well as the correspondence that was sent. The Employment Tribunal also applied its own experience and knowledge of how proceedings are frequently settled and what the drivers are towards settlement. This led the Employment Tribunal to make findings at paragraph 140 that "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"; and at paragraph 144 that "The Tribunal does not find that there was a cost threat in the way the Claimant has put forward". These findings fed into the conclusion reached at paragraph 154 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 not detriments. They set out the Respondents position." These findings and the conclusion at paragraph 154 were plainly open to the Employment Tribunal to reach on the evidence.

85. Second, it was contended by Mr Allen KC with respect to issue 4.1(b) that the

Employment Tribunal erred in finding that what was written in the statement published on 10 January 2019 – about what would happen if the Claimant's evidence at the 2018 hearing had been found to be "untruthful" -- was not true. This was an attempt by Mr Allen KC to reopen the question of perversity that had specifically been refused by Andrew Burns KC (sitting as a Deputy Judge of the High Court in this tribunal) at a preliminary hearing on this appeal.

86. In the written reasons produced by the learned Deputy Judge explaining why certain grounds of appeal would be permitted to proceed and others would not, he stated that:

> "There is nothing perverse in the finding that Mr Milso[m] initiated the conversation and that would have involved asking about the Respondent's position".

This was a reference to the finding made at paragraph 156 that

> "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".

That finding of the Employment Tribunal reflects its understanding of what was being said by the Respondent in the 10 January 2019 statement (issue 4.1(b)).

87. In any event, it can be seen from the Liability Judgment that the Employment Tribunal examined what had taken place in the settlement discussions between Mr Milsom (for the Claimant) and Mr Cooper KC (for the Respondent) in some detail. At paragraph 136, the Employment Tribunal stated that it "considered why Mr Milsom approached Mr Cooper when he did to open discussions about evidence", and why he asked to speak to his client about the prospect of settlement whilst he was still being cross-examined, something which the Employment Tribunal regarded as "highly unusual". At paragraphs 138-9, the Employment Tribunal stated that:

> "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".

88. At paragraph 140, the Employment Tribunal stated that it was 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".

The Employment Tribunal went on to consider the question of costs. In the absence of direct evidence as to what happened in the conversations between Mr Milsom and the Claimant as privilege had not been waived, the Employment Tribunal concluded at paragraph 142 that the reason why the Claimant believed that he was at risk of costs was 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".

This led to the Employment Tribunal's finding at paragraph 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)".

89. It is clear from reading these extracts from the Liability Judgment that the findings made by the Employment Tribunal were sufficient to enable it to reach the conclusion at paragraph 156 that what had been put in the statement by the Respondent on 10 January 2019 (issue 4.1(b)) was "correct and not a detriment".

90. In his submissions to this tribunal, Mr Allen KC said that the statement about the Claimant not being "truthful in his evidence" would have been a detriment looking at

it from the position of the worker (here, the Claimant) even if it had been true. The latter point is not open to the Claimant to argue on appeal as it was not an issue that the Employment Tribunal had to determine. The question for the Employment Tribunal was whether the statement was objectively true, and not what the Claimant may have perceived to be the meaning or effect of the statement.

91. There is, however, one aspect of the Claimant's Ground 1 that I do consider was made out on this appeal. One of the issues for the Employment Tribunal – 4.3 – was whether it was a detriment not to remove the public statements once the Respondent was contacted by the CQC with concerns. The Employment Tribunal did not answer this question. Rather, it focused on whether or not the CQC had asked the Respondent to remove the statement, which was a different matter. The failure of an Employment Tribunal to determine an identified issue is an error of law. Whether or not that means that the appeal succeeds, however, depends on my consideration of other points in this appeal, and will be discussed further below.

92. For completeness, I note that there was no challenge to the Employment Tribunal's findings with respect to the alleged "detriment" involving the request from Sir Norman Lamb either to justify or remove the public statements from the Respondent's website. The Employment Tribunal decided that the Respondent had responded to the request, albeit not in the way that the Claimant had hoped. Accordingly, no detriment was made out.

93. In summary, therefore, I consider that with respect to Ground 1, one of the arguments made by the Claimant is made out: that the Employment Tribunal failed to determine whether or not it was a detriment to the Claimant that the Respondent deliberately failed to remove and/or update their public statements once contacted with concerns about the statements by the CQC.

Ground 2: inferences

94. The Claimant contends that the Employment Tribunal made an error of law in failing to draw inferences that were adverse to the Respondent from the "extraordinary conduct of the litigation". In his skeleton argument, Mr Allen KC highlighted the following conduct of the Respondent:

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

b) the late disclosure of the Respondent that letters had been written to several other stakeholders within the NHS enclosing statements about the Claimant, even though Mr. Travis had stated in his cross-examination that he had written to no other NHS stakeholders;

c) the late disclosure of a note of the board meeting held prior to the settlement of the Claimant's claim, even though Mr Travis had told the Tribunal that there was no note of that meeting. In his oral submissions, Mr Allen KC noted that the note contained the statement 'worried about what come out in cross-examination';

d) Mr Travis had advanced a position in his witness statement that at the time of settlement he advised the Board that he wanted the case to run its course - but the record of Board meeting that approved the settlement showed the opposite and that he stated to the Board that he favoured settlement and that the four doctors had expressed concerns about giving live evidence; and

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

95. At the hearing before this tribunal, Mr Allen KC also referred to the fact that during the course of the hearing before the Employment Tribunal, on 4 July 2022, the Respondent was ordered to conduct a discovery exercise with respect to a number of specific individuals, including three of the four doctors who were due to give evidence at the 2018 hearing and were key protagonists in relation to the alleged detriment to the Claimant that was being considered as part of the 2014 claim. Mr Allen KC explained that it had become apparent during the course of the hearing in 2022 that these individuals had reviewed the statements that had been published by the Respondent and had signed off on them. No disclosure concerning these individuals' role in the statement making process had been provided by the Respondent even though they had obviously played a part in the statement making process that was at the heart of the claim.

96. Mr Allen KC also pointed out that the discovery exercise ordered by the Employment Tribunal on 4 July 2022 related to Janet Lynch, the Respondent's former director of workforce and Deputy Chief Executive. Ms Lynch was in post at the time that the statements were published, and yet no disclosure to and from her had been provided by the Respondent.

97. Mr Allen KC also referred to the witness statement from the solicitor to the Respondent, Mr Rowland. That witness statement had been ordered by the Employment Tribunal on 4 July 2002 to explain the mechanism and methodology used to conduct the original disclosure exercise by the Respondent. Mr Allen KC highlighted a number of features of Mr Rowland's evidence: including that there had been no instruction to preserve documents, that a whole class of documents had been destroyed and Ms Lynch's email account had been permanently deleted on 22 July 2019, several months after the current claim had been issued.

98. Mr Allen KC contended that the Respondent's approach to disclosure had been cavalier or deceitful. Further, the Respondent's lack of transparency and concealment of information had parallels to the protected disclosures that had been made by the Claimant and formed the basis of the claim (noting that the Claimant had claimed about concealment of patient risks), as well as to the detriment that he had suffered.

99. Mr Allen KC also referred to the suggestion made by the Respondent that certain documents were irrecoverable but pointed out that, on the evening before the parties were due to make their submissions to the Employment Tribunal at the end of the hearing, more documents were disclosed by the Respondent which were said to have been recovered.

100. Mr Allen KC also submitted that the failure of the Employment Tribunal to draw

inferences from the Respondent's misconduct was especially serious in this case given that, in its reasoning for refusing the Claimant's strike out application, the Employment Tribunal had specifically stated that a fair trial was still possible because it could evaluate the evidence and defects in the disclosure exercise and "make such inferences as it deems fit". If the Employment Tribunal was not going to make inferences, it should have set out the reasons why not.

101. Mr Allen KC also contended that the failure to draw inferences from the Respondent's misconduct, or to explain why no inferences were drawn, was illustrated by the Employment Tribunal's findings with respect to the evidence of Mr Travis and Mr Cocke. At paragraph 168 of the Liability Judgment, the Employment Tribunal stated that:

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

According to Mr Allen KC, the Employment Tribunal did have reason to doubt this evidence: there had been considerable disclosure failures as well as untruths in the evidence.

102. I acknowledge that the conduct of the Respondent with respect to disclosure was troubling. Among other things, no instruction had been given to preserve relevant documents. The emails of Ms Lynch who was the instructing client for the Respondent in the 2014 claim had apparently been deleted. A categorical statement that there was no note of a board meeting had been made at a case management hearing, and subsequently in Mr Travis' witness statement, and yet a copy of such a note was produced at the trial in 2022. There had also been the deletion by Mr Cocke of 90,000 emails, some of which may have been relevant to the issues in the claim.

103. Mr Tatton Brown KC rightly accepted that, as a result of the failures and defects identified by Mr Allen KC, it would have been open to the Employment Tribunal to draw inferences adverse to the Respondent: see Active Media Services Inc v Burmester Duncker & Joly GmbH & Co KG [2021] EWHC 232 (Comm). At [310], Calver J pointed out 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."

104. Whether or not the Employment Tribunal erred in its failure to draw inferences requires a careful examination of the Liability Judgment, bearing in mind the benevolent reading called for by Greenberg. It is necessary to consider whether the Employment Tribunal directed itself properly on the law, analysed the evidence in accordance with the law, and the reached a conclusion that was properly open to it. Having carried out that exercise, it is clear to me that the Employment Tribunal did properly consider whether or not to draw inferences and chose not to do so. The decision not to draw inferences

was plainly one that was open to the Employment Tribunal.

105. The Employment Tribunal was well aware that it had the power to draw inferences from the Respondent's failures and defects. This was highlighted by the Employment Tribunal in its reasons for refusing the strike out application, as set out above. The Employment Tribunal was also well aware of the analysis in Active Media: eleven paragraphs of that judgment, taking up nearly three pages, are set out in the Liability Judgment. Although Active Media was referred to for the purposes of considering the strike out application, there is no reason to doubt that the Employment Tribunal had the decision in Active Media in mind when it came to consider the substantive claim.

106. It is clear that the Employment Tribunal was aware of the failures and defects of the Respondent that had been identified by Mr Allen KC. In the Liability Judgment, the Employment Tribunal referred to a number of the defects and failings at paragraph 83, when setting out its reasoning with respect to the strike out application. It is inconceivable that the Employment Tribunal forgot about these failings when it came to consider the substantive claim.

107. Written submissions were made to the Employment Tribunal by Mr Allen KC about the Respondent's conduct, supplemented by oral submissions. The Employment Tribunal was invited by Mr Allen KC to draw adverse inferences as a result. This invitation was countered by submissions from Mr Tatton Brown KC on behalf of the Respondent. There is no reason to believe that these submissions were not taken on board by the Employment Tribunal.

108. It is also important to bear in mind that the Employment Tribunal had itself dealt with disclosure issues as they had arisen during the course of the hearing, and so was fully aware of how the Respondent had behaved. This was explained in the Liability Judgment at paragraphs 50-56, where the Employment Tribunal addressed the application for additional discovery that was made by the Claimant. In those paragraphs, the Employment Tribunal describe the additional disclosure that was provided by the Respondent, as well as the order that it made directing the Respondent to provide further disclosure and to provide a witness statement explaining how the discovery process had been conducted: the latter is an unusual order for an employment tribunal to make. The Employment Tribunal was well aware that the disclosure that was being ordered was relevant to one of the key issues in the case. At paragraph 55 of the Liability Judgment, it was explained that the evidence relating to the four doctors was "important . . . to determine the issue of causation".

109. The Employment Tribunal also dealt specifically with the "late disclosure" bundle at paragraphs 175-178. I will deal with this in more detail when I discuss Ground 3: causation. What these paragraphs show, however, is that by the time that the Employment Tribunal came to determine the issues in the case, there was documentary material relating to the process of drafting the statements which evidenced one of the central arguments being made by the Claimant – that the doctors who were due to give evidence at the 2018 hearing were hostile towards him on account of the protected disclosures that he had made – and was relevant to the issue of causation. There was not, therefore, an evidentiary gap on the issue of causation which could only be filled by making the adverse inference that the Claimant was advancing on account of the Respondent's disclosure failings: c.f. Active Media at [310].

110. At paragraph 198 of the Liability Judgment, the Employment Tribunal stated with respect to the evidence of Mr Travis that:

> "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".

(Emphasis added). Mr Travis' evidence was central to the key issue of causation. It was to this issue that the additional documentation had been ordered. It was also to this issue that an adverse inference could be drawn from the Respondent's defects and failures with respect to disclosure: the issues relating to detriment turned on a reading of the statements themselves, as well as the evidence from Counsel who had represented the parties at the 2018 hearing; there were no real issues between the parties as to whether there were "qualifying" or "protected" disclosures; and the issue about "field of employment" was essentially one of law as applied to facts that did not turn on the disclosure.

111. On a benevolent reading of the Liability Judgment, where the Employment Tribunal refers in paragraph 198 to the issues "relating to disclosure . . . together with the Tribunal's criticism of that process. However, notwithstanding this . . . ", this can be understood as a recognition by the Employment Tribunal that an adverse inference could be made, but that it was not going to do that. The explanation for this is that the Employment Tribunal broadly accepted the evidence of Mr Travis.

112. The Employment Tribunal's finding at paragraph 198 also provides the answer to Mr Allen KC's contention that the conduct of the Respondent in its approach to the 2014 claim meant that there was "reason to doubt" the evidence of Mr Travis. The Employment Tribunal stated that it believed Mr Travis. It would be highly unusual for such an assessment to be impugned by an appellate tribunal. It is the employment tribunal which hears from the witnesses and can assess their evidence against the documents that they have been provided with, as well as the evidence of other witnesses. It is the employment tribunal that can take into account the absence of material that would be expected to have available, and generally to the conduct of the parties in the proceedings. There is nothing that has been said on this appeal that permits this tribunal to second-guess the Employment Tribunal's finding as to Mr Travis' credibility.

113. In all the circumstances, therefore, it is clear that the approach taken by the Employment Tribunal to whether an inference should be drawn adverse to the Claimant was one that it was entitled to take, and the conclusion reached was open to the Employment Tribunal on the basis of the evidence, including its assessment of the witnesses.

Ground 3: Causation

114. Mr Allen KC challenged the Employment Tribunal's decision on causation in a number of different ways. Mr Allen KC contended that the Employment Tribunal failed to apply

the correct test of "material influence". I disagree. For the Employment Tribunal to have done this it would have had to misapply the principle set out in Fecitt which had been set out three times in the Liability Judgment. Popplewell LJ in Greenberg cautions this tribunal to be "slow to conclude" that an employment tribunal has not followed the principles that has been set out and should generally only do so where "it is clear from the language used that a different principle has been applied to the facts found."

115. I have adopted that cautious approach in examining the Employment Tribunal's reasoning between paragraphs 162 to 179. In those paragraphs, the Employment Tribunal examined "How were the statements prepared?". The concluding sentence of paragraph 179 was "The protected disclosures had no material influence on the way the statements were drafted". That is precisely the language of Fecitt. On its face, it indicates that the Employment Tribunal was well aware of the test that needed to be applied to the issue of causation.

116. Mr Allen KC criticised the first sentence of paragraph 179, that:

> "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". (emphasis added)".

Nevertheless, the mere usage of the subordinating conjunction "because" would not of itself be an error. It is essentially another way of saying "On the ground of", which is the statutory wording for section 47B of the 1996 Act. It is well accepted that there is no real difference in meaning between the wording "because" and "on the ground of": Onu v Akwiwu [2014] ICR 571 at [19].

117. It also appears to be the case that, at the beginning of paragraph 179, where the term "because" was used, the Employment Tribunal was dealing with why the statements were made at all: which is in response to the media interest in the case, and not the fact that protected disclosures had been made by the Claimant. In the final sentence, the Employment Tribunal was answering the question why the statements said what they did. In using that language, the Employment Tribunal has faithfully followed the direction in Fecitt.

118. In his skeleton argument, Mr Allen KC made a number of specific points which he contends show that the Employment Tribunal had not taken into account all the important causation evidence which suggests that the Claimant's protected disclosures had more than a material influence on the alleged detriments. These points were not developed in his oral submissions before this tribunal. It seems to me that Mr Allen KC's criticisms were somewhat pernickety, something which has been decried by the appellate courts: see Greenberg and even more recently by Elisabeth Laing LJ in Leicester City Council v Parmar [2025] EWCA Civ 952 at [88], [97] and [105]. Moreover, some of the points made by Mr Allen KC in this regard seemed to have no relevance to the issue of causation.

119. Taking Mr Allen KC's points in turn,

a) It is contended that at paragraph 26 of the Liability Judgment, the Employment Tribunal failed to grasp that Dr Smith's relevant oral evidence that "*there was a clear and present danger to patient safety*" inherent in the Claimant's protected disclosures may have had more than a trivial influence on the alleged detriments. Dr Smith also made the point in her evidence that the matters which were the subject of Claimant's disclosures were not usual or common place in the NHS. As Mr Tatton Brown KC pointed out, however, and I agree, Dr Smith was not employed by the Respondent and could not give evidence as to why the statements were produced and so the Employment Tribunal was entitled not to factor this into the analysis on causation.

b) It is contended by Mr Allen KC that the Employment Tribunal should have made more in this context of Mr Travis' assertions in cross-examination about the record of the Board meeting and additional stakeholder letter which had been shown to be untrue. This contention ignores the fact that the Employment Tribunal specifically made findings about Mr Travis' reliability as a witness, and of his evidence with respect to the Board meeting.

c) Mr Allen KC contended that, at paragraph 155, the Employment Tribunal makes a finding as to the timing of the Respondent's decision definitely not to pursue costs against the Claimant, but then the Employment Tribunal makes nothing of this timing in assessing causation. This submission ignores the Employment Tribunal's overall analysis of causation and its conclusion that the protected disclosures had no material influence on the way the statements were drafted: that would include the comment in the statement that the Employment Tribunal found to be a detriment at paragraph 155 (issue 4.1(a)(iii)).

d) Mr Allen KC submitted that at paragraph 173 the Employment Tribunal found that the article in the *Daily Telegraph* of 2 December 2018 was the reason the Respondent published the statement of 4 December 2018 without considering whether the publication of the statement (and its tone and content) was more than trivially influenced by the protected disclosures. Once again this ignores the Employment Tribunal's overall analysis of causation and conclusion that there was no material influence.

e) Mr Allen KC submitted that there was no requirement for the information to be "*false and tainted*" by the input of the four doctors, simply that it was materially influenced by the protected disclosures. As Mr Tatton Brown KC pointed out, and I agree, at paragraph 176 of the Liability Judgment the Employment Tribunal was merely rejecting the Claimant's case that the four doctors had provided false and tainted information for inclusion in the statement. The Employment Tribunal was not approaching the issue of causation on the basis that the information had to be false and tainted.

f) Mr Allen KC complained that at paragraph 177 the Employment Tribunal had concluded that "the official sign off and authority to publish the statements was made by Mr. Travis", and that the relevance of this conclusion is unclear and the reasoning is incomplete. It is obvious why the Employment Tribunal made that finding: as part of its analysis, the Employment Tribunal was looking to see who was responsible for publication of the statements and what that person's reasoning was for the publication.

g) Mr Allen KC referred to the Employment Tribunal's findings at paragraph 78 that the late disclosure of the emails between Ms. Lynch and the four doctors "does not indicate any malice on the part of the doctors, merely a wish to set the record straight from their point of view". Mr Allen KC made criticisms about these individuals not giving evidence and that revealing their identities was strongly resisted by the Respondent. Further, Mr Allen KC contended that the finding that there was no malice was not a determinative consideration. The fact that the individual doctors did not give evidence was obviously known to the Employment Tribunal. Nevertheless, there was not an evidence gap about their involvement as the late disclosure showed their involvement. With respect to malice, the Employment Tribunal was not saying that it was precondition for causation.

120. The question as to 'why' the Respondent published the statements and what they contained was examined by the Employment Tribunal at paragraphs 175-178. The Claimant's case was described at paragraph 175 as being 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 Employment Tribunal addressed this at paragraphs 175-178, concluding at paragraph 178 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". It was this finding that explains the final sentence of paragraph 179: "The protected disclosures had no material influence on the way the statements were drafted". In other words, the Employment Tribunal found that the protected disclosures did not taint the contributions made by the doctors to the content of the statements complained about.

121. Mr Allen KC also contended that the Employment Tribunal erred when considering causation by taking a "binary approach" to the question of causation, or was erroneously looking for the primary influence. That is not borne out by the Employment Tribunal's analysis. As explained above, the Employment Tribunal essentially looked at why the statements were made in the first place, to which there was one answer -- the Respondent's perceived need to engage in the PR battle -- and why did the statements say what they did. In doing so, the Employment Tribunal faced head on the case put forward by the Claimant that the statements were influenced by the malice of the four doctors. The Employment Tribunal specifically rejected this case.

122. Mr Allen KC also contended that the conclusion on causation was perverse. I am reminded that there is a high hurdle for an appellant to overcome if this ground of appeal is to succeed: see **Yeboah v Crofton** [2002] IRLR 634, where Mummery LJ stated at [93] that an "overwhelming case" needed to be made out that the decision reached was one "which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached". The Claimant does not come close to satisfying that test. There is a clear rationale for the Employment Tribunal's conclusion, and this is reflected in the documentary material that it was provided with.

123. The reason why the statements were made by the Respondent in the first place was found by the Employment Tribunal to be "the PR battle": see paragraph 179. This was supported by the finding at paragraph 168, where the Employment Tribunal accepted the evidence of Mr Travis about 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 more generally. There was an evidential foundation for this. Not only was this Mr Travis' evidence given on oath, but it was supported by what Mr Cocke had said in his statement. The Employment Tribunal was well aware of the limitations relating to Mr Cocke's witness statement as it was unsigned, and the Claimant was deprived of the opportunity to cross-examine him. Nevertheless, what Mr Cocke had referred to in his witness statement was itself supported by documentary evidence that was before the Employment Tribunal: there was documentary evidence before the Employment Tribunal about the "speculation on social media and the press about the settlement process including allegations that the Respondent had made costs threats to force the Claimant [to] agree to settle".

124. With respect to the content of the statements put out by the Respondent, the Employment Tribunal referred at paragraph 175 to the emails that formed part of the late disclosure, saying that:

> "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".

The Employment Tribunal went on to say at paragraph 176 that:

> "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".

125. These passages from the Liability Judgment evidence an employment tribunal looking closely at the documentary evidence and reaching a view that is founded in that evidence, with no suggestion that protected disclosures made by the Claimant had any material influence on the content of the contributions made by the four doctors to the statements that were published by the Respondent.

126. Accordingly, the challenge to the Employment Tribunal's finding on causation fails.

Ground 4: "in employment"

127. The majority of the Employment Tribunal decided that the Claimant was not acting "in employment" for the purposes of his whistleblowing claim, but was acting as a "crowdfunded litigant". Their reasoning for this was said to be the arguments put forward by Mr Tatton Brown KC: these were set out by the Employment Tribunal at paragraphs 183-189 of the Liability Judgment.

128. Mr Tatton Brown KC's submissions included the contention that the statements would

not have been made but for the fact that the Respondent had been the Claimant's former employer, but they were not made in the capacity of his former employer. Rather, they were statements made by an opponent in litigation about that litigation. In the circumstances, and relying on the analysis used by Underhill LJ in Tiplady v City of Bradford [2020] ICR 965 at [45] – where the question to be asked was "in what "capacity" the detriment was suffered – or, to put the same thing another way, whether it was suffered by the claimant "as an employee"", the capacity in which the Claimant suffered the detriment was not "in the field of employment".

129. Mr Tatton Brown KC had pointed out that the Claimant's employment with the Respondent was relatively short-lived and had ended in August 2014, more than four years before the detriments complained about. Critically, the Claimant's role as employee or ex-employee had been superseded by his role as a litigant who was claiming against the Respondent and was doing so as a high-profile crowdfunder.

130. Further, the detriments that the Claimant claimed to have suffered were how he was treated as a litigant, about how the 2014 Claim was settled and not about his employment: his complaints were about the cost threats that forced him to abandon his claim, and how those facts were misreported. Also, the alleged detriments did not affect him as an employee, but as a litigant who had crowd-funded a claim against the NHS.

131. At the hearing before this tribunal, these arguments which had found favour with the Employment Tribunal were reiterated by Mr Tatton Brown KC. He also sought to address a contention that was made on appeal by Mr Allen KC that Tiplady was wrongly decided. Mr Tatton Brown KC accepted that what Underhill LJ had said in that case was *obiter*.

132. Mr Allen KC contended that Tiplady could not sit with the decision of the Court of Appeal in Woodward v Abbey National Plc (No. 1) [2006] ICR 1436, which had determined that "in employment" meant "in the employment relationship" and that could survive the termination of the contract of employment itself. The protected disclosures complained about were made by the claimant when he was an employee. The claim before the Employment Tribunal relied on the same protected disclosures and, in part, on the false characterisation of those protected disclosures. Furthermore, the Claimant is a doctor and to attack his reputation and credibility is to attack him in the employment field.

133. In my judgment, the Employment Tribunal did err in reaching the conclusion that the claim brought by the Clamant fell outside of the "employment field" and was therefore outwith the Employment Tribunal's jurisdiction under section 47B of the 1996 Act.

134. The starting point for the analysis is the statutory language. This provides that:

> "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 grounds that the worker has made a protected disclosure".

As was explained by Ward LJ in Woodward, the definition of "worker" for these purposes included a former employee: see section 230 of the ERA. The definition of "employer" set out in section 230 of the ERA is the counterpart to that of "worker", and refers to "the person by whom the employee or worker is (or, where the employment

has ceased, was) employed".

135. In Woodward, the Court of Appeal held that the effect of this interpretation was that the claimant was protected from suffering whistleblowing detriment even after her employment had ended. The detriment alleged to have been suffered by the claimant in that case concerned (1) the failure to provide a reference for a job application to another employer; (2) the failure to progress with various job applications; (3) the failure to be appointed as a consultant to a third party; (4) the failure of the new chairman of her former employer to respond to a letter in which she sought employment with the former employer; and (5) the failure of the former employer to make adequate efforts to seek alternative employment for her following an exchange of letters with her some time after her departure. None of these matters had been investigated at the time that the matter was considered by the Court of Appeal, and it proceeded on the basis that they were true.

136. In reaching his conclusion, Ward LJ identified the underlying purpose of section 47B. At [68], Ward LJ stated that:

> "The public interest, which led to the demand for this Act to protect individuals who make certain disclosures of information in the public interest and to give them an action in respect of that victimisation, would surely be sold short by allowing the former employer to victimise his former employee with impunity. It simply makes no sense at all to protect the current employee but not the former employee, especially since the frequent response of the embittered exposed employer may well be dismissal and a determination to make life impossible for the nasty little sneak for as long thereafter as he can. If it is in the public interest to blow the whistle, and the Act shows that it is, then he who blows the whistle should be protected when he becomes victimised for doing so, whenever the retribution is exacted".

137. This conclusion was in alignment with the judgment of the House of Lords in Rhys-Harper v Relaxion Group plc [2003] ICR 867, which found that a former employee had protection against post-termination discrimination and victimisation under the anti-discriminatory legislation that was then in existence. The matter has now been put on a statutory footing in section 108 of the Equality Act 2010.

138. In Tiplady, the Court of Appeal was not concerned with a whistleblowing claim brought by a former employee about something that had been done after the employment relationship had ended. Rather, it was a claim brought by a former employee about things that had happened during the course of her employment. The claimant had been an employee of a local authority and, along with her husband, she had had extensive dealings with that authority about problems affecting a property that they owned: described as the "sewer episode" and the "shed episode". Neither episode had anything to do with Mrs Tiplady's employment relationship with the local authority, but with the local authority's powers with respect to property within its area. Mrs Tiplady was unhappy about what she perceived to be her treatment by the local authority with respect to these episodes, culminating in the execution of a search warrant. Mrs Tiplady lodged a grievance and then resigned. She claimed that she had been dismissed and suffered detriments as a result of disclosures that she had made to the local authority with respect

to the two episodes. It was in that context that Underhill LJ made his observations about "in the employment field".

139. Underhill LJ stated that if the claimant had brought a discrimination claim based on sex, she could not have proceeded in the employment tribunal in respect of the detriments in question because they did not arise in the field of work. The same approach needed to be taken to the whistleblowing protection. At [43], Underhill LJ stated that:

> "in my view Parliament must be taken to have intended, when using the terminology of detriment in the discrimination legislation and in Part V of the 1996 Act, that it should have the same scope in both".

140. At [45], Underhill LJ set out what he considered to be the boundaries of the "employment field" for the purposes of determining what fell within the scope of the protection against detriment and what fell outside the scope:

> "Broadly, the test suggested by Mr Lewis to the ET, and which it accepted, of asking in what "capacity" the detriment was suffered – or, to put the same thing another way, whether it was suffered by the claimant "as an employee" – seems to me likely to produce the right answer in the generality of cases. This is not strictly the same as the "two hats" analysis which Mrs Tiplady challenges, because the focus is not on the hat being worn by the employer but on that being worn by the employee; but in practice these may, if I may mix my metaphors, be two sides of the same coin. But I do not think the boundaries of the employment field should be drawn narrowly. Mrs Tiplady suggested, in order to illustrate how arbitrary the concept was, that it would mean that detriments would only be within the scope of section 47B if they occurred in the workplace or during working hours: I do not accept that that is the result. It may be a useful thought-experiment to ask whether, if the claim had been based on a protected characteristic under the 2010 Act rather than on the making of a protected disclosure, it would fall under a Part of that Act other than Part 5 : if, say, the detriment was suffered by the claimant as a consumer of services or as a student or as an occupier of premises and thus would fall under Parts 3, 4 or 6 , it could not be suffered as a worker. But I am chary about suggesting that that is a touchstone which will provide the answer in every case. There are bound on any view to be borderline cases, and I do not think that it would be right for us in this case to attempt any kind of definitive guidance. I would only add that I think it was sensible of the ET in this case to give Mrs Tiplady the benefit of the doubt as regards detriments (11) and (12)".

141. Although the observations of Underhill LJ in Tiplady were *obiter*, they have been followed. In Sullivan v Isle of Wight Council [2025] EWCA Civ 379, the Court of Appeal was considering a claim brought by an individual who applied for a job with a

local authority. She complained to her Member of Parliament about certain things that had been said during her interview, and also complained about the activities of a charitable trust, one of whose members was on her interviewing panel. She also complained to the local authority, who rejected her complaint but did not give her the opportunity for a review of the complaint. The claimant brought proceedings in the employment tribunal that she had been subjected to a detriment – there had been a refusal to allow a further review of her complaint – and the claimant alleged that this was because she had made a protected disclosure. The claimant accepted that she had not been refused the post with the local authority as a result of the disclosure, given that she made the disclosure after her job application had been refused. As a job applicant, the claimant did not fall within the definition of "worker" for section 47B of the ERA. She sought to argue that the legislation was incompatible with the European Convention of Human Rights (article 14 read with article 10).

142. In the course of his judgment, Lewis LJ considered the question as to whether the detriment which the claimant was subjected to was related to her job application. Lewis LJ held (again *obiter* as the appeal fell to be dismissed on other grounds):

> "The claim was that the appellant had suffered a detriment by not being allowed to pursue her complaint because she had made a protected disclosure about alleged financial irregularities at a charitable trust. That was a complaint made as a member of the public. It is not made in connection with the fact that she had applied for a job with the applicant. The appellant's claim to the employment tribunal was not a claim that she had been subjected to a detriment in her capacity as a job applicant, or in any way connected with putative employment with the respondent. The EAT was correct, therefore, to apply the reasoning in Tiplady and to conclude that the claim presented did not involve a detriment to which section 47B of ERA or the Regulations applied. I would have dismissed the appeal on this additional ground".

143. Neither Tiplady nor Sullivan dealt with the situation like the present. That is, where the Claimant is a former worker of the Respondent; where the protected disclosures that he is relying on were made during the course of his service with the Respondent; and where the detriment that he complains about arose out of and specifically relate to employment tribunal proceedings that he brought against the Respondent, and where those proceedings were themselves concerned with the same protected disclosures.

144. It seems to me that the present circumstances can be seen as falling within, or as within a logical extension of, the framework of what was decided by the Court of Appeal in Woodward: that is, a claim by a former employee who is subject to alleged retribution for blowing the whistle during his employment, and where the detriment was closely connected to the employment as it related to the earlier employment tribunal proceedings. Alternatively, it is entirely consistent with the analysis of Underhill LJ in Tiplady: that is, the capacity in which the detriment occurred was as a former employee, and was closely related to that former employment given that the protected disclosure was made during the course of that employment and the detriment was closely connected to the employment tribunal proceedings brought by that former employee.

145. In considering the "thought experiment" proposed by Underhill LJ in Tiplady, if the complaint made by the Claimant was on the basis of a protected characteristic rather than one of protected disclosure, his claim would not have fallen under one of the other parts of the Equality Act 2010. The Claimant was not making the complaint as a consumer of services provided by the Respondent, as a student, or as an occupier of the Respondent's premises. That the Claimant does not fall within one of these other categories is strongly suggestive of him falling on the side of the "employment field" of the boundary set by Underhill LJ.

146. I consider that Mr Tatton Brown KC's contention that the capacity in which the Claimant was conducting himself in the 2014 claim, and at the 2014 hearing, was as a crowd-funded litigant is artificial. It does not focus on the essential features of the complaint as described at paragraph 143 above.

147. I acknowledge that there will be limits to the Woodward principle. Not all claims for whistleblowing protection brought by former employees will fall within the scope of section 47B of the ERA. It may be that former employees who fall within one of the other parts of the Equality Act, as referred to in Underhill LJ's "thought experiment" would not obtain the protection of section 47B of the ERA, even if the protected disclosure complained about was made during the course of employment. That, however, is not the present case.

148. Accordingly, this ground of appeal is made out. Nevertheless, this will not lead to a remission of the appeal to the Employment Tribunal on its own. The Liability Judgment might stand for other reasons.

Conclusion on the appeal from the Liability Judgment

149. As I have found, therefore, the Claimant has succeeded in demonstrating that the Employment Tribunal erred in two respects: (i) it failed to consider one of the issues that it had been asked to determine (issue 4.3); and (ii) it applied the wrong approach to whether the claim fell within section 47B of the ERA. This does not mean, however, that the appeal succeeds and that the matter should be remitted to the Employment Tribunal.

150. It is well accepted that having detected a legal error, I must remit the case unless (a) I conclude that the error cannot have affected the result, in which case the error will have been immaterial; or (b) without the error, the result would have been different, and I can conclude what it must have been. I am reminded that in both of these scenarios, I am not permitted to make any factual assessment for myself or make any judgment as to the merits. The result must flow from findings made by the ET, supplemented only by undisputed or indisputable facts: see Laws LJ in *Jafri v Lincoln College* [2014] ICR 920 at [21]. I am reminded that in *Burrell v Micheldever Tyre Services Ltd* [2014] ICR 935, Maurice Kay LJ observed that "Provided it is intellectually honest [the EAT] can be robust rather than timorous in applying what I shall now call the Jafri approach."

151. In this case, it is abundantly clear that the error made by the Employment Tribunal in not addressing this particular alleged detriment cannot have affected the result. The same conclusion would have inevitably been reached. At paragraph 210 of the Liability Judgment, the Employment Tribunal referred to a letter which records that the Trust:

> "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".

152. Had the Employment Tribunal addressed the question as to whether the alleged detriment referred to at issue 4.3 had been made out, the conclusion would have been in the affirmative. The Respondent had "[d]eliberately fail[ed] to remove and/or update their public statements once contacted with concerns about the statements from the Care Quality Commission". That is what is recorded in the Liability Judgment at paragraph 210.

153. As for the question of causation: that is, whether or not this detriment was on the grounds of the Claimant's protected disclosures, the Employment Tribunal would inevitably have answered in the negative. The Employment Tribunal had recorded what the Respondent had said in paragraph 210, including the views of Mr Travis, as to why the statements had not been taken down. There is no conceivable reason why the Employment Tribunal would not have found Mr Travis' account to have been truthful and correct. The reasoning reflects why, as the Employment Tribunal found, the statements were published in the first place. Furthermore, the Employment Tribunal regarded Mr Travis's evidence as being reliable and would undoubtedly have accepted his position that he was confident that the statements were correct. In the circumstances, the Employment Tribunal would no doubt have concluded that neither of those matters were materially influenced by the protected disclosures made by the Claimant.

154. Accordingly, I conclude that the error at Ground 1 – with respect to issue 4.3 -- cannot have affected the result. The error was, therefore, immaterial and there is no reason to remit the matter to the Employment Tribunal for further consideration.

155. The same conclusion – that the Claimant's whistleblowing claim failed – would have been reached even if the Employment Tribunal had reached a different conclusion as to whether the claim was "in employment" and so fell within section 47B of the ERA. The fundamental difficulty for the Claimant was that the causal connection between the making of the protected disclosures and the detriment complained about was not made out.

B. Costs Judgment

156. Following the promulgation of the Liability Judgment, the Claimant made an application for costs. The Claimant contended that the Respondent's conduct in relation to disclosure leading up to and during the final merits hearing between was unreasonable, and further or alternatively, was in breach of the orders made by the employment tribunal. It was contended that this conduct resulted in an increase to the Claimant's costs.

157. This application was considered by the Employment Tribunal on the papers. On 26 April 2023, the Employment Tribunal issued the Costs Judgment. The unanimous decision of the Employment Tribunal was to dismiss the Claimant's application. I have set out in some detail the Employment Tribunal's reasoning in the Costs Judgment at paragraphs 47 to 54 above.

158. The approach that appellate tribunals should take to the reasons given by an employment tribunal (see Greenberg) apply just as much to decisions on costs as they do to decisions on liability. A judgment on costs needs to be read benevolently, not all of the evidence relied upon in reaching findings of fact needs to be identified, a comprehensive and detailed analysis of the case in terms of facts and law is not required.

159. A further point that applies specifically to judgments on costs is that the employment tribunal deciding the costs matter will ordinarily have conducted the liability hearing, and will therefore be very familiar with the issues that needed to be determined and the way in which the case was conducted by the parties. As a result, the fact that certain points from the liability judgment are not mentioned or are mentioned only briefly does not mean that they were not properly taken into account when the employment tribunal comes to deliver their judgment on costs.

160. There is no challenge by the Claimant to the legal principles considered by the Employment Tribunal in making its decision on costs. Indeed, in his skeleton argument and in oral argument, Mr Allen KC specifically accepted that it was permissible for the Employment Tribunal to take into account the conduct of the party seeking costs when making its decision. The challenge made by the Claimant is essentially to the way in which the Employment Tribunal approached the exercise of discretion, the factors it placed weight on or did not consider properly or at all, the adequacy of the Employment Tribunal's reasoning, and what is said to be the failure to factor into the decision-making the gravity of the Respondent's unreasonable conduct.

161. I consider that many of the criticisms made by Mr Allen KC of the Costs Judgment contravene the principles set out in Greenberg. They apply a pernickety approach to the Costs Judgment, and ignore the fact that the Employment Tribunal was well aware of what had happened at the hearing on liability and was therefore able to form a view of the Claimant's conduct and whether or not that was unreasonable, and was also well aware of the Respondent's unreasonable conduct and the gravity and impact of it on the Claimant and his legal team as well as on the course of the proceedings.

162. Looking first at Ground 1 – failure to exercise or improper exercise of discretion. In his skeleton argument, Mr Allen KC sets out a compendium of criticisms of the Costs Judgment. Mr Allen KC submits that (i) the Employment Tribunal did not take into account, or adequately taken into account, the litany of defects and failures by the Respondent, and devoted most of the Costs Judgment to considering the Claimant's allegedly unreasonable conduct even though they had made no findings about this in the Liability Judgment.

163. In my judgment, it cannot be said that the Employment Tribunal did not take into account, whether adequately or at all, the defects and failures by the Respondent that led to the application for costs by the Claimant. It is obvious that the Employment Tribunal was aware of these matters as they are set out in some considerable detail in the Liability Judgment, along with the dim view that the Employment Tribunal took of the Respondent's conduct. There was no requirement for the Employment Tribunal to say more than it did about the Respondent's conduct than was set out at paragraph 11 of the Costs Judgment, and there was no requirement for the Employment Tribunal to repeat that summary later on in its analysis. Paragraph 11 of the Costs Judgment expressly incorporates the criticisms set out at in the Liability Judgment. Furthermore, it demonstrates that the Employment Tribunal was aware of the impact that the

Respondent's conduct had on the Claimant and his legal team.

164. Furthermore, the Employment Tribunal was not precluded from making findings about the Claimant's allegedly unreasonable conduct in the Costs Judgment simply because it had not made such findings in the Liability Judgment. As a matter of principle, this complaint cannot be correct. There may be matters of conduct by a party that do not need to be referred to in a Liability Judgment, but will be of relevance to a question of costs. On the facts, however, there were a number of references to the Claimant's conduct in the Liability Judgment which, although not expressed there as being "unreasonable", were capable of that characterisation when costs were being considered. I note, in this regard, that the Liability Judgment referred specifically to the Claimant's evidence and his approach to the claim being considered at paragraph 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".

165. The submission of Mr Allen KC under (ii) of Ground 1 was that the Employment Tribunal did not consider the impact of the Respondent's conduct on the length of the hearing and that this caused significant extra billable work for the Claimant's legal team. That criticism is misconceived as it is referred to, or as at least implicit, in the Cost Judgment at paragraph 11.

166. At (iii) under Ground 1, Mr Allen KC contended that the Employment Tribunal took into account irrelevant factors, and to illustrate this point he set out a number of matters:

a) There is no finding in the Liability Judgment that the Claimant had conducted his case unreasonably; in fact, there is only one mention of unreasonableness in relation to the Claimant's conduct which relates to one sentence;

b) The Employment Tribunal has taken new post-facto evidence adduced by the Respondent in its submissions in response to the Claimant's costs application as being relevant to all the circumstances of the case, which it plainly cannot be, because it post-dates the case (referring to paragraph 21 and comments on social media);

c) in any event, the Respondent has mischaracterised that evidence, and the Employment Tribunal does not appear to have considered the Claimant's reply submissions when making the Costs Judgment;

d) the Employment Tribunal refers at paragraph 17 of the Costs Judgment to findings it had made about the scope of the Claimant's claim; but there were no findings to this effect in the Liability Judgment, nor did it refer to **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 in the Costs Judgment;

e) There is no finding in the Liability Judgment that the Claimant's conduct in cross-examination amounted to unreasonable conduct of proceedings;

f) The findings at paragraphs 18 and 19 of the Costs Judgment do not correlate in any way with the Employment Tribunal's findings in the Liability Judgment; instead, the Liability Judgment shows that the Employment Tribunal curtailed the evidence (see, for example, paragraph 38), which meant that there was considerable leeway in the trial timetable. In fact, the only findings regarding the length of the trial were directly caused by the Respondent's unreasonable conduct;

g) The finding at paragraph 19 of the Costs Judgment is an impermissible reference to another claim which could not possibly be relevant to the Claimant's conduct at the hearing in question;

h) The finding of unreasonable conduct is entirely new, and does not correlate with any finding in the underlying Reasons;

i) At paragraph 21 of the Costs Judgment, the Employment Tribunal plainly takes into account the Claimant's social media activity, despite saying that it will not do this.

167. This aspect of Ground 1 is unfounded. Some of the points are repetitive of one another (a, e and h), and has already been explained at paragraph 164 above (findings of unreasonable conduct). Points (b), (c) and (i) concern the same matter: the Claimant's social media activity. The Employment Tribunal specifically said that these matters did not form part of its reasoning on costs, but merely reinforce it. There is no reason to go behind that statement. In those circumstances, it is incorrect to suggest that the Employment Tribunal relied on "ex post facto evidence". As for the suggestion in (c) that the Employment Tribunal has not considered the Claimant's reply submissions, that criticism cannot stand given that they are referred to at paragraph 1 of the Costs Judgment and there is no basis to suggest that they were not properly considered in the decision-making process.

168. Point (d) contains a criticism of the Employment Tribunal saying at paragraph 17 that it had made findings in its judgment about the matters set out at paragraph 16. Those matters were referred to in the Liability Judgment, even if they were not described there as "unreasonable". As for the Employment Tribunal's reference at paragraph 17 of the Costs Judgment to Hendricks, it is correct that the Employment Tribunal did not refer to that authority in the Liability Judgment, but the proposition from Hendricks that attempts should be made to keep proceedings "within reasonable bounds by concentrating on the more serious and the more recent allegations" was exactly the criticism that the Employment Tribunal had expressed about the Claimant's approach to the evidence in the hearing at paragraph 197 of the Liability Judgment: he was not concentrating on the issues in the case.

169. At point (f), Mr Allen KC criticises the Employment Tribunal's assessment about the Claimant's evidence and the impact it would have had on the length of the hearing and the Respondent's costs. This was a view that the Employment Tribunal was entitled to come to given that they were responsible for the hearing itself and were well aware of the evidence that the Claimant gave and wanted to give.

170. As for point (g), Mr Allen KC criticises the Employment Tribunal's reference to

another claim: the Employment Tribunal exhorts the Claimant to seek to confine his evidence in that other case to the issues that will need to be decided. I agree that this was not a necessary statement for the Employment Tribunal to make in the Costs Judgment and it may have been better had it not been made. Nevertheless, it does not affect, let alone undermine, the reasoning in this judgment.

171. Ground 2 of the appeal against the Costs Judgment is that the Employment Tribunal erred by considering in isolation the Respondent's submissions as to the Claimant's conduct at stage three of its assessment, and was in any event perverse.

172. Whilst the Employment Tribunal does not expressly state in its Costs Judgment that the gravity of the Respondent's conduct has been weighed up and placed in the balance with that of the Claimant's conduct, on a benevolent reading of the Costs Judgment, this is precisely what the Employment Tribunal has done. At paragraph 20, which is where the conclusion of the Employment Tribunal is set out, it is said that "whilst the threshold test for the Claimant's application for costs against the Respondent is met, . . . it would not be just and equitable to award costs", referring then to the Claimant's unreasonable conduct and its effects. What the Employment Tribunal was saying there was that the Claimant's unreasonable conduct and its effects meant that an award of costs as a result of the Respondent's conduct was not justified. In other words, the unreasonable conduct and effects of the Respondent was cancelled out by that of the Claimant.

173. I cannot say that this is a "perverse" decision, given the high hurdle that needs to be satisfied: see Yeboah. Whilst the impact of the Respondent's conduct was that the parties had to attend for days that they were not expecting to (see paragraph 11) – thereby increasing costs for the Claimant – the Claimant's own conduct resulted in increased costs to the Respondent, as the hearing would have been "significantly shorter" if he had confined himself to the actual issues (see paragraph 19). I cannot say that this analysis has no basis in the evidence, or that no reasonable employment tribunal could have arrived at that conclusion. The Employment Tribunal read the Claimant's witness statement and heard the evidence that he gave.

174. The Claimant criticises the Employment Tribunal's finding that his "evidence was exceptionally long. It did not confine itself to the issues." After the oral hearing before this tribunal, I was sent two of the witness statements that the Claimant produced for the liability hearing before the Employment Tribunal. Having perused these witness statements, it is clear that the finding made by the Employment Tribunal about the Claimant's written evidence is one which a reasonable employment tribunal was entitled to come to, and was not "perverse". The first of the witness statements runs to 408 paragraphs, and 90 pages. Paragraphs 51 to 167 (pages 13-39) set out details of the protected disclosures made by the Claimant in 2013-14 as well as some discussion of how they were dealt with at the 2018 hearing, the investigation into the protected disclosures, and discussion of the Critical Care Peer Review in 2017. A witness statement of that length could be described as "exceptionally long", and it did contain much material that was not strictly necessary for the Employment Tribunal to determine.

Conclusion on the appeal from the Costs Judgment

175. For the reasons set out above, the appeal against the Costs Judgment is dismissed.