Neutral Citation Number: [2026] EAT 97

Case No: EA-2025-000150-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2nd July 2026

Before:

THE HONOURABLE MRS JUSTICE STACEY DBE

- -

Between:

DR C M DAY

Appellant

- and –

HEALTH EDUCATION ENGLAND

-and- **Respondent**

HILL DICKINSON LLP

Interested Party (Respondent to the Appeal)

- -
- -

Andrew Allen KC and **Elizabeth Grace** (instructed by Slater & Gordon) for the **Appellant**
Dijen Basu KC (instructed by **Hill Dickinson LLP)** for the Respondent

Hearing date: 11 March 2026

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JUDGMENT

Practice and Procedure

SUMMARY

The Claimant before the ET applied for a wasted costs order against Hill Dickinson LLP as the legal representatives of Health Education England over their non-disclosure of relevant documents in his claim against Health Education England in a preliminary dispute as to whether Health Education England was his employer for the purposes of s.43K(1)(a) Employment Rights Act 1996 and thus entitled to bring a whistleblowing complaint against Health Education England as well as his employer, Lewisham and Greenwich NHS Trust.

The ET had concluded, amongst other things, that Hill Dickinson LLP had not behaved improperly, unreasonably or negligently pursuant to Rule 80 ET Rules of Procedure and in any event the Claimant had not incurred additional costs because of the non-disclosure of the documents.
In reaching its decision the ET had correctly applied the applicable test in **Ridehalgh v Horsfield** [1994] Ch 205. It had correctly approached its assessment of the evidence the implications of Health Education England's refusal to waive legal professional privilege (see **Morris v Roberts (HMIT)** [2005] EWHC 1040 (Ch). There was no legal error or flaw in the detailed and careful decision of the ET.

THE HONOURABLE MRS JUSTICE STACEY DBE:

1. The subject matter of the appeal before this Tribunal is the decision of EJ Ramsden sitting in the London South Regional Office of Employment Tribunals in a wasted costs application sent to the parties on 17 December 2024 ("the WACO Decision"). The WACO Decision refused the application of the appellant, Dr CM Day (who was the Claimant below), for a wasted costs order ("WACO") pursuant to Rule 80 ET Rules of Procedure 2013[1] against the solicitors representing Health Education England ("HEE") which was the Second Respondent in the proceedings below and is the Respondent to the appeal. Where not referred to by name I shall continue to refer to the parties as they were before the Employment Tribunal ("ET"). HEE's solicitors, Hill Dickinson LLP ("HD"), have been joined as an interested party as the Respondent to this appeal. Dr Day's former employer, Lewisham and Greenwich NHS Trust ("the Trust") which was the First Respondent in the proceedings before the ET, no longer has any interest in the proceedings and has ceased to be a party by an order of the registrar of this Tribunal of 26 June 2025.

2. The WACO Decision concluded that the Claimant was precluded from applying for a WACO given the terms of a number of settlement agreements that had been made during the course of the proceedings, but that in any event, if he was not precluded from making his WACO application it would fail on the merits for two reasons. Firstly there had neither been any improper, unreasonable or negligent act or omission on the part of HD as HEE's representative and secondly because the omission relied on - HD's failure to disclose Learning and Development Agreements ("LDA") about which more later – had not caused the Claimant to incur any additional costs.

[1] Now superseded by the 2024 ET Rules of Procedure, but Rule 80 is in materially identical terms.

3. This case has a long and complex history which it will not be necessary to set out in any detail in order to understand the WACO Decision given the grounds of appeal. Dr Day is a doctor and was a specialist registrar in medical training under a contract of employment with the Trust. He made disclosures about patient safety to the hospital where he worked which he repeated to HEE, the Second Respondent training body, which was responsible for arranging and supervising his training placement and which funded part of his salary. He brought whistleblowing claims before the ET on 27 October 2014 against his employer, the Trust, and against HEE as the Second Respondent, arguing that he also came within the definition of a "worker" of HEE under s.43K(1) Employment Rights Act 1996 ("ERA 1996") and that the ET had jurisdiction to consider his whistleblowing claim against the Second Respondent as well as the First Respondent. At that stage of the proceedings there were two other respondents who are not relevant to the issues in this appeal.

4. For the purposes of whistleblowing complaints under ss.43A-L, s.47B ERA 1996, the ET jurisdiction includes an individual who is not a worker for the purposes of the general definition in s.230(3) ERA 1996 but who:

> "43K(1)(a) works or worked for a person in circumstances in which –
>
> (i) He is or was introduced or supplied to do that work by a third person, and
>
> (ii) The terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them"

5. Progress in the substantive case was slow and was delayed since the Second Respondent applied to strike out Dr Day's claim against them on the grounds that the ET had no jurisdiction because Dr Day was not their worker. The Second Respondent succeeded in its strike out application before the ET. The ET found that although it was arguable that Dr Day had been supplied by the HEE to do the work he did for the Trust within the meaning of section 43K(1)(a)(i) ERA 1996, that body did not ''substantially'' determine the terms on which he did that work within the meaning of

section 43K(1)(a)(ii), so he did not come within the extended meaning of ‘‘worker’’ in section 43K for the purpose of bringing a whistle-blowing claim.

6. The EAT dismissed Dr Day’s appeal holding that a person who came within the general definition of ‘‘worker’’ in section 230(3) ERA 1996 Act could not also come within the extended meaning of ‘‘worker’’ in section 43K in relation to another ‘‘employer’’; and that, in any event, the training body could not be said to be substantially determining the terms on which the Claimant was engaged to work so as to be an ‘‘employer’’ within section 43K(2)(a).

7. Dr Day appealed to the Court of Appeal. Shortly before the hearing in the Court of Appeal, Dr Day and HEE agreed to a consent order that did not dispose of the appeal but related only to costs with a recital clause that stated:

> “Upon the Appellant [Dr Day] and Second Respondent having agreed not to pursue costs against the other, whatever the outcome of the appeal
>
> BY CONSENT IT IS ORDERED THAT:
>
> Whatever the outcome of the Appellant’s appeal, each of the Appellant and Second Respondent shall bear its own costs…” (“the October 2016 Agreement”)

8. Dr Day was successful in the Court of Appeal in a judgment of 5 May 2017 in which it found that the ET and EAT had considered the wrong question. The Court of Appeal **(Day v Lewisham & Greenwich NHS Trust and another (Public Concern at Work intervening)** [2017] EWCA Civ 329) found that s.43K(1)(a)(ii) ERA 1996 envisaged that both the person for whom an individual worked and the person who introduced or supplied him could substantially determine the terms on which he was engaged, either jointly or to different extents and an individual could, therefore, in principle be employed by both. Since the ET had not engaged directly with whether HEE as well as the Trust had substantially determined the terms on which Dr Day was engaged, the Court of Appeal remitted the case back for fact finding and determination by the ET and it was listed

for a four day hearing in the ET in May 2018. The Court of Appeal rejected an application to decide the matter for itself.

9. In advance of the rehearing of the strike out application a preliminary hearing was held in the ET on 10 July 2017 when Regional Employment Judge Hildebrand made a number of case management orders including that the parties were to give further standard disclosure of any documents not previously disclosed ("the Hildebrand Order"). Prior to that date there had been no orders for disclosure which had taken place on a voluntary basis.

10. Three days prior to the start of the hearing in May 2018, the Second Respondent withdrew their strike out application and conceded that Dr Day was their worker and had been employed by them for the purposes of s.43K(1) ERA 1996 with the consequence that the ET would have jurisdiction to consider a complaint of his having been subjected to a detriment pursuant to the Public Interest Disclosure Act 1998 and the amendments to the ERA 1998 set out in s.43A-K. The parties agreed terms about costs in a consent order made on 17 May 2018:

> "By consent the Employment Tribunal orders that in full and [sic] settlement of all the Claimant's claims for costs in respect of the "worker" issue HEE will pay the Claimant's costs to the Claimant's solicitors in the sum of £55,000 inclusive of VAT within 28 days of today." ("the May 2018 Agreement")

11. The jurisdictional issue of whether the Clamant could bring a whistleblowing complaint against HEE having been resolved, the case was listed for a final hearing to determine the substantive claims which commenced on 1 October 2018. Part way through the substantive hearing the parties reached settlement terms which included the following clause:

> "This Agreement is also in full and final settlement of all or any claim or application for costs/expenses that any of the parties may have against any other party or parties' representative, whether in relation to the claims or their conduct or otherwise." ("the October 2018 Agreement")

12. The Claimant's claims were then all dismissed upon withdrawal. The October 2016 Agreement, the May 2018 Agreement and the October 2018 Agreement are collectively referred to as "the Settlement Agreements".

13. Sometime later, in May 2019, Dr Day first learnt of the existence of a document, the Learning and Development Agreement of the First Respondent of 2014 ("the 2014 R1 LDA") which had been provided to a journalist following a freedom of information request. The Tribunal carefully explained (at paragraphs 10 – 17) the LDAs. There is a standard template agreement between HEE and NHS Trusts that are updated from time to time (in 2012 and 2014 for example), referred to as Template LDAs, that individual NHS trusts will negotiate with HEE to suit any particular circumstances. They record the terms under which HEE agreed to commission and fund junior doctors' employment at each NHS trust. During the period of Dr Day's employment there was in existence a 2012 and 2014 Template LDA and a specific 2012 R1 LDA and 2014 R1 LDA. On learning of the existence of this document Dr Day made his WACO Application contending that he had had to incur significant costs resisting the strike out application as a result of the failure of the Second Respondent to disclose the document and that it was a highly relevant document and the failure to disclose the document was a breach of the Hildebrand Order. His argument was that the failure of HD to disclose the document involved an improper, unreasonable and/or negligent act or omission because they must have known about LDA agreements – both the template LDAs and the final LDAs of the First Respondent of 2012 and 2014, since HD had worked on the 2014 Template LDA.

14. It took some time for the WACO Application to be heard for a number of reasons. Covid caused a delay and a further delay was caused by HD's unsuccessful application to strike out the WACO application at a preliminary hearing in December 2022. There were then two further case management preliminary hearings in 2023 and 2024 before the eventual hearing of the WACO application before EJ Ramsden.

15. At the second preliminary case management hearing before EJ Taylor in March 2024 she identified the seven issues for determination:

> 1.1 Does the October 2018 Agreement preclude the making of a WACO or may it be set aside for negligent or fraudulent misrepresentation?
>
> 1.2 If the October 2018 Agreement does not preclude the making of a WACO, does the October 2016 Agreement preclude the making of a WACO?
>
> 1.3 Does the May 2016 Agreement preclude the making of a WACO?
>
> 1.4 Can and should the Tribunal consider making a WACO of its own initiative?
>
> 1.5 If it is open to it to do so, should the Tribunal make a WACO and in what amount?
>
> 1.6 Has there been any improper, unreasonable or negligent act or omission on the part of HD?
>
> 1.7 If so, then what extra costs was the Claimant caused to incur?

16. The case was listed for a three day hearing to decide the issues.

The WACO Decision

17. After setting out a brief history and chronology of the case and the law, the Tribunal applied its mind to the agreed list of issues and decided that the terms of the October 2018 Agreement precluded the Claimant from making a WACO application rejecting his arguments on both construction and misrepresentation (issue 1.1, paras 87 – 96). In light of the Tribunal's conclusion on issue 1.1, issue 1.2 fell away, but the Tribunal found in the alternative that if it was wrong about the October 2018 Agreement precluding an application for a WACO then the October 2016 Agreement also precluded the making of a WACO in respect of wasted costs incurred up to 5 May 2017 when the Court of Appeal judgment was handed down (paragraphs 97 – 103). Issue 1.3 also fell away in light of the Tribunal's conclusion on issue 1.1 but the Tribunal diligently considered it in any event and found that the May 2016 Agreement precluded the Claimant from applying for a WACO (paragraphs 104 – 112).

18. On issue 1.4 the Tribunal found that it was not open to it to make a WACO on its own initiative (see paragraphs 113-119) rendering issue 1.5 unnecessary to consider (paragraph 120).

19. Issue 1.6 asked the Tribunal to decide if there had been any improper, unreasonable or negligent act(s) or omission(s) on the part of HD. On this issue the Tribunal heard evidence from Michael Wright, a solicitor and partner at HD. He was not authorised by the Second Respondent to discuss any privileged matters and did not purport to waive any legal professional privilege in his evidence. The Tribunal made clear and detailed findings of fact from Mr Wright's evidence and all the other evidence before it (para 124)[2]. It concluded that the lawyers in HD working on the litigation were unaware of the existence of LDAs that had been drafted by their colleagues in the commercial department until 27 June 2016. On 27 June 2016 the litigation lawyers first became aware of similar LDAs used by NHS trusts other than the First Respondent, but the ET found that the litigation lawyers did not consider them to be relevant in the strike out application appeal before the EAT.

20. Once the Court of Appeal had remitted back the question of whether the Claimant was a worker of the Second Respondent to the Tribunal to decide the relevant facts, the Hildebrand Order was made which included an order for standard disclosure. Previously disclosure had been provided voluntarily by both sides. The Second Respondent provided a copy of the 2012 Template LDA to its lawyers, HD on 24 November 2018. Following an agreement between the parties to extend the deadline for simultaneous disclosure HD disclosed the 2012 Template LDA along with various other documents, to the Claimant in accordance with the agreed extended deadline. Neither the 2012 R1 LDA, 2014 Template LDA nor the 2014 R1 LDA was disclosed then or later.

21. Having found those facts the Tribunal then considered whether HD's conduct in not disclosing the 2014 Template LDA was unreasonable, improper or negligent by reference to each of the periods of time identified in its findings. It was a relevant exercise because the Claimant

[2] There was an agreed hearing bundle of 1640 pages, a further bundle of 527 pages and the Claimant also gave evidence at the preliminary hearing and made two witness statements.

incurred costs at different stages of the long life of the case which would be relevant to the making of any WACO.

22. The Tribunal also found that the information in the undisclosed document was already known to the Claimant as it was set out in the Gold Guide (which was the name used for a document entitled "A Reference Guide for Postgraduate Speciality Training in the UK") which he was familiar with and had been provided with a copy of in 2011.

> "126. In light of these findings, there is no basis for a finding that HD acted unreasonably, improperly or negligently. Significantly, the Gold Guide was in evidence, and had been heavily relied upon by the Claimant throughout the litigation concerning the Strike-Out Application. While the Tribunal finds that the 2012 Template LDA was a relevant document to the issues in play, there is no evidence to support any argument that the Second Respondent's duty not to withhold from disclosure any document the suppression of which would render a that Gold Guide, or any other disclosed document, misleading, was breached, or that HD acted unreasonably, improperly or negligently in advising the Second Respondent or its duties to the tribunals or court.
>
> 127. Moreover, the Tribunal notes that HD is not authorised by the Second Respondent to discuss privileged matters. As per the decision in *Ridehalgh*, it would only be if, with all allowances made for the inability of HD to tell the whole story, HD's conduct of proceedings was quite plainly unjustifiable, that it can be appropriate to make a wasted costs order. The evidence before the Tribunal about HD's conduct is very, very far away from that threshold.
>
> 128. Although the Wasted Costs Application was not based on the non-disclosure of any of the 2012 R1 LDA, the 2014 Template LDA or the 2014 R1 LDA, even if those documents had been the subject of that application, the Tribunal's view is that:
>
> a) There was no obligation to disclose any of those documents before the date when Ordered disclosure took place, on 14 February 2018, given the Tribunal has found that the Claimant has not shown that there was any difference of any significance between:
>
> (i) The relationship between each of the Respondents and the Claimant as described in the Gold Guide; and
>
> (ii) The relationship between each of the Respondents and the Claimant as shown in the 2012 R1 LDA, the 2014 Template LDA or the 2014 R1 LDA.
>
> The duty not to mislead did not require any of those documents to be disclosed.
>
> b) It is not clear to the Tribunal why none of the 2012 R1 LDA, the 2014 Template LDA or the 2014 R1 LDA was disclosed by the Second Respondent on 14 February 2018. At this point, the Order to disclose all documents relevant to the issues in the case required the disclosure of the 2012 R1 LDA, the 2014 Template LDA and the 2014 R1 LDA. However, the Tribunal is not persuaded, after making

> all allowances for the inability of HD to tell the whole story (because the Second Respondent does not waive privilege), that HD's conduct of proceedings was quite plainly unjustifiable (*Ridehalgh*). The threshold for making a wasted costs order in respect of the failure to disclose these documents is not met."

23. In light of that conclusion there was no need to consider issue 1.7, but Tribunal once again diligently made counter-factual conclusions and found even if it had been wrong about issue 1.6, the Claimant had not demonstrated that the non-disclosure of the documents from 14 February 2018 to 17 May 2018 resulted in any additional costs being incurred by him (paragraph 130).

24. In short, the application was lost on all grounds.

Appeal grounds

25. The notice of appeal was referred to Lord Fairley P, in accordance with Rule 3(7), and he allowed grounds 1, 2, 3 and 5 to proceed to a full hearing. **Ground 1** was that the Tribunal erred in its application of the relevant law in construing the settlement agreements as precluding a WACO. Whilst it was accepted that the Tribunal had correctly directed itself as to the law (paragraphs 64-70), it was said that it had erred in its application of the law to the facts. It could not be inferred from the facts that the Claimant had intended to surrender rights of which he was not aware and, given the circumstances in which the settlement agreements were concluded, on a proper construction they were not drafted so as to preclude wasted costs against HD. It was unconscionable to construe them otherwise.

26. **Ground 2** alleged errors in relation to the construction of the 2014 R1 LDA in paragraphs 89-91, in that the Tribunal failed to grasp that the 2014 R1 LDA agreement governed the employment relationship between the Claimant and HEE at the relevant time which demonstrated that it was untenable for HEE to argue that the Claimant was not a worker of theirs for the purposes of s.43K ERA 1996. Since the Gold Guide was a non-contractual document, the Tribunal had placed impermissible emphasis upon the Claimant's knowledge of the Gold Guide.

27. **Ground 3**, closely related to ground 2, was that the Tribunal's reliance on the Gold Guide impermissibly contradicted the findings made in the strike out decision of the Tribunal which were reinforced by the EAT and not undermined by the Court of Appeal. The Tribunal had thus erred in its findings in relation to the Gold Guide.

28. **Ground 5** asserted that there was an error of law in the Tribunal's finding that HD was unable to tell the Tribunal about advice given to HEE due to legal privilege (paragraphs 125, 128 and 133(a)) and that there was no obligation on HEE to disclose the LDAs before 14 February 2018. In any event the reason that HD did not explain the "whole story" was because HEE did not waive privilege. It was asserted that it was an error of law for the ET to reach such a conclusion since a refusal to waive privilege does not preclude a finding of abuse "when the particular conduct admits of no reasonable explanation" **(Morris v Roberts (HMIT) [2005] EWHC 1040 (Ch) and Ridehalgh v Horsfield [1994] Ch 205 (approved in Medcalf v Mardell [2007] UKHL 27).** It was also said that the Tribunal's conclusion that it was not satisfied that there had been any unreasonable, improper or negligent conduct had misapplied the **Ridehalgh** test as the Tribunal had not considered "negligence" in a non-technical sense and had assumed that privilege was the reason why HD could not explain their failure to disclose the 2014 LDA.

29. In his Rule 3(7) observations, the President noted that ground 5 was dependent on the success of grounds 2 and 3. With the benefit of the skeleton arguments and oral submissions at the full hearing it became apparent that grounds 1, 2 and 3 are all dependent on the success of ground 5.

The law

30. Rule 80 ET Rules of Procedure entitled "When a wasted costs order may be made" provides:

> "(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs –
>
> (a) As a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b) Which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as "wasted costs".

31. Thus, Dr Day would have been the receiving party if his application had been successful before the Tribunal.

32. The ET diligently set out the relevant ET rules and an accurate summary of the general principles to be applied in WACO applications from the applicable authorities at paragraphs 50-61 of the WACO Decision. The well-known three-stage test is (1) whether the legal representative acted improperly, unreasonably or negligently; (2) if so, did such conduct cause the applicant to incur unnecessary costs; and (3) if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs **Ridehalgh v Horsefield** [1994] 3 All ER 848). The ET's power is discretionary.

33. It is a rigorous test and it is vital to establish that a representative assisted proceedings amounting to an abuse of the courts' process (thus breaching her or his duty to the court) and that their conduct actually caused costs to be wasted. Simler P noted in **KL Law v Wincanton Group Ltd & anor** (EAT 0043/18) that Tribunals should proceed with care in the area of wasted costs and that "a wasted costs order is a serious sanction for a legal professional. Findings of negligent conduct are serious findings to make."

Discussion and conclusions

34. I shall start with Ground 5, a challenge to the ET's approach and conclusions on issue 1.6: Has there been any improper, unreasonable or negligent act or omission on the part of HD? since the success of the other grounds are contingent on Ground 5 succeeding. The error of law of the ET alleged by Dr Day in ground 5 is to the ET's approach to its finding that HD were unable to tell the ET about advice given to HEE due to privilege and finding that there was no obligation on HEE to disclose the LDAs before 14 February 2018.

35. Mr Allen KC has two prongs to his argument. The first is that a refusal to waive privilege does not preclude a finding of abuse "when the particular conduct admits of no reasonable explanation" (**Morris v Roberts (HMIT)** [2005] EWHC 1040 (Ch)). The second is that the ET's conclusion failed to consider "negligence" in the non-technical sense when concluding that it was not satisfied that there had been any negligent conduct on the part of HD. It has simply assumed that privilege is the reason why HD could not explain their failure to disclose the 2014 LDA.

36. The findings of fact of the ET were that throughout the period up to 27 June 2016 none of the HD team working on the case was aware of the existence of LDAs despite the fact that their commercial colleagues had worked on the 2014 Template LDA (para 124(a)). When Mr Wright (the witness for HD at the ET hearing) became aware of an LDA in another region between the Second Respondent and another NHS trust, the EAT had already ruled that an individual could not be both a worker of the person or organisation with whom they had a contract of employment and their supplier under the provisions of s.43K(1) (para 124(b). In other words, until the Court of Appeal clarified the law there could not be one man and two governors. So at that stage in the history of the proceedings, HD submitted that the LDAs were not relevant because if the ET and EAT had been correct in their interpretation it did not matter what was in the LDAs or the Gold Guide or any other document: Dr Day could not be employed by both of the Respondents at the same time and he was employed as an employee of the Trust. Therefore, HD submitted that the LDAs were not relevant to the issues at that stage.

37. The ET engaged carefully and closely with the evidence. It accepted that the HD litigation team was completely unaware of the specific LDAs until 27 June 2016. The ET accepted that HD did not know about them, even though agreements[3] had been referred to in the Gold Guide which was a familiar document to everyone. That is a highly plausible finding of fact that in any event this

[3] As "Educational contracts or Service Level Agreements"

Tribunal cannot interfere with. Mr Allen KC directs his firepower at 125(a)(ii) of the WACO Decision where the ET then said:

> "It is unclear why HD did not know of the existence of the Learning and development Agreements upon enquiry of its client (which the Tribunal would have expected to have been made) as to what these contract or agreements were accepted that HD did not know about them. It must not be forgotten, though, that HD is unable to tell the Tribunal about the advice it gave the Second Respondent at this time, as the Second Respondent maintains, as is its right, its privilege in that advice."

38. Here the thrust of Mr Allen's submission is that HD cannot hide behind the cloak of privilege. But the observation and findings of the ET do not support a conclusion that "the particular conduct admits of no reasonable explanation", (the *Morris v Roberts* test). There are a number of obvious and reasonable explanations, such as, for example, since there was no dispute that the Gold Guide summarised the relationship between the parties, the agreements themselves were not anyone's particular focus of attention. That would not amount to negligence in either the technical or everyday sense of that word. It is also highly relevant that the ET found that there was no difference of materiality between the summary of the relationship between Dr Day and HEE provided by the Gold Guide and that contained within the LDAs, see para 119:

> "The Gold Guide provided the Claimant with a good understanding of the significant terms of the [LDAs]….. the Claimant's subsequent uncovering of the 2014 R1 LDA does not represent: a material change of circumstances, or a material omission or misstatement".

39. It is also to be remembered that at that point in time, up until 13 February 2018, no order for disclosure had been made. In this regard the ET correctly directed itself in accordance with **Birds Eye Walls Ltd v Harrison** [1985] ICR 278 and **Square Global Ltd v Leonard** [2020] EWHC 1008 (QB) (at paragraphs 62- 63) that in the absence of an order from the ET, no party is under an obligation to give discovery in ET proceedings, but any party who chooses to make voluntary disclosure "must not be unfairly selective in his disclosure" or withhold documents if there is any

risk that the effect of withholding them might be to convey a "false or misleading impression as to the true nature purport or effect of any disclosed document." The ET found that the fact that the LDAs were not disclosed or disclosed earlier did not create unfairness or risk giving a false or misleading impression, because their contents were entirely consistent with what the Gold Guide said would be in the agreements that the Gold Guide referred to.

40. The ET considered carefully the Respondent's argument on relevance and once again displayed very close analysis of the evidence and arguments before it and had a clear grasp of the issues. It was unpersuaded by HD's argument that the LDAs were not relevant because the ET and EAT had been focussed on the point of construction of whether an individual could be a worker (under s.43K) of one organisation and an employee of another at the same time. But since there had been no order for disclosure, the obligation to make disclosure had not arisen and the failure to disclose the LDAs did not mislead.

41. It then considered the position after the Hildebrand Order and noted that the 2012 Template LDA was disclosed in accordance with the Hildebrand Order and that disposed of the application (see paras 126 – 127 of the WACO Decision).

42. The ET noted the precise terms of the Claimant's application related only to the 2012 Template LDA, but the ET, again very diligently, also considered the non-disclosure at any stage of the three other LDA documents – the 2012 R1 LDA, 2014 Template LDA and 2014 R1 LDA. In this regard the ET is again criticised by Dr Day for allowing too much protection to HD from the non-waiver of privilege. The Tribunal noted that it was not clear why these three documents were not disclosed by the Second Respondent, but that:

> "it was <u>not</u> persuaded, after making all allowances for the inability of HD to tell the whole story (because the Second Respondent does not waive privilege), that HD's conduct of proceedings was quite plainly unjustifiable (*Ridehalgh*). The threshold for making a wasted costs order in respect of the failure to disclose these documents is not met." (paragraph 128(b)

43. Here the ET was directing itself in accordance with its earlier direction about when a representative may be hampered by privilege from presenting the full facts (see para 56 -57 WACO Decision) as is self-evident from its use of the wording in **Ridehalgh** which established the proposition.

44. I therefore dismiss the appeal on ground 5. Even if Dr Day could succeed on his interpretation points about each of the Settlement Agreements so as to allow him to make a WACO application, it would fail in substance. The application failed at the first, or gateway, condition, and the ET was correct to conclude on its analysis that Dr Day had not proved that HD acted improperly, unreasonably or negligently. Nor can there be any criticism of the ET's conclusion that the conduct of HD did not cause Dr Day to incur unnecessary costs. It was fanciful to suggest that if the LDAs had been disclosed at any time up to the hearing in the Court of Appeal, the Court of Appeal would not have remitted the issue back to the ET.

45. As to the third question to be addressed in a WACO application, even where an applicant has satisfied the first two questions, the ET has a wide discretion as to whether or not to award wasted costs with which an appellate court will not interfere absent compelling grounds to do so, of which none are apparent in the findings of the ET in its WACO Decision.

46. The appeal is therefore dismissed. It is not necessary to consider the remaining grounds of appeal.