

**IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL**  
**BETWEEN**

**DR CHRIS DAY**

**CLAIMANT**

**-and-**

**LEWISHAM AND GREENWICH NHS TRUST**

**FIRST RESPONDENT**

**HEALTH EDUCATION ENGLAND**

**SECOND RESPONDENT**

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**Application for Orders**

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**Orders Sought**

1. The Claimant respectfully asks the employment tribunal to make 2 orders in respect of this case;
  - **Proposed Order 1 : The Second Respondent be ordered to clarify their position on each of the Claimant's protected disclosures including the basis of any concession as directed by the Judge on 13 November 2020.**
  - **Proposed Order 2 : The First Respondent be ordered to disclose the formal record and other relevant documents/communications in respect of the Sunday 14 October 2018 board meeting/teleconference that approved the settlement agreement in the Claimant's 2014/15 Claim.**

**Proposed Order 1 : The Second Respondent be ordered to clarify their position on each of the Claimant's protected disclosures including the basis for any concession as directed by the Judge on 13 November 2020 (but not formally ordered).**

2. On 13 November 2020, the Second Respondent made a very significant concession and accepted the status of the protected disclosures the Claimant made to it in 2013/14 about serious patient safety issues and alleged cover up. This was after spending 6 years and significant amounts of public money denying the Claimant's reasonable belief in the substance of his protected disclosures.
3. The Claimant respectfully repeats his request made verbally on 13 November and asks that the Tribunal order the Second Respondent to confirm their position (as the First Respondent has) on each of the Claimant's alleged protected disclosures and clearly state the statutory basis in which they are conceding any protected disclosures as set out in ERA s43B. That is to say give a clear position on whether they are accepting the Claimant had a reasonable belief in the public interest for each of his pleaded protected disclosure in respect of;
  - a) Containing information tending to show that the health and safety of people has been, is being or is likely to be endangered for the purposes of ERA s43B1(d);  
  
And/or
  - b) Containing information tending to show that matters endangering the health and safety of people were being or were likely to be deliberately concealed for the purposes ERA s43B1(f)
4. In contrast to the Second Respondent, the First Respondent has made their position quite clear on each of the Claimant's protected disclosures following their concession on 8 of the disclosures on 3 October 2018. This occurred after being asked to reflect on their position by Judge Freer;

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

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

5. The Claimant is not asking for anything more from the Second Respondent than the First Respondent has offered in response to Judge Freer's request on 3 October 2018. Although Judge Andrews, on 13 November 2020, did not think a formal Order was required, she made her position quite clear in the hearing on the Claimant's request. Mrs Day's note of the Hearing records:

*"I expect they (the Respondents) when they file their amended responses to make clear exactly their position on each of the protected disclosures... I stand by what I said, both Respondent to very clearly state the basis of the Protected disclosures"*

6. Given the nature of the Second Respondent's concession and the 6 years it has taken to accept the Claimant's reasonable belief in such serious issues, the Claimant takes the view a clear position should have been given by the Second Respondent on each of the protected disclosures on the 13 November and the Claimant was hoping that this would be ordered when it was not provided at the hearing.
7. The result of this not happening, is the Claimant still not being provided with this information and the amended pleadings from the Second Respondent not giving a clear position on each of the protected disclosures and in particular the basis on which the Second Respondent is conceding each of the protected disclosures ie whether they are accepting the Claimant's reasonable belief in safety issues (ERAs43B1(d) or deliberate concealment (ERA s43B1(f) or both. The Second Respondent's amended Grounds of Resistance states;

*"The Second Respondent's position in relation to the protected disclosures on which the Claimant relies at paragraph 16 to 19 of the Grounds of Claim (which are admitted as set out in the statement that it agreed with the Claimant and the First Respondent on 15 October 2018"*

8. The amended pleadings also claim that the Second Respondent's position on the protected disclosures has not changed from October 2018 then paradoxically makes reference to protected disclosures being admitted. The Respondent's position on the Claimant's protected disclosures in 2018 and shortly before the 13 November 2020 hearing couldn't have been clearer;

“ R2 makes no admissions as to the alleged protected disclosures.”

9. In the hope of avoiding an application, the Claimant wrote a letter dated 14 December 2020 to the Second Respondent, yet again, to request a clear position on each of the alleged protected disclosures and the basis each disclosure was being conceded. Rather than simply giving a clear position on each of the protected disclosures as requested by the Claimant and Judge Andrews, a long email was sent back criticising the Claimant and his wife's understanding and recollection of the 13 November 2020 hearing and expressing in writing the broad position concession made on 13 November 2020 which offered no new information;

“The Second Respondent has admitted Paragraph 16, in other words, it has admitted that you made protected disclosures which “contained information tending to show either that the health or safety of patients was being (or was likely to be) endangered or that such matters had been, or were being, deliberately concealed.”

### **Why this Order is Important**

10. Going from denying that an Intensive Care Unit doctor had a reasonable belief in serious patient safety issues and cover up contained in 13 protected disclosures to suddenly accepting that the doctor had a reasonable belief in serious patient safety issues and cover up in the 13 protected disclosures is obviously a dramatic concession, if that is what the Second Respondent has done. The fact this took 6 years is also hugely significant. It is therefore key that the Claimant and the Tribunal understands exactly what the Respondents have conceded in respect of the protected disclosures and the basis for conceding it in order to properly deal with the Claimant's claims of whistleblowing detriment that he alleges occurred as a result of the protected disclosures.

11. This whistleblowing case has involved the NHS, using public money, to vigorously deny for 6 years the Claimant's reasonable belief in protected disclosures containing serious patient safety issues that have now been verified.
12. This is hugely relevant as the Respondents' 6 year campaign to resist the status of the Claimant's protected disclosures has meant attacking the reasonableness of Claimant's professional view as a doctor on very serious issues. The Respondents have done this on professional networks, publicly and at the Tribunal in 2018 when it was known all along that the Claimant's protected disclosures were credible and important. (See letter dated 11 November 2020 to the Tribunal enclosing the Claimant's Further and Better Particulars)
13. The Respondents' tactics at denying the Claimant's reasonable belief in his protected disclosures have involved smearing the Claimant with false allegations, misrepresenting the findings of formal investigations and denying that the protected disclosures involved critical care/intensive care. These are pleaded as detriments in the Claimant's Grounds of Claim.
14. The Claimant submits that the Respondents' strong desire to deny the credibility of the Claimant's 13 protected disclosures is the motivation for the alleged whistleblowing detriments in this case both pre and post October 2018.
15. The Claimant submits that it is key when making findings on the alleged whistleblowing detriments in this case that the Tribunal understands and compares the current position of the Respondents on the Claimant's protected disclosures with the position that the Respondents advanced in 2014.
16. The Respondents' strong resistance to the reasonableness of the Claimant's protected disclosures commenced in 2014 before the Claimant had any campaigning social media accounts, had started any crowdfunding or put any of the facts of this case into the public

domain. The Claimant asserts that the motivation for the detriments in 2014 was the same as the motivation for the detriments in 2018/19 that occurred when the facts relating to the protected disclosures and NHS' response to them were revisited in open Tribunal and began to circulate.

17. For the reasons set out above the Claimant submits the Tribunal should make the above Order.

**Proposed Order 2 : The First Respondent be ordered to disclose the formal record and other relevant documents/communications in respect of the Sunday 14 October 2018 board meeting/teleconference that approved the settlement agreement in the Claimant's 2014/15 Claim.**

18. On 15 July 2020 the Claimant was copied into the following email that was sent to the Solicitor Regulation Authority from the Journalist Tommy Greene;

*"Attached to the forwarded email is a response to a Freedom of Information request by Lewisham and Greenwich Trust. It is a fairly straightforward request, asking for the details of a trust board meeting that took place in October 2018. It has been stated in open tribunal that at this board meeting the controversial settlement agreement in Dr Day's whistleblowing case was approved by the trust's board. I believe the SRA and Dr Day should both seek the records of this conference, as my FOI request and all questions I have put to the trust board secretary on this matter have been met with the same response - they have declined to answer any questions on the meeting (which have been put to them several times) and now claim no records of the meeting can be provided as they say it took the form of a 'confidential teleconference'. Trusts can be referred to the Secretary of State for failing to keep records of their meetings - particularly ones that deal with matters of such public interest as this one - and for failing to disclose them.*

19. On the 21 July 2020, the Claimant sent the First Respondent's solicitor an email attaching Mr Greene's email sent to the SRA;

*Please can I request an explanation as to why the written record of the Trust board meeting/teleconference that occurred on Sunday 14 October 2018 that approved the settlement of my case, was not disclosed in the recent application proceedings and or appeal. It is likely that such a record will make clear what the Trust Board knew at the time of settling in respect of the following;*

- 1. The Trust's stated position/instruction on wasted costs during settlement talks;*
- 2. The Trust's stated position/instruction on ordinary costs during settlement talks;*
- 3. The use of any reference to costs to secure the wording of the agreed statement and to discourage the cross examining of witnesses.*
- 4. The Board's knowledge/consent to the above tactics while I was giving evidence in purdah*
- 5. The Board's understanding of the patient safety issues in my case and whether they have been accurately reported in the various Trust public statements.*

*It is likely to also make clear what the Trust Board knew about my reasons for settling and agreeing to the wording of the agreed statement.*

20. The First Respondent's Solicitor replied by email dated 4 August 2020;

*"Thank you for your email of 21 July 2020. I also note that you have forwarded correspondence from Tommy Greene to the SRA and a response from my client, Lewisham & Greenwich NHS Trust, to an FOI request made by Tommy Greene.*

*As you know, I represent the Trust in respect of your employment claims against the Trust. Claims 2302023/2014 and 2301446/2015 were dismissed by the Employment Tribunal as was a subsequent application for reconsideration. Your further attempts to appeal that decision have been dismissed*

*by the Employment Appeal Tribunal and the Court of Appeal. If any documents exist relating to the meeting you refer to, these are not relevant to proceedings that have long since been dismissed. Had they been relevant you could (and no doubt would) have sought their production a great deal earlier.*

*In relation to claim number 2300819/2019, the Employment Tribunal will no doubt in due course make an order for disclosure of relevant documents. If any documents exist relating to the meeting you refer to that are relevant to the issues in that claim, they will be disclosed in accordance with that direction.”*

21. The Claimant respectfully asks the Tribunal to order that First Respondent must disclose the formal record/minutes of the Sunday 14 October 2018 Board Meeting/Teleconference that approved the settlement agreement in the Claimant’s case. This does not appear in the first Respondents list of documents. The Claimant requested this on 13 November 2020 but Judge Andrew stated that the Claimant must give the Respondent a chance to disclose it. The Claimant made the point that this document was not disclosed in the litigation that attempted to set aside the settlement agreement in this case and was clearly relevant.

#### **Why This Order is Important**

22. *When considering the Claimant’s whistleblowing detriments, It is fundamental to the Claimant’s claim that the Tribunal understands, establishes and makes findings on exactly what the senior management team of both Respondents understood to be true about the Claimant’s case in respect of the scope of the protected disclosures and the findings of the formal investigations into the Claimant’s case.*
23. *The understanding of the First Respondent’s board members of the reality of what induced the settlement of the 2014/15 whistleblowing claim and wording of the agreed public statement is also vital to the just disposal of this case.*
24. *The Claimant wishes to ask the Tribunal to make factual findings on the Sunday 14 October 2018 teleconference and has secured reference to it to be added to his amended Grounds*



*of Claim and therefor also to the list of issues.*

25. For the reasons set out above the Tribunal is respectfully asked to grant the above Order

Dr Chris Day

20 December 2020