

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL
BETWEEN

DR CHRIS DAY

CLAIMANT

-and-

LEWISHAM AND GREENWICH NHS TRUST

FIRST RESPONDENT

HEALTH EDUCATION ENGLAND

SECOND RESPONDENT

Application for Reconsideration

Introduction

1. The Claimant applies for a reconsideration of Employment Judge Kelly's refusal of the Claimant's application to amend his claim number 2300819/2019 to include the content of the 4th Claim presented on 4 January 2021. The relevant ET Order of EJ Kelly was made on 19 March 2021 but the record of the preliminary hearing was only sent to the parties on 7 May 2021. . The Claimant says that the interests of justice require a reconsideration for the reasons set out below

2. Half of Claim number 2300819/2019 against the Second Respondent centres on a misleading briefing document, about the Claimant's case, sent by Dr Frankel, the Second Respondent's former Post Graduate Dean, to the former health minister Sir Norman Lamb. The document misleads Sir Norman Lamb on, firstly, the substance of several Tribunal witness statements prepared for the hearing of an earlier ET claim made by the Claimant against the Respondents; secondly, the findings of an investigation; and thirdly, the Second Respondent's stated position in that earlier ET claim on the Claimant's serious patient safety issues.

3. In their Grounds of Resistance dated 23 May 2019 in this Claim 2300819/2019 , the Second Respondent did not attempt to present any argument that the Claimant was wrong to say the document was untrue and misleading but argued instead;
 - a) *“Dr Frankel's communication and subsequent meeting with Mr Lamb occurred significantly after Dr Frankel's retirement from the Second Respondent.”*

 - b) *“Dr Frankel's actions in relation to Allegation B were made without the knowledge or approval of the Second Respondent.”*

4. The Claimant has established that Dr Frankel is employed by Imperial College Healthcare NHS Trust as a hospital consultant and the description of him being retired does not give an accurate picture of the reality of Dr Frankel's work status.

New Evidence/Facts

5. The Claimant's need to amend his claim arose as a result of new evidence that was disclosed by the Second Respondent on 8 January 2021 [A bundle of that relevant new evidence is attached and page numbers that follow refer to pages in that bundle].¹].
6. From this new evidence, clear reference is made by the Second Respondent's Medical Director to Dr Frankel, a month before the meeting with Sir Norman Lamb of an intention from the Second Respondent to create a key 'fact sheet' about the Claimant's case (page 3-4). It appears that the fact sheet was to be sent to senior doctors around England. It also appears Dr Frankel was invited by the Second Respondent to have input into that document. There is a clear likelihood that this document will have similarities to the document sent to Sir Norman Lamb.
7. This so called 'fact sheet' about the Claimant's case appears to have been circulated nationwide and has not yet been disclosed in this litigation. The Claimant says that this document (the "fact sheet") should have been disclosed by the Second Respondent as part of standard disclosure in Claim number 2300819/2019 as it relates to the relationship between Dr Frankel and the second respondent at the relevant time and what the Second Respondent was publishing about the Claimant's case. The claimant has advanced an application for specific disclosure dated 10 May 2021 for it to be disclosed (page 29-30).
8. From the disclosure process in January 2021 (conducted only 2 months before the scheduled start of the hearing before postponement in March 2021) , the Claimant had become aware of the following facts that he COULD NOT have been aware of prior to that disclosure :
 - a) On 5 December 2018, some time before Dr Frankel met with and sent his briefing document to Sir Norman Lamb, the HEE Medical Director, Prof Reid contacted Dr Frankel to inform him of HEE's intention to create a 'Fact Sheet' on the Claimant's case (Page3). The purpose of the fact sheet was to tell senior doctors around England what they could say openly about the Claimant's case. For some reason the email chain refers to a potential meeting with Sir Norman Lamb (page3). In the email chain Dr Frankel offers his assistance to Prof Reid on the fact sheet and references his "*unfortunate encyclopaedic knowledge of this case*"(Page 3).
 - b) On 12 December 2018, Dr Frankel clearly informs a second HEE senior manager of the situation and states his intention to "*to produce a short document which describes **our [HEE's]** involvement on a factual basis which may be helpful if this continues to cause problems for HEE. You may want to speak after seeing this*" (Page 5)

¹ Please note of the documents in the bundle those numbered 1,2,7,8 were not before EJ Kelly at the hearing on 19 March 2021, but are added to supplement this application. Document 2 is further evidence of the knowledge of the statement prepared by Dr Frankel before the same was issued to Sir Norman Lamb {of which the Claimant was unaware until after disclosure by the second respondent in January 2021}

- c) a) On 26 December 2018, Dr Frankel sent the very same briefing document that was sent to Sir Norman Lamb in January 2019, to the HEE medical Director Professor Reid and copied it to another HEE medical manager Prof MacLeod. The purpose of the document is clearly stated to be *“a recount on a factual basis the events that occurred in relation to Dr Day’s whistleblowing case from the perspective of HEE. I have not marked this as confidential”* (page 7-8)
- d) It is clear from the disclosure the specific document Dr Frankel sent to Sir Norman Lamb was circulating and being read by employees of the Second Respondent in the same month that it was sent to Sir Norman Lamb (January 2019) (page 9-16). The month before the relevant document was sent to Sir Norman Lamb the document was read by at least two senior HEE doctors including the Medical Director Prof Reid (Page 7-8). The Second Respondent’s more recent claim that they only found out about the document from the Claimant’s March 2019 claim cannot be accurate given the content of their 2021 disclosure .
- e) There is email evidence that on 16 January 2019 the HEE senior doctor, Dr Lacy had read the relevant document and described the document in the following terms;
- (i) *“Andrew its factually incorrect”(page10)*
 - (ii) *“Am extremely concerned at the content of this report which I feel is misleading in parts and have considerable anxiety as to who has ownership of it and where it is distributed.” (page11)*

Grounds for Reconsideration

Ground One

9. It is one thing for the senior management team of a public body, such as the Second Respondent , not to correct a Member of Parliament being misled about a whistleblowing case if it really didn’t know what was going on. It is quite another more serious situation if the public body did know the reality of the situation but chose to not to correct the statement both before and after being made to a serving Member Parliament, Sir Norman Lamb MP. This had a detrimental impact on the Claimant as Sir Norman Lamb was at the time interested in raising concerns about the Claimant’s treatment on his behalf.
10. It is clear the Claimant could have only have presented an ET claim, or sought an amendment to the existing claim , that the Second Respondent knew the reality of the situation but failed to correct a serving MP *after* the Claimant had inspected the evidence contained in the 2021 disclosure and seen the amended Grounds of Resistance from the Second Respondent sent in December 2020. Only then was it evident that the Second Respondent had seen on 26 December 2018 a copy of the statement that was to be sent to

Sir Norman Lamb in January 2019 and prior to the meeting between Dr Frankel, the claimant and Sir Norman Lamb MP in January 2019.

11. The disclosure also demonstrated the document circulating within the Second Respondent the same month as the meeting with Sir Norman Lamb and the same document being described within the Second Respondent as “misleading”. This simply could not have been known by the Claimant prior to inspecting the January 2021 disclosure.
12. It is respectfully submitted the Judge’s reasons do not deal with this assertion and do not explain why that is not the case nor does it refer to any of the evidence set out above. It is submitted that it is in the interests of justice that this issue be addressed

Ground Two

13. The Second Respondent’s failure to disclose the English Deans ‘Fact sheet’ document (see attached application dated 10 May 2021) is yet further indication that the Claimant could not have presented the position set out in the 4th Claim prior to 2021. It is likely this ‘fact sheet’ that was likely to have been sent nationwide and may be similar to , or be based on, the document sent to Sir Norman Lamb.
14. The decision on whether or not the Claimant’s Claim number 2300819/2019 should be amended to include the content of the 4th Claim presented on 4 January 2021 cannot be made properly without sight of this document.

Ground 3

15. On 13 May 2019, Sir Norman Lamb attempted to hold the Chief Executive of the Second Respondent to account on allegations that the Second Respondent misled a Tribunal and on serious disclosure offences by writing to the Chief Executive as follows (Page 17-22)

“ I believe that it is of critical importance that both of these letters dated 5th April 2019 receive a substantive response. If your lawyers are unwilling to respond then, as a public body, it is incumbent upon you to respond, particularly given the amount of public money that has been incurred in fighting a procedural point all the way to the Court of Appeal (and then losing) on the basis of failure to disclose a key contract. I hope very much that you will reply in substance to both of these letters and I look forward to receiving your full response as soon as possible. I should also make clear that I intend to raise these issues in Parliament.”

16. When the substance of Sir Norman Lamb’s letter was not answered. Sir Norman brought the matter up during a debate on whistleblowing in the House of Commons on 3 July 2019 (page 23-25). Another MP and former lawyer had knowledge of the Claimant’s case, Justin Madders MP who stated:-

“Health Education England effectively sought to remove around 54,000 doctors from whistleblowing protection by claiming that it was not their employer.”

Sir Norman Lamb made the following statement in response to Justin Madders MP (emphasis added);

*“Is the hon. Gentleman aware that the contract between Health Education England and the trusts, which demonstrates the degree of control that Health Education England has over the employment of junior doctors, was not disclosed for some three years in that litigation? It was drafted by the very law firm that was making loads of money out of defending the case against Chris Day. **I have raised this with Health Education England, but it will not give me a proper response** because it says that the case is at an end. Does the hon. Gentleman agree that this is totally unacceptable and that it **smacks of unethical behaviour** for that law firm to make money out of not disclosing a contract that it itself drafted?”*

17. It is clear from the 2021 disclosure that the Second Respondent’s senior managers including their Chief Executive had a good working knowledge of the reality of the Claimant’s case from late 2018. This could not have been known to the Claimant prior to 2021.
18. The Tribunal reasoning for allowing the Second Respondent’s Chief Executive to avoid the scrutiny of cross examination is perverse and even more so after a serving MP and former health minister has been refused answers to serious allegations that could potentially evidence serious wrong doing (Page 17-28 and Page 1-2) . (see Sir Norman’s letter to the SRA dated 9 September 2019)

Summary

19. For the reasons set out above this reconsideration application should succeed.
20. A preliminary hearing has already been listed for September 2021. To save cost, the Claimant suggests that this application be determined at the same time – after disclosure of the ‘fact sheet’.

Dr Chris Day

21 May 2021