

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 to Amend Claim

Introduction

1. An order dated 28 May 2021 from the London South Employment Tribunal by Judge Kelly stated the following in respect of the Claimant's application for reconsideration of the decision of 19 March 2021 to refuse to permit him to amend his ET claim 2300819/2019 by the addition of the material contained in his fourth ET claim . That fourth claim had been presented by the Claimant to the ET on the 4 January 2021 before the standard disclosure deadline on the 8 January 2021.

"An application made by the claimant on 21 May 2021 to reconsider the Tribunal's refusal of 19 March 2021 to allow him to amend his claim to include the contents of his fourth claim;

We refuse the claimant's above mentioned reconsideration application on the grounds that there is no reasonable prospect of its being varied or revoked.

If the claimant is actually seeking, by his reconsideration application, to amend his claim in some way that is different to the claims raised in his fourth claim to the Tribunal presented on 4 Jan 2021, the claimant's amendment application will be considered at the Preliminary Hearing on 2 September 2021 subject to:

a. The claimant must by 15 June 2021 write to the respondents setting out the amendment he seeks;

b. The claimant must by 15 June 2021 notify the Tribunal, copied to the respondents, that a full day, not a half day should be allocated to the hearing on 2 September 2021"

2. The Claimant respectfully accepts the opportunity given by the Judge to apply to amend his claim for the reasons set out in this application. The Claimant would also be grateful to take up Judge Kelly's offer of extending the half day hearing to a full day hearing on 2 September 2021.

The application to amend

3. The Claimant applies to amend Claim number 2300819/2019 (“the Claimant’s Claim”). A previous amendment to the claim was permitted at a PH on 13 November 2020.
4. The thrust of the Claimant’s Claim is that both Respondents released false and detrimental statements about the Claimant and his earlier whistleblowing case (Claim 2302023/2014). The material released by the Respondents also included false and detrimental statements in respect of the circumstances of how the previous claim settled in October 2018.
5. Following the standard disclosure process that occurred 8 January 2021 and then subsequently following the responses to various specific disclosure requests (with some material from the Respondents still remaining undisclosed) new evidence and facts have emerged about who in the Respondents were involved and had knowledge of the various false and detrimental statements released by the Respondents. It also provides new evidence to the extent at which the Respondents have circulated false and detrimental statements about the Claimant and his case both internally and externally.

Proposed amendment to claim against First Respondent

6. The Claimant applies to amend the Claimant’s Claim against the First Respondent by the addition of the following paragraphs to his amended grounds of claim based on the new evidence obtained from the 8 January 2021:-

Add new paragraph 37 A:

a. On 4 December 2018, the First Respondent’s Chief Executive, Mr Travis wrote 18 letters to local MPs and public officials enclosing the 23 October 2018 and 4 December 2018 public statements about the Claimant’s case. This material contained untrue and detrimental material (see Grounds of Claim [33]-[37]). Mr Travis stated in his letters that this material would leave the various MPs and public officials “fully briefed about the case” (Page 2(c) to 2(d)).

b. None of these letters were included in the standard disclosure of 8 January 2021 but were obtained by the Claimant on 26 January 2021 as the Second Respondent made reference to them in an internal email that was disclosed on 8 January 2021 as part of standard disclosure (Page 31-33)

c. These letters misled the various MPs/public officials on the scope and nature of the Claimant’s protected disclosures about serious patient safety issues, the results of an external investigation and the circumstances that led to settlement of the case.

Add new paragraph 73A:-

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 (see Grounds of Claim [33]-[37]).

Proposed amendment to claim against Second Respondent

7. The Claimant applies to amend the grounds of the Claimant's Claim against the Second Respondent by the addition of the following paragraphs to his amended grounds of claim based on the new evidence obtained from the 8 January 2021 and subsequently at paragraph 56 A and 74 (c) to (f)

Add new Paragraph 56A:

- (a) The Second Respondent's senior management team allowed and or failed to take reasonable steps to prevent a then serving MP Norman Lamb (now Sir Norman Lamb) being misled about the Claimant's whistleblowing case by a document sent to Norman Lamb by their former senior employee Dr Frankel in January 2019. The Second Respondent's senior management team became aware of the document ,and therefore of its misleading nature through:
 - 1) Prof Reid (Second Respondent's Medical Director) who received the relevant document from Dr Frankel on 26 December 2018
 - 2) Prof Macleod (Second Respondent's Director for Education and Quality and Lead for Deans) who received the relevant document from Dr Frankel on 26 December 2018
 - 3) The HEE Senior Management Team (By the 16 January 2019 4 HEE managers had received the document including the Medical Director (Prof Reid), Director who is lead for Post Graduate Deans (Prof Macleod), London Head of Emergency Medicine (Dr Lacy) and the Service Delivery Manager in London (Gemma Thompson)
- (b) The Second Respondent failed to correct the MP Norman Lamb on the misleading document that was sent to Norman Lamb by Dr Frankel despite a senior doctor from the Second Respondent (Dr Lacy) emailing Dr Frankel and the management of the Second Respondent (Gemma Thompson) to say the document was misleading and factually incorrect.

- (c) The Second Respondent's senior management team (including but not limited to their Chief Executive and Medical Director) failed to correct what either or both Respondents stated publicly about the Claimant's case. This is despite the following appearing in an internal email circulating at CEO and Head of NHS employment level (in Hill Dickinson) in December 2018 (Page2(b);

" HEE keeping to the consistent and clear line that we did not threaten costs is aided by the Trust's current, slightly weasel-worded line, and any subsequent changes they make. The more they twist, the clearer and more trustworthy our position is."

- (d) Despite having knowledge of the Claimant's case and expressing views about strategy about publicity (Page 2(e)), the Second Respondent's CEO failed to provide a proper response to Norman Lamb's letter dated 13 May 2019 (Page 17-22).

Add after paragraph 72 (b) the following

(c) The Second Respondent's senior management team allowed and or failed to take reasonable steps to prevent a serving MP Norman Lamb from being misled about the Claimant's whistleblowing case by a document sent to Norman Lamb by their former senior employee Dr Frankel in January 2019.

(d) The Second Respondent failed to correct the MP Norman Lamb on the misleading document that was sent to Norman Lamb by Dr Frankel despite a senior doctor from the Second Respondent (Dr Lacy) emailing Dr Frankel and the management of the Second Respondent (Gemma Thompson) to say the document was misleading and factually incorrect.

(e) Sending, and/ or failing to prevent the sending of, and/ or failing to correct the same misleading briefing document that was to sent to Norman Lamb in January 2019 to a Prof Macleod on 26 December 2018 who is chair of the UK's Conference of Postgraduate Medical Deans (known as COPMed.) By sending the document to Prof Macleod, this meant that the document was being made available to disseminate within the U.K Conference of Post Graduate Medical Deans

(f) The Second Respondent's senior management team (including but not limited to their Chief Executive and Medical Director) failed to correct what either or both Respondents stated publicly about the Claimant's case.

(g) Despite having knowledge of the Claimant's case and expressing views about strategy about publicity (Page 2(e)), the Second Respondent's CEO failed, without good reason, to provide a proper response to Norman Lamb's letter dated 13 May 2019 .

Factual Background to the Proposed Additional Detriments against the Second Respondent

8. Half of the Claimant's existing claim against the Second Respondent (Claim number 2300819/2019) centres on the Second Respondent's denial that cost threats were used to induce settlement of the Claimant's whistleblowing case and also to force the wording of an agreed statement stating the Claimant agreed that the Respondents had acted in good faith.
9. The other half of the existing Claim 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 Norman Lamb. The document misled 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.
10. 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.
11. 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

12. The Claimant's need to amend his claim arises as a result of new evidence that was disclosed by the Second Respondent on or after 8 January 2021 [A bundle of that relevant new evidence is attached and page numbers in this application refer to pages in that bundle].
13. 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 (pages 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, or be based on, the document sent to Norman Lamb. 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 nature of 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). Disclosure of this document may lead to a need for the Claimant to plead a further detriment.

14. 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 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 (page 3). The purpose of the fact sheet was to tell senior doctors around England what they could say openly about the Claimant's case (Page 3). For some reason the email chain refers to a potential meeting with Sir Norman Lamb. 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 3-4).
 - 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). This second HEE senior manager, Prof Macleod is the senior doctor lead for all Post Graduate Deans around England and a Post Graduate Dean for East Midlands. More significantly, she is also chair of the UK's Conference of Postgraduate Medical Deans (known as COPMeD). Prof Macleod chairs regular meeting and residential conferences with English and U.K Post Graduate Deans.
 - c) On 26 December 2018, Dr Frankel sent the very same briefing document that was sent to Norman Lamb in January 2019, to the HEE medical Director Professor Reid and copied it to 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). The most likely reason for sending the document to Prof Macleod was make the document available within the UK Conference of Post Graduate Medical Deans. This is consistent with Prof Reid's email dated 5 December 2018 to Dr Frankel referring to a fact sheet about the Claimant's case that was to be sent to the nation's Post Graduate Deans.
 - d) It is clear from the disclosure the specific document Dr Frankel sent to Norman Lamb was circulating and being read by several employees of the Second Respondent in the same

month that it was sent to Norman Lamb (January 2019) (page 9-16). The month before the relevant document was sent to Norman Lamb the document was seen 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)*

Why Granting this Application for Amendment is in the interests of justice

First Respondent

15. It is submitted that the First Respondent's CEO should have been open about the fact he had written to 18 local MPs and public officials about the Claimant's case. It is clear that these 18 letters should have been disclosed to the Claimant as part of standard disclosure. The First Respondent's legal representatives make reference to the possibility of an email from the First Respondent to the Health Service Journal being deleted (also not disclosed on 8 January 2021 but referred to by the Second Respondent in an internal email) (Page 32).

16. The Claimant and his family live in South East London. The First Respondent's CEO writing to 18 MPs and public officials local to the Claimant and his family is a clear attempt to damage these influential individuals' view of the Claimant and his credibility. By playing down and distorting the Claimant's protected disclosures, misrepresenting the results of an investigation and the circumstances of settlement there is intent to cause support for the Claimant to drain away and to cause the Claimant detriment.

Second Respondent

17. It is one thing for the senior management team of a national 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, Norman Lamb MP. This had a detrimental impact on the Claimant as Norman Lamb was at the time interested in raising concerns about the Claimant's treatment on his behalf.

18. It is clear the Claimant could have only have sought an amendment to the existing claim against the Second Respondent *after* the Claimant had inspected the evidence contained in the 2021 disclosure. 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.
19. 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.
20. On 13 May 2019, 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.”

21. When the substance of Norman Lamb’s letter was not answered. Norman Lamb 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 stated:-

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

22. 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?”*

23. 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 and how it settled from late 2018. This could not have been known to the Claimant prior to 2021 and clearly makes the Chief Executive's failure to respond to Sir Norman Lamb's letter dated 13 May 2019 far more serious.

Conclusion

24. For the reasons set out above this application to amend the claim by the addition of the paragraphs above should succeed.

Dr Chris Day

15 June 2021