IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

CASE NO. 2300819/2019

BETWEEN:

CHRIS DAY

Claimant

-and-

LEWISHAM & GREENWICH NHS TRUST

First Respondent

HEALTH EDUCATION ENGLAND

Second Respondent

Claimant's Skeleton Argument for Preliminary Hearing
17-19 January 2022

---

1. This preliminary hearing concerns only the Claimant and the 2nd Respondent, Health Education England ('HEE'). It has been listed to determine "whether Dr Frankel was at the point of any alleged detriments from 14 Dec 2018[1] to 8 Jan 2019 a worker or an agent of R2 acting in the course of his employment or with R2's authority either precedent or subsequent" [80, para 2.1].

2. The second preliminary issue to have been determined at this hearing was whether if the answer to the first issue is negative, it was not reasonably practicable for the ET1 claim form to be presented by 1 March 2019 and, if so, whether the claimant could show that the claim form was presented within such further period as was reasonable?[2] The Claimant concedes that it would have been reasonably practicable to have presented the claim form by 1 March 2019 and therefore this issue does not need to be determined by the tribunal.[3]

3. The tribunal has an indexed bundle running to 502 pages. There are witness statements from the Claimant and for the Respondent from: Dr Andrew Frankel (HEE Post Graduate Dean to 30 April 2018); Mr Lee Whitehead (HEE Director of Corporate Accountability and Engagement since February 2021, who was

---

[1] This dated is stated in the PH record to be 'Dec' rather than 14 November 2018 (which is the date of the first detriment by R2, but in any event, the question is really whether Dr Frankel was a worker or agent at the times of his actions in December 2018 and January 2019

[2] [96, para 4.1]

[3] Recorded in an email from the Claimant' solicitor to the Respondent's solicitor dated 25 October 2021

Director of People and Communications at the relevant times); and Professor Wendy Margaret Neely Reid, (HEE Director of Education and Quality and Medical Director).

Disputed evidence before the tribunal

4. There are a number of relevant disputed facts which will have to be resolved by the tribunal upon hearing the evidence and this skeleton primarily addresses the legal issues which arise in relation to the concept of agency.

5. The tribunal will need to make findings of fact about:

    a. Dr Frankel's status in relation to HEE concerning the litigation between the Claimant and HEE during that litigation including the attempts by the Claimant to set aside the settlement agreement which were ongoing during the relevant period of time and discussed between HEE and Dr Frankel;
    b. The communications leading up to 3 December 2018 and 8 January 2019 between Dr Frankel and HEE and what they suggest about Dr Frankel's status in relation to HEE and what they say about HEE's knowledge of Dr Frankel's communications with Norman Lamb;
    c. The communications between Dr Frankel and Norman Lamb (and the Claimant) from 3 December 2018 onwards and whether Dr Frankel appeared to have been holding himself out as acting in part on behalf of HEE or certain HEE employees;
    d. Dr Frankel's motivation for his communications with Norman Lamb (and the Claimant);
    e. The communications after 8 January 2019 between Dr Frankel and HEE and what they suggest about HEE's knowledge of Dr Frankel's communications with Norman Lamb;
    f. All communications relating to the 11 page document produced by Dr Frankel, its initial purpose, its source material, its circulation within HEE and any utility which it had or might have been proposed to have for HEE.

The legal context

6. The Relevant part of the Employment Rights Act 1996 states as follows:

> **47B Protected disclosures**
> (1) 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.
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or
(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a)[4], it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or
(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and
(b) it is reasonable for the worker or agent to rely on the statement.
But this does not prevent the employer from being liable by reason of subsection (1B).

(2) … this section does not apply where—

(a) the worker is an employee, and
(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.

7. Subsection 1A was added by the Enterprise and Regulatory Reform Act 2013, s 19(1) with effect from 25 June 2013. Under the law as it stood before June 2013, the whistleblower provisions (a) contained no specific vicarious liability rules (unlike discrimination law) and (b) created no liability on a fellow employee for subjecting a whistleblower to detriment. The Court of Appeal in *Fecitt v NHS Manchester* [2011] EWCA Civ 1190, [2012] ICR 372 had held that this meant that an employer could only be vicariously liable on ordinary principles and there was no liability on a fellow employee for subjecting a whistleblower to detriment. These subsections were introduced to remedy that situation, thus bringing whistleblowing into line with discrimination law where there can be direct liability on a fellow employee, independently of any liability on the employer (see *Harvey* Q. [671.03] and CIII.8 [98]] in line with Equality Act 2010 ss 109 to 111).

[4] This is therefore not a defence open to a principal in relation to an agent – a distinction described as 'rather surprising' by Underhill LJ in *Unite v Nailard* at para 19 – see further below

8. The knowledge or approval of the employer for the specific act is immaterial - s47B(1C).

Common Law of Agency

9. *Bowstead on Agency*[5] states at paragraphs 1-001, 1-003, 1-0011, 1-0023, 2-001 and 2-074 [footnotes omitted other than where directly relevant, my emphasis in by underlining]:

> 1-001
> (1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.
>
> (2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.
>
> (3) Where such authority results from a manifestation of assent that the agent should represent or act for the principal expressly or impliedly made by the principal to the agent personally, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.
>
> (4) A person may have the same fiduciary relationship with a principal where that person acts on behalf of that principal but has no authority to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent.
>
> **Limits on definition**
> 1-003 But in any case definitions are, however commonplace, of limited utility in law as elsewhere; in particular, reasoning based on presupposed definitions is often suspect. A longer explanation is usually required than can be encapsulated in the definitional form. No one has the monopoly of the "correct" use of this or any other term. The word "agency", to a common lawyer, refers in general to a branch of the law under which one person, the agent, may directly affect the legal relations of another person, the principal, as regards yet other persons, called third parties, by acts which the agent is said to have the principal's authority to perform on the principal's behalf and which when done are in some respects treated as the principal's acts. These acts are probably thought of as most likely to occur in connection with the formation and discharge of contracts and in the disposition of property, but the same idea appears, sometimes in modified form, in many other parts of the law. Even in this context, the term "agency" may be used to refer to: the relationship between the principal and the agent; to the function of the agent with respect to the outside world; or to the sum total of all legal relations involving principal, agent and third parties arising in such situations. But these are only some possibilities: even in legal terminology the term may be used in other senses, and lay usage of the words "agency" and "agent" provides further variations. . . .
>
> . . .
>
> **Apparent authority**
> 1-011 By a further extension, the law may treat a third party dealing with a person who appears to have authority from a principal as entitled, by virtue of the principal's

[5] *Bowstead and Reynolds on Agency* (Sweet and Maxwell, 22nd ed, 2020, incorporating 2021 supplement)

manifestations to that party by words or conduct, to assume that the person in question has such authority, regardless of whether anything has occurred from which the law would draw that conclusion if the matter were in issue only between the supposed agent and the supposed principal. This reasoning takes effect in the doctrine of apparent authority. This applies both where the supposed agent is not authorised to act at all, and also where the agent appears to have a greater authority than was actually conferred.

. . .

Meaning of term "agent", where a question of construction
1-023 When it is necessary, as in statutory interpretation or in the construction of an agreement, to attribute a meaning to the word "agent", it may be said that the central significance of the term agent refers to a person who attracts both the external and internal aspects of agency, for it is here that the complete complex of rules is most fully worked out, and it is because of the external powers that the internal duties are imposed. And where the term agent is used in a statute or formal document, it has been said that it may be presumed that the word is used in this, its proper legal connotation, unless there are strong contrary indications. But there is certainly no rule to that effect, and the term is often used of any form of intermediary, or of persons who simply perform functions for others. Conversely, the context may suggest that the word encompasses only professional agents who are independent contractors. Similarly, the word "authority" in a statute may not require actual authorisation by the principal, but extend to acts, authorised or not, occurring in the performance of authorised tasks.[6] Another common form of words comes from the context of injunctions, which are often issued against "the defendant, its servant and agents". The only direct party will be the defendant, but the wording signals that the defendant needs to control those whom it has engaged to do the enjoined activity, who might be independent contractors that are not exercising any agency functions in the common law sense.

How Agency Arises
2-001
(1) The relationship of principal and agent may be constituted:

(a) by the conferring of authority by the principal on the agent, which may be express, or implied from the conduct or situation of the parties, and may or may not involve a contract between them;

(b) retrospectively, by subsequent ratification by the principal of acts done on the principal's behalf.

(2) A person may be liable under the doctrine of apparent authority in respect of another who is not that person's agent at all; or may be estopped as against a third party from denying the existence of an agency relationship.

What Constitutes Ratification
2-074
(1) Ratification may be express or by conduct.
(2) An express ratification is a manifestation by one on whose behalf an unauthorised act has been done that he treats the act as authorised and becomes a party to the transaction in question. It need not be communicated to the third party.
(3) Ratification will be implied whenever the conduct of the person in whose name or on whose behalf the act or transaction is done or entered into is such as to amount to clear evidence that he adopts or recognises such act or transaction: and may be implied from the mere acquiescence or inactivity of the principal.
(4) The adoption of part of a transaction operates as a ratification of the whole.
. . .

[6] [Footnote 104 in *Bowstead] See Kemeh v Ministry of Defence* [2014] EWCA Civ 91; [2014] I.C.R. 625 at [11] (racial discrimination). See too *Unite the Union v Nailard* [2018] EWCA Civ 1203; [2019] I.C.R. 28.

10. Although an agency is most often created under the law of contract, the relationship between principal and agent is not always contractual. An agent can act gratuitously, without any compensation or reward.

11. An agent who acts beyond the scope of his actual authority, but not beyond the scope of his apparent authority, can still saddle the principal with a liability.

12. An agency can come into being through the conduct of the parties. For example, a principal might recognise, or acquiesce in, the acts of another, and those acts might be consistent with a principal/agent relationship (see, for example, *Targe Towing Ltd v Marine Blast Ltd* [2004] 1 C.L.C. 1082, para 21).

13. An act done by an intermediary on behalf of a disclosed principal but without authority may be treated in law as the act of the principal if subsequently ratified or adopted by that disclosed principal. Ratification in this context has been defined in one case as "the approval after the event of the assumption of an authority which did not exist at the time" (*Harrisons & Crossfield Ltd v London & North-Western Railway Co* [1917] 2 KB 755, at page 758). Ratification has been referred to as a unilateral act of the will, and does not depend on estoppel (though the two doctrines might apply to the same set of facts). There is no need for the principal to communicate the fact of ratification to the third party. Ratification may be constituted not only by express words, but also implied from acts. Silence is incapable of giving rise to implied actual authority without more (*MVV Environment Devonport Ltd v NTO Shipping GmbH & Co KG & Ors* [2020] EWHC 1371 at para 33); but silence or inactivity may be enough to constitute ratification if the inactivity results in a state of affairs which is inconsistent with treating the transaction as unauthorised (*Yona International Ltd v La Réunion Française SA d'Assurances et de Réassurances* [1996] 2 Lloyd's Rep 84 at 106).

Agency within the employment law context

14. There are no cases on the scope of the principal—agent relationship under s47B(1A)(b) but there is case law on the analogous provision contained in s109(2)–(3) EqA, which states that discriminatory acts done by an agent for a principal, with the authority of the principal, are treated as also done by the principal, regardless of whether the act was done with the principal's knowledge or approval.

15. Sub-section 47B(1A) was introduced in order to fill a gap in the protection accorded to whistleblowers. It should be applied in order to align that protection with the protection given under ss109 to 110 Equality Act 2010 the relevant parts of which state:

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

110 Liability of employees and agents
(1) A person (A) contravenes this section if—
(a) A is an employee or agent,
(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

(3) A does not contravene this section if—
(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and
(b) it is reasonable for A to do so.

. . .
(6) Part 9 (enforcement) applies to a contravention of this section by A as if it were the contravention mentioned in subsection (1)(c).

111 Instructing, causing or inducing contraventions
(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought—
(a) by B, if B is subjected to a detriment as a result of A's conduct;
(b) by C, if C is subjected to a detriment as a result of A's conduct;
(c) by the Commission.

(6) For the purposes of subsection (5), it does not matter whether— (a) the basic contravention occurs; (b) any other proceedings are, or may be, brought in relation to A's conduct.

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

(8) A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.
(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating—
(a) in a case within subsection (5)(a), to the Part of this Act which, because of the relationship between A and B, A is in a position to contravene in relation to B;

(b) in a case within subsection (5)(b), to the Part of this Act which, because of the relationship between B and C, B is in a position to contravene in relation to C.

16. This takes the concept of 'agent' beyond the strict sense of a person that has the power to create, change or terminate the legal relations of the principal.

17. Where possible, the law relating to protection of employees should be interpreted in order to provide the protection that the law seeks to give, whether in the context of discrimination or whistleblowing (see *West Midlands v Tipton* [1986] AC 536, at 544D-E; and *Uber v Aslam* [2021] UKSC 5, [2021] ICR 657 at para 70).

18. Underhill LJ examined the liability of a principal for the action of an agent in the context of discrimination law in *Unite the Union v Nailard* at paragraphs 15 to 45:

> 16. I would note two points at this stage about the drafting of section 109 :
> (1) The phrase "with the authority of the principal" in sub-section (2) might at first sight appear to connote a specific authorisation to do the act complained of; and that would not be an unexpected provision since at common law such authorisation is the main basis on which a principal may be liable for a tort committed by his agent (see *Bowstead and Reynolds on Agency* (21st ed) article 90 (2) (a)). But that construction is negated by sub-section (3), which makes it clear that an act may be done with the principal's "authority" for the purpose of sub-section (2) even though he or she has no prior knowledge of it.[7] The effect of the sub-section, having regard to sub-section (3), was considered in *Kemeh* , with which I deal in the following paragraphs: see in particular para. 19.
> (2) The "reasonable steps" defence in sub-section (4) is available only to employers and not to principals. Counsel were unable to offer any explanation for this distinction, which is on the face of it rather surprising.
>
> . . .
>
> 42. The starting-point is the statement of Elias LJ at para. 11 of his judgment in *Kemeh* that the effect of what is now section 109 (2) is that "the principal will be liable wherever the agent discriminates in the course of carrying out the functions he is authorised to do" (see para. 19 above). That formulation effectively equates the circumstances in which a principal may be liable for the acts of an agent with the "course of employment" test governing the liability of employers for the acts of their employees. It may well extend the scope of the liability beyond what would apply at common law[8]; but there is no reason why Parliament should not have chosen to effect such an extension in discrimination cases. (This approach is not of course in any way inconsistent with the Court's insistence that the terms "agent" and "authority" should be construed in accordance with "ordinary legal parlance": that point was being made in response to the argument about whether Ms Ausher was the MoD's agent at all, not to the question of whether it would be liable for her acts if she were.)
>
> 43. If, therefore, the effect of the language of section 109 (2) is to render a principal liable for the acts of his or her agents done in the course of the performance of their authorised

[7] Similar wording is used in the context of whistleblowing in s47B(1C) ERA 1996

[8] [This is Underhill LJ's footnote] Elias LJ in Kemeh thought that the point was moot (see para. 12 of his judgment quoted at para. 18 above). I am bound to say that on the orthodox view as summarised in article 90 of Bowstead and Reynolds I would have thought that the statute does effect an extension: if we were in this case concerned with a common law tort the recognised conditions for liability would not be satisfied. But, as we have now been told authoritatively more than once, "the law of vicarious liability is on the move": see most recently per Lord Reed at para. 1 of his judgment in *Cox v Ministry of Justice* [2016] UKSC 10 [2016] AC 660 (p. 664 D-E).

> functions, I can see no justification for limiting that liability in the way proposed by Mr Segal. An agent may stand in the shoes of the principal in dealing with A, but if while wearing them he treads on B's toes I see no good reason why he should not be liable to B just as much as if it had been A's toes that were crushed: in both cases the wrong is done in the course of performing the authorised functions. The proposition based on *Bowstead and Reynolds* that it is inherent in the principal/agent relationship that the agent be in a position to affect the principal's legal relationship with third parties is fine as far as it goes[9], but it misses the point that we are not here considering whether an agency relationship exists at all but with liability in tort for acts done in the course of it. The same goes for the passages which Mr Segal relies on from *Kemeh* . The question in that case was indeed whether there was any agency relationship between Ms Ausher and the MoD, and that is why it was relevant for Elias LJ to point out that she had no authority to act on its behalf as regards third parties. But that is not the question here. *Heatons Transport* is even less relevant. In truth its only value is to the Claimant, since it confirms – though in fact this is not contentious – that the kind of dealings in the context of which the harassment of the Claimant took place were functions which the lay officials were performing on behalf of the Union.
> . . .

Conclusions to draw from the common law and employment law approaches to Agency

19. The phrase 'with the authority of the principal' in s47B(1B)(b) does not require the principal to specifically authorise the act complained of; (see Underhill LJ in *Nailard*, para 16).

20. Apparent authority may extend liability beyond ostensible authority (see *Bowstead,* para 1-011 ans 2-001 (2).

21. An agency / principal relationship can come into being retrospectively, by subsequent ratification by the principal of acts done on the principal's behalf. (see *Bowstead,* para 2-001 (1)(b)).

22. Ratification may take place by silence if the inactivity results in a state of affairs which is inconsistent with treating the transaction as unauthorised (*Yona* para 106).

23. In an employment context, the scope of liability of a 'principal' for the acts of an 'agent' may well extend the beyond what would apply at common law (see Underhill LJ in *Nailard*, para 42 in the context of *Tipton*, 544D-E and *Uber*, para 70).

How can these principles be applied to the facts of this case

24. The Claimant contends that Dr Frankel gave the impression to the Claimant and Norman Lamb that he had the authority to communicate on behalf of HEE (or at least certain HEE employees); and in the alternative:

---

[9] [This is Underhill LJ's footnote] Though it is in fact qualified, as noted at para. 23 above: indeed at para. 1-004 the authors note that that the aspect of the definition relating to affecting legal relations with third parties might not be apt to "other phenomena of agency reasoning such as its application in tort".

a. Dr Frankel was sufficiently authorised by HEE (or at least certain HEE employees) to correspond with and speak to Norman Lamb on behalf of HEE to make him HEE's agent for the purposes of s47B(1A) ERA 1996; and / or
b. Dr Frankel's communications with Norman Lamb were subsequently sufficiently ratified by the actions or omissions of HEE and / or its employees to make him HEE's agent for the purposes of s47B(1A) ERA 1996.

25. If the tribunal is satisfied that either of those contentions is made out, then Dr Frankel was acting as the 'agent' of HEE to the degree necessary to satisfy s47B(1A) ERA 1996.

Andrew Allen QC
Outer Temple Chambers
11 January 2022