

BETWEEN:

CHRIS DAY

Claimant

-and-

LEWISHAM & GREENWICH NHS TRUST

First Respondent

HEALTH EDUCATION ENGLAND

Second Respondent

Claimant's Submissions for Preliminary Hearing
17-19 January 2022

1. These submissions are to be read in addition to the Claimant's skeleton argument. They primarily address the evidence but also expand upon the skeleton argument in relation to the argument on ratification.
2. The tribunal has heard evidence 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 Director of People and Communications at the relevant times); and Professor Wendy Reid, (HEE Director of Education and Quality and Medical Director).

Necessary relevant findings - overview

3. In relation to Dr Frankel's approach to Norman Lamb by email dated 3 December 2018, his subsequent communications to Norman Lamb and his meeting with Norman Lamb on 8 January 2019, the overarching question is whether Dr Frankel was acting as HEE's agent with their authority. To make that decision, the tribunal must determine:
 - a. Whether HEE sent Dr Frankel to approach Norman Lamb (in that scenario, it is not necessary for the establishment of agency status for HEE to have specifically authorised his every action¹);
 - b. If not:
 - i. whether HEE knew in advance; or
 - ii. whether HEE learned of it at some point prior to their knowledge of the Claimant's claim;

¹ see Underhill LJ in *Nailard*, para 16 (authorities bundle [224])

If (i) or (ii) whether Dr Frankel's approach to Norman Lamb² was ratified by HEE.

Submissions on evidence before the tribunal

4. Addressed below are findings of fact that the tribunal is encouraged to make. These initially address the points raised at para 5 of the Claimants skeleton and then other relevant evidence.

Dr Frankel's status in relation to the litigation

5. There are two questions here – (a) whether Dr Frankel told the Claimant at the Norman Lamb meeting that he was responsible for legal decisions in the case; and (b) whether that was indeed the case. There is a direct conflict of evidence between the Claimant and Dr Frankel as to whether Dr Frankel told the Claimant and Norman Lamb on 8 January 2019 that he (Dr Frankel) was the medical manager running the defence of the litigation and that he was the person responsible for the decisions taken to defend the case; and that he was the person responsible for giving instructions at the 2018 tribunal (C's w/s para 54 and 55). Dr Frankel denied this in oral evidence. Dr Frankel's evidence in general as to his involvement in the case is contradictory and unreliable – on the one hand he is the person with 'encyclopaedic knowledge on the case' [245] but on the other hand he repeatedly said in oral evidence that his knowledge was only about him and his team and the actions they took between June and December 2014. He also said that his 11 page report was limited in the same way but the report itself refers to matters from 2011 [299] and in 2015 [300] and indeed 2018 [299, 300] and is repeatedly expressed in a way that presents the report as an HEE position rather than an individual view from Dr Frankel (see further below). The tribunal is requested to reject Dr Frankel's evidence on this point.

The communications leading up to 3 December 2018 and 8 January 2019 between Dr Frankel and HEE

6. Dr Frankel was regarded as part of the HEE family as described by Prof Reid [440]:
 - a. His professional links with HEE continued after the end of his secondment on 30 April 2018 and included:
 - i. the continuing duty of confidentiality in clause 24 of the secondment agreement [103];
 - ii. his role in relation to the ongoing litigation;
 - iii. assisting with activities relating to the GMC visit and draft report up to 5/6/18 [109-110], [111-114], [115];
 - iv. in relation to his role on CPSA [117] including supporting his replacement over the next 12 months; and at least until August 2018 representing HEE [126];
 - v. input in relation to the Lancet Commission Submission in liaison with his replacement [125];
 - vi. in September 2018 in relation to an upcoming presentation on 3/4/19 where he asks to do it on behalf of HEE and there is an

² Note again that the authority or ratification need only cover the general act of approaching Norman Lamb – it need not descend into the specific actions taken – see s47B(1B and 1C)

agreement to do it as a 'double act' with someone from HEE [128-129];

- vii. in his sitting on ARCP panels since 30 April 2019³;
 - viii. in his continuing role at Imperial as a clinical supervisor and an educational supervisor at Imperial (AF w/s para 51(b)) pursuant to the LDA [105] which regulates the relationship between HEE and Imperial.⁴
- b. He was not treated as a departed employee. He was forwarded email chains that included discussions at a senior level about strategy and even legal advice [245-254, 255-257, 326-331];
 - c. HEE and Dr Frankel deny that anyone at HEE had knowledge of Dr Frankel's communications to Norman Lamb prior to his meeting on 8 January 2019 – however they cannot adequately explain why out of the blue, Prof Reid in an email to Dr Frankel at [245] refers to the possibility of her meeting Norman Lamb.

The communications between Dr Frankel and Norman Lamb (and the Claimant) from 3 December 2018 onwards

- 7. Contrary to Dr Frankel's repeated assertion that he was speaking for himself, in internal HEE emails and in communications with Norman Lamb, he repeatedly refers to HEE's position in the 3rd person plural (using we, us and our in the present tense in a large number of communications [246, 255, 264, 269, 301, 302, 345, 414] aligning his position with that of HEE). Dr Frankel also uses phrases such as:
 - a. 'both sides of the story [166] – which he (eventually) accepted in oral evidence meant that he was offering to put HEE's side of the story to Norman Lamb;
 - b. 'I would ask you only to look objectively and independently at my documentation describing what happened from HEE's perspective' [290]
 - c. 'we (HEE SL) did not cause Chris detriment' [292]
 - d. 'I initially wanted to focus on what I believe are the core matters that relate to how I (representing HEE) managed Chris' [292]
 - e. 'members of the organisation I work for' – which he accepted was a reference to HEE [345]
 - f. 'we genuinely did not believe' and never have believed that we [HEE] caused Chris detriment' [345].

Dr Frankel's motivation for his communications with Norman Lamb (and the Claimant);

- 8. His manner of expression in his communications certainly gave the impression to the Claimant that Dr Frankel was holding himself out as communicating an HEE position – despite his repeated disclaimers. He had expressed his desire to repair HEE's reputation with trainees [133] and that his concern was 'that Trainees should appreciate that their educational leads do and always have supported them in relation to potential issues within the trust. The damage that

³ It was accepted by Prof Reid in oral evidence that HEE would be responsible for the actions of ARCP panellists *as panellists*

⁴ It was an LDA between HEE and R1 which enabled the Claimant to establish the worker status of junior doctor trainees in relation to HEE

has occurred because of this loss of trust has had implications on patient safety' [166]. He said in oral evidence that his motivation changed over time (although it was unclear what it had changed to).

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;

9. HEE and Dr Frankel deny that anyone at HEE had knowledge of Dr Frankel's communications to Norman Lamb after his meeting on 8 January 2019 and prior to receipt of the Claimant's ET1 in this claim – however they cannot adequately explain why on 15 January 2019 Dr Frankel refers to Prof Reid potentially meeting Norman Lamb at [417]; or why Jemma Thompson considers that Dr Frankel will know whether it is likely that Prof Reid will meet Norman Lamb [416] – which Dr Frankel described as 'odd' in his oral evidence.⁵

Communications relating to the 11 page document

10. On 5 December 2018, Prof Reid tells Dr Frankel that 'we are putting together a fact sheet for Deans and this will include what they can say openly'. He offers his input on the fact sheet and she thanks him [245]. On 12 December 2018 he tells her and Prof MacLeod that 'I was planning to and will produce a short document which describes our involvement' [255]. Neither of them suggest that he should not do so. On 20 December 2018 Dr Frankel wrote to Dr Lacy telling her that he was 'preparing a briefing for Wendy' from our perspective and asking for information which Dr Frankel accepted in oral evidence, he would only have been entitled to if he had authority from Wendy Reid to ask for it [264]. On 26 December 2018 he sends the document to Prof Reid cc'd to Prof MacLeod [269] described as being 'from the perspective of HEE' ... 'how we were involved' ... 'our responses' ... 'where we could have done better'. Neither Prof Reid nor Prof MacLeod challenged his action in preparing such a document or the content of his document [270-280]. After sending a later version of the document to Prof Reid on 12 January 2019 [400] and then a further iteration to Dr Lacy and Jemma Thompson on 15 January 2019 [326], Dr Frankel refers in an email exchange about the document to 'an external version which is significantly shorter'. In oral evidence he volunteered that this external version was the Deans' fact sheet (referred to by Prof Reid back at [245]). His oral evidence was that by 'external version' he was referring to the Deans' fact sheet. He went on in oral evidence to say "I knew there would be something produced that may be an external version and that's what I was referring to. I wasn't referring to my document." The tribunal is asked to consider whether in answering Jemma Thompson's question about Dr Frankel's document 'is this going to be an external document' [417] with the words 'There is an external version which is significantly shorter', Dr Frankel can have been referring to anything other than a version of his document. It is submitted that he cannot. If that submission is accepted, it links Dr Frankel's production of his document to Prof Reid's Deans' fact sheet; that cloaks Dr Frankel's work in preparing that document (which is sent to Norman Lamb in substantially the same form as distributed internally) with HEE's authority – which goes to the agency point; and it has an implication for the credibility of his evidence generally.

⁵ See further below at para 15(c) of this document

Other Relevant Evidence

11. HEE's position on 15 October 2018 was that it should not be *seen* to promote Dr Frankel speaking externally about the case but that it did not want him to feel unsupported or alone [133].
12. Dr Frankel felt that he had 'closure' on 17 October 2018 [134]. Something changed prior him contacting Norman Lamb on 3 December 2018 [165-166]. He was unable to adequately explain to the tribunal what that something was. The tribunal is requested to take into account that on the morning of the same day (3 December 2018) there had been internal communication within HEE [507-510] in response to a Sunday Telegraph article and that both behind the scenes action was mentioned by Prof Reid [508] and Norman Lamb's name came up [507]. The Claimant suggests that what happened was that Norman Lamb was speaking out trenchantly about HEE as reported in the Telegraph [160-161] and it was 'becoming damaging' and Prof Reid was being asked about the case at events [508]. HEE, in line with Prof Reid's preferred 'behind the scenes' approaches to the GMC and Presidents [508], and in accordance with its preferred strategic stance of not picking a fight publicly with the Claimant, sent Dr Frankel to attempt to neutralise Norman Lamb by providing him with information to counter the information he had received from the Claimant. That Dr Frankel completely failed in this endeavour does not mean that this was not the plan.
13. The Respondent will say that this is a scenario denied by those Respondent witnesses called to the tribunal. However when assessing the credibility of those witnesses, the tribunal is asked to consider what is more likely – the Claimant's version – which is that HEE used Dr Frankel to rid itself of the attentions of a troublesome MP without being seen to do so publicly or leaving a documentary track record – or the Respondent's version that Dr Frankel in meeting Norman Lamb; in preparing an 11 page document [299-309] that must have involved a very considerable amount of work as it was based on a vast trial bundle, numerous witness statements and other material; and at [264] in seeking personal information about the Claimant from Dr Lacy without authority (but giving the impression that he had such authority), was acting stupidly (Dr Frankel's term) and secretly, behind the back of everyone at HEE, entirely of his own accord, knowing that if he had asked permission it would be refused, repeatedly giving out somewhat theatrical disclaimers that he hadn't spoken to anyone at HEE and that they didn't know what he was doing and that he was acting on his own account. If he was on such a solo secret mission, Dr Frankel would not have repeatedly expressed himself in terms that suggested that he was speaking as a representative of HEE and with a position that aligned himself with HEE. Dr Frankel was given the opportunity in oral evidence to explain what he did on his version of events and he failed to give any comprehensible explanation.
14. This ongoing close relationship with HEE (including ongoing tasks such as the preparation of the 11 page document to assist with the Deans' fact sheet) makes it more likely that Dr Frankel's approach to Norman Lamb was part of the behind

the scenes approach adopted by HEE in relation to its concerns about Dr Day and Norman Lamb in which it did not wish to be *seen* to assist Dr Frankel [508, 133].

Evidence particularly relevant to ratification

15. If HEE did not send Dr Frankel to Norman Lamb, then there is evidence that they subsequently became aware of his request to meet Norman Lamb and / or the subsequent meeting:
 - a. On 5 December 2018, out of the blue and without any reference in the email chain to Norman Lamb or a meeting with Norman Lamb, Wendy Reid emailed “Thanks Andrew - if I have to meet with Norman Lamb I will be in touch for a tutorial!”.
 - b. On 15 January 2019, Dr Frankel emailed Jemma Thompson stating “I have sent this to Wendy as an aide memoir particularly if she does meet Norman Lamb”. He could not in oral evidence explain why he had made that reference to meeting Norman Lamb at that time.
 - c. On 15 January 2019, Jemma Thompson replied to Dr Frankel asking him “Is it very likely that she will meet with Norman Lamb?”. The point here is not the reference to Norman Lamb – which is a response to Dr Frankel’s mention of Norman Lamb in the previous email – but rather the words ‘Is it very likely’ – which suggests that HEE considered that Dr Frankel would have knowledge about the likelihood that Prof Reid would meet with Norman Lamb (described as odd by Dr Frankel in his oral evidence). This suggests that HEE knew that Dr Frankel had met with Norman Lamb.
 - d. If HEE became aware of the interaction between Dr Frankel and Norman Lamb after 3 December 2018, it made no disavowal of Dr Frankel to either the Claimant or Norman Lamb.
 - e. There were two attachments to the letter sent by Norman Lamb to the Chief Executive on 30 April 2019 [458-459] both letter from the Claimant to Hill Dickinson, solicitors for HEE, dated 5 April 2019 which expressly made reference in one document to Dr Frankel having sent a document to Norman Lamb in January 2019 and in the other to there having been a meeting between Dr Frankel and Norman Lamb ‘earlier this year. In the response at [462] the meeting is referred but there is no disavowal of Dr Frankel by HEE.

Absence of Evidence

16. It is noteworthy that Prof MacLeod was not called as a witness by HEE.

Additional Submissions on Ratification

17. The Respondent has asked for more clarification on the Claimant’s legal argument about ratification.

18. The starting point is that in interpreting the word 'agent' in s47(1A)(b) the tribunal should 'extend the scope of the liability beyond that which would apply at common law' in line with the approach to be taken in discrimination cases.⁶

19. It is accepted on behalf of the Claimant that silence is incapable of giving rise to implied actual authority without more.⁷

20. Bowstead states:

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.

...

21. 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).

22. The Plaintiff in *Yona* lost a timber concession in Liberia resulting from the overthrow of the government and Yona sued those it said were its insurers – the 1st, and 4th to 19th Defendants who formed the PARIS pool – a vehicle for writing political risk insurance. The second Defendant, UIC, was the agent. UIC offered insurance by PARIS to the Plaintiff but a question arose as to whether PARIS had given UIC authority to make the offer – or whether it adopted the offer (that is the ratification point in that case) [Headnote, 141] (internal page 84). Moore-Bick J held that [Headnote, 142] (internal 85 - at paras 3, 4, 5) that UIC's offer

⁶ See Underhill LJ at para 42 of *Nailard* – referred to in more detail at para 18 of the Claimant's Skeleton Argument

⁷ See para 13 of the Claimant's Skeleton Argument

was unauthorised and that becoming aware of the unauthorised offer was insufficient to require PARIS to expressly disavow UIC's offer.

23. At [162] (internal 105) – letter (b) the question identified was whether PARIS adopted UIC's offer of the [insurance] pool. In answering that question, Moore-Bick J at [163 (internal 106 highlighted passage) stated:

The essence of ratification is a decision by the principal to adopt the unauthorized act as his own (see Bowstead on Agency, 15th ed., art. 17, p. 68). It does not therefore depend on communication with or representation to the third party and is thus in principle distinct from estoppel, but since the intention to ratify must be manifested in some way it will in practice often be communicated to and relied upon by the other party to the transaction. Ratification can no doubt be inferred without difficulty from silence or inactivity in cases where the principal, by failing to disown the transaction, allows a state of affairs to come about which is inconsistent with treating the transaction as unauthorized. That is probably no more than a form of ratification by conduct. Where there is nothing of that kind, however, the position is more difficult since silence or inaction may simply reflect an unwillingness or inability on the part of the principal to commit himself. For that reason it will not usually be sufficient to evidence ratification, nor will it amount to an unequivocal representation sufficient to give rise to an estoppel.

24. This opens the possibility of ratification by silence if the inactivity results in a state of affairs which is inconsistent with treating the transaction as unauthorised.

How does this apply to our case?

25. Ratification is potentially relevant if the tribunal's findings lead it to conclude that HEE did not know of Dr Frankel's approach to Norman Lamb before it happened but found out about it later and did nothing about it. The question is whether their failure to do anything about it is enough to constitute ratification? This is of course not the Claimant's primary case, which is that Dr Frankel was given this task by HEE.
26. It is only if by failing to disavow the transaction, there is a state of affairs that is inconsistent with treating the transaction as unauthorised that the failure to disavow can constitute ratification. The language of commercial transactions does not lend itself easily to the employment law context.
27. The particular circumstances of the employment law relationship is relevant. The duty of care between two commercial organisations who may enter into a commercial relationship (e.g. client and insurer) is different from that between employer and worker regulated by statutory employment rights.
28. Dr Day is not a stranger to HEE, in the way that a company with Liberian logging interests is a stranger in relation to a potential insurer. Dr Day has established former worker status and he had an entitlement – a right - not to be treated in a detrimental fashion by HEE. Therefore they have a corresponding duty to him to prevent such wrong being done to him. HEE were aware of the document sent to

Norman Lamb on 7 January 2019, having been sent a copy on 26 December 2018.

29. Therefore if we, for the purposes of this preliminary hearing presume that Dr Frankel's actions towards the Claimant including in his communications to Norman Lamb, the content of his 11 page report and in the meeting with Norman Lamb report were detrimental on grounds of whistleblowing, I say that HEE have the duty to disavow (as Yona terms it) and that the 'something more' is that former worker status of Dr Day – which created a state of affairs that is inconsistent with treating the transaction as unauthorised

Andrew Allen QC
Outer Temple Chambers
19 January 2022