

BETWEEN:

CHRIS DAY

Claimant

-and-

LEWISHAM & GREENWICH NHS TRUST

First Respondent

HEALTH EDUCATION ENGLAND

Second Respondent

Claimant's Position Statement for Preliminary Hearing
17-19 January 2022

1. The need for this position statement is largely provoked by the incorrect information contained in HEE's Skeleton Argument dated 10 January 2022. There is also some housekeeping information including about additions to the bundle and a proposed timetable towards the end of this position statement.
2. The only conceivable objective of many of the assertions made in HEE's document is to diminish the Claimant and his credibility in the eyes of the tribunal. Therefore there is a need to correct the manifold errors in what purports to be an account of the litigation thus far.
3. It is sad that there is a need for such a document but HEE's stance is entirely consistent with the treatment of the Claimant by HEE throughout this litigation. HEE have grasped at any means of avoiding the substantive issues. This preliminary hearing itself represents an attempt by HEE to wriggle free from the issues to be determined at the hearing due to start on 20 June 2022. It echoes the expensive, time consuming and ultimately fruitless stance adopted by HEE in relation to the Claimant's worker status over the period of 4 years between 2014 and 2018.¹

Contentious matters in HEE's skeleton

4. In relation to para 11, there is a witness order in relation to Sir Norman Lamb (to attend the substantive hearing) and there is an approved witness statement from Sir Norman Lamb, who will be giving evidence at that hearing. Witness statements have not yet been exchanged in relation to that substantive hearing.

¹ The litigation history relating to this matter is set out at para 5 of the amended PoC [22]

There has never been an application for such a witness order in relation to this preliminary hearing.

5. Paragraphs 15 to 60 are irrelevant, given that the Claimant conceded the time point by email to HEE dated 25 October 2021 (confirmed in the email to the tribunal dated 13 January 2022).
6. Paragraph 16 is not agreed. The Claimant ceased to be a worker of the Second Respondent on 10 September 2014 when Dr Frankel deleted the Claimant's National Training Number. It is not accepted this occurred as a result of the Claimant's email of resignation dated 16 July 2014 which he made on request from Guy's and St Thomas NHS Trust. The Claimant's subsequent letter to Dr Frankel dated 7 September 2014 does not amount to a request from the Claimant for Dr Frankel to delete the National Training Number or to terminate his relationship with the Second Respondent.
7. Paragraph 18 neglects to mention that the first trip to the EAT and then the Court of Appeal (which was ultimately successful) was necessitated by HEE's incorrect litigation stance (that it was not responsible for detriments to whistleblowing junior doctors); and upon the very late disclosure of an outdated but relevant document, which ultimately led HEE to concede the point that it had spent 4 years and hundreds of thousands of pounds defending and to pay £55,000 in costs to the Claimant.²
8. Paragraph 19 of the skeleton argument submitted by HEE's 4th barrister fails to explain the significance of the number of lawyers used by the Claimant. The Claimant now has the support of the BMA and is instructing the BMA approved solicitors but during the history of this litigation, there have been times when the Claimant had to represent himself and other times when he had to resort to crowd-funding his case.
9. Paragraph 23 is incorrect. Jane Dann and Hans Sauer's evidence was also given to the tribunal.
10. Paragraphs 24 to 26 set out a contested version of events which is the subject of the substantive hearing to be determined in June 2022. The accounts of the different lawyers involved are not consistent.
11. In paragraph 29, it is stated that the Claimant made complaints to the BSB about Mr Milsom. That is not correct.
12. In relation to paragraphs 54 and 55, it is my recollection that HEE did state that they were intending to call Dr Frankel as a witness. Whether that amounted to a 'guarantee' is a rather fine point.

Tribunal's approach to the substantive issues at this preliminary hearing

² The actual version of the document relevant to the First and Second Respondent, drafted by the law firm representing the Second Respondent was obtained by a journalist in 2019. This is now subject to a wasted cost application (see Order EJ Andrews dated 13 November 2020 [71, para 1])

13. In relation to the substantive issues:

- a. Despite the wording of the settlement agreement of 15 October 2018, in this claim, HEE initially would not admit that the Claimant had made protected disclosures to HEE. At the PH on 13 November 2020 HEE subsequently accepted that the Claimant had made protected disclosures. It is not therefore in dispute that he is a 'whistleblower';
- b. For the purposes of this hearing, the tribunal must presume that the Claimant was subjected to detriments by HEE and Dr Frankel on:
 - i. 12 November 2018 [139];
 - ii. 3 December 2018 [165-166];
 - iii. 7 January 2019 – the 11 page document [299-309];
 - iv. 8 January 2018 – at the meeting;
 - v. 8 January 2018 – email [290].
- c. The tribunal must also at this preliminary hearing presume that those detriments were done on the ground that the Claimant had made a protected disclosure.
- d. The remaining question for the tribunal at this hearing is whether Dr Frankel was acting as an agent of HEE in December 2018 and January 2019.
- e. The Claimant considers that it is artificial to seek to determine the agency point without considering all of the circumstances including the content and nature of the detrimental communications. The Claimant opposed the determination of this issue as a preliminary point; a stance with which the tribunal initially agreed [67, para (6)] and then disagreed [79, para (7)(e)].

Other matters

14. The version of the amended Particulars of Claim in the 1st version of the Bundle sent to the tribunal is not the final version of that document as approved by EJ Andrews on 13 November 2020 as it includes the two paragraphs that she did not approve (paras 47 and 48). That is why the references in the amended Grounds of Resistance do not match the paragraph numbers in the amended Particulars of Claim [this may have been corrected prior to the start of the hearing].
15. The Claimant seeks to add to the bundle an email chain dated 3 December 2018 which includes two of HEE's witnesses and which is clearly relevant to the issue of HEE's attitude towards Norman Lamb at the time at which Dr Frankel was seeking to speak to Norman Lamb. The email chain is 4 pages long and can be supplied by the Claimant paginated from the end of the existing bundle at pages 507 to 510. The document is clearly relevant. It is dated on the morning of the same day as the approach made by Dr Frankel to Norman Lamb. Norman Lamb is referred to by name in the email chain. The subjects of the email chain include a concern about the undermining of junior doctors' belief that they can

whistleblow with confidence – which is one of the concerns raised by Dr Frankel in his subsequent communications with Norman Lamb [166, 298]. The document has been before the parties for a long time.

16. The version of the HEE Quality Visit, led by the Second Respondent’s Dr Lacy on 15 October 2014, in the bundle at [499-502] is incomplete and the pages appear in random order. It does not include all of the matters referred to by the Claimant in his witness statement at paragraph 68. The Claimant seeks to add to the full 3 page cover letter and 14 page document to the bundle and can supply the tribunal with a full version in the correct order – paginated to be inserted at the end of the bundle from pages 511 to 527. The full document has been in the possession of both parties for a considerable time and was part of the trial bundle for the 2018 hearing.

17. The Claimant has identified some typos and missing page references in his witness statement. These have been notified to the tribunal (copied to the Respondent) by email on 14 January 2022 and for ease of reference, they are repeated below:

1. at paragraph 8, line 1 “conservable efforts” should read “considerable efforts”
2. the letter from Sir Norman Lamb MP to the then newly appointed Secretary of State for Health, Matt Hancock, dated 26 July 2018, referred to at para 15 is to be found at pages 503/4 of the bundle
3. the letter from Sir Norman Lamb MP and Justin Madders MP to Matt Hancock dated 17 December 2018, and referred to at para 20 of the claimant’s statement is at pages 505/6 of the bundle
4. at para 58, the quote for the email should end at “is a perfect report”. It should then read “In the email I set out paragraph 147 and 148 of my 2018 statement

Timetabling of the hearing

18. The Claimant proposes:

Date	Activity
Mon 17 Jan 22 morning afternoon	Preliminary matters and reading C’s evidence
Tues 18 Jan morning and afternoon	R’s evidence
Wed 19 Jan morning afternoon	Submissions - limited to 45 mins each Deliberation, Judgment

Reading List

19. The tribunal is encouraged to read:
- a. The amended pleadings;

- b. The witness statements;
- c. Pages [99 (paras 1 to 5), 103 (para 24), [109-110, 111-114, 115, 117, 126, 132-134, 162-166, 245-254, 255-257, 264, 269, 288-298, 299-309, 324-325, 326-331, 399-400, 414-418, 438-439, 440, 458-459, 463, 503-504, 505-506, 507-510].

Andrew Allen QC
Outer Temple Chambers
17 January 2022