



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE K ANDREWS
sitting alone

BETWEEN: Dr C Day
Claimant

and

Lewisham and Greenwich NHS Trust (1)
Health Education England (2)
Respondents

ON: 17-19 January 2022

Appearances:

For the Claimant: Mr A Allen, Queen's Counsel

For the Second Respondent: Mr D Basu, Queen's Counsel

RESERVED JUDGMENT

The claim against the second respondent is dismissed.

REASONS

1. This preliminary hearing was held to determine the limited issue of whether Dr A Frankel was acting as agent for the second respondent at the time of certain of his actions in December 2018 and January 2019 (the other matters for which this hearing was originally listed to determine having been resolved). The first respondent was not present at this hearing.
2. There is a very significant and keenly litigated history to these proceedings. I emphasised during the hearing and do so again here, that the merits or otherwise of those underlying matters are not relevant to the current issue before me.

Evidence & Documents

3. I heard evidence from the claimant and also for the second respondent I heard from:

- a. Dr A Frankel, now Consultant Nephrologist at Imperial College Healthcare NHS Trust but Postgraduate Dean for the second respondent from May 2013 to 30 April 2018;
 - b. Mr L Whitehead, now Director of Corporate Accountability and Engagement but Director of People and Communications at the relevant time; and
 - c. Professor W Reid, Director of Education and Quality and Medical Director.
4. I also had an agreed bundle of documents before me.
 5. Both Counsel had submitted written arguments and made very helpful oral submissions on the conclusion of the evidence.

Relevant Law

6. Section 47B of the Employment Rights Act 1996 states as follows:
 - (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. ...
 - (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. The Supreme Court has recently restated that the modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose (*Uber v Aslam* [2021] ICR 657 at para 70).
8. The principal text on the law of agency, *Bowstead and Reynolds on Agency* (Sweet and Maxwell, 22nd ed), at paragraph 1-001 states the basic position as follows:
 - (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.

Mr Allen confirmed in submissions that the claimant is not relying upon apparent authority.

9. And at paragraph 2-001 as to how agency arises :

(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.

10. And at paragraphs 2-054, 2-063 & 2-071 as to ratification:

2-054: Every unauthorised act, whether lawful or unlawful, which is capable of being done by means of an agent (except an act which is in its inception void) is capable of ratification by the person in whose name or on whose behalf it was purportedly done.

2-063: It is clear that ratification only applies where the person whose act is in question professed or purported at the time of acting to do so as agent and to have authority to bind the principal.

2-071: In order that a person may be held to have ratified an act done without his authority, it is necessary that, at the time of the ratification, he should have full knowledge of all the material circumstances in which the act was done, unless he intended to ratify the act and take the risk whatever the circumstances may have been.

11. And at paragraph 2-074 as to what constitutes ratification:

(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.

The claimant accepts that silence is incapable of giving rise to implied authority without more 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 Reunion Francaise* [1996] 2 Lloyd's Rep 84).

12. I was referred to various authorities on the law of agency by both Counsel. None of these were decided specifically in the context of the provisions of section 47B but *Ministry of Defence v Kemeh* [2014] ICR 625 and *Unite the Union v Nailard* [2019] ICR 28 were decided in the context of equalities legislation and therefore analogous.
13. Of those two authorities, *Kemeh* is particularly useful as it was a case that addressed whether there was an agency relationship and confirmed that the use of the terminology of agency in legislation must be interpreted in the same way as that terminology would be understood in the common law of agency (para 70 - decided of course before *Uber*, above). In *Nailard* the Court considered liability in tort for acts done in the course of such a relationship once established, although it did usefully confirm that the words 'with the authority of the principal' in section 109 of the Equality Act 2010 (analogous to the words 'with the employer's authority' at section 47B(1)(A)(b)) does not connote a specific authorisation to do the act complained of.

Findings of Fact

14. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts.

15. Background

16. The claimant was employed as a Doctor in training by the first respondent until his resignation in 2014. He brought Tribunal claims in 2014 and 2015 against the same respondents to this claim. In the course of those claims it was established that he also had a worker/employer relationship with the second respondent (referred to simply as the respondent for the remainder of this Judgment) which similarly came to an end in 2014.
17. The 2014 & 2015 claims settled in 2018. The terms of that settlement included an agreed position statement but no confidentiality clause. The claimant subsequently but unsuccessfully applied for the terms of that settlement to be set aside.

18. The 2018 hearing

19. Dr Frankel was seconded to the respondent as its Postgraduate Dean for South London between May 2013 and April 2018 and was involved in the events underlying the 2014 and 2015 claims. He provided a witness statement and was due to give evidence in the 2018 hearing.
20. That hearing had been listed for 20 days but the settlement was reached after the claimant's evidence. Dr Frankel had attended every day of the hearing (except one). The claimant says that at a later meeting (considered below) with Mr Norman Lamb MP (now Sir Norman Lamb), Dr Frankel confirmed he had been the instructing client for the respondent's legal team at that hearing and agreed the terms of the settlement. Dr Frankel denies

that. His evidence was that when the claims were first submitted the respondent's central and legal team managed the process and that at the hearing he was an unpaid 'resource' for the respondent, he listened to the evidence and commented where appropriate. He remembered that there were discussions regarding settlement but that he was not consulted on the wording and there were discussions about that between the respondent's Counsel, its Chief Executive Mr Milne and Mr Whitehead. He also said that he did not say at the meeting with Mr Lamb that he had given those instructions. He says that the claimant misinterpreted him when he in fact said that he took responsibility for the respondent's actions in 2014/15. Prof Reid's evidence was also that the decisions on the litigation were made by Mr Whitehead in discussion with Mr Milne and the legal team. My finding in this respect is set out below where I deal with that meeting.

21. After the settlement

22. The key factual dispute between the parties is Dr Frankel's role when he approached Mr Lamb in December 2018 with an offer to brief him. In summary the respective positions are that the respondent says Dr Frankel acted entirely alone and never spoke to anyone at the respondent regarding contacting or meeting Mr Lamb. The claimant's position is that there was an agreement between Dr Frankel and the respondent to use him as a behind the scenes mouthpiece, circumventing the position statement agreed in the 2018 settlement. The claimant relies upon extracts from various contemporaneous emails and other alleged statements to support that position. It is necessary, therefore, to consider in detail various statements made between relevant parties both orally and in emails.

23. As Dr Frankel left the Tribunal following the 2018 settlement, he had a conversation with Ms Fletcher, the respondent's Head of Postgraduate Work Medical and Dental Education Delivery. He advised her that he planned to conduct interviews as the previous Postgraduate Dean with some organisations who had commented on the case with a view to repairing the respondent's reputation with trainees. She cautioned him against this as it could be 'fraught with difficulties and opportunity for misreporting' and believed she had persuaded him to limit his contact to the British Medical Journal. Ms Fletcher brought this conversation to Mr Whitehead's attention in an email dated 15 October 2018.

24. He replied:

'As for Andrew I understand why he would want to do that and he is right, he no longer works for us so is free to do as he pleases.

Do you know when and how he is planning to do this as I am keen he does not feel unsupported or alone. We have a duty of care, but I also feel we cannot be seen to promote this approach or provide logistical support as I am not sure we agree that we want to undertake interviews at this stage.

Happy to discuss with colleagues as appropriate as to how we approach this.'

25. The claimant says that this exchange shows that there was authorisation given to Dr Frankel to speak on the respondent's behalf, albeit limited to the BMJ, and he relies in particular on the phrase 'cannot be seen to' which he says indicates the behind the scenes type of activity he alleges. Mr Whitehead denied that that was the case. His position was that the respondent was saying they did not want this sort of activity to happen as they had just agreed a statement as to what could be said publicly.

26. In the event Dr Frankel emailed the respondent's solicitors on 17 October 2018, copying in Ms Fletcher, and said:

'Just thought I would check in to say how reassured I have been by the statements from HEE, the reporting of the statements, CDs appropriate response and indeed the general lack of social media furore.

Michael you can reassure Lee that given the above I am now happy to put this completely behind me and don't feel the need to approach anyone for responsive interviews!

I do feel that we can say we have closure here.'

27. December 2018 & January 2019

28. In late 2018, there was publicity again about the issues arising from the 2014 & 2015 claims. In particular an article in The Sunday Telegraph on 2 December 2018 of which Dr Frankel quickly became aware. The thrust of that article was that the claimant had been forced to withdraw his earlier claims and accept a settlement because of costs threats. The article also referred to Mr Lamb expressing concerns about the claimant having been 'crushed' and the implications for patient safety.

29. Dr Frankel emailed Mr Lamb on the following evening from his Imperial email address. After introducing himself, Dr Frankel said:

'I know that you are passionate about the health service and the ability of its staff to report deficiencies in care as indeed I am and have always been. I appreciate that you have been very involved in the case of Dr Chris Day.

For the five years whilst I worked for Health Education England I could not ever publicly talk about the issues around this case but now that I have retired I am completely at liberty to do so.

I would be very happy to tell you what actually happened in this doctors case in order to ensure that you really are aware of the true facts.

I remain deeply concerned 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 has occurred because of this loss of trust has had implications on patient safety.

I hope that you really will be open to hearing both sides of the story.'

30. The claimant's interpretation of this email, which he had not seen prior to disclosure in this matter, is that it was written on behalf of the respondent and its educational leads making a representation about their future conduct. Whilst he acknowledges that Dr Frankel expressly said that he

had retired and was therefore completely at liberty to talk about the case, he believes that this position was contradicted in other emails.

31. Dr Frankel's position is that despite referring to 'both sides of the story' and conceding that those two sides must have been those of the claimant and the respondent, when he wrote this email he had not spoken to anyone at the respondent about it and he was writing entirely in his personal capacity albeit based upon his experiences whilst seconded to the respondent. His concern was Mr Lamb's belief about how medical educators had responded to allegations of issues of patient safety. His evidence was that he sent his email on behalf of all NHS educators and based upon his own personal knowledge of what had happened concerning the claimant. He said that his intention when he sent this email was to show Mr Lamb a report from 2016 to reassure him that the respondent had acted to understand and address the issues raised by the claimant. He said his overall concern was to try to improve trust between trainees and their educators.
32. Unsurprisingly the Sunday Telegraph article also provoked reaction from both the respondents. The first respondent issued a statement to its key stakeholders challenging its content.
33. There were informal conversations within the respondent and also various email exchanges both internally and with their lawyers as to what their response should be. In one email exchange it was agreed that they would continue to abide by the agreed position statement although the Chief Executive's short contribution made it clear that that was not a unanimous view.
34. In a second email exchange internally at the respondent, also on 3 December 2018, there was a separate discussion about the best response to the article and again the consensus was to refrain from public comment but to continue to deny inappropriate cost pressure on the claimant. In that exchange Prof Reid commented:

'This is becoming damaging- I was asked about the case last week at two separate events. I will speak to Charlie as we need to (sic) GMC to defend us the same way we did for them with Dr [redacted] and I will make sure other Presidents understand but I understand the case is being raised in trainee meetings at colleges so we need to watch this.'
35. Later in the same exchange, on the same day, Mr/Ms A Wallace, Head of Private Office for the respondent, said:

'Calling for a public inquiry is just Norman being Norman....'
36. The claimant relies upon this exchange to show that Prof Reid's view was that some behind the scenes activity was needed as had been done in another case with the GMC and also points to the reference to Mr Lamb.
37. Prof Reid's evidence was that despite her comment re the GMC the agreed overall position was to stand by the statement and therefore she did not speak to them but she did speak to some college Presidents to reassure them that the respondent would support trainees. She also said that there

had been no discussion regarding trying to get someone to intervene with Mr Lamb on behalf of the respondent. Further her compelling evidence was that when she found out that Dr Frankel had in fact met Mr Lamb she had been 'absolutely astounded and flabbergasted' and that she thought it was 'an extraordinary thing to do'. She also very credibly described how if any meeting was to be held with Mr Lamb – or any Member of Parliament- it would be at a senior level, well organised and prepared for and without the claimant present.

38. On the afternoon of 5 December 2018 Prof Reid forwarded the first email exchange of 3 December 2018 to both Dr Frankel and Prof McLeod (the Head of English Deans for the respondent who had also been a proposed witness at the 2018 hearing) simply saying 'so you are both up to speed'. Her explanation in evidence as to why she forwarded this (which Mr Whitehead said he was unaware of at the time) was that as Dr Frankel was a former senior colleague deeply involved in and affected by the litigation he was likely to become aware of these developments and become involved again should further litigation arise.

39. Dr Frankel replied expressing his disappointment at this development and frustration that:

'... we constantly allow this man to say what ever he wishes without challenge.'

and

'...I am concerned that we are certain that we have reassured the large number of trainees out there that patient safety and trainee support or (sic) central to HEEs ethos and always have been.'

40. The claimant relies upon Dr Frankel's use of the first person plural (we) in this email to support his allegation that Dr Frankel was still very closely aligned with the respondent and a further indicator of an agency relationship.

41. Prof Reid replied to Dr Frankel on the same day informing him that they were preparing a fact sheet for the Deans which would include what they could say openly as she wanted them to be able to give reassurance to others that they could raise concerns. Dr Frankel's reply was an offer of input into the fact sheet given his 'unfortunate encyclopaedic knowledge on this case'. Prof Reid's reply to that was to thank him and say '...if I have to meet with Norman Lamb I will be in touch for a tutorial!' To which Dr Frankel replied, 'Please do'.

42. The claimant relies heavily on this exchange of emails to support his argument that the briefing document subsequently produced by Dr Frankel (referred to below) was the fact sheet referred to here and that Prof Reid saying 'thank you' when he offered his input is evidence of her accepting that offer. The claimant also says that Prof Reid's reference to Mr Lamb coming apparently from nowhere shows that Mr Lamb had already been a topic of conversation between them. Otherwise, he says, this was a

suspiciously coincidental reference given that Dr Frankel had in fact emailed Mr Lamb only a couple of days before.

43. Prof Reid's evidence was that her emails to Dr Frankel were simply polite correspondence between professional colleagues, that she did not commission any document and that her reference to Mr Lamb was prompted by the Telegraph article (she had of course also by then seen Mr/Ms Wallace's email on 3 December where he/she referred to Mr Lamb calling for a public enquiry). Prof Reid also confirmed that no fact sheet for the Deans was ever produced as it was overtaken by events. Dr Frankel also said that his subsequent document was separate to his offer to input to any fact sheet and that no one at the respondent had ever asked him to meet Mr Lamb or intimated that he should. He acknowledged that he was 'perhaps being deceitful by not disclosing' his email to Mr Lamb to Prof Reid.
44. On 12 December 2018 Mr Whitehead informed Prof Reid and others that the claimant had sought leave from the Tribunal to have the settlement agreement set aside. She forwarded that email to Dr Frankel and Prof McLeod with the comment:

'So you are in the loop - happy to talk at any time'
45. Dr Frankel replied saying, inter alia, that he was planning to and would produce a short document describing 'our' involvement which may be helpful if the case continued to cause problems for the respondent. He also said 'You may want to speak after seeing this.'
46. The claimant's view of this exchange is that, in his words, it jumps off the page that Prof Reid says she is happy to talk and that Dr Frankel also refers to perhaps speaking. It is therefore clear, he says, they were talking to each other. He also says that Dr Frankel's offer of a draft document was in response to Prof Reid's mention of the fact sheet.
47. The respondent disputes this. Both Dr Frankel's and Prof Reid's evidence, which I accept, was that they did not speak to each other after a dinner they both attended to mark his departure from the respondent in the summer of 2018. Further Dr Frankel's evidence was that the short document he referred to planning to produce was different to Prof Reid's fact sheet. He said that he had been thinking about producing a document since October 2018 as a way of capturing in one sequential account what had happened regarding the claimant from the perspective of the respondent. He believed this would be useful for the respondent given that he, who had the most knowledge about what had happened during the underlying events, had now left. He said that he was not commissioned to write this document, he decided to do it of his own volition and that the terms of his email ('planning to and will') is consistent with that. Prof Reid also said that she had not asked Dr Frankel to produce any document.
48. Arrangements were made on the 14 December 2018 between Dr Frankel and Mr Lamb's parliamentary assistant, Ms Savin, for him to meet Mr Lamb on 8 January 2019.

49. On 20 December 2018 Dr Frankel emailed Dr Lacy, former Head of the School of Emergency Medicine for the respondent, also involved in the events underlying the original claims. Dr Frankel told her that he was 'preparing a briefing for [Prof Reid] in relation to case from our perspective' and asked for some information regarding the claimant's training. Dr Frankel accepted in his evidence that he had no authorisation to seek that information and that he was falsely holding himself out as authorised. As for the use of the phrase 'from our perspective', Dr Frankel said that this was again a reference to the period June to December 2014, when he had been associated with the respondent and what his department had done then. Prof Reid's evidence was also that she had not authorised him to approach Dr Lacy. She referred to Dr Frankel's approach to Dr Lacy as, again, 'extraordinary'.

50. Later on the same day Ms Savin conveyed to Dr Frankel that Mr Lamb wanted to invite the claimant to their meeting. In response to that Dr Frankel by email also dated 20 December 2018 said:

'My preference would be for me to meet Norman as planned and if a meeting could be facilitated thereafter which helps to resolve this very difficult conflict then that is something that would be very helpful. However such a joint meeting would need to involve someone who currently represents HEE as I have now retired.'

51. Mr Lamb's office did not specifically respond to that point and Dr Frankel did not pursue it further. In particular he did not at that stage inform the respondent as to what was happening. He admitted in his evidence that perhaps he should have done. He denied that this was because they already knew that he was attending and that they could not be seen to condone it.

52. On 26 December 2018 Dr Frankel emailed a briefing document to Profs Reid and McLeod. In the covering message he said that the purpose of the document was to recount factually the events that had occurred in relation to the claimant's whistleblowing disclosures from the perspective of the respondent. He again referred to himself and the respondent in the first person plural (we/our). It is clear on this occasion that he was talking about his historic position with regard to the respondent. He concluded the email:

'I hope you will find this briefing document useful simply because it allows you to have the actual true facts of what happened at the time given that so many of the people involved have now left HEE'

53. There was a further exchange of emails between Dr Frankel and Ms Savin on 3 January 2019. She provided some documents to him which the claimant had supplied as background reading. In reply Dr Frankel stated:

'It is important for me to be able to reassure Norman that individuals from HEE and HEE itself would never cause detriment to a trainee who has made a whistleblowing disclosure.

I would therefore like to suggest that the focus of this meeting would be the events between June 3rd and December 2014....'

54. Prof Reid was on leave until the week commencing 7 January 2019. Her evidence was that she did not see Dr Frankel's report until 7 January 2019 at the earliest and she did not read it then as she understood that she would be meeting him and she planned to read it shortly before the meeting.

55. On 7 January 2019 Dr Frankel sent to Mr Lamb and the claimant, via Ms Savin, a document that set out his understanding of the events relating to the case between June and December 2014 (this was substantially the same document that he had emailed to Profs Reid and McLeod). His covering email included:

'What I need to get across is that this document describes what I have genuinely believed to have been the facts relating to how my team (HEE SL) were involved in relation to Chris' whistleblowing disclosures and why over the last four years I have held to the view that we (HEE SL) did not cause Chris detriment.

I know that there is so much more to the case since December 2014 and completely understand that Chris feels that this is just as pertinent but I initially wanted to focus on what I believe are the core matters that relate to how I (representing HEE) managed Chris' disclosures.'

56. The claimant says this is a key email that contradicts Dr Frankel's frequent statements that he was acting entirely independently and was not representing or acting on behalf of the respondent. Indeed in this email Dr Frankel expressly refers to his team and him representing the respondent. My reading of this email however is that it is a reference to Dr Frankel historically having represented the respondent and what his team had done then. Further it is clear from the document enclosed with the email, in which Dr Frankel again refers to his role in the first person plural, that he is then referring to his role at a time when he did represent the respondent.

57. Dr Frankel and the claimant met informally on 8 January 2018 while waiting for the meeting with Mr Lamb to begin. There is a dispute between them as to exactly what was said during that pre-meeting but it is clear that there was a general conversation where it was acknowledged what a difficult experience the case had been for many people including the claimant.

58. During the meeting with Mr Lamb, of which no notes were taken, there was a general and wide ranging discussion about the situation which is outwith the scope of this hearing. The claimant agreed that at the outset and conclusion of the meeting Dr Frankel emphasised that he was there in a personal capacity, without the respondent's knowledge, and asked that that be respected. The claimant did not challenge that statement at the time.

59. Dr Frankel's evidence was that in the course of the meeting he said that he took full responsibility for the decisions made in 2014. He did not recall being asked who had made the decisions in relation to the 2014 & 2015 claims. The claimant's evidence was that Dr Frankel was asked that and he confirmed that he had been responsible for those decisions.

60. It seems unlikely that someone who is no longer seconded to a party to litigation would have responsibility for giving instructions on that litigation

and especially where it concerned such an important issue. I recognise that there were other matters on which Dr Frankel did perform some unpaid 'run off' work and that he was provided with updates on various matters – including the 2014 & 2015 claims – from time to time. That run off work was of a fundamentally different nature however (e.g. a visit to the GMC, submissions to the Lancet). It seems much more likely that the accurate position is as described by both Mr Frankel and Prof Reid, namely that it was Mr Milne and Mr Whitehead who provided those instructions. That being the case, it must further be unlikely that Dr Frankel said at the meeting with Mr Lamb that he took responsibility for the instructions. It is more likely, as Dr Frankel has suggested, that the claimant misunderstood what he said.

61. I conclude that Dr Frankel's recollection (and I did not have the benefit of hearing Sir Norman Lamb's evidence on this point) is the more reliable. I find that Dr Frankel did not have, and did not say he had, authority as the instructing client at the 2018 hearing.

62. The following day the claimant emailed Mr Lamb and in response to that Dr Frankel also sent an email in which he said, inter alia:

'I really do agree with Chris's comments about this being a tragic case and understand that this has had enormous implications for him and while members of the organisation i work for have also suffered as a result of this case I completely empathise with him in relation to his position.

...we genuinely did not believe and never have believed that we (HEE) caused Chris detriment.'

followed by several expressions in the present tense of the respondent's position. It concluded:

'Please note that I am not copying this email to anyone and have not discussed the contents of this email with HEE or their lawyers and hope that you will respect that.'

63. On 12 January 2019 Dr Frankel sent a further draft of his report to Prof Reid by email and said he would value a short conversation with her about why he had sent it to her. The fact that he wanted to tell her why he sent it to her does suggest that he did not think she was expecting it. Prof Reid replied saying that her business manager would book a call with him and that was in due course done.

64. On 10 January 2019 the first respondent issued a further public statement. Ms Diaz, Senior Communications Manager, Media for the respondent circulated that statement to various senior members of the respondent and its legal team, including Prof Reid. Ms Diaz confirmed her view that the respondent should not change its position. Ms Thompson, the respondent's Service Delivery Manager, Case Management and Appeals, forwarded Ms Diaz's email to Dr Frankel and Dr Lacy for their information. Dr Frankel took the opportunity to ask Dr Lacy again for the information he had previously requested regarding the claimant's training. Dr Lacy replied with that information on 14 January 2019. Dr Frankel then inserted that information into his briefing document which he emailed to Dr Lacy and Ms Thompson

on 15 January 2019. He told them that he had already sent it to Prof Reid, had now inserted the new data and that any comments were welcome and it might be good to have a chat non-urgently.

65. Ms Thompson thanked Dr Frankel for his document and asked if this was an internal document acting as an aide memoir for Prof Reid or was it going to be an external document. Dr Frankel's reply was:

'I have sent this to Wendy as an aide memoir particularly if she does meet Norman Lamb

There is an external version which is significantly shorter'

His evidence was that his reference to an external version was to the fact sheet which had been previously mentioned but he had not seen and was completely separate to his own document. He accepted that his language was lazy and incorrect but his view was that the documents were two completely separate things. His explanation of why he referred to Mr Lamb was that he thought it was highly likely Prof Reid would meet him given his public statements on the matter.

66. Ms Thompson replied asking if the external document was going to be published and if it was likely that Prof Reid would meet Mr Lamb. Dr Frankel simply replied saying 'no this contains the key data' which Dr Frankel accepted in evidence seems to be a non sequitur.

67. Dr Lacy replied making it clear that she was extremely concerned at some of the contents of Dr Frankel's document which she felt were inaccurate and may require her to take independent advice. In the course of that exchange Dr Lacy asked whether the document had 'HEE ownership' to which Dr Frankel replied that it was a 'private' document that he was sharing with Prof Reid in advance of any meeting she had and he later said that it was a document for his and Prof Reid's use. His explanation of that comment in his evidence was that he had the relevant institutional memory and that there was no one else in a position to record the information that he had.

68. I find that Dr Frankel decided of his own volition to write his briefing document in order to capture his knowledge of the underlying events in what he saw as a more helpful format than the documents prepared for the litigation. This was in accordance with his general motivation throughout the period (see below) and at least some of his express statements in his emails. I find that Prof Reid did not commission the briefing document and she was unaware of it until he sent it to her in January 2019. Further, I find that the briefing document and the proposed fact sheet are two separate things.

69. Because of the concerns raised by Ms Thompson and Dr Lacy, Dr Frankel cancelled his planned meeting with Prof Reid. He explained:

'The London office [by which he said he meant Ms Thompson and Dr Lacy] are concerned that I as someone who is no longer working for HEE are briefing her with a document that

has not been through HEE due process. I understand this concern and this email is not sent in anger.

I would suggest that the document I have sent Wendy goes no further as it is a personal document created by me. It was created to try and tell the story in a sequential manner as the evidence bundle and witness statements do not provide this overview...

I am certain that Wendy will obtain any formal briefing in relation to this case from HD and from the London office - if she is due to meet Norman Lamb and wants me to talk through the nuances of the case so that she can appropriately, effectively and robustly defend HEE position I am happy to talk through the case. However in the first instance the briefing should come through formal HEE processes.'

70. By then Prof Reid had read the document in preparation for the planned meeting and she replied to Dr Frankel on 21 January 2019 thanking him for it and stating that she was grateful as keeping track of the case had been a challenge and his expert input had been vital for her understanding. She stated:

'I am sorry that the London Office felt the need to be quite so formal and I certainly consider you as part of the HEE family!'

71. Dr Frankel replied on the same day. His concluding comment was:

'My suggestion is that if you do find yourself in a position where you are meeting in relation to the case and particularly if it involves Chris Day himself it would be very useful for us to have a telephone conversation before that meeting.'

Dr Frankel's evidence was that at this point he had still not told Prof Reid that he had met with the claimant and Mr Lamb.

72. In the meantime the claimant had sent a detailed email to Mr Lamb following the meeting with various challenges to the respondent's position. Ms Savin forwarded that to Dr Frankel on 11 January 2019 and Dr Frankel replied, in some detail, to her on the same day. Again in that email Dr Frankel referred to himself and the respondent in the first person plural several times and also referred to the respondent as 'the organisation I work for'. I accept his evidence that that was simply an error and he should have said 'worked' as plainly he did not at that stage still work for the respondent. The final paragraph of his email read:

'Please note that I am not copying this email to anyone and have not discussed the contents of this email with HEE or their lawyers and hope that you will respect that.'

73. This claim

74. The claim form in this matter was submitted to the Tribunal on 6 March 2019.

75. Mr Lamb wrote to the respondent's Chief Executive on 30 April 2019. The thrust of that letter was that he remained concerned about the conduct of the respondent towards the claimant and asked for a substantive response to various concerns he had raised. The Chief Executive replied on 22 May 2019 (the day before their response was filed with the Tribunal)

acknowledging his letter, setting out a short background of the matter and stating:

'In addition, Dr Day has now issued further proceedings in the Employment Tribunal claiming compensation for new alleged detriments, part of which arise from meetings at which you were present. As you will appreciate, it would therefore not be appropriate for me to comment on any issue or claim which is subject to ongoing going legal claims by Dr Day.'

76. The claimant has commented on the failure by the respondent in that reply to set the record straight regarding Dr Frankel's attendance at the meeting and make it clear that he was not representing them. I find that it was entirely reasonable and predictable for them not to comment given that legal proceedings were underway.

77. Authority of Dr Frankel

78. Having made those findings of fact, the key remaining factual issue is whether the respondent knew about and furthermore expressly authorised Dr Frankel to meet the claimant and Mr Lamb on their behalf.

79. Dr Frankel says they did not and has described his own actions in contacting Mr Lamb and then conducting the meeting without the respondent's knowledge, knowing that if he told them they would seek to dissuade him, as 'naïve' and 'stupid'. Prof Reid described it as 'extraordinary' and it has obviously led to a loss of trust in him on her part. He says however that his motives were good. Initially he just wanted to aid Mr Lamb's understanding which in turn would help restore trainees' faith in the respondent and then, when it became clear the claimant would be present, try to help repair his relationship with the respondent. The claimant says that Dr Frankel did not act stupidly, naïvely or extraordinarily as agreement had been reached between him and the respondent to approach Mr Lamb.

80. In assessing the evidence and concluding which of these accounts is more likely than not to be accurate, I have to assess the credibility of the witnesses. The claimant of course has not offered any direct evidence of his case but rather relies upon implication. My view is that the claimant genuinely believes that implication and accordingly his evidence is truthful in that it reflects his beliefs. I also find however that the evidence of Dr Frankel and Prof Reid was similarly truthful. They are both distinguished in their respective careers and appeared to give their evidence carefully and candidly. Indeed Dr Frankel readily acknowledged the foolhardiness of some of his actions, undoubtedly well-meaning though they were.

81. A number of factors lead me to conclude that the respondent had no prior knowledge of the meeting between Dr Frankel, the claimant and Mr Lamb nor did they expressly authorise Dr Frankel to so act on their behalf:

- a. the respondent has its own legal and media departments and has experience of dealing with communication issues of public importance. It had previously been made clear to Dr Frankel that they did not want him briefing any external bodies directly (although

they recognised he had become a free agent and they had a duty of care to support him). It is clear that there were finally balanced internal views on how to deal with the issues arising from the dispute with the claimant and various people were consulted before deciding not to make any public comment but to stick with the agreed position statement. In those circumstances it must be extremely unlikely that the respondent or any individual within it would ask Dr Frankel to unofficially brief a Member of Parliament who had been very vocal on this specific issue. It is far more likely, as Prof Reid described, that any such meeting would be very carefully handled and planned. That is not outweighed by the particular phrases in emails relied upon by the claimant that he believes show the contrary (e.g. 'cannot be seen to', reference to being part of the HEE family) nor Prof Reid's previous requests 'behind the scenes' for GMC support;

- b. that position is consistent with the express statements made by Dr Frankel both orally and in writing to Mr Lamb and the claimant that he was acting entirely privately. I am not persuaded that Dr Frankel's insistence that he was acting in a personal capacity is in itself evidence that he was not i.e. a 'he protests too much' argument. I do recognise that Dr Frankel's use of words in his emails and the briefing document is mixed. On some occasions he used the first person singular which was entirely in accordance with him acting privately. On others he used the first person plural - sometimes clearly by reference to times when he had been seconded to the respondent but other times inappropriately using 'we/our' etc. I find that this was a combination of, on occasion, poor drafting by Dr Frankel and also a strong personal identification with the issues. It is clear that, understandably, Dr Frankel took very personally the claims that had been made against the respondent 'on his watch'. Although he had left in 2018 he continued to be involved as a potential witness in the ongoing litigation and could not simply walk away from the very serious issues that had been raised. His continuing interest in those issues was to be expected. I accept that his motivation to do what he did was laudable namely trying to help resolve matters between the parties and also try to repair damage done to the reputation of the respondent with Doctors in training. The way he went about it however was wholly inappropriate and in doing so he slipped into using language that confused his previous and current roles;
- c. although Mr Lamb's name was mentioned in emails within the respondent together with some rather light-hearted references to perhaps having to meet him at the very time Dr Frankel was either contacting him or planning to, this is not particularly surprising given the MP's vocal and public support of the claimant and recent publication of the Sunday Telegraph article. I do not find that this was an indication of conversations happening that I have not been told about.

82. Further I find that the respondent remained unaware of Dr Frankel's activities until they received the claim form in March 2019. There is no evidence to suggest otherwise.

Conclusions

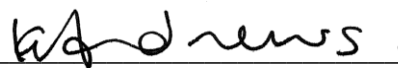
83. Mr Allen confirmed that the claimant's primary case is that the respondent sent Dr Frankel to meet Mr Lamb in order to put their case to him (i.e. he was an express agent). His secondary case is that the respondent found out about the meeting after the event and then ratified Dr Frankel's actions (he acknowledged that they could only ratify something they had become aware of) and in that context he argues that the 'something more' required in addition to silence on the part of the respondent to ratify the actions of Dr Frankel can simply be the worker status of the claimant vis-à-vis the respondent. Such an approach, in the context of purposively reading the concept of agency broadly, results - he says - in the respondent positively needing to disavow the actions of Dr Frankel when they become aware of them which he says they did not do.

84. Having found as a fact that the respondent did not expressly or impliedly commission Dr Frankel's briefing document nor know that Dr Frankel was contacting Mr Lamb or meeting him, it is clear that my finding must be that Dr Frankel was not acting as an express agent of the respondent. There was no manifestation of assent by the respondent as a principal for him to do so. The claimant's primary case therefore fails.

85. Further, as ratification can only apply where the person whose act is in question (Dr Frankel) professed or purported at the time of acting to do so as agent and to have authority to bind the principal (the respondent), it is plain that the claimant cannot successfully argue ratification as in fact the opposite was professed by Dr Frankel. He expressly and repeatedly said that he was acting entirely privately and not on behalf of the respondent.

86. In any event, my findings on the facts are that the respondent did not find out about Dr Frankel's actions until the claim was served on them and once it was, they pleaded that he had not been their agent (even though the agency argument was not initially argued). Ratification cannot therefore be made out.

87. The claim against the second respondent is therefore dismissed. The claims continue against the first respondent as already listed.


Employment Judge K Andrews
Date: 16 February 2022

Judgment sent to the parties and entered in the Register on
17th February 2022

A handwritten signature in black ink, appearing to read 'M. Kankulu', written in a cursive style.

Maria Kankulu
for the Tribunal Office