

This paper is prepared for my legal team and the BMA by way of a response to the recent Tribunal Judgment on 16 February 2022. Please do not hesitate to contact me if I can be of any further assistance.

This paper has 4 Focuses

## **Focus 1 - Dr Frankel's Account of Norman Lamb meeting**

Paragraph 5 of Andrew Allen QC's skeleton argument states;

*“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. “*

**Question A** speaks to what I was told at the time in January 2019 by Dr Frankel and what it was reasonable for me to believe about Dr Frankel's alleged stated claim to have taken the legal decisions in the case as an agent of HEE.

**Question B** is about the likelihood of Dr Frankel actually being responsible for the legal decisions in the case from 2014-2018.

### **Error 1**

**The Judge has sought to conflate the two questions by answering both questions at the same time with the same answer by referring only to reasoning applicable to question B and using that to find my account less reliable as compared to Dr Frankel.**

The Judge has not considered the possibility of Dr Frankel being asked who was responsible for the legal decisions in the case by me and Norman Lamb, and instead of being honest, deciding to cover for the relevant HEE person by taking responsibility himself for the legal decisions. This is entirely consistent with Dr Frankel's actions at the hearing re concession on being deceitful, misleading Dr Lacy to get data from my file etc

This is also entirely consistent with HEE's refusal to answer this question, after being repeatedly asked it, until open Tribunal in 2022 when it was asserted in open Tribunal that Lee Whitehead was the person giving instructions. If that was the case why did Dr Frankel not simply provide this answer to Norman Lamb and me.

It should be noted that the LDA/employer/junior doctor whistleblowing protection matter which has been described by Norman Lamb, a journalist and an instructed legal opinion as a potential crime (fraud/contempt of court) was serious. That is the most likely reason for the reluctance of HEE to provide an answer on who made the legal decisions in this case (see wasted cost application)

## **Error 2**

**When properly considering question A, the Judge should have used the following below points to engage in a comparison exercise of my credibility vs that of Dr Frankel of the account given of the Norman Lamb meeting. The following should have been taken into account. The fact it was not even recorded in the Judgment is perverse.**

- a) Contrary to his sworn witness statement, Dr Frankel finally accepted in oral evidence that I did challenge him in the meeting with Norman Lamb with the 5 clear examples pleaded in my Grounds of Claim on misleading of false and detrimental content in his briefing document. By Dr Frankel's own concession in open Tribunal, he effectively conceded that his own written account of the Norman Lamb meeting in his statement was unreliable and I would assert not truthful. How can you forget being challenged with 5 examples that forced a concession that the HEE formal investigation was terrible? Dr Frankel explicitly accepted in oral evidence that my 5 examples were put to him when Andrew Allen challenged him and deny stating to Norman Lamb that the HEE formal investigation into my case was terrible.
  
- b) Dr Frankel accepted he sat on HEE ARCP panels once his HEE secondment had ended. When Dr Frankel realised this might not be helpful for HEE's agency position, he attempted to get the Judge to believe that his employing Trust Imperial College NHS Trust was responsible for ARCPs and not HEE. Prof Reid confirmed this was not the case. This point was emphasised in Andrew Allen QC's closing submissions and was clearly understood by the Judge.

It is clearly an error of law that these clear challenges to Dr Frankel's credibility, that were clearly conceded by HEE's own witnesses (Frankel and Reid respectively) were not recorded in the Judgment and considered when weighing the credibility of my account of the meeting with Norman Lamb with that of Dr Frankel.

They are clearly incompatible with Frankel being a credible witness and even more so the finding that Dr Frankel was a more credible witness than me in respect of the Norman Lamb meeting (when there are no recorded challenges to my credibility in the judgment). To succeed at this argument the Judge would have needed to dream up some even more dramatic challenges to my credibility to outweigh these significant challenges to Frankel's credibility (conceded by Dr Frankel and HEE). Instead, the Judge has opted instead just to exclude them from the judgment.

### **Error 3**

**When considering my credibility v Dr Frankel's on our respective accounts of the meeting with Norman Lamb and who is more reliable the Judge should have explicitly considered in addition to the points made in Error 2 the following clear additional challenges to Dr Frankel's credibility.**

- a) The finding the Judge made that Dr Frankel was falsely holding himself out to Dr Lacy as authorised by Prof Reid on his briefing document in order to obtain confidential material from my file from Dr Lacy. (our case this clearly asserted this is breaking the law (GDPR) which was not disproved in evidence)
- b) Dr Frankel's concession that he was secretive and deceitful

It is an error of law that these clearly recorded challenges to Dr Frankel's credibility are recorded in the Judgment but not considered when assessing Dr Frankel's credibility in relation to mine where Judge concludes we are both credible but that Dr Frankel is more credible. This appears to be justified by him being more distinguished than me.

### **Error 4**

It was an error of law that the significant challenges to Dr Frankel's credibility (conceded by either Dr Frankel or HEE) set out in Error 2 and Error 3 above, were not explicitly weighed against any challenges to my credibility when choosing which account of Norman Lamb meeting was more reliable. There are no recorded challenges to my credibility in the Judge and the judge found my evidence honest.

Can we also argue that it is perverse to exclude such dramatic concessions on Dr Frankel's credibility from any consideration when weighing my evidence against that of Dr Frankel. Preferring Frankel's credibility to mine given the 4 robust challenges to Frankel's credibility above is perverse and with no explanation is an error of law.

The argument seems to be Frankel is distinguished and more so than a junior doctors so the challenges to his credibility don't matter.

## **Focus 2- Making findings inconsistent with me having a credible case of whistleblowing detriment against HEE when assessing the agency point.**

### **Error 5**

It was submitted by Andrew Allen QC, that the Preliminary Hearing that focused on the agency point had to assume that my claim of detriment on account of protected disclosures were made out and

credible. The Judge erred in law by making findings that departed from the assumption that HEE and Dr Frankel caused me whistleblowing detriment with the document sent to Sir Norman Lamb

*"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 findings that Dr Frankel with his actions were trying to resolve matters with me is incompatible with a finding that Dr Frankel/HEE caused me whistleblowing detriment on account of the false and detrimental document. This finding was not open to the Judge and is frankly absurd given the evidence see Error 6 and 7 below.

#### **Error 6**

My Grounds of Claim set out 5 clear examples of Dr Frankel providing false and detrimental information to Norman Lamb in his document. This is also supported by an approved statement by Norman Lamb who is a former health minister. The Second Respondent's Ground of Resistance does not offer any position on why these 5 examples are not false and detrimental. Moreover Dr Frankel' claims in his statement that the 5 examples or any criticism of the document were never put to him but conceded they were put to him in our meeting with Norman Lamb. Dr Frankel only did this when pressed under cross examination.

From the above it is an error of law for the Judge conclude;

*"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. "*

#### **Error 7**

To make the following findings on Dr Frankel's motivation whilst excluding from the Judgment and consideration the points on his credibility in error 2 is perverse.

*"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. "*

#### **Error 8**

Outside of any fact finding process and after actively shutting down any discussion on why Dr Frankel's document was false and detrimental the Judge finds contrary to clear factual evidence and concessions on credibility that Dr Frankel's actions were "laudable namely trying to help resolve matters between the parties". This finding is incompatible a finding of Dr Frankel/causing me detriment on account of whistleblowing. This finding was not simply not open to the Judge at a PH confined to the agency point and is perverse given the above points and evidence which were not considered at the PH.

**Focus 3 – The finding that Dr Frankel was trying to help me resolve things with HEE was not open to the Judge and prevented her analysing the Yona case properly which required her to accept HEE/Frankel causing me detriment was a real possibility.**

**Error 9**

The Judge erred in law by making the assumption that Dr Frankel was trying to help me “resolve matters with HEE” . This was not open to her at the PH where she had to assume Frankel’s document was a whistleblowing detriment. This prevented her from properly assessing the agency arguments advanced by Andrew Allen QC in respect of the Yona case. Clearly, the Judge’s findings on Dr Frankel would not have given rise to a ‘Yona like’ duty from HEE to protect me from whistleblowing detriment if the Judge had perversely found (contrary) to all evidence that was not event considered that Dr Frankel was not acting to my detriment. Whatever the rights or wrongs of such a finding, it was clearly not open to her on the evidence or in any event at a PH on agency which is an error of law..

See [25-29] on Andrew Allen’s skeleton

*“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*

#### **Error 10**

The Judge had to assume the detriments in the case were made out. If I am proved right about my detriments. It is clear HEE would have benefitted from the false impressions advanced on cost threats and from the false content in the Frankel document. Prof Reid acknowledged that HEE needed to repair their reputation. The Judge chose to believe that Frankel was trying to help me which was a finding not open to her which prevented her assessing my primary case that Frankel was sent with a detrimental document that clearly benefitted HEE. If the Judge perversely assumed the document was helpful to me and an attempt to repair relations between me and HEE she has not assessed my primary case properly.

If my claim succeeded that would have serious implications to the credibility for all HEE witnesses on the cost threats alone.

#### **Error 11**

The ET erred in law by allowing Judge Sage's order denying HEE a preliminary hearing confined only to agency to be reversed by Judge Kelly's Order outside of any appeal process. Furthermore whilst confining the PH to the agency point then seeking to make findings on whether or not Dr Frankel was helping me resolve matters by sending what I say is a false and detrimental document to Sir Norman Lamb.

## Focus 4 – Deans Factsheet

Andrew Allen QC writes at para 11 of his closing submissions;

“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.

### Error 12

In direct conflict to Prof Reid’s evidence, Dr Frankel confirms the existence of the Dean’s Factsheet and in email about his own 11 page document refers to the Dean’s factsheet as an external version of his own 11 page document.

- a) The Judge does not record or refer to the obvious conflict in evidence between Dr Frankel and Prof Reid’s on the existence of the Deans Factsheet?
- b) The Judge does not refer to the absence of Prof Macleod as a witness who was sent Dr Frankel’s 11 page document and is Chair of the UK Conference of Post Graduate Deans and lead for all HEE’s Post Graduate Deans.
- c) The Judge also does not refer to Andrew Allen QC’s submission (see below) on the Fact sheet and explain why she is accepting or rejecting it which is material to our agency argument.

*“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.*

Dr Chris Day

20/2/22