

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

BETWEEN

DR CHRIS DAY

CLAIMANT

-and-

LEWISHAM AND GREENWICH NHS TRUST

FIRST RESPONDENT

HEALTH EDUCATION ENGLAND

SECOND RESPONDENT

**SUPPLIMENTARY WITNESS STATEMENT OF CLAIMANT
FOR PRELIMINARY HEARING ON STATUS OF DR ANDREW FRANKEL**

The context of this Supplementary Statement

1. As stated at [64] of my main statement for this hearing;

“I am advised it is not relevant for the purposes of this hearing whether the material in the briefing document is misleading, so I will not address the numerous ways in which it is.”

2. This statement responds to following paragraph in Dr Frankel’s statement;

“The meeting lasted around 50 minutes. I thought it was a very difficult meeting, primarily because Dr. Day directed the conversation throughout and moved erratically through documentation he had with him and across the chronology of events with no logical sequence and taking quotes from documents out of context. Despite the exchange of emails before the meeting, described above, there was no attempt to

use the Facts document that I had produced as a fulcrum for discussion. Notably, Dr. Day did not challenge or raise concerns about the content of the document in the meeting, rather it appeared to be immaterial to the discussion and there was no attempt by Sir Norman to bring the discussion back to the points raised within my document.

3. I find the claim that I did not challenge Dr Frankel's document in the meeting with Sir Norman Lamb absurd. My challenge of Dr Frankel's document was how I secured concessions from Dr Frankel in the meeting in particular in respect of the formal investigation into my case by the Second Respondent's Director of HR Malcolm Plummer.
4. My verbal and written communication also set out issues that Norman Lamb would go on to directly challenge the Second Respondent's Chief Executive on in a letter dated 13 May 2019 (page xxxx). When Sir Norman's letter was not responded to properly by the Second Respondent's Chief Executive, this fact and some of the issues that I raised was set out in a speech by Norman Lamb in the House of Commons on 3 July 2019 (Page XXXX).
5. My main statement for this hearing refers to an email dated 10 January 2019 (page 323/4) sent to Sir Norman Lamb's office shortly after the meeting. In the email, I refer to the 5 examples of misleading statements from Dr Frankel's document that were clearly put to Dr Frankel in the meeting (in the order that I pleaded them in my Grounds of Claim). It is absurd for Dr Frankel to now suggest these 5 examples were not put to him. My email states, "*Dr Frankel made some significant concessions in our meeting including that the HEE investigation process was terrible.*" My email concludes by making the point that Dr Frankel could not answer key points about the 5 examples put to him in the meeting. I clearly showed what I mean by referring to the the same examples pleaded in my Grounds of Claim.
6. My main statement makes clear at [53]

"The primary purpose of the meeting for me was to challenge what had been advanced by Dr Frankel and Health Education England (the Second Respondent) about me and my case. This should have been done properly at the Tribunal during cross examination but I saw this as an opportunity to expose the reality of Health Education England's position to Sir Norman Lamb. This must have had some impact given the concessions made by Dr Frankel in the meeting and Norman Lamb's subsequent statements in the House of Commons (see below).

7. For the purpose of the present hearing it is important that the Tribunal understand that there is a very credible case that serious issues have been misrepresented in Dr Frankel's 11 page document and that the most significant of these were put to him in the meeting with Norman Lamb by way of the 5 examples pleaded in my Grounds of Claim. This supplementary statement is therefore needed for that purpose given Dr Frankel now claims this content was not put to him. This statement is also required on account of several other things Dr Frankel has chosen to say in his statement.

8. There were of course more than 5 examples of misleading content in Dr Frankel's document (as my pleadings make clear). I had prepared 6 examples for the meeting with Norman Lamb that I thought would have the most impact (but only had time for 5). Far from being erratic, my approach was considered and structured with the primary aim of exposing the reality of HEE's formal investigation into my case by Mr Plummer, which I clearly did, hence Dr Frankel's concession in the meeting that the Plummer Investigation was terrible (which Dr Frankel has not denied).

The Thrust of Dr Frankel's Document

9. The main thrust of Dr Frankel's briefing document was as follows;
 - a) To falsely claim that HEE's formal Plummer investigation into me and my case, that made hugely damaging findings against me and discredited my protected disclosures was supported by ALL Tribunal statements. (Dr Frankel knew 3 of the Respondents' employees' Tribunal statement contradicted the findings in the Plummer report and one raised serious concerns about Mr Plummer's conduct).
 - b) To falsely claim that there was no evidence that Dr Brooke the early recipient of my protected disclosure, that had failed to act on it, had caused me detriment in an unplanned meeting with the ARCP panel (there is clear evidence from 3 separate individuals of Dr Brooke causing me detriment)
 - c) To falsely state HEE supported the validity of my protected disclosures. (Dr Frankel knew the opposite was true and that key a October 2014 Quality visit showing serious concerns was objectively misrepresented as showing no concerns and the serious concerns in the Quality Visit were left out of Tribunal statements to discredit me. Dr Frankel also excluded from his statement a view, captured by covert audio of a BMA

meeting, that he thought the situation described in my protected disclosures was “totally unacceptable” and “unsafe”. This enabled the Respondents and their counsel to smear me and my protected disclosure as irrational, dishonest and hyperbolic at the 2018 hearing.

d) Provided an objectively false account of my ARCP/appraisal process not even consistent with the Second Respondents own 2014 documents including their Tribunal pleadings.

10. It would be inconceivable for me not to have challenged these points at the first opportunity which makes Dr Frankel’s account of the meeting with Norman Lamb not plausible including the reported exchanges in the waiting room that are frankly bizarre.

11. Within a few minutes of Dr Frankel sitting down next to me in the waiting room in Portcullis House, Dr Frankel had asked me what I thought of his 11 page document where I effectively called him a liar with what he chose to write in it. Such an assertion from me clearly was and would have been to anyone a conversation stopper. This cannot be consistent with the friendly conversation Dr Frankel describes where I supposedly say that I don’t blame Dr Frankel for anything and also apparently looked to him for career advice about returning to HEE employment/training. Such an account is farcical given the situation.

12. I will now turn to the 5 examples of false content in his document that I put to Dr Frankel in the meeting with Norman Lamb as my email dated 10 January 2019 makes clear (January 2022 bundle page 323/4).

Example one - “The statements produced for the ET all confirmed the findings of Malcolm Plummer’s report.”

13. I started with the example that I felt would have the most impact and it certainly did. I took Dr Frankel and Norman Lamb to the Tribunal statement of my clinical supervisor Dr Sauer. I made the point that this was the consultant that I had day to day contact with for 6 months at the First Respondent up until the point my contract expired in August 2014. I stated something along the lines ‘Lets see what Dr Sauer, my actual clinical supervisor, makes of the Plummer Report and HEE’s allegations against me – lets look at his Tribunal statement – Does this sound very supportive of Mr Plummer?’

“the Second Respondent and senior managers at the First Respondent have made allegations about his performance, state of mind, engagement with supervisors and personal, as well as, professional

conduct. I find these allegations extremely surprising as during the whole period of my engagement with the Claimant I never noticed any basis for such allegations. It is also surprising that these allegations were never discussed with me. As the Claimant's clinical supervisor, I would expect to hear about such concerns as a matter of urgency. I confirm that I clearly do not support these allegations and believe they have no grounds. It is also not consistent with anything that has been written in the Claimant's Eportfolio by the over 30 health professionals that have worked with or assessed the Claimant during his training.(emphasis added) "

14. I also highlighted the evidence from Dr Sauer in his statement that Dr Frankel and Mr Plummer excluded from their investigations that contradicted concerns about my performance as a doctor;

"a competent and confident trainee with a skill set which exceeds the expectations of someone of his level of training... He was very conscientious, absolutely reliable and always attended punctually. He took very little sick leave and was always willing to work flexibly to enable the department to cope with the clinical workload and was unfailingly cheerful and as a consequence a popular colleague."

15. I asked Dr Frankel how he could possibly justify excluding and ignoring Dr Sauer's written evidence from the Plummer investigation. I got no significant response and moved on as I wanted to just show that I had put the evidence to Dr Frankel.

16. I briefly explained the significance of multisource feedback and Eportfolio evidence and highlighted this content from Dr Sauer's statement;

"It is also not consistent with anything that has been written in the Claimant's Eportfolio by the over 30 health professionals that have worked with or assessed the Claimant during his training"

17. I set out how my Eportfolio provides evidence from 30 members of NHS staff demonstrated my ability at the Respondents to get on well with colleagues and seniors, my high performance and also my ability to deal well with potentially stressful or heightened situations. I highlighted this comment in the Multisource Feedback that appeared in my 2018 statement, as it discredits the angry unhinged impression the Respondents and their Counsel are so keen to portray of me:

“His ability to think on his feet and diffuse heightened situations with agitated or aggressive patients has been commented upon and respected by many colleagues” (2018 bundle page 566).

18. I challenged Dr Frankel on how it could possibly be fair to also have excluded this evidence from the Plummer investigation. Dr Frankel did not offer a response so I moved on.

19. I then took Dr Frankel and Norman Lamb to the Second Respondents witness statement of Dr Chakravarti. My lead in was ‘lets see what the Second Respondent’s own consultant anaesthetist witness makes of the Plummer Investigation – Does this sound very supportive of Mr Plummer?’

“the notes made by Mr Plummer contain short phrases without giving their context and by stringing the phrases together I feel it gives an exaggerated distorted impression. Upon reading the report, I was very surprised to find various phrases in inverted commas seemingly quoting me, when I could not recall saying those phrases. I did not feel that the report portrayed the situation as accurately from my perspective as I would have wanted.” (emphasis added)

20. I made the point that Dr Chakravarti only started telling the truth about what I said and the way I said in respect of my of my protected disclosure at the ARCP when I asserted in 2015 that covert audio would be used in the litigation to counter false allegations of my dialogue that the Second Respondent had inserted into the formal Plummer Report..

21. I concluded by making the point that the Tribunal statement of the ARCP panel members Dr Harrison and evidence from the consultant Dr Umu-Etuk also contradicts the findings of the Plummer Report.

22. I remember Norman Lamb asking Dr Frankel, after he had failed to respond to my points, with a certain level of robustness, for a response to what I set out which is when Dr Frankel conceded the Plummer investigation was terrible.

Example Two - “Through the statements issued by all the participants both to our subsequent internal investigation and in the witness statements produced for the employment tribunal it is clear that Dr Brooke spoke up for Dr Day.”

23. I provided context that Dr Brooke was a Director of both Respondents that had failed to escalate my protected disclosures months before the 2 Serious Untoward Incidents after initially saying he would escalate my protected disclosure to Dr Lacy at the Second Respondent.
24. I set out evidence describing Dr Brooke's unplanned contact with my ARCP panel following my protected disclosure. I made clear that the Second Respondent and Dr Brooke shortly after the ARCP had refused for several months to give an account of the evidence Dr Brooke gave to the ARCP panel.
25. I set out the following examples of written evidence showing Dr Brooke causing me detriment during his contact with the ARCP panel.
- a) The ARCP Chair Dr Harrison's Tribunal statement at [48] and [76]

" We mentioned to Dr Brooke that Dr Day had raised concerns about lack of supervision at QEH. Dr Brooke said he was aware of the issue. Dr Brooke told us that he that he thought that Dr Day seemed more concerned about the issue than was warranted for a trainee and that he seemed fixated about it. I recall Dr Brooke giving us his view that Dr Day was not managing this situation well"
 - b) Dr Umu-Etuk stated in an email in 2014 (2018 Bundle Page 829-830) that she was disheartened by Dr Brooke's.
 - c) Dr Lacy's comment to me after her contact with Dr Brooke and the ARCP panel (who had no personal experience of me);
 - (i) *"I used to get angry sometimes when I was younger and even now "I go 0-60 with my husband sometime"*
 - (ii) *"What will happen when you see something unsafe or that you don't like at St Thomas, will you fly off the handle "*
 - (iii) *"have you ever considered professional help or support"*
26. I made the point to Dr Frankel and Norman Lamb that in the lead up to the October 2018 Hearing it must have been clear to Dr Brooke that the above evidence from Dr Harrison and Dr Umu-Etuk was not going to support his initial account of his contact with the ARCP panel where he

stated *“that he had given verbal evidence to the panel but assured me that it was all positive.”*

27. I showed Dr Frankel and Norman Lamb this section of Dr Brooke's statement for the 2018 hearing;

“At this stage, I became very concerned about how Dr Day was acting towards people who were trying to support him. I lost sleep over the situation and I even had worries about my own personal safety at one point as I had never come across anything like this from a trainee before or since. Given the lack of explanation for the change, and given that I had only ever experienced similar behaviour in the past from agitated patients, I was concerned for my welfare. This is because I have previously been physically assaulted by patients behaving in a similar manner. I sought advice from Dr Chis Lacy, Simon Rose and Geoff Hinchley, Head of the School of Emergency Medicine.

28. I emphasised that at no point during my employment at the Respondents or during 2 formal investigations in 2014 did Dr Brooke express anything like the position that he chose to express in 2018 in Tribunal statement.

29. I showed Dr Frankel and Norman Lamb Dr Brooke's record of our last ever face to face meeting on 11 June 2014 and asked whether it seemed consistent with what Dr Brooke would later claim 4 years later in a sworn statement. Dr Brooke states on 11 June 2014 (2018 bundle Page 797a)

“Most of the curriculum covered with WBA or training days attended. Few outstanding to be covered. Chris has engaged fully and we have had another useful meeting. Clear plan to achieve outstanding assessments by the ends of the month.”

30. I then showed Dr Frankel and Norman Lamb how Dr Brooke described me to the Roddis Associates formal investigations in 2014 and demonstrated that this was yet another example of what a change in position it was in Dr Brooke's Tribunal statement 2018. Roddis Associates recorded Dr Brooke's impression of me 2 months after I had left the Trust in October 2014.

“He had no concerns about CD's safety. He also told them that he thought CD was a good doctor. He had reached most of his milestones, had made fantastic progress and was well liked with a good MSF.”

31. I stated to Norman Lamb and Dr Frankel that what I have set out is clear evidence of Dr Brooke making allegations against me rather than speaking up for me, all be it when being pressed about my protected disclosures.
32. Dr Frankel did not offer a significant response that agreed or disagreed.

Example 3 - “He (the ARCP Chair) was forced to tick those boxes because the emergency medicine eportfolio required this. This affected every doctor in emergency medicine undergoing their annual assessment at the time.”

33. A key detriment in my case is an ARCP record containing false allegations that the Second Respondent refused to remove from my permanent record for 5 weeks. Dr Frankel now accepts the record was “inappropriate” and the HEE Manager Mr Waltham accepted the refusal to remove it from my record for 5 weeks as “unreasonable.”
34. Paragraph 134 and 135 of my 2018 statement with the relevant parts of the bundle prove as false the claim made by Dr Frankel in his document that the ARCP document was a computer error also affecting every doctor in emergency medicine.
35. I firstly pointed out to Dr Frankel in the meeting that a computer software error cannot explain the verbal comments from Dr Lacy, her refusal to remove the ARCP document for 5 weeks or a manuscript document recording by fabricated agreement to a service staffed by psychiatrists.
36. On the claim the ARCP document was an apparent computer error affecting all emergency medicine doctors, my 2018 statement states;

“On 8 December the BMA wrote to Mr Plummer criticising the sending of a partial report and for not providing the data on Outcome 5 the Dean promised to obtain (pages 1452-1453). This data that was excluded from the Plummer investigation but is found at pages 913-936 of the bundle. It shows me as the only doctor in London to have allegations about engagement with supervision and personal/professional added to their ARCP Outcome 5.”

37. I put to Dr Frankel that the audio of the 2 September 2014 meeting shows the BMA securing his agreement to source this ARCP outcome 5 data to see if I was the only doctor affected by significant allegations on their ARCP Outcome 5 record. This data was obtained then excluded from the Plummer investigation and initially from Tribunal disclosure because it

proved my ARCP record as a whistleblowing detriment. Dr Frankel did not respond.

38. I also put to Dr Frankel that the audio on 2 September 2014 shows that he understood and could “totally see” the seriousness of my complaint about the false ARCP document (2018 Bundle Page 904t);

“It is the concern that suddenly you were, and I’ve read this in your email that suddenly you were tainted by having these tick boxes when they said you were not engaging and issues about your conduct - I can absolutely see that.”

39. I also put to Dr Frankel that he conceded to the BMA and me in the same meeting with the BMA on 2 September 2014 (2018 Bundle Page 904v),”

“I can see that any discussion about having removed (the ARCP document) from the Portfolio is irrelevant It’s actually the process from what went on to get it on there in the first place.”

40. This is clearly Dr Frankel conceding in 2014 that the false ARCP document and the process leading to it was a significant detriment as I have always claimed.

41. I put to Dr Frankel that this was evidence of him completely understanding and agreeing with my serious complaint about the ARCP document and then him changing his view for the litigation and trying to conceal evidence that supported my position in order to discredit me in litigation.

42. I received no significant response from Dr Frankel.

Example 4 - A weakness of the report was the failure to interview one of the four panel members (Dr Umu-Etuk). We were however able to review correspondence relating to her contribution. She has confirmed that the contents of the report and the description of the panel meeting given by the other members of the panel was entirely accurate.”

43. I took Dr Frankel and Norman Lamb to the ARCP panellist, Dr Umu-Etuk’s description of me making my protected disclosure on 3 June 2014 to the ARCP panel (2018 Bundle Page 829-830) ;

“I was of the opinion that you came across confident and assertive.. I do not recall you to be visibly shaking but did form the opinion that the hospital in question failed to provide enough support out of

hours..I remember that you had sole responsibility for ITU which seems to be beyond the expected competency of a CT1/2 doctor”

44. This email evidence was deliberately excluded from the Plummer report despite being referred to my me and the BMA. It contradicts the damaging description of me making the disclosure that was (apparently) falsely attributed to the ARCP panellist Dr Chaktrvarti in the Plummer Report and then falsely pleaded as the unanimous view of the ARCP panel in Tribunal pleadings. The false account of me making the protected disclosure in the Plummer report included the words;

“in the grip of angst”,

“physically shaking”,

“this behaviour on the day alone does certainly appear to have raised questions for the panel about his state of mind”.

45. I put to Dr Frankel that Dr Chakravarti confirmed in her tribunal witness statement that the above statements were falsely attributed to her by Mr Plummer (see[18] above) . On 5 January 2015 Dr Chakravarti sent an email to HEE saying she was “baffled by the various quotes attributed to [her]”. HEE’s Director of HR Mr Plummer made no changes to the report and responded referring to the scandalous application to strike the claim out by denying employer status;

“We are reasonably hopeful that it will be ‘struck out’ on the grounds that we (HEE) are not his employer and that the Public Disclosure Act therefore does not apply to the relationship that existed between him and HEE which will be the end of it for you (and me).”

46. I put to Dr Frankel that in other words Mr Plummer is effectively saying to Chakravarti, that it doesn’t matter that he has falsely attributed a load of damaging statements to her to smear a junior doctor raising safety issues because HEE and their lawyers are going to prevent the case ever being heard by denying employer status and denying HEE is covered by whistleblowing law. Dr Chakravarti goes along with the plan.

47. Dr Frankel offered no significant response so I moved on.

Example 5 - “A quality management visit was planned for the QEH site specifically to look at the ACCS programme. This was undertaken on 15 October 2014. The visit confirmed the issues raised by Dr Day in relation to

his disclosures.. Progress was slow and a further visit took place on 15 March 2015 because of this and also because of the outcome of a CQC visit...the ICU was reviewed and unfortunately only limited improvement had occurred in this area.

48. I challenged Dr Frankel for leaving out of his 2018 Tribunal witness statement the true findings of the 2 HEE Quality Visits that he referred to in his 11 page document to Norman Lamb. I showed Dr Frankel and Norman Lamb what the Respondents reported about the October 2014 Quality Visit in formal reports in 2014 and at the Tribunal in 2018;

“A recent Deanery (HEE) visit concluded that the staffing levels (unchanged since January 2014) were safe and there were no concerns about supervision highlighted by them.”

49. I put to Dr Frankel why this is not clear evidence of the Respondents misleading a Tribunal about the reality of a Quality Visit. I got no answer from Dr Frankel. In particular, I highlighted the following quote from the Quality visit which was one of several serious criticisms of the First Respondent by a body of junior doctors;

“Culture; “Concerns raised regarding bullying and undermining, with some trainees being too scared to name consultants that were responsible for this for fear of repercussion. It was felt that this was a problem that had been seen if not experienced by most if not all trainees.”

50. I asked how serious issues like the above from large numbers of junior doctors could be represented to a Tribunal and in formal reports as “no concerns about supervision highlighted” and how such important detail could have been left out of his witness statement. I got no answer from Dr Frankel.

51. I then reminded Dr Frankel of what the covert audio recorded as his view of my protected disclosure in the formal meeting with the BMA 2 September 2014;

“What you describe to me is totally unacceptable for me to have trainees in a situation that you were in. In ICU you are not trained for intubation and airway care and you’re in charge 19 never mind all the other issues. the whole things what you described is unsafe.. You were clearly not the only person who had concerns about it.”

52. I invited Norman Lamb to compare this stated view of my protected disclosure from Dr Frankel on covert audio to the stated position of both Respondents in formal reports used at the Tribunal;

“ Dr Day was expected to cover the 18 bedded ICU, ward outliers, A&E and ward ICU as a Resident SHO in QEH. In my opinion this was acceptable in light of his experience and skills at the time”.

“A recent Deanery Visit concluded that staffing levels (unchanged since January 2014) were safe and there were no concerns about supervision highlighted by them”

53. I put it to Dr Frankel, that now the content of my protected disclosure had become more widely known, thanks to certain MPs and the media, that he was seeking to give the false impression to Norman Lamb that he and HEE had formally supported the validity of my protected disclosures in reports and at the Tribunal which was simply not true. I put to Dr Frankel that his true view on my protected disclosures and the honest account of the relevant Quality Visits were left out of his statement. This enabled Angus Moon QC and Ben Cooper QC to smear me as irrational and hyperbolic with my protected disclosures. One of the quality visits was not even disclosed as part of standard disclosure.

54. I put to Dr Frankel that he and HEE allowed the situation in the relevant ICU that he as a senior doctor knew was “totally unacceptable “ and “unsafe” to be described as acceptable. This included claiming that 2 SUIs that further supported the deadly seriousness of my protected disclosures were irrelevant.

55. I made the point to Dr Frankel that one of the SUI’s involved an inexperienced junior doctor working on what he had described as “totally unacceptable conditions” on an ICU doing a procedure incorrectly and then not noticing due to overwork or undertraining with this resulting in the patient slowly bleeding to death. I asked how such an incident could possibly not be relevant to my case?

56. Dr Frankel did not respond.

Example 6 – Fabricating a new account of my ARCP and false training deficits for the litigation in 2018 that were contradicted by the Second Respondents own papers from 2014

57. I did not have time to cover this 6th example in the meeting with Norman Lamb. The material I had planned to put to Dr Frankel in this 6th example is included in a separate document at (Page xxxx).
58. There was absolutely no dispute about my ARCP Outcome 5 back in 2014 that came quite reasonably and predictably as a result of deficits in the training evidence that I presented to the ARCP panel (like 40% of my colleagues that year (2018 bundle page 1117(a)-(e))).
59. The narrative of a dispute and me failing to engaged with the ARCP panel's findings on my training evidence was concocted for the 2018 litigation to take the emphasis off my protected disclosures.
60. Prior to my ARCP on 3 June 2014, I had met the Second Respondent's Training Programme Director who identified some deficits in my training evidence and stated that, " *I would get an Outcome 5 and that I didn't have too much to worry about. He said he would help me convert my Outcome 5 to an Outcome 1" (2018 bundle page 1392).*
61. It is quite clear from the Second Respondents own papers from 2014 that the findings and outcome 5 issued by the ARCP panel on 3 June 2014 were accepted by me as reasonable. It is also clear from the papers that the ARCP outcome had occurred before I made my protected disclosure.
62. It is also clear from the papers that by 11 June 2014 the Second Respondent's Training Programme Director, Dr Brooke, had assessed that I had made "good progress" and nearly rectified most of the deficits in training evidence and was "*on-track to rectify all of them by the end of the month*" (2018 Bundle Page 797a). This further discredits the assertion that I did not engage properly with the ARCP panel or as Mr Moon put it at the Tribunal that I thought ARCPs were stupid.
- "Post ARCP meeting. Has list of competencies required to convert outcome 5 to 1. Has made good progress since ARCP. One of the procedures completed, plans to complete the other outstanding 2. STR anaesthetics – trainers & trainee unable to access correct form but evidence seen and STR completed. Audit complete needs uploading due for presentation in July. Most of the curriculum covered with WBA or training days attended. Few outstanding to be covered. Chris has engaged fully and we have had another useful meeting. Clear plan to achieve outstanding assessments by the ends of the month."*

63. The Second Respondent attempted to invent a narrative for the 2018 hearing of me arguing and disputing the ARCP panel's reasonable findings and outcome. They asserted that I made an angry and irrational alleged protected disclosure midway through the ARCP before the ARCP outcome was issued whilst arguing with the ARCP panel about the outcome. Dr Frankel does something similar in his 11 page document.
64. The Second Respondent's own witnesses confirmed that I made a protected disclosure in a "confident and assertive" manor (2018 bundle Page 829-830) at the conclusion of my ARCP on 3 June 2014 once I had accepted an ARCP Outcome 5 for a deficit in certain training evidence (like 40% of my colleagues that year (2018 bundle page 1117(a)-(e))).
65. The Second Respondent's narrative for the 2018 litigation even changed from their own pleaded position in 2014 which should have been obvious to the Tribunal. The Second Respondent's pleadings include an acceptance that my alleged protected disclosure (now conceded) occurred at the conclusion of my ARCP after I had accepted that my ARCP Outcome 5 was the only outcome that I could have received;

"The claimant accepted that an outcome 5 was the only he could have received as he had failed to complete the relevant training and evidence. At the conclusion of the panel meeting, the claimant disclosed to the panel his concerns regarding patient safety and staffing in the ICU at QEH which he had raised in August 2013 and January 2014."

66. Any reasonable employment tribunal would not have accepted this narrative clearly recorded in the Respondents own documents and pleadings in 2014 being completely re-invented for an employment tribunal hearing in 2018. It is surprising my former barrister Chris Milsom fell for this as he clearly did from his response to my Letter Before Action.
67. At the meeting with Norman Lamb, I had been intending to ask Dr Frankel about the methods deployed at the 2018 hearing to re-invent the HEE account of my ARCP. The method used at the Tribunal by Mr Moon QC involved making false statements about my ARCP and then preventing me be from accessing the bundle to prove them as false.
68. This created the impression of a dispute/argument at the Tribunal in 2018 about my ARCP (that did not occur in 2014). I had intended to put the 2 strongest of several examples of this to Dr Frankel in the meeting with Norman Lamb but as stated I did not have time;

Clinical Audit

- a) There was an issue at the 2014 ARCP of me not uploading to my Eportfolio a Power Point of my Audit in time for the ARCP which was a reasonable point for the ARCP panel to make that I accepted in 2014. At the Tribunal this was re-invented to the Second Respondent falsely claiming in witness evidence at [61] of Dr Harrison's statement "*Every trainee was required to complete at least on audit. Dr Day had failed to complete an audit.*" Mr Moon QC used this false statement to smear me as failing academically. Mr Moon then prevented me from taking the Tribunal to proof of my audit in my training record at (2018 bundle page 797a) where Dr Brooke states on 11 June 2014, "Audit completed needs uploading due for presentation in July" or in my supervisor, Dr Sauer's statement, "He participated actively in the audit and teaching" or the actual power point of my audit presentation. This exchange between me and Mr Moon gave the false impression of a dispute about an audit that simply didn't exist in 2014. Mr Moon accused me of lying about my claim to have conducted an audit. This is outrageous given the evidence in the bundle and the fact that I was prevented from accessing it.

Training Days

- b) At the ARCP it was found that I had not attended enough of my mandatory training days. The reason for this was recorded by the ARCP panel as "*little opportunity to attend training days from a poorly supervised ICU*". Despite not being able to attend all of them I had evidence of attending 8 mandatory training days (2018 bundle pages 652-653). At the Tribunal the situation in 2014 was re-invented for the 2018 hearing to falsely stating that I had attended none of my mandatory training and further more added to this false statement was the deliberate falsehood of me apparently being AWOL from work when not at the training days. Both Respondents knew when I was not at the training days I was working in an understaffed ICU (as recorded in my ARCP record by the chair). Both Respondents were also aware that my leave position at the First Respondent included only half a day sick leave and me not claiming 19 days of annual leave that I was entitled to (2018 bundle Page 856). Mr Moon used the false statements to smear me as someone who did not attend for work and also to create a dispute about training days at the 2018 hearing that was simply not there in 2014 at the ARCP as the papers clearly show. I was prevented from proving this with the bundle at the Tribunal.

69. Dr Frankel's claim in his statement that I started to tell Norman Lamb about procedure numbers in the meeting is false. The procedure matter is a very minor point for me. I accepted at the ARCP that I did not have 3 out of a large number of supervised procedures that I should have had recorded at ARCP and started to rectify this within 10 days of the ARCP as Dr Brooke makes clear in his entry in my training record on the 11 June 2014.
70. If we had discussed my proposed 6th Example from Dr Frankel's document, I would have focused on challenging Dr Frankel on the fact he and several other senior doctors misled the Tribunal in their statements on falsely claiming that I had not completed an audit when they knew that I had. That is clearly my strongest point followed closely by the false statements about the training days and the sequence of events contrary to the Second Respondent's own pleadings. I certainly would not have entered into an argument over 3 procedures that I accepted HEE's position on in 2014 and still do.

The Impact of the Meeting With Dr Frankel and Norman Lamb

71. Contrary to what Dr Frankel now claims, my meeting with Dr Frankel and Norman Lamb clearly had an impact on both Norman Lamb and Dr Frankel as evidence by Dr Frankel's concessions and Norman Lamb's subsequent actions stemming from the meeting which I will now briefly turn to.

Formal Contact Between Norman Lamb and HEE

72. It has been asserted by Professor Reid in her statement that had Norman Lamb made a formal approach to the leadership of HEE then a full and appropriate response would have been forthcoming.
73. On 13 May 2019, Norman Lamb did exactly that and attempted to hold the Chief Executive of the Second Respondent to account on allegations that the Second Respondent misled a Tribunal on my 3 June 2014 protected disclosure and on serious disclosure offences that were also described by me in 2 letters dated 5 April 2019 that Norman Lamb forwarded with his cover letter;

“ I believe that it is of critical importance that both of these letters dated 5th April 2019 receive a substantive response. If your lawyers are unwilling to respond then, as a public body, it is incumbent upon you to respond, particularly given the amount of public money that has been incurred in fighting a procedural point all the way to the Court of Appeal (and then losing) on the basis of failure to disclose a key contract. I hope very much that you will reply in substance to both of these letters and I look forward to receiving your full response as soon as possible. I should also make clear that I intend to raise these issues in Parliament.”

74. When the substance of Norman Lamb’s letter was not answered. Norman Lamb brought the matter up during a debate on whistleblowing law in the House of Commons on 3 July 2019 (page XXXX) when he referred to my case in some detail’

“ I have raised this with Health Education England, but it will not give me a proper response because it says that the case is at an end. Does the hon. Gentleman agree that this is totally unacceptable and that it smacks of unethical behaviour”

75. The Second Respondent’s Chief Executive by the time he responded to Norman Lamb’s May 2019 letter knew about Dr Frankel’s contact with Norman Lamb and his 11 page document also sent to Sir Norman Lamb. When the HEE CEO wrote back to Sir Norman Lamb he could have clarified HEE’s position on Dr Frankel’s 11 page document but chose not to.

76. There is a clear benefit to the Second Respondent of the content of Dr Frankel’s document being believed. If accepted the reader would be satisfied that HEE’s formal Plummer Investigation into my case was endorsed at the Tribunal by several senior doctors and ALL Tribunal statements. The reader would also be satisfied that HEE supported and were open and honest about my protected disclosures and the support the protected disclosure had from various forms of evidence including HEE Quality Visits. This content would clearly lead a reasonable person to conclude the claims that I have advanced in my case are dishonest and vexatious. At no point has the content of Dr Frankel’s document ever been corrected by the Second Respondent for very obvious reasons as it has clearly been disseminated more widely including to the Chair of the UK Conference of Post Graduate Deans.

STATEMENT OF TRUTH

This statement is true to the best of my knowledge and belief.

Signed:

Dr Christopher Day

On this ... day of January 2022