Chrismarkday@gmail.com

16 March 2022

By email only; steven.bint@sra.org.uk

Dear Mr Bint,

Re :The SRA's Formal Investigation into Capsticks Solicitors

This letter is copied to the Chief Executive of the SRA.

Earlier last month, I wrote to you about the 3 separate formal SRA investigations that were eventually performed into 3 law firms that had involvement in my whistleblowing case.

My correspondence related to a helpful Financial Times piece about my case and also a Tribunal Order dated 2 September 2021 from a Judge Kelly. I enclose both with this letter.

My correspondence repeated 2 simple but important questions about Capsticks Solicitors that the SRA has simply dodged in their investigations.

The SRA failed to respond to my queries by their own self-imposed deadline of the 28 February 2022. When you did respond on the SRA's behalf on 11 March 2022, despite your long email, it is clear that both questions still remained unanswered.

I shall now repeat the questions to the give the SRA one final opportunity to respond. I intend to send this letter to my MP, my crowdfunders and to other relevant stakeholders if I do not receive an adequate response to it by the end of the month.

Question 1 – Does the SRA assert that it is the Lewisham and Greenwich NHS Trust CEO and not Capsticks Solicitors that is responsible for the failure in disclosure described in Judge Kelly's Order dated 2 September 2021.

The order from Judge Kelly dated 2 September 2021 refers to 18 letters that the Chief Executive of Lewisham and Greenwich NHS sent to local MPs and influential stakeholders about my whistleblowing case. The CEO asserts in the letters, that enclose the very same NHS public statements at the centre of my tribunal claim, that the written material that he has provided will leave the various public officials "fully briefed" about my case.

My Tribunal whistleblowing claim asserts that these public statements are objectively false and detrimental. It should be noted that my tribunal claim is supported by the British Medical

Association. The NHS statements have been further criticised by the former health minister and lawyer Sir Norman Lamb in a letter to the Lewisham and Greenwich CEO;

> *"It is my belief that aspects of the Trust's public statements (as referred to in Chris Day's letter) are severely defamatory and should be withdrawn forthwith and that there should be a full apology. I should stress again that the inaccuracies in the public statements by the Trust are not only defamatory but are deeply distressing."*

The 18 letters were left out of Lewisham and Greenwich's Standard Disclosure to the Tribunal contrary to a Standard Disclosure Court Order. They were only disclosed when I caught Lewisham and Greenwich out with an internal email disclosed from Health Education England referring to the 18 letters that it stated the Trust CEO had sent to local MPs and local stakeholders. It is obvious that these 18 letters, that are clearly relevant to my claim, would not have been disclosed had I not noticed HEE's reference to them and caught the Trust and their lawyers out with the relevant internal email from HEE.

Judge Kelly states in her order;

> "*R1 failed to comply with its discovery obligations. If the amendment is not allowed, R1 may be seen to be benefitting from its failure.. we can see that sending allegedly detrimental material to specific local stakeholders is more clearly potentially damaging to the claimant than merely posting information on a website where it cannot be said who will see it, if anyone. Therefore, allowing the amendment may be important to the quantum of damage if the claimant succeeds in his claim."*

It is obvious why I would want to know whether it is the SRA's position that the Lewisham and Greenwich CEO attempted to hide these 18 letters from Capsticks Solicitors and so the firm is in no way to blame for the failure in disclosure or whether during their investigation, the SRA has found that the firm did know about the 18 letters or worse may even have had input into their drafting (which I have reason to suspect)

Instead of dealing with this obvious point, the SRA have ignored it and most recently have attempted to deny that a failure in disclosure even took place despite a Tribunal Order clearly stating that it did, which is extraordinary. This most recent SRA attempt at dodging the question simply refers to the fact Capsticks disclosed the letters once I had caught the firm and the Trust out with the relevant HEE internal email;

> "*You raised this issue with Capsticks direct in your email dated 18 January 2021 requesting disclosure. Capsticks responded on 26 January 2021 providing the documents, as far as it was able, and explained some of the letters were not presently available and were being searched for but may have been deleted by the Trust. Capsticks confirmed that the documents were provided in accordance with the disclosure requirements and would be added to the hearing bundle. It is apparent that Capsticks has appropriately assisted the Trust in fulfilling its disclosure obligations … Having established this position from the documents, it was not necessary for us to specifically ascertain when Capsticks first became aware of the '18 letters'. I am therefore unable to confirm this date to you."*

How can the SRA be satisfied that Capsticks actions in respect of disclosure have been appropriate with the 18 letters, if the SRA accepts that it does not know when Capsticks became aware of the 18 letters of whether or not the firm helped draft them?

It is entirely possible and frankly probable that Capsticks knew about 18 letters that were sent to 18 local MPs and stakeholders about a high profile whistleblowing case that the firm was instructed on. It is equally probable that the firm had input in the drafting of the letters. I am afraid the SRA's persistent refusal to give a straightforward answer to this question suggests the SRA are attempting to cover for Capsticks who are also the SRA's their panel law firm. If that was not the case, the SRA would simply confirm Capsticks were not aware of the 18 letters prior to my request for them rather than concocting some long-winded explanation about why the question doesn't matter.

Please can the SRA provide the date at which Capsticks first became aware of the 18 letters.

Question 2 –

In respect of the settlement of my whistleblowing case. My former Barrister, Chris Milsom, has described in writing 3 separate ordinary cost threats, a reference to wasted costs against my former legal team and references to referring me and my former legal team to our respective medical and legal regulators. The Managing Partner of Capsticks, Martin Hamilton, has categorically denied that these threats occurred and the NHS has gone further and stated the fact I say they did occur is simply untrue (effectively accusing me of dishonesty to MPs and the press). I say these threats were used to induce the settlement of my whistleblowing case and to force me to agree to certain wording in an agreed public statement.

Can the SRA provide a position on who they believe is telling the truth out of Mr Milsom or Mr Hamilton and explain their refusal for over 2 years to put Mr Milsom's evidence to the Managing Partner of Capsticks Solicitors, Martin Hamilton?

I set out the evidence below that Mr Milsom and Mr Hamilton have committed to writing in late 2018 (that cannot now be re-invented). The fact Mr Milsom has become obstructive to me using this evidence does not change the fact that Mr Milsom and Mr Hamilton wrote it back in 2018.

The Financial Times piece that I sent to the SRA sets out how simple this situation is. The dispute that has arisen between the lawyers in this case was covered in the FT piece with expert opinion. The Head of Employment at Irwin Mitchel Mr Shah Qureshi commented to the FT;

> *"Employers and their lawyers routinely threaten costs against whistleblowers to frighten them into dropping their claims or watering them down"*

I will now set out evidence.

Ordinary Cost Threats

1. A letter from Mr Hamilton (Capsticks Managing Partner) to the Lewisham and Greenwich Board dated 21 December 2018 states;

> "We are writing to confirm as follows: Lewisham and Greenwich did not instruct us to threaten Dr Day with legal costs at any stage. We did not instruct the barristers, instructed by us on behalf of the Trust, to threaten Dr Day with legal costs, and they have confirmed that they did not do so."

The Trust released the following public statements;

> "*On the issue of costs, we had decided not to pursue Dr Day for legal fees before he withdrew his case"*

> *"he claims that the Trust threatened him with the prospect of paying our legal costs. All of this is simply untrue.."*

2. Emails disclosed to me (using GDPR from Ben Cooper QC the Trust Counsel) show that Mr Cooper updated Martin Hamilton of an intended cost threat and drop hands offer that Martin Hamilton later instructed on Friday 5 October 2018 on behalf of his client Lewisham and Greenwich NHS Trust. I rejected the threat and drop hands offer when it was put to me and continued with my evidence and the case. The evidence shows that a cost threat was clearly made, with an assertion that my evidence was dishonest. Mr Cooper tells Mr Hamilton in an email the following on Friday 5 October 2018;

> *"I indicated.(to Dr Day's lawyer Mr Milsom). There is now clearly a real risk that he (Dr Day) will not only lose his claim but may have findings that he has been untruthful in his evidence; If he were to withdraw at this stage we would not pursue him for costs but that if he ploughed on and that was the outcome, we would make a cost application"*

3. When I rejected the 5 October 2018 drop hands offer tethered to a cost threat, a second wave of ordinary cost threats were subsequently made that have also been described by Mr Milsom in writing. These came from Heath Education England and Lewisham and Greenwich NHS Trust's legal teams that Mr Milsom makes clear was "in no way invited by him". Mr Milsom writes in an email dated 30 November 2018;

> *"In addition to my discussion with Ben Cooper on Friday (after 2 days of your evidence) counsel for both Respondents in a joint conversation on at least one occasion made reference to cost consequences of continuing. As I have stated*

previously this was a sophisticated discussion in that a two tier approach was mooted by them and in no way invited by me,

a) Rejecting a drop hands offer and losing at trial without any credibility findings would lead to an application in respect of ongoing costs of trial.

b) The above but with adverse credibility findings; the Respondents expressly stated that costs for the entire litigation maybe at large.

I challenged this with Angus Moon as regards costs of the appeal process, he replied that since these were associated with litigation these too would have to be sought and in any event "Dr Day would have to return the £55,000 paid at the remitted PH."

4.In an approved Tribunal statement, Mr Milsom confirms the position of me and my wife that the cost threats used to induce settlement of my case were also used to pressure us to agree to certain wording in an agreed public statement. Mr Milsom's approved statement dated 11 December 2018 states;

"I remember that there was a point during the course of settlement discussions at which an impasse was reached on the terms of the joint statement. HEE in particular became more emphatic on the prospect of a costs application at this juncture and Mr Moon stated that the wording of the agreed statement must accept that individuals employed at the Respondents acted in good faith towards Dr Day as a 'red line' in negotiations. I communicated this fact to Dr Day and his wife."

Wasted Costs

4. Martin Hamilton claims the following in a second letter to the Lewisham and Greenwich Board, 24 hours after his first letter denying that ordinary cost threats were used in my case;

"*We had no instructions from the Trust to threaten a wasted cost application against Dr Day's legal representatives, and we did not make such a threat and we have not made such a referral.*

5. Mr Milsom contradicts Mr Hamilton's email dated 30 November 2018

"The sole issue was in relation to the non-disclosure of covert recordings which went beyond my knowledge. I have never suggested that my own conduct was under scrutiny and wish to shun the notion immediately that this could have played any part in resolution of proceedings. There was a mention by counsel for both Respondents as to the possibility of wasted costs arising from the late disclosure of these recordings vis-a-vis TJL."

Threats to Refer Me to the General Medical Council Whilst I Was Giving Evidence

6. Mr Hamilton writes in his letter to the Lewisham and Greenwich Board;

> "We had no instructions from the Trust to threaten to refer Dr Day to the GMC, and we did not make such a threat on the Trust's behalf. You have confirmed that the Trust has never considered referring Dr Day to the GMC and has no intention of doing so."

7. In contrast Mr Milsom writes,

> *"the prospect of a GMC referral/conduct which may warrant GMC interest (principally as regards covert recording) was raised not only by Ms Montraghi for the Trust (junior to Ben Cooper)"*

The SRA has point blank refused to investigate the dramatic difference in accounts between Mr Chris Milsom and Mr Martin Hamilton. It is clear to anyone from the evidence above that both lawyers cannot both be telling the truth. The SRA dismisses the situation as a slight difference in recollection (without speaking to any of the lawyers involved).

Please can you commit to the SRA performing the basic investigative duty of putting the above account provided by Mr Milsom to Mr Hamilton and recording Mr Hamilton's response to it. The SRA should make clear which account they are accepting and rejecting with logical reasons. It is beyond belief that this basic and obvious investigation step has not been taken in a formal investigation that has taken nearly 2 years.

The reluctance for the SRA to investigate or even speak to the lawyers involved in my case speaks volumes about how paralysed the SRA seems to be by its conflicts of interest with its panel law firm Capsticks Solicitors.

Explaining Away Allegations of Fraud and Contempt of Court From Both a Former Minister and a Journalist (without speaking or taking statements from the lawyers involved)

The situation does not seem to be much better with the SRA and the firm Hill Dickinson. The SRA has dismissed serious allegations of fraud and contempt of court with an SRA narrative, not based on any evidence or statements. The SRA position is that various lawyers in Hill Dickinson did not know what each other were doing. Nearly a million pounds of public money has been paid to the relevant law firms in my whistleblowing case. The case has been reported in the national media over several years and discussed in the House of Commons on several occasions. The SRA asserts after no direct

contact with the lawyers involved, that Hill Dickinson lawyers including their former Head of NHS Employment, did not know large numbers of NHS commissioning contracts. This is despite the firm being paid to draft each of the contracts. Each contract is worth tens of millions of pounds and shows Health Education England governing and commissioning the employment and training of 54,000 doctors nationwide, this is something that Hill Dickinson denied on HEE's behalf in Court. They did this whilst withholding the contracts from disclosure which damaged whistleblowing law for the nation's doctors in an attempt to stop my case ever being heard.

On the 3 July 2019, this situation was discussed in the House of Commons by two MPs that are both former lawyers.

Justin Madders first raised the issue;

"*Health Education England effectively sought to remove around 54,000 doctors from whistleblowing protection by claiming that it was not their employer."*

Sir Norman Lamb then stated;

"Is the hon. Gentleman aware that the contract between Health Education England and the trusts, which demonstrates the degree of control that Health Education England has over the employment of junior doctors, was not disclosed for some three years in that litigation? It was drafted by the very law firm that was making loads of money out of defending the case against Chris Day. 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 for that law firm to make money out of not disclosing a contract that it itself drafted?"

The SRA narrative of "no one knew what each other was doing" at Hill Dickinson without putting any of the evidence to a single lawyer involved is simply not credible especially as the complaint involves the former Head of NHS Employment at Hill Dickinson (who retired and left the firm in the middle of a letter exchange with me and the EAT about this issue).

Even if the SRA had interviewed any of the Hill Dickinson lawyers, it would surely be a tough sell for the Hill Dickinson former Head of NHS employment to claim for 4 years that he did not know his firm drafted 217 NHS contracts each worth tens of millions of pounds governing the way every junior doctor in England was employed. For the SRA to blame the NHS for this failure in disclosure and exonerate Hill Dickinson of any responsibility is shambolic.

Conclusion

I am a busy Emergency Medicine doctor and I find it unacceptable that I have had to expend yet more time asking the SRA to discharge its duties properly on the 2 simple questions above that were of fundamental importance to the SRA investigations. Clearly if I am being asked by MPs, journalists and doctors what the answers to the 2 questions are then they are important.

The SRA's brazen refusal to engage in basic fact finding in this situation is frankly embarrassing given how clear the issues are.

The former lawyer and Government Minister, Sir Norman has made reference to the crimes of fraud and contempt of court that are obviously applicable to the facts set out above. Sir Norman did this in his letter to the SRA's Chief Executive dated 9 September 2019. Once this was made public several further SRA complaints were lodge by doctors, members of the public and even a Bishop in the Church of England. Sir Norman's letter to the Chief Executive of the SRA ends,

> "*If your organisation continues to ignore complaints alleging very serious misconduct by lawyers at Hill Dickinson then we run the very serious risk that public trust in your organisation's ability to hold lawyers to account and to uphold high standards of conduct will be fatally undermined."*

If by the end of the month, I do not have a clear answer to my first question above and in respect of my second question, a commitment to put Mr Milsom's evidence to Martin Hamilton and then to record Mr Hamilton's response, I will be contacting my MP and taking any other steps externally to the SRA that might be appropriate.

Yours sincerely,

Dr Chris Day