IN THE EMPLOYMENT TRIBUNAL **Case Number: 2300819/2019**

LONDON SOUTH

BETWEEN

DR. CHRISTOPHER DAY

Claimant

-and-

(1) LEWISHAM AND GREENWICH NHS TRUST
~~**(2) HEALTH EDUCATION ENGLAND**~~ **Respondents**

OPENING POSITION STATEMENT FOR CLAIMANT

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1. This is the Claimant's position statement in relation to the preliminary matters which the Employment Tribunal is invited to determine.
2. The parties have agreed and sent to the tribunal:
    a. the list of issues;
    b. a cast list;
    c. a chronology;
3. The matters addressed in this position statement are as follows:
    a. The nature of the hearing
    b. The Claimant's request for the proceedings to be transcribed.
    c. Timetabling
    d. The evidence of Dr. Smith and Dr. Hormaeche
    e. The Claimant's supplementary witness statement
    f. That Claimant's request for specific information
    g. Privilege, and the parties' positions on privilege
4. Hereafter, the Claimant is referred to as "C", the Respondent as "R", and the Employment Tribunal as "the ET". No discourtesy is intended by these or any other shorthand adopted in this position statement.

PRELIMINARY ISSUES

The nature of the hearing

5. The parties were informed on 13 June 2022 that the hearing would take place in person. The parties were subsequently informed on Friday 17 June 2022 that the hearing was now to be by CVP. C considers that this type of lengthy hearing involving a number of witnesses is best dealt with in person. 15 days have been set aside for the hearing but neither party envisages that all of those days will be necessary. The tribunal is asked to consider whether the hearing can take place within the 15 day period but starting later than Monday 20 June in order that it can take place in person.

Transcription of the proceedings

6. C made an application to the ET dated 17 June 2022 for the proceedings to be transcribed by a professional transcriber. Arrangements have been made with a provider Epiq Europe limited to provide real time transcription.
7. C invites the ET to grant this application for the following reasons:
   a) It will be expedient for all parties and for the ET to have a transcription of the evidence. Given the length of the hearing and the number of witnesses, a professional transcript will ensure that each party has an accurate note of what each witness said. It is hoped that this will be of particular assistance in drafting helpful closing submissions that comment on the evidence, and for the ET in the event that a written judgment is drafted, which is likely in a case of this nature;
   b) Given that C is a whistleblower (which is accepted by R), an independent transcript will assist C in understanding and absorbing the evidence that is before the ET. This is of equal benefit to R. It ensures that there is absolute parity between the parties as regards a record of the hearing. This is of particular importance in whistleblowing cases where the trust between the parties is often eroded (as it certainly is here);
   c) Parties may, in any event, apply for transcripts of *recorded* ET hearings (see **Kumar v MES Environmental Ltd**: [2022] EAT 60);
   d) Allowing the proceedings to be transcribed transparently is in-keeping with the principle of open justice;
   e) Sir Keith Lindblom, Senior President of Tribunals, has already indicted in response to a letter on behalf of the Employment Tribunal Open Justice Campaign, that where recording facilities are available (which is primarily remote hearings), recording should be encouraged so that a transcript may be obtained.[1]
8. Accordingly, the ET is invited to grant C's request to allow the proceedings to be professionally transcribed. A copy of the transcript will be provided to the ET.

Timetabling

[1] See https://davidhencke.com/2022/04/22/employment-tribunal-open-justice-campaign-sir-keith-lindbloms-office-replies-to-lack-of-fairness-and-transparency-in-hearings/; reported here: https://www.lawgazette.co.uk/practice/tribunal-proceedings-could-be-recorded/5112269.article Accessed 16 June 2022.

9. C made a proposal as to the timetabling of this case on 16 June 2022. In particular C considers that the preliminary matters set out below are best dealt with by a tribunal already informed by having read the witness statement in the case. If the hearing does start on Monday 20 June 2022, C proposes 2 days of reading and that preliminary matters are dealt with on Wednesday 23 June 2022. There are a number of timetabling issues involving the needs of specific witnesses that also need to be addressed.

The evidence of Dr. Smith and Dr. Hormaeche

10. C understands from R that R intends to make an application to exclude the evidence of Drs. Smith and Hormaeche, on the basis that it is effectively expert evidence. To date, R has not in fact made this application, and so C reserves his right to provide a full response should such an application be made.

11. Firstly, C's primary position is that both Dr. Smith and Dr. Hormaeche are not expert witnesses of any description. Rather, they provide key factual and contextual evidence which will assist the ET in understanding how C's claims arise, and why in the view of C's colleagues and peers, his claim raises important issues in terms of protection of whistleblowers within the NHS. In order to decide this case the Tribunal must understand how certain members of the medical profession have and will interpret the allegedly detrimental statements. In addition to the Tribunal understanding and forming its own view on the alleged detrimental statements, it must consider the view of the key classes of individuals that have been affected by the public statements allegedly to the Claimant's detriment. It is common ground that the statements have been disseminated amongst MPs and the medical profession.

12. In seeking the exclusion of some of C's witnesses R seeks to advance objectively false statements about the Claimants protected disclosures and investigation and a view of the Claimant that his claims of whistleblowing detriment are weak dishonest and vexatious. C believes that such an assertion will not be possible if the Tribunal hears evidence from witnesses with experience of anaesthetics and intensive Care.

13. Secondly, the ET is plainly not bound by the Civil Procedure Rules as to evidence. The ET has discretion to admit the evidence regardless, and C invites the ET to do so.

14. Even so, taking into account the stricter propositions which apply under the CPR, the evidence is relevant and should still be allowed:

    a) Opinion evidence is prima facie admissible;

    b) The evidence of Dr. Smith and Dr. Hormaeche is helpful and necessary, and will genuinely assist the court;

    c) Both Dr. Smith and Dr. Hormaeche are experts in their fields, even if it is not C's position that they are relied upon as experts.

15. Thirdly, and most importantly, the ET is entitled to take a pragmatic position as to this evidence:

a) Allowing these statements would result in no prejudice whatsoever to R, who has had these statements since 24 May 2022 and is fully equipped to cross-examine on them;

b) R is an NHS Trust, and had it been necessary for R to rebut any of the evidence raised in the relevant statements, it could have called upon its own anaesthetists to provide that evidence. It has not sought to do so;

c) By contrast, there will be significant prejudice to C, who, days before the final hearing, has not had sight of any application made by R and therefore will have very little time to formulate a response;

d) The ET can hear the evidence and determine its weight following admission of the evidence, as it would ordinarily do;

e) There is plenty of room in the timetable for the evidence to be heard;

f) The overriding objective dictates that the parties should be on an equal footing and that undue formality in proceedings should be avoided. Those are factors which go in C's favour given the allegations C asks the ET to determine.

C's supplementary witness statement

16. C sent a supplementary witness statement to R on 6 June 2022 in response to parts of the witness statement of Ben Cooper QC on behalf of the Respondent .

17. Mr. Cooper in his witness statement, though on the one hand stating that it is not for this employment tribunal to make findings as to the evidence that was given at the tribunal hearing in October 2018, nevertheless has commented in strong terms on aspects of the witness evidence given by the claimant at that 2018 hearing. The claimant's supplementary statement addresses those issues on the basis that he does not agree with the assessment provided by Mr. Cooper for the reasons set out in the supplementary statement, and he refers to documents in the supplementary bundle.

18. C did not expect that the evidence on behalf of R would address the evidence given by C at the hearing in 2018. Even though C feels that the tribunal should not make any findings regarding the evidence at that stage, it would be unfair to C to leave the evidence of Mr. Cooper unchallenged, when C can provide documentary evidence to counter the relevant assertions made by Mr. Cooper. Mr Cooper is a well-known employment law barrister. His assertions and opinions may be given weight by the tribunal if C is not permitted to counter them.

19. R has been asked to agree to the admission of the supplementary statement from C but does not agree to its admission though they have not set out their reasoning to date.

20. The matters referred to in C's supplementary statement are technical / medical in their nature and not suitable to be dealt with by way of oral examination in chief – which would in any event be less useful to both R and to the tribunal.

21. There is more than enough time in the existing listing to offer the opportunity of cross examination to the respondent on all parts of C's evidence.

Request for specific information

22. C has applied on 14 June 2022 for an order that R reveal:

    a) who comprised the senior team at all material times as referred to at paragraph 4 of Mr Cocke's statement?

    b) who were the senior clinicians from whom Mr Cocke had gained his understanding as referred to at paragraph 14 (as extracted above)?

    c) who were the senior doctors who had given internal sign off to the 24th of October 2018 statement on the Trust website as referred to at paragraph 15 of Mr Cocke's statement?

23. Given the acceptance that a large number of protected disclosures were made to a large number of senior medical professionals; and given the claimant's contention that he was subjected to a number of detriments on grounds that he made those disclosures; and given Mr Cocke's rather mysterious references to the senior team, senior clinicians and senior doctors who were involved in decision making which led to the alleged detriments, it is likely that the identity of those individuals is relevant to the tribunal's determination of the issues.

24. It is for R to determine who it calls to give evidence but none of the medical professionals to whom protected disclosures were made have been called by R to give evidence and nor have any of the 'senior clinicians' and 'senior doctors' referred to by Mr Cocke. Many of whom were present at the 2018 tribunal hearing and many of whom are likely to have been involved in the decision making which led to the alleged detriments. If the tribunal is to be asked to draw inferences from the evidence and lack of evidence presented by R, it is important for R to have provided the names of those involved in the decision making process.

25. R's position is that C can ask questions of Mr Cocke in cross examination. If the answers to those questions are 'I can't remember' then the tribunal will be no further forward. This is information which is likely to be contained in a documentary record – indeed it is striking that no such documentation has been disclosed. If the information is divulged at the outset of the hearing, either it can put the issue to bed or it may open a request for further disclosure – either way, this is best addressed at the outset and not after the Claimant has given his evidence.

Privilege

26. In the present proceedings, two forms of privilege are asserted: legal advice privilege ("**LAP**"), and the without prejudice ("**WP**") principle . It would be helpful to either reach a common position or have the tribunal indicate a position on privilege prior to the start of the evidence.

27. In brief summary, LAP arises when the following conditions are met:

    a) A communication;

    b) Between a client and a lawyer (or the immediate agent of either);

    c) Made in confidence;

    d) For the (dominant) purpose of giving or obtaining legal advice.

28. Despite this, not all communication between a lawyer and client is privileged. Communications with a third party are not covered by LAP. Further, the identity of the "client" in the context of a large organisation has a narrow construction (**Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)** [2003] QB 1556).

29. Therefore, communications between a lawyer and an employee of a client is not automatically covered by LAP: the position is that employees are their parties unless it can be shown that the communication was between a lawyer and officers or employees authorised to give instructions and receive advice on behalf of the client. The fact of legal advice being given is not privileged.

30. The WP principle is a rule of evidence, which renders inadmissible all negotiations genuinely aimed at facilitating settlement. Underlying it is the public policy principle of encouraging parties to settle disputes out of court without being prejudiced should the litigation nonetheless proceed. A communication is therefore protected by the WP principle when it is for the purpose of resolving a dispute or part of a dispute outside of the proceedings themselves.

31. The privilege does not apply between parties in the same proceedings in which there is no claim as between those parties – so for example, two respondents – and where the communication is not for the purpose of resolving a dispute between them (**Stax Claimants v Bank of Nova Scotia Channel Islands Ltd** [2007] EWHC 1153 (Ch)).

32. There are a number of exceptions to the WP principle. In essence, WP communications can be referred to "*for a variety of reasons when the justice of the case requires it*" (per Lord Griffiths in **Rush & Tompkins Ltd v Greater London Council** [1989] A.C. 1280 at 1300). It follows that the categories of exception are not closed, though Further, the categories of exception are not closed, though only principled and incremental extensions of existing exceptions are permissible.

33. Commonly raised category of exception include costs, unambiguous impropriety, and disputes as to settlement; however, in **EMW Law LLP v Halborg** [2017] EWHC 1014 (Ch), the High Court applied the exception in **Muller v Linsley & Mortimer** [1996] PNLR 74.

34. In **EMW**, Newey J (as he then was), held as follows at ¶¶44 – 45:

> *"44. In the course of the hearing before me, there was some debate as to whether a party to without prejudice negotiations can properly show a third party documents relating to the negotiations without obtaining the consent of his counterparty. The authorities show both that the without prejudice rule can be waived only with the consent of both parties and that the rule protects communications within its scope from disclosure. Does it follow that relevant documents can be shown to a third party only if both parties to the negotiations agree?*
>
> *45. The answer, I think, must be "No". The voluntary provision of a document has, as it seems to me, to be distinguished from compulsory disclosure. The fact that a party to without prejudice negotiations is*

entitled to withhold communications within their scope on disclosure cannot mean that he is not free to show them to someone else if he so chooses, at least if there is a legitimate reason for doing so. Were the position otherwise, a litigant might find himself unable to provide relevant documents to, say, an expert unless and until the other side agreed, which would be absurd".

35. It is also possible for privilege between the parties to be waived. Waiver may occur where the parties agree to waive privilege, but it may also occur as a result of the parties' conduct, and in particular where a party relies on some privileged material, there is a risk that all privileged material may be admissible. This is known as "collateral waiver".

36. Where collateral waiver arises, it relates to the whole of the material relevant to the issue in question (see **Nea Karteria Maritime Co v Atlantic and Great Lakes Steamship Corporation** [1981] Com LR 138). This is a question of fact and turns on what justice demands in the circumstances.

37. In **Fulham Leisure Holdings Ltd v Nicholson Graham Jones** [2006] EWHC 158 (Ch), it was held that collateral waiver applied to the "transaction" in question, which might go beyond the actual document (or privileged information) disclosed. In **Fulham Leisure**, Mann J suggested the following approach at ¶11:

> *"(i) One should first identify the 'transaction' in respect of which the disclosure has been made.*
>
> *(ii) That transaction may be identifiable simply from the nature of the disclosure made – for example, advice given by counsel on a single occasion.*
>
> *(iii) However, it may be apparent from that material, or from other available material, that the transaction is wider than that which is immediately apparent. If it is, then the whole of the wider transaction must be disclosed.*
>
> *(iv) When that has been done, further disclosure will be necessary if that is necessary in order to avoid unfairness or misunderstanding of what has been disclosed."*

38. This approach was considered by the EAT in **Kasongo v Humanscale UK Ltd** UKEAT/0129/19 (see HHJ Stacey, as she then was at ¶19).

The parties' positions on privilege

39. R and C have plainly waived WP privilege as between themselves.

40. It has been asserted in the context of these proceedings that HEE has not waived privilege [433]; however, given that HEE is no longer a party to these proceedings, and given the nature of the matters C seeks to prove, C invites the ET to rule that the content of any WP communications between C and HEE are admissible without HEE's consent, following the exception in **Muller** and the decision of the High Court in **EMW Law**.

41. Further, had HEE remained a party to these proceedings, given that the nature of their defence turned on the content of WP conversations, there would be an implied waiver of those conversations in any event.

42. LAP is more complicated, because neither C nor R have accepted that this has been waived.

43. Overall, the law of privilege is complex, and the practical solution will be obvious to the ET. Examples of the complexity of the law of privilege are found in Mr. Cooper QC's witness statement:

    a) Although Mr. Cooper appears to assert in his witness statement at ¶5 that the fact of the advice he has given is itself privileged, this incorrect in the context of LAP. The fact of legal advice is not privileged. The fact of WP negotiations is privileged, but every party to this litigation, present and former, has already referred to the fact of WP negotiations, and therefore there can be no serious contention that fact of any potentially privileged material or communication cannot be referred to in these proceedings.

    b) Similarly, Mr. Cooper asserts in his witness statement at ¶44 that he cannot refer to conversations he had with Mr. Moon QC. Though Mr. Cooper declines to explain how those conversations can be privileged, it is clear that WP cannot apply (because of **Stax**) and LAP cannot apply because Mr. Cooper does not advise Mr. Moon. Accordingly, it is highly likely that Mr. Cooper will be able to assist the court with the content of those conversations after all.

44. The reality is that given the nature of this claim: R has waived all WP privilege by collateral waiver; R is wrongly asserting privilege over communications with HEE; and R is wrongly asserting privilege in relation to the fact of legal advice being given (rather than its content) - and the ET is asked to make a ruling to this effect and order any subsequent disclosure by R.

Andrew Allen QC

Elizabeth Grace

Outer Temple Chambers

17 June 2022