

(LONDON SOUTH)

BETWEEN:

DR CHRISTOPHER DAY

Claimant

-and-

LEWISHAM AND GREENWICH NHS TRUST

Respondent

WITNESS STATEMENT OF MRS MELISSA DAY

I, Mrs Melissa Day of [REDACTED] will say as follows:

1. I am the wife of Dr Christopher Day, the Claimant in these proceedings. We married in 2007.
2. I am a Registered Nurse and am employed by [REDACTED]
3. I have re-read my witness statement dated 11th December 2018, submitted in support of the application to set aside the settlement agreement reached in 2018. I confirm this to be true and ask for it to be included as part of this statement.

Thursday 11 October 2018

4. I travelled back from Croydon to Cloisters barristers' chambers for a conference. I attended the meeting with my husband, barrister Chris Milsom and from my husband's Solicitors firm, Tim Johnson, and Ellie Wilson.
5. At the conference, we were informed by Mr Milsom that both Respondents had adopted the 'drop hands offer' which had been described to my husband on 7 October.
6. It was clearly expressed on 11 October that if my husband did not take up the offer and proceeded to cross examine the Respondents' witnesses that the offer would be withdrawn. We were told that if the case then proceeded to judgment, the Respondents would proceed to attempt to recover their costs for the whole of the proceedings if the case was lost.
7. The Respondents' Counsel had told Mr Milsom what the costs were likely to be, and Mr Milsom passed this information on to us. Mr Milsom described details of the financial information given to him from the Respondents' side. We were told Ben Cooper QC's brief fee was around £70,000 and the total cost liability that Chris (and therefore our family) could be exposed to could be as much as £500,000.
8. I would like to offer further explanation of my understanding of the various cost threats that made up this £500,000 figure as described by Chris Milsom at the conference.
9. Firstly, I understood if Chris were to lose the case, the respondents would as the conference note states claim for "the costs between now and the end of the hearing (£120,00 or more)" [sic] (**Page 976**). This was a significant amount of money which would have caused severe financial stress for our family.
10. A further cost threat was linked to potential credibility findings relating to Chris' use of covert audio. In these circumstances, the potential total cost liability could be closer to £500,000 which was more than the value of our house and clearly would have put it at risk. At no point were any of the cost threats linked to the truthfulness of Chris' evidence and I certainly had no concerns about this. I did have concerns about a potential reaction from the judge on the use of covert audio. This is despite what the audio showed about the way the patient safety issues were investigated and the

validation it gave Chris' claims that the Respondents' made false accounts of his dialogue. One example is the 18 September 2014 Roddis Associates meeting. (para 57 of 2014 Grounds of Claim, **Page 21**).

11. Mr Milsom confirmed in an email dated 30 November 2018 (Page 1123):

*"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 adverse credibility findings would lead to an application in respect of ongoing costs of trial
b) as above but with adverse credibility findings: the Respondents expressly stated that costs of the entire litigation may be at large."*

12. In the conference, when Mr Milsom was asked by Chris what the potential liability would be associated with the cost threats Mr Milsom listed wasted costs in relation to covert recordings with Chris' potential cost threat liabilities as the conference note confirms (Page 976):

"CM said that there are two types of costs: wasted costs (in relation to the covert recordings) and the costs between now and the end of the hearing (£120,00 or more) CM said that AM told him that if we go ahead then they would ask for their £55,000 back"

13. At the time I did not properly understand how wasted costs differed from what I now know are ordinary costs. I had no previous experience of employment tribunals or the different types of cost threats. As they were listed together and reference was made to covert audio, I assumed that Chris would be liable for the costs Mr Milsom had listed.

14. In addition to the 2 cost threats described above, we were informed that Angus Moon QC, the HEE barrister had stated that if Chris proceeded to cross examine any of the Respondents' witnesses and then lost the case, that they would also ask for the £55,000 costs payment agreed just before the May 2018 Preliminary Hearing to be returned. That hearing was to have been about whether junior doctors are covered by whistleblowing protection. The conference note states (Page 976) "CM said that AM told him that if we go ahead then they would ask for their £55,000 back".

15. Chris consulted me and wanted to discuss our options over dinner, I replied that there was no discussion to be had and I was not prepared to risk our family's security. Chris decided very quickly in the conference that based on the costs threats and my opinion that he was not prepared to accept the risk to our family home and security that proceeding with the case would involve. Chris withdrew the case as a direct result of the costs threats. My stated reluctance for him to continue came also as a direct result of the cost threats. There was no doubt in my mind that proceeding with the case was not an option after hearing about the cost consequences despite the serious safety issues at the centre of the case, the unacceptable NHS response to them and the toll that getting this case heard had taken on Chris and our family over the preceding four years.
16. After the conference, outside the conference room, I overheard Mr Milsom and our solicitors discussing a fine and how much it was likely to be. This was not mentioned in the conference when the costs threats were described by Chris Milsom, so I assumed it had nothing to do with them and was something separate. I told Chris what I had heard. At the time I did not link this to wasted costs but I now know this could have been a discussion about the proposed application for wasted costs in the Employment Tribunal or a reference to a referral to the Solicitor's Regulation Authority. At the time, I was unaware of the significance of this conversation.

Friday 12 October 2018

17. I attended the London South Employment Tribunal to support my husband with settlement negotiations. I arrived when negotiations had already started after I had taken my children to school. I became aware that the Respondents were insisting on an agreed statement as part of the withdrawal.
18. During a discussion in Costa Coffee in Croydon, I became aware through Mr Milsom's reported telephone conversations with Mr Moon that Heath Education England through their counsel, were starting to apply the cost threat originally associated with continuing proceedings in getting my husband to consent to certain wording in the agreed statement.
19. I understood that this was a stance supported by the Trust, as the discussions described below regarding Dr Roddis could only have been with a Trust representative

even if Mr Moon was the person conveying the position to Mr Milsom over the phone. The wording required was that all individuals employed by the Respondents had acted in good faith. We were told that this was a 'red line' for HEE, though I understood as detailed below, the stance was supported by the Trust. I understand from Chris' legal team that Mr Milsom has confirmed this account in his approved statement.

20. I remember a discussion about how it could possibly be said that Dr Roddis and Mr Plummer acted in good faith given their actions in the investigations for the Trust (Dr Roddis) and for HEE (Mr Plummer). In Costa, Chris discussed how Roddis Associates had excluded the Serious Untoward Incidents (SUI's) from the investigation and had described clearly unacceptable staffing (**SB p97**) as "acceptable" (**Page 675-676**). Chris discussed how Mr Plummer had been criticised by HEE's own witness, Dr Chakravarti for giving "an exaggerated or distorted impression" and attributing phrases (**SB p178-179**) to her which she could not recall saying (**SB p301-2 para 20-21**). I understand the false statements attributed to Dr Chakravarti remained in the relevant NHS formal report to discredit Chris (**SB p165-6**) and even appeared in tribunal pleadings pleaded as not only the view of Dr Chakravarti but the view of all the panel members. (**Page 102 para 34**) . This was despite the statements being contradicted by evidence from the ARCP panellist Dr Umo-Etuk (**SB p148-149**). Dr Umo-Etuk's account was excluded from the investigation.

21. Mr Milsom had a discussion on the phone with Mr Moon QC. From the discussion, it became evident that the response to the points Chris raised about Roddis Associates and Mr Plummer from the Respondents was that these people did not matter because they were not now employed by either of the Respondents. It follows that Mr Moon must have discussed the Dr Roddis' employment status issue with Mr Cooper, a Trust solicitor, or the instructing NHS manager. Instead of it being argued why the Respondents' actions were made in good faith, we had a long discussion about the employment status of both Dr Roddis and Mr Plummer which could have only happened if the Trust's managers and lawyers had been involved in the discussion. Mr Milsom spent a large proportion of the morning walking up and down Croydon precinct outside Costa on the phone to counsel about the agreed statement. It is clear all these discussions about the agreed statement would not have happened without the cost threats as Chris would not have agreed to the wording that everyone acted in good faith or any similar wording.

22. Negotiations about the agreed statement went on for most of the day (Friday 12 October). Eventually, Chris accepted that he had no choice but to accept the final wording of the agreed statement. The cost threats were the only reason that he agreed to this wording. I supported his decision as I felt we had no choice after being threatened for costs in the way described above.

Bath

23. After the tribunal came to an end my parents in law paid for us both to go to Bath for a few days while they looked after our children. It was a particularly stressful time. As it was a high profile, crowdfunded case, people wanted to know why the case had suddenly settled. As a result of the settlement, we felt that we were only able to refer to the agreed statement.

24. There was a great deal of hostility on social media at this time. The Trust had released their first public statement at 9.59am on the morning of 24th October 2018, I have included the relevant sections below (**Page 169-172**):

“Some of this publicity around this case has incorrectly made a link to the findings of a peer review of the critical care unit at QEH undertaken by the South London Critical Care Network in February 2017. This review found a range of concerns, including the number of consultants employed in critical care. It is important to be clear that these were not the same issues that Dr Day had raised in January 2014, which related to junior doctor cover on the medical wards.”

“At the point that Dr Day withdrew his claim, we decided that we should not pursue Dr Day for costs, and we have been clear from the outset that the Trust does not want to discourage other colleagues raising matters of concern.”

25. This statement was particularly damaging to Chris because it gave the impression Chris' protected disclosures were not about the intensive care unit, focusing only on one situation where there was a problem with medical ward cover on one night and claimed they had decided not to pursue Chris for costs. As I have mentioned previously, the cost threats were the only reason he withdrew the claim.

26. On 24th October 2018 whilst away, we were sitting outside around lunchtime at a central Bath Café as the weather was warm for the end of October. My husband received an email from Phil Hammond with a draft of a Private Eye article with an offer to edit the article if there were any errors. He stated he had taken the information from publicly available documents from the Employment tribunal and previous proceedings. As we were in central Bath without access to a computer, we went to the library and Chris edited the document which did not take too long. It was sent from my email account, from memory due to a problem with accessing Chris' email account in the library. From memory, we were granted guest access at the library for a limited time.

Norman Lamb

27. I attended a meeting with Norman Lamb and Chris at Portcullis house to give my side of the story regarding the settlement of the case. It would have been in December 2018 or January 2019 before the 14th January meeting with Mr Travis, I cannot remember the exact date.

28. On 14th January 2019, I attended a meeting at Portcullis house with my husband with Norman Lamb MP, Mr Ben Travis, the CEO of the Trust, and Mr David Cocke. It was a fast-moving meeting. Chris set out why the Trust's public statements were untrue, misleading and damaging.

29. Following the meeting, I assisted my husband with the writing of the letter dated 23rd January 2019 (**Page 157-168**). This was sent to Norman Lamb MP and forwarded onto the Trust. Mr Lamb also wrote a letter to the Trust dated 28th January 2019. I note that he describes aspects of the Trust's public statements as 'severely defamatory and should be withdrawn forthwith and that there should be a full apology' (**Page 272-273**).

30. There has been no apology from the Trust and the public statements remain on their website. Chris and I now know that the 24th October 2018 and 4th December 2018

statements have also been sent to several local MPs and councillors including the mayor of Lewisham.

Norman Lamb in Parliament 3 July 2019

31. It was a huge relief to have the truth of this situation set out in the House of Commons by Norman Lamb MP on 3rd July 2019 and I watched the video of the debate (**Page 1431**) The toll it has taken on our family was also acknowledged. Norman Lamb said

“Dr Chris Day, a brave junior doctor working in a south London hospital, raised safety concerns about night staffing levels in an intensive care unit”

“What happened to Dr Day, because he spoke out, is wholly unacceptable. He suffered a significant detriment. His whole career has been pushed off track, and his young family have been massively affected.”

32. The pressure that the 2014 claims and now this current claim have put on my family over the last 7 years has been immense. We have made huge sacrifices towards getting this case heard, my husband has lost his career and our lives have been put on hold. Chris waited 4 years to get the 2014 case heard in the Employment Tribunal and withdrew only because he was threatened for costs and was not prepared to lose any more because of this case.
33. As a health professional in the NHS, it was important for me that these serious issues about night-time understaffing associated with 2 Serious Untoward Incidents (SUI's) in an intensive care unit and the NHS response to them were heard. However, I agreed with Chris that we could not risk our family home once he was threatened for costs.
34. I could not believe it when the Trust released statements giving the impression that the case was not at all about the intensive care unit, and they did not threaten Chris with costs. It has always been clear that the now accepted protected disclosures were about the intensive care unit. This Autumn it will be 4 years since the hearing in 2018 and more than 8 years since he made his first protected disclosure.

35. The Queen Elizabeth Hospital in Woolwich is our local hospital and we come across many people who work there in our day to day lives. To have the Trust give the impression that the protected disclosures were just about ward cover, which most people in the NHS understand as an unavoidable situation, and in addition deny any cost threats is deeply damaging. The Trust's public statements give the impression that it was all a fuss about nothing and at their worst imply that Chris' own lawyers thought his evidence was untruthful (**Page 1314-1317**).
36. The Trust statements caused a reaction on social media, one example of this on Twitter is Dan Wilson @mrdanfresh appearing to refer to Chris being dishonest after reading the Trust's January 2019 public statement. Another similar example of this is a tweet from Ben Dean @bendean1979 (**Page 1535-1536**) I have set out in detail why the truthfulness of Chris's evidence was not the issue regarding credibility and that the actual issue was about Chris's use of covert audio.
37. When "Dr Chris Day" is googled even at the time of this statement the Trust 24th October 2018 statement appears 9th on the list, when "Dr Chris Day Case" is googled, the same statement appears 7th on the list (**SB p248-49**). This google ranking is significant as it shows how widely viewed this statement has been and how likely people are to read it going forward, this is similar for Yahoo. This is deeply damaging to but not limited to future opportunities and employment prospects for my husband.
38. As a result of this case, Chris has already lost his career and his personal and professional reputation continue to suffer so long as these statements are not retracted and apologised for. He did not pursue the case for 4 years just to suddenly drop it. As stated, the cost threats were the only reason Chris withdrew from the case.
39. It took until 2020 for both the Trust and HEE to accept there had been protected disclosures made by Chris as first asserted in 2013 when he started his job in intensive care at Woolwich. Chris has been left in the vulnerable position of standing alone with these serious patient safety issues against significant resistance. Our family have paid a high price for this.
40. By denying any cost threats were made, stating Chris' protected disclosures were not linked to the intensive care unit and implying that his own legal team thought his evidence was dishonest, the Trust, it seems to me, with their highly damaging statements, have sought to destroy Chris' personal and professional reputation and any future career he may have.

41. Almost 4 years after the 2018 hearing and calls for their removal by Norman Lamb MP in January 2019, the public statements on the Trust's website remain, significant numbers of people have been misled and this false narrative continues to cause Chris harm.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true


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MRS MELISSA DAY

Dated this 24th May 2022