

B E T W E E N:

DR CHRIS DAY

CLAIMANT

-and-

(1) LEWISHAM AND GREENWICH NHS TRUST

(2) ~~HEALTH EDUCATION ENGLAND~~

RESPONDENT

WITNESS STATEMENT OF SIR NORMAN LAMB

I, Sir Norman Lamb of [REDACTED] will say as follows:

1. I make this statement in support of the Claimant. I will be attending to give evidence for the claimant at the hearing under a witness order dated 19 March 2021.
2. I am currently the Chair of South London and Maudsley NHS Foundation Trust.
3. Prior to my engagement in this official role, I was an elected Member of Parliament for North Norfolk (Liberal Democrats) from 2001 to 2019. During my political career, I held various ministerial and senior positions, including Assistant Government Whip (HM Treasury) from 2010 to 2012, Parliamentary Under Secretary of State at the Department for Business, Innovation and Skills, 2012, Health Minister from 2012 – 2015, Liberal Democrat Spokesperson (Treasury) 2002 – 2005, Liberal Democrat Spokesperson (Trade and Industry) 2005 – 2006, Liberal Democrat Spokesperson (Health) 2006 to 2010 and again from 2015 – 2017, Chair, Science and Technology Select Committee, 2017 to 2019 (among others).
4. In my capacity as Minister of Health and Health Spokesperson, I pursued a number of health-related matters with various NHS Trusts and NHS Foundation Trusts. As an MP, I campaigned actively for health-related issues, particularly relating to mental health.
5. I was a qualified solicitor and previously worked as a solicitor and partner specialising in employment law at Steele and Co Solicitors (subsequently named Steeles Law and now acquired by Ashton Legal), prior to my election to Parliament in 2001. I feel

strongly about protecting employees' labour rights and have a particular interest in whistleblowing law and pursued that interest in Parliament.

6. In 2019, I received a knighthood in the Queen's birthday honours for my public and political service, notably my contribution to mental health.

Background

7. My first involvement in this matter was in or around the Summer of 2017 when Dr Chris Day contacted my office for support and assistance with his whistleblowing claim.
8. I met Dr Chris Day on a number of occasions at Portcullis House in Westminster whilst I was a serving MP.
9. I was concerned to learn of Dr Chris Day's protected disclosures and the concerns that he expressed about patient safety issues at Woolwich ICU, a hospital run by Lewisham and Greenwich NHS Trust, the Respondent. The issues raised by Dr Chris Day were significant. They related to patient safety issues which could put patients' lives at risk. I feel strongly that staff working in the NHS must be able to raise patient safety issues without any fear of adverse consequences for so doing. If a culture exists in which staff fear that their careers or their employment could be jeopardised, it has a chilling effect on people's willingness to speak out. This, in turn, puts patients at risk.
10. I have set out below further details of the various meetings that I attended in relation to Dr Chris Day's matter and the public statements that I made about his case.

Meetings with the Respondent, Dr Andrew Frankel of HEE, Dr Chris Day, and the Secretary of State for Health

Meeting with Jeremy Hunt Secretary of State for Health

11. On 23 May 2018, I arranged for Dr Day, and his then solicitor, Tim Johnson, to join me in a meeting with the then Secretary of State for Health, Mr Jeremy Hunt.
12. In the meeting, Dr Day set out details of his case and in particular the reality of the night time staffing at the relevant hospital's Intensive Care Unit, the fact that it departed significantly from national standards of safe levels of staffing, and that there were two deaths associated with the working conditions. The investigations at the time described clearly unacceptable staffing as acceptable. I described the content of the meeting in a letter I sent to the then current Health Secretary, Mr Matt Hancock dated 26 July 2018 [p258-259].

1 November 2018 Meeting with Dr Day

13. On 1 November 2018, I met Dr Day at his request following the settlement of his whistleblowing case. He was clearly deeply frustrated. From my recollection, Dr Day

gave an account that was not inconsistent from what is set out in the statements of Dr Day and Mrs Day in the application to set aside the settlement agreement which I have read. I remember being very surprised that Chris had settled the claim before the end of the tribunal hearing given the fact that he had spent years working to get the chance to put his case to the tribunal. Chris told me that he had been faced by an impossible dilemma. He told me that he feared losing his family home if costs were ordered against him. He said he had consulted his wife on the decision, and they had agreed that as parents, he could not carry on. Chris told me that Mel, his wife, had urged him to settle.

14. In preparation for this hearing, I have seen an email dated 30 November 2018 from Dr Day's then Barrister, Mr Chris Milsom, to Dr Day (Page 1123). Mr Milsom confirms what he was told by the NHS's barristers about the consequences of Dr Day continuing the case. Mr Milsom further states that "*this was a "sophisticated discussion" that was in "no way invited by [Mr Milsom]."*" I can also see reference to wasted cost consequences directed against Dr Day's former legal team by the NHS Counsel.

Dr Andrew Frankel

15. On 3 December 2018, I received an email from a Dr Andrew Frankel. He introduced himself as a consultant physician working at Imperial College. He confirmed that from 2013 to 2018 he worked as Postgraduate Dean in South London. As I understand it, this was a role with Health Education England (HEE).
16. He offered to meet and stated: "*I would be very happy to tell you what actually happened in this doctor's case in order to ensure that you really are aware of the true facts...I hope that you really will be open to hearing both sides of the story.*" [p xx]
17. I understand Dr Frankel had been representing the HEE during Dr Day's employment and had been involved in the defence to the claim brought by Chris Day against HEE (and the Respondent in this case) which had been settled in October 2018.
18. I agreed to meet Dr Frankel but made it clear that I would want Dr Chris Day to also attend.
19. On 7 January 2019, Dr Frankel sent an email to my assistant, which included an eleven and half page document setting out his view on Chris' case. In the email, he said he "*wanted to focus on what I believe are the core matters that relate to how I (representing HEE) managed Chris' disclosures*" [p1298, the accompanying eleven and half page document starts at p1302].
20. On 8 January 2019, Dr Chris Day and Dr Frankel attended a meeting with me in my Portcullis House office. Among other matters, we discussed the content of the document I had received from Dr Frankel the day before.
21. Following the meeting, I received two emails from Dr Frankel (via my assistant) on 8 and 9 January 2019. In the 8 January email, he acknowledged that this was a tragic

and complex case, and that the Plummer Report was not a “perfect report”. [p xx and Xx]

22. I am troubled by the document that Dr Frankel had sent prior to our meeting. The document had a reassuring tone to it. Dr Frankel had stated that he would be happy to tell me ‘what actually happened’ in Dr Day’s case and that he hoped I would be ‘open to hearing both sides of the story.’ I took this to mean that Dr Frankel disputed Dr Day’s account of his treatment and that he clearly hoped to convince me of his version of events. Yet it is clear that there were inaccuracies in Dr Frankel’s document that he sent me prior to the meeting.

23. For example, Dr Frankel’s document had explained that he had asked one of the HR directors at HEE, Malcolm Plummer, to lead an investigation ‘to ascertain exactly what had been said about Dr Day at the ARCP [Annual Review of Competence Progression] meeting’, and which had been attended by representatives of the Respondent. Dr Frankel’s document stated:

‘The statements produced for the ET all confirmed the findings of Malcolm Plummer’s report and there was no suggestion any point (sic) that the panel had been briefed negatively about Dr Day.’ [see page 1311]

24. Malcolm Plummer’s report, in its ‘findings’ highlights that at the ARCP Panel meeting on 3rd June 2014, Dr Day had variously been described as *‘tenaciously going on and on’* about it, *‘gripped by angst’* and *‘shaking as he recalled events’* and *‘locked in’*. Malcolm Plummer continues:

‘This behaviour on the day alone does certainly appear to have raised questions for the panel about his ‘state of mind’.’ [p XXX]

25. Yet one of the ARCP panel members, Dr Madhurie Chakravarti-Chattopadhyay states in her statement to the Employment Tribunal for the 2018 hearing that:

‘I did not feel that the report portrayed the situation as accurately from my perspective as I would have wanted.’

She states that she was: -

‘very surprised to find that various phrases in inverted commas, [in Malcolm Plummer’s report] seemingly quoting me, when I could not recall saying those phrases.’

Dr Chakravarti-Chattopadhyay also states;

‘I regret not being able to edit or amend what appeared in the final report as reported from my perspective.’ [page XX]

26. Dr Frankel does state that *'there was a statement made in the report that appears to have been incorrectly transcribed by Mr Plummer but which does not appear to affect the broad outcomes of the report'* [page 1311]. He did not explain what he was referring to any further.
27. In another statement to the Employment Tribunal, Dr Hans Sauer, who was Dr Day's clinical supervisor at the time of the ARCP Panel meeting on 3rd June 2014, stated of Dr Day; *'He is a competent and confident trainee with a skill set which exceeds the expectations of someone of his level of training. He is aware of his limitation and not afraid to ask for help and advice.'* [see page 1599, para 6]
28. Dr Sauer also comments on allegations made by the HEE and senior managers of the Respondent about Dr Day's *'performance, state of mind, engagement with supervisors and personal, as well as professional conduct.'* He states that *'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'*. [see page 1600 para 11].
29. He refers to his reference for Dr Day in which he stated, *'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.'* [page 1600 para 11] Dr Sauer also states: *'I confirm that I clearly do not support these allegations and believe they have no grounds.'* [page 1600 para 12]
30. Dr Umo-Etuk, another member of the ARCP panel has also stated in an email to Dr Day, which I have seen, and which is dated 5th December 2014: *'I was of the opinion that you came across as assertive and confident...'* [p XX]
31. I therefore have to conclude that it cannot fairly or accurately be stated that 'statements produced for the ET all confirmed the findings of Malcolm Plummer's report' as Dr Frankel asserted
32. With regard to the statement in Dr Frankel's document that he sent to me that *'there was no suggestion (sic) any point that the panel had been briefed negatively about Dr Day'* [page 1311], panel member Dr Umo-Etuk stated in an email dated 15th July, 2014 to Dr Day, which I have seen, *:'I do recall your Educational supervisor saying that he thought you had doubts about your ability to complete the training.'* She also stated in that email: *'I did find that disheartening because in my opinion any person who could undertake a career thang of such magnitude has strength of character most mere mortals can only dream off (sic)!' [see p XX]*
33. I see that the ARCP panel Chair Dr Harrison [from the Respondent] states at paragraph 48 his Tribunal statement, *"We mentioned to Dr Brooke [of the Respondent] that Dr Day had raised concerns about lack of supervision at QEH. Dr Brooke said he was aware of the issues already." 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."* [see p XX]

34. Dr Harrison also states at paragraph 71 of his statement, *“In the ARCP meeting, Dr Day had given the impression that he was not being adequately supervised at QEH and was exercised about the supervision issue. I recall Dr Brooke giving us his view that Dr Day was not managing this situation well.”* The evidence from Dr Umu-Etuk and Dr Harrison seems to indicate there may well have been negative briefing against Dr Day in the ARCP.
35. Dr Frankel also addressed the concerns that Dr Day had raised as a protected disclosures in the document that he had sent me prior to the meeting. He stated: *‘In a follow-up action plan from the GMC survey 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 a and b above [relating to a lack of support for airway management when commencing the role of “SHO” covering ITU at night and a lack of consultant supervision in terms of the numbers of consultants per bed on the ITU] and highlighted requirements for the trust to ameliorate the situation.’* He later stated: *‘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.’* From this it appeared that Dr Frankel accepted that Dr Day had raised serious and legitimate concerns about the Respondent in his protected disclosures. Yet I have subsequently been informed that Dr Frankel had not stated any of this in his witness statement for the Employment Tribunal hearing in 2018. In fact, at the hearing, evidence called by both the Respondent and HEE had given a very different impression. It had been stated that: *‘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.’* The respondent had also given evidence stating: *‘A recent Deanery Visit concluded that staffing levels (unchanged since January 2014) were safe and there were no concerns about supervision highlighted by them.’*

Meeting with Dr Day and Mr Travis (the Respondent’s CEO)

36. After an approach from Mr Ben Travis, the CEO of the Respondent, I met with Dr Day and Mr Travis on 14 January 2019. Also in attendance was Dr Day’s wife Mrs Melissa Day and the Respondent’s Head of communications, Mr David Cocke
37. I do not have a clear recollection of everything discussed at this meeting but I do recall suggesting to Mr Travis that as the new CEO of the Respondent, he could draw a line under past events and the parties could put the dispute behind them if he commissioned an independent review of Dr Day’s case, including consideration of the culture of bullying at the Trust.
38. Dr Day sent me a letter dated 23 January 2019 [p1386-1397] setting out an account of the meeting and repeating several concerns stated in the meeting about the three separate public statements released by the Respondent. I sent this letter and my own letter dated 28 January 2019 to Mr Travis that included the following [p1402-3]:

“Thank you for coming to meet with Dr Chris Day and myself on 14 January.

I refer you to the enclosed letter sent to me from Dr Chris Day on 23 January. I have read through Chris Day's letter very carefully. Your urgent response would be appreciated. It is very important that you confirm whether, in the light of the contents of Chris's letter, you stand by all the statements made by the Trust and publicly available on your Trust website. Further, is there anything in Chris Day's letter which you believe is in any way inaccurate?

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. They are damaging to Chris Day's reputation."

39. I received a response from Mr Travis on 7 February 2019 [p1404]. However, as Dr Day had applied for a reconsideration of the Tribunal's decision, he said that he did not think it was appropriate to "respond further in writing to you or Dr Day until a decision on Dr Day's application is made.."

40. I replied to his letter on 18 February 2019 [p1413] as follows:

"Thank you very much for your letter of 7th February. I have forwarded your letter to Chris Day and we have since discussed its contents.

The problem I have with it is that, by failing to address the clear inaccuracies in the public statements made by the Trust, the damage to Chris' reputation continues. This, I feel, is unconscionable and needs to be addressed. You made clear your desire to change the culture in your Trust but by failing to address these matters, it inevitably raises doubt over the Trust's commitment to change. I would urge you again to seriously consider the analysis I enclosed with my previous letter from Chris Day and to act upon it so as to bring to an end what we believe to be defamatory statements in respect of Chris Day..."

Finally, I note that a Freedom of Information request from Tommy Greene has resulted in information being provided by the Trust to confirm that the external investigators, MJ Roddis, charged £12,983 plus VAT simply for attending the tribunal hearing for six days. There was no reason for them to be there. They did not need to be there in order to give evidence in the tribunal hearing at a later time (which never occurred because of the settlement which Chris Day is now challenging). What is the possible justification for public money being spent in this way?

Public statements on Twitter, to the press and in Parliament

41. I recall speaking out publicly about Dr Chris Day's case. During the course of his first claim, I was interviewed by various newspapers, including the Mirror, among others. I also tweeted about Dr Chris Day's case and in November 2018, I expressed the view that it was "wholly wrong" to "frighten Chris Day into withdrawing on this basis." [pX]. Dr Chris Day had made it very clear to me that he was threatened with costs. From my work as an employment law solicitor, I am aware that costs awards are extremely rare

and unlike the civil courts, the employment tribunal does not usually order the unsuccessful party to pay the costs of the winner.

42. Furthermore, I was quoted in an article in the Daily Telegraph on 2nd December 2018, written by journalist, Tommy Greene. The article included the following passage:

“Norman Lamb MP who brought up the case with Jeremy Hunt, the former Health Secretary and current health secretary Matt Hancock has now called for a public inquiry saying Dr Day had not so much been ‘priced out of justice’ as ‘crushed’.

“When you have serious allegations relating to patient safety raised – by a person, a whistleblower, who’s risking everything to get them heard – there should be a fair and full hearing.

“What appears to be the case is that Chris Day and his family were put into, in effect, an impossible position – they were faced with a threat of costs, an application for costs, which would’ve destroyed them financially.

“It’s an outrageous use of taxpayer money to crush and prevent the full facts of a whistleblower’s case being aired it completely goes against the Department’s talk of openness and transparency,” he said.”

43. On 3 July 2019, I opened a debate in Parliament on the case for reforms to whistleblowing law. I referred to Dr Day’s case. I discussed how Dr Chris Day, a brave junior doctor working in a South London hospital, raised patient safety concerns about night staffing levels in an intensive care unit and as a result he suffered a significant detriment, which is wholly unacceptable. [see page 1431]. I mentioned Sir Robert Francis’ “Freedom to Speak Up” report in 2015, and how he spoke about NHS whistleblowers who had given evidence to him overwhelmingly experienced negative outcomes [see page 1432]. The full debate was published in Hansard, Volume 662 [
44. I formed a view on Dr Day’s case based on what is set out above including my two meetings with senior people involved in this case at the Respondent, together with the meeting with Dr Frankel.

The Health Education England Employer Point

1. During the debate in Parliament on 3 July 2019, I intervened on a point made by Justin Madders on the former Second Respondent’s conduct in these proceedings on their on denial of their employer status. The actions of the Second Respondent were first raised in the debate by Justin Madders (**Page 1443**);

“As the right hon. Member for North Norfolk mentioned, junior doctor Chris Day was a prominent example of someone who blew the whistle and was treated appallingly. He raised legitimate concerns about staff ratios, then lost his job. The tribunal action that followed resulted in a lengthy and, in my view, wholly unnecessary legal battle in which Health Education England effectively sought to remove around 54,000 doctors from

whistleblowing protection by claiming that it was not their employer. Four years and hundreds of thousands of pounds later, it eventually backed down and accepted that it should be considered an employer after all.

2. I intervened and stated; **(Page 1433)**;

“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 behavior for that law firm to make money out of not disclosing a contract that it itself drafted?”

STATEMENT OF TRUTH

I believe that the facts in this witness statement are true to the best of my knowledge and belief.

Signed:

Sir Norman Lamb

Dated: