

IN THE EMPLOYMENT TRIBUNAL

CASE NO: 2300819/2019

(LONDON SOUTH)

B E T W E E N:

DR CHRISTOPHER DAY

Claimant

-and-

LEWISHAM AND GREENWICH NHS TRUST

Respondent

WITNESS STATEMENT OF DAVID COCKE

I, **DAVID COCKE**, of Lewisham and Greenwich NHS Trust, University Hospital Lewisham, Lewisham High Street, London SE16 6LH, WILL SAY AS FOLLOWS:

Introduction

1. I am employed by Lewisham and Greenwich NHS Trust ("the Trust") as the Trust's Associate Director of Communications. I have held this position with effect from April 2018. I became Head of Communications for the Trust in October 2013, having previously been communications lead for one of the Trust's predecessor organisations, Lewisham Healthcare NHS Trust. Prior to my employment with the Trust, I worked as Head of Communications for Sutton and Merton Primary Care Trust. In my current role as Associate Director of Communications at the Trust, I am primarily responsible for internal and external communication and engagement. This includes overseeing media relations and the Trust's corporate social media accounts.

Dr Day's previous claims

2. I first became aware of Dr Day's previous Tribunal claims against the Trust (case numbers 2302023/2014 & 2301466/2015 / "Claims 1 & 2") in 2016 when approached by some media outlets asking for statements from the Trust on the case. I had no direct knowledge or involvement with Dr Day during his employment with the Trust and I was unaware of the concerns he had raised at the time. Through the media publications outlined below, I was aware that Dr Day's previous case (Claims 1 and 2) included that

he had raised concerns about understaffing at Queen Elizabeth Hospital when two locums did not arrive for a shift. However, until these current Tribunal proceedings (Claim 3), I was not aware of the specific nature of Dr Day's concerns and in particular, was not aware of the specific communications of protected disclosures cited in his Amended Grounds of Claim Paragraphs 16(i) – (x) **[pages 459-460]**.

3. The existence of Dr Day's Tribunal claims (Claims 1 and 2) came to my attention in my role of Head of Communications as I was overseeing the Trust's response to media queries. By way of background, much of this interest lay in the legal issue as to whether the Second Respondent, Health Education England ("HEE"), was an "employer" for doctors in training and therefore whether claims of whistleblowing could be brought against it before an Employment Tribunal. This was a point which the Trust was not party to but the impact of it was that the allegations against the Trust could not proceed whilst this point was determined and the Trust was often named alongside HEE. Examples of local and national press interest were the Evening Standard article dated 22 February 2016 **[pages 760-765]**, The Daily Mail article on 14 May 2017 which was headlined "*The dedicated NHS doctor they tried to gag then destroy: His dream career left in tatters, his family life ruined and his legal bills crippling...after he blew the whistle on a hospital that left its patients in grave danger*" **[pages 831-838]**, The Mirror on 5 August 2017 **[pages 846-850]**, Public Concern at Work in November 2017 **[pages 204-209]** and The Guardian on 2 October 2018 **[pages 932-937]**, which all referenced the Trust. I was also aware of broadcast media coverage in May 2016, such as on ITV **[pages 766-769]**.

Communications strategy prior to settlement

4. Although I was not directly involved in the legal proceedings against the Trust, I was responsible for the management of the Trust's communications in relation to Dr Day's claim. We did not issue any statements about Dr Day's legal case proactively, but provided statements in response to media queries when the Trust was asked to comment. When dealing with any media query, the Communications team liaises with the relevant teams or individuals to try to obtain relevant information; the statement is then drafted and – before it is issued – final sign-off is required from the relevant member(s) of the Trust's Executive Team. The reactive statements that were issued in relation to Dr Day were agreed and signed off by members of the senior team including the Trust's Chief Executive and Janet Lynch, (former) Director of Workforce and Education (who was also the Deputy Chief Executive). Accordingly, responding to media interest was never a decision made in isolation. An example of an historical response statement given by the Trust is a response to the Evening Standard article published in February 2016, over which I had oversight. The journalist asked us to respond to the allegations being made against the Trust through the legal proceedings, and also asked for comment on whether the Trust had addressed the safety concerns

- raised. I liaised with the clinical leads in our intensive care team who confirmed that we had increased medical staffing numbers in the intensive care unit and were meeting key quality standards. The statement (attached) was signed off by our (former) Director of Workforce and Education and Chief Executive **[pages 760-765 and 759]**.
5. The Trust also provided a statement for the Mirror article published in August 2017 **[pages 846-850 and 845]**, over which I also had oversight. The story was written by a freelance journalist, Martyn Halle. In his query, he referred to a peer review carried out into the intensive care unit at Queen Elizabeth Hospital in 2017 **[pages 845]**. In this query, Mr Halle referred to a statement that had been provided by the Trust on the peer review to Shaun Lintern of Health Service Journal in June 2017. I understand that Dr Day wishes to refer to this article for these current proceedings and therefore the Trust statement for that article has been included accordingly.
 6. Dr Day's case had coincided with a time when the new junior doctor employment contracts were being implemented nationally which itself had attracted negative publicity. Colleagues involved in overseeing our junior doctor training programme were concerned that the publicity around Dr Day's case was having a negative impact about how junior doctors viewed the organisation. There were also concerns that junior doctors – and indeed other staff who heard about the case – would not raise important safety issues as they would fear that there would be negative repercussions if they did so. Colleagues overseeing the junior doctor training programme also voiced concerns that the recruitment of junior doctors could be negatively affected as a result of the publicity about the case; I had received oral reports from colleagues that junior doctors in the training programme were expressing dissatisfaction about the Dr Day case and in particular they felt the Trust was treating Dr Day unfairly and that this showed there were repercussions for speaking up.

Communications strategy post settlement

7. The final hearing to determine Claims 1 and 2 commenced on 1 October 2018. Ultimately, I understand that Dr Day withdrew his claims against the Trust following a settlement agreement negotiated between the parties on 15 October 2018 which included an agreed statement **[page 996]**. I had no involvement in those negotiations. I was informed by Janet Lynch that the matter had settled during the week commencing Monday 15 October 2018. I also recall the preceding week that Ms Lynch had reported her observations from when she had attended some of the Tribunal hearing whilst Dr Day was giving his evidence; I recall she mentioned she felt sorry for him as the case was going badly for him and he seemed to be struggling.

8. There was limited media interest immediately after the settlement, although I was aware of the article in the trade press, the British Medical Journal (BMJ), on 16 October 2018 (the day after settlement) [pages 1011-1012]. HEE had issued a statement on 15 October 2018 [pages 1003-1004]. Following the settlement of Claims 1 & 2, Janet Lynch took the lead on drafting a statement about the case for publication on the Trust website. This was because Ms Lynch had been involved in the legal proceedings so had a good understanding of the details around the case, whereas my involvement had been limited to coordinating the Trust's response to media queries. Ms Lynch explained to me that the Trust Board felt that there was a need to issue a fuller statement with a summary of key facts about the case. The media coverage to date had focused on the allegations about the Trust, so there were concerns that anyone who had heard about the case – including junior doctors and staff – would have a largely one-sided, negative and misleading view of the Trust. The Trust had therefore begun to take initial steps to prepare a statement which reconfirmed the agreed statement, set out a summary of the facts of the case but also reflected the impact the case had upon the Trust, a point which we had previously felt unable to comment on given the ongoing proceedings, and to emphasise the procedures the Trust had in place to support staff who wished to raise concerns. The Trust's reasoning behind this was that anyone that heard about this case including existing Trust staff, would have seen very one-sided coverage which we felt was misleading. For the Trust, this was the first opportunity to explain its position now that legal proceedings had concluded.
9. My first significant involvement post settlement in this case was when I was contacted by the journalist, Martyn Halle, on 18 October 2018 regarding an article he was writing for the Mail on Sunday [page 1025]. Mr Halle had written the previous article for the Mirror on 5 August 2017 which is referenced earlier in my statement. The original email posed a series of questions to HEE. I responded to Mr Halle with a statement from the Trust, which was signed off by Janet Lynch and Ben Travis, Chief Executive [page 1028-1029]. This confirmed the terms of settlement, that costs are not automatically awarded to the successful party, that the Trust was pleased the matter had resolved and the steps the Trust was taking to support staff who wished to raise concerns. I was then pushed to give a categorical denial that *"the trust threatened Dr Day during the hearing with the risk of it seeking substantial costs running into several hundred thousand pounds. Can we have that categorical denial please"* [page 1028]. I responded with an additional statement to confirm the Trust's position on costs; again, the statement was agreed by Janet Lynch and Ben Travis.
10. From this point, there was increasing speculation on social media and in the press about the settlement negotiations, with allegations that cost threats had been issued to make Dr Day drop his case.

11. I was concerned by the serious allegations that were included in the email from Mr Halle and sought assurances on the issues raised before responding. This included gaining clarification from Ms Lynch about a question asking whether the agreed settlement amounted to a '*legal gag*' on Dr Day speaking about the case [page 1025]. In fact, I was informed that there had been no confidentiality provisions; I understood from speaking with Ms Lynch and Mr Travis that this had been an important clause for the Trust to ensure that there was transparency as to its terms. There was next the allegation of the threat of '*crippling*' legal costs running into '*several hundred thousand pounds*' to make Dr Day drop his case. I was informed in discussions with Mr Travis and Ms Lynch that legal costs are only awarded in exceptional cases – such as if someone is found to have lied in court or otherwise conducted the litigation unreasonably – and that an individual's personal circumstances are or can be taken into account when costs are awarded. In relation to Dr Day's Claims 1 and 2, I was also informed by Ms Lynch that it was likely that the claims against the Trust would have been dismissed on their (lack of) merits if they had not been withdrawn.
12. Following the email exchange with Mr Halle, I was concerned that there would be an unfairly negative piece in the Mail on Sunday. The Mail did not publish a story that weekend, although noting the continued interest in the case from Mr Halle we felt under pressure to clarify the Trust's position on the case.
13. By this point, I was approached by Ms Lynch, who asked me to check that the statement that she had prepared was in plain English and easy to understand, without legal or NHS jargon. I reviewed the statement for Ms Lynch and made some changes accordingly, revising the language but not the overall content.
14. In the statement, Ms Lynch had noted that an incorrect link had been drawn between Dr Day's historical claims, which related to concerns raised and alleged detriments in 2013 and 2014, and the findings of a peer review of the critical care unit in QEH undertaken by the South London Critical Care Network in February 2017. One example of this was the Guardian article of 2 October 2018 which had highlighted a statement from Dr Day that: "*After four years I'm just relieved the important issues in this case are finally going to be heard and scrutinised by a specialist employment tribunal*", says Day. *It's been a bruising experience, but Day says, one worth enduring. Not least because in 2017 a major peer review was published into the ICU ward round which Day's disclosures were based revealing, grave concerns over staffing levels, incident reporting procedures and safety standards*" [pages 932-937]. The results of the peer review had also been reported in the story in the Mirror, which has been previously cited. In the Mirror, Dr Day is quoted as saying: "*It beggars belief that the patients are still being exposed to the same risks three years after I raised concerns. It is a disgrace and it seems that nobody really cares.*" The concerns raised by Dr Day in 2013 had focused on junior doctor staffing levels (this was my understanding from

senior clinicians and Ms Lynch); these specific concerns had been addressed by the Trust, with improvements noted by the peer review undertaken by the South London Critical Care Network in February 2017. However, the 2017 peer review identified that the QEH intensive care unit did not meet the guidelines for consultant staffing. I understand from Elizabeth Aitken, the Trust's Medical Director that, as a result, the issue of consultant staffing was addressed as a priority, with the improvements noted in the subsequent peer review, carried out in February 2018 [pages 872-906]. However, the impression from the media coverage in the Mirror and Guardian was that the Trust had chosen to ignore specific safety concerns raised since 2013. This was not accurate and could potentially discourage colleagues from speaking up and raising any other safety issues that needed to be addressed.

15. Janet Lynch told me that she had obtained internal sign off on the statement from the senior doctors who had been involved in the Tribunal case, from the Trust's Medical Director and Chief Executive. The statement was published on the Trust website on 24 October 2018 [pages 1046-1050].
16. I understand that Dr Day alleges that the statement of 24 October 2018 amounts to a detriment because this included the following wording which Dr Day alleges is not true "*The external investigation found it had been appropriate for Dr Day to raise his concerns and that the Trust had responded in the right way*". The external investigation referred to is the investigation carried out by MJ Roddis Associates Ltd ("MJ Roddis") which was commissioned by the Trust. MJ Roddis is a consultancy that provides support to healthcare professionals and carries out investigations within the health sector. It was commissioned to carry out an investigation into complaints raised by Dr Day in a letter to the Chief Executive on 4 August 2014.
17. The complaint raised two issues: (1) clinical concerns regarding medical staffing levels and (2) a grievance about the effect his raising concerns had on his time at the Trust and his career. I understand that these two elements were investigated by two separate investigators. It is my understanding that the terms of the appointment of MJ Roddis were referred to in the Trust statement to demonstrate that Dr Day's concerns had been properly investigated.
18. At the outset, I should note that I had not read the report at this stage but, as previously stated, the statement was drafted by Ms Lynch, who had more detailed knowledge about the case. I had no involvement with the original complaint and had not been provided with the report at the time. I was therefore relying upon Ms Lynch's knowledge of the case. This is not untypical; as stated at the outset of my statement, we work as team when preparing statements and I am guided by those involved with the specific facts as to the content. Time pressures within Communications dictate that it is not always possible for me to review every document referred to.

19. I consider the reference by Dr Day to the Trust's statement to be misleading as it references an incomplete sentence from the Trust statement. The statement actually states: "*The external investigation found it had been appropriate for Dr Day to raise his concerns and that the Trust had responded in the right way by calling in the on-call consultant to provide additional support. The investigation also found that there was no evidence that there were patient safety issues as a result of what had been an unexpected situation*" [page 1047]. The two reports were provided by MJ Roddis in December 2014. Both reports are lengthy and can be found in full in the bundle although without the appendices [pages 655-714 & 715-758]. The purpose of referencing these two particular conclusions of the report in the statement was to address the negative perception that the Trust had failed to take Dr Day's concerns seriously and had instead sought to discredit him.
20. As stated above, at the time I had not read the report. I now believe that the reference to the report's conclusions referred to above is derived from comments in the report of Clare McLaughlan in which she says "*In my opinion those with responsibility for ensuring sufficient onsite medical cover on the medicine wards at QEH on the night of 10 January 2014 did so without compromising patient safety* [page 685]. This section of the report then goes on to state "...None of the staff present considered there to be active patient safety issues. Dr Day did not identify any specific, current patient safety concerns to the SMOC although he did state that he felt there were potential patient safety issues. The CSM was not made aware of any 'at risk' patients that night and was [sic] the medical registrar said she did not have any seriously ill patients and felt the hospital was safe. The CCON was aware there was potential for the hospital to become unsafe but she felt patient safety was not compromised in any way. No patient safety incidences were reported that night through Datix. Although Dr Day did subsequently submit a Datix report, this was general in nature and did not identify specific patient safety issues" [page 686]. Whether the statement challenged by Dr Day is a fair reference to this passage is a matter of opinion. The factual evidence I can give is that I believed at the time that the statement was accurate and I certainly do not believe that it was issued or authorised in order to subject Dr Day to a detriment for having made protected disclosures years earlier (which is I understand his case).
21. I further understand that Dr Day alleges that the statement of 24 October 2018 amounts to a detriment because it included the following wording: "*Some of the 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... 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*". I have set out above why the Trust's position was that these were two different issues both in terms of time and substance.

22. I would also note in reference to this report that Dr Day's crowdfunding page refers to "*Hiring private investigators that attempted to discredit me and the important safety issues that I raised about night time staffing on an Intensive Care Unit*" **[page1515]** which appears to relate to this investigation and implies that private investigators had been hired to discredit Dr Day whereas it related to the decision to commission an external investigation to consider Dr Day's complaint.
23. Around this time, I was also aware of a further article being circulated on social media by Private Eye **[page 1056]**, which added to the mounting media pressure the Trust was under at the time.
24. The Trust was then contacted on 5 November 2018 by Tommy Greene, a freelance journalist working on a story about Dr Day's case for the Daily Telegraph, with a request for the Trust's comment on his proposed article. By way of email on 8 November 2018, Mr Greene asked the following questions:
- '1) Can you please provide me with a copy of each of the tribunal statements (from all of the 14 witnesses)?*
- 2) Did Lewisham and Greenwich NHS Trust ask its legal team/representatives in the case to make a significant cost threat after 2 half-days of evidence, when Mr. Day did not have access to legal advice since he was under oath? Or, less specifically (in terms of time), was the cost threat made during the 6 days in which Mr. Day was under oath and, as such, was not able to speak with anyone else including lawyers?*
- 3) Was the cost threat made against Day at all used to secure the wording of the agreed statement subsequently put out into the public domain by the parties?' **[pages 1058-1059].***
25. Kirsten Edwards (then Communications Manager) forwarded the correspondence to me. Again, the key questions centred on the issue of whether a costs threat was made at a time that Dr Day was disadvantaged by not being able to seek legal advice. I prepared a draft response; this was signed off by Janet Lynch and Ben Travis and was sent to Tommy Greene on 12 November 2018. The statement is included in an email to the Trust Board on 12 November 2018, which was issued by a colleague in the communications team (while I was on leave), with the response to all three questions **[page 1090]**. Our aim was to set out the chronology of the negotiations as we considered that it was important to record that it was Dr Day's barrister, Chris Milsom, who had initiated the settlement discussions when he was mid-way through giving evidence. We also sought to emphasise that the Trust's understanding was that costs were not automatically awarded to the successful party; these could only be awarded after an application on specific grounds and, even if successful, could take into account

Dr Day's personal circumstances. Given that Dr Day had legal representation during the negotiations, it was our assumption that this must have been explained to him when discussing the risks of continuing to pursue his claim.

26. Mr Greene then responded on 13 November 2018 (15:26) querying why the Trust had stated on 24 October 2018 that the link to the findings in the Peer Review Report of the Critical Care Unit at Queen Elizabeth Hospital was incorrect and to walk him through this step by step **[page 1089]**. I responded on 15 November 2018 to explain that the February 2017 Peer Review found issues related to a number of consultants employed in the Intensive Care Unit at QEH and, as outlined in the Trust's statement, we took immediate action to address these issues and improvements were noted by the subsequent Peer Review in February 2018. I confirmed it was important to note Dr Day's Tribunal case had related to concerns he had raised in 2014 about whether there were enough junior doctors covering the medical wards on the night shift rather than consultant staffing in the ICU **[pages 1088-1089]**.

27. I then received a voicemail from Mr Halle on 16 November 2018, stating that Dr Day had 'gone on the record' to say that the only reason he dropped his case against the Trust and agreed to the joint settlement was because he had been put under financial pressure by the Trust and Health Education England ('HEE'), the Second Respondent.

28. On the same day at 10:35am, shortly after his voicemail, Mr Halle sent me an email in the following terms:

'Dr Day has now gone on the record to allege financial bullying costs led to the agreed statement. He rejects the agreed statement that he wouldn't have succeed [sic] if the case had proceeded. He says, on the record, that this was agreed due to the costs threat. First made just two days into the hearing and then again after 6 days. Can I confirm that your solicitors were Capsticks and that the negotiations were conducted between the solicitors representing the Trust and HEE and [sic] Dr Day's solicitor?' **[pages 1094-1095]**.

29. Our response was agreed by Ms Lynch and Mr Travis. The Trust responded to Mr Halle's query on 16 November 2018 to clarify that the settlement negotiations had been initiated by Dr Day's legal representatives "not as a result of pressure placed upon them by the Trust, but because it was apparent to them that Dr Day's case was not going well." We clarified that costs are only awarded in exceptional circumstances, and that an individual's personal circumstances are taken into account when costs are awarded. We also clarified that negotiations "predominantly took place between the parties in person at London South Employment Tribunal on 12 October 2018 and Dr Day was both present and legally represented by his solicitor and barrister during those discussions" **[page 1094]**.

30. The Health Service Journal (HSJ) published a story on this case on 20 November 2018, with the headline: *"Revealed: Junior doctor whistleblowing case cost NHS £700k"*. The story contained a quote from Dr Day: *"My wife and I decided to withdraw the case because of the six figure cost consequences that were attached to the proceedings in the event that the case did not succeed."* The Trust had not been approached to comment on this. As a result, I contacted the journalist by email on 20 November 2018 to ask for the story to be updated to include the Trust's statement on the issue of costs **[pages 1111]**. The story was updated accordingly to include the Trust's statement **[pages 1112-1114]**.
31. On or around 21 November 2018, Dr Day published an update on his Crowd Justice page **[page 1115]**. Dr Day referred to statements which he said had been provided to Tommy Greene by the Trust and HEE. Dr Day stated that he considered he was now in a position to speak more openly about the circumstances in which his whistleblowing case was withdrawn under a settlement agreement. His statement repeated the quote which he had provided to the HSJ [in the article referred to above, published on 20 November 2018, **page 1113**] which stated: *"My wife and I decided to withdraw the case because of six figure costs consequences that were attached to proceedings in the event that the case did not succeed. These tactics were used two days into my 6 days of cross examination when I was under oath and could not discuss my evidence with anyone, including my lawyers. The cost consequences were attached to me cross examining any of the NHS' 14 witnesses and were then used to secure the wording of the agreed statement once I had agreed to withdraw the case after completing my 6 days of evidence"* **[page 1115]**. The statement went on to refer to the legal costs spent on the defence of the claim.
32. Shortly after this an article in the Sunday Telegraph on Sunday 2 December 2018 written by Mr Greene on the settlement of Dr Day's claims was published **[pages 1141-1142]**. I was disappointed to see that the article was extremely one-sided and had taken the Trust's response out of context, in particular on the issue of whether the Trust had instructed Capsticks Solicitors to make a legal threat as to costs – the article published the Trust's response to this allegation, that no such instruction had been given, without referring to the context of the question. I was also concerned that the journalist had not included the rebuttals provided on the other points and in particular, that Dr Day's legal team had approached the Trust to discuss settlement. I emailed the Trust Board in the late afternoon of Sunday 2 December 2018 to notify them of the Sunday Telegraph article, as it was likely that members of the Board would be asked to comment on the coverage **[pages 1138-1139]**. The tone of my email was perhaps more emotive than my normal style; this reflected my disappointment that the coverage had misrepresented the course of the settlement discussions.

33. There was increasing pressure on social media to comment on the allegations about the cost threats. There was a post from "54000 Doctors" which was directed at the Trust and stated that the Trust had changed its position on the allegation of a costs threat from denial to saying it "did not ask for it" **[page 1143]**. The post referred to the fact that the Trust Board had met on the Sunday evening before the settlement was signed off so was drawing the Trust Board into the issue of costs.
34. On 4 December 2018 (11:38) I emailed Ben Travis and Angela Helleur, Chief Nurse, cc Scott Bartlett, Senior Communications Officer (and lead on social media) and Ms Edwards, to notify them of recent criticism on social media and to share some recent posts I had seen regarding Dr Day **[pages 1168-1177]**.
35. I discussed with Mr Travis the need to respond to the allegations that were being widely circulated that cost threats had been issued against Dr Day.
36. The Trust's view by this point was that it needed to react in the face of the coverage at this time to what were believed to be misleading statements. I felt it was also time sensitive given the recent turn of events and that it was important to be sure that there no suggestion that the Trust agreed with what had been said and to avoid a fresh cycle of unfavourable news. Consequently, the Trust made the decision to issue a further public statement on 4 December 2018 to respond to specific questions about and allegations against the Trust **[pages 1159]**. I drafted the statement and this was approved by Ben Travis, Chief Executive.
37. In addition to issuing the statement on the Trust's website, and following discussions with Ben Travis which I understand he details in his statement, I prepared a letter from Mr Travis to the Trust's local stakeholders, enclosing this statement and the October statement. A list of the local stakeholders is at **[page 1183]** and an example of the letter which was then duplicated via mail merge is at **pages 1179-1182**. It is not unusual for the Trust to issue briefings to local MPs, councillors and NHS partners on issues that are prominent in the press and on social media. Given the coverage in the Telegraph and the increasingly high levels of interest in the case on social media I felt there was a likelihood that HSJ would do another story, and I wanted to ensure that the Trust's statement was included if they did.
38. Within the Trust's 4 December 2018 statement, the Trust set out its position on the issue of the alleged costs threats. I understand Dr Day claims as a detriment the following statements contained within the Trust's December statement:
- a. *"he claims that the Trust threatened him with the prospect of paying our legal costs. All of this is simply untrue"*
 - b. *"we did not threaten Dr Day with legal costs to pressure him to drop his claim"*

c. *"[o]n the issue of costs, we had decided not to pursue Dr Day for legal fees before he withdrew his case"*

39. I observe that when formulating his detriments Dr Day has broken down the statement into three sections but the first two references were formatted differently by the Trust. The statement actually states: *"he claims that the Trust threatened him with the prospect of paying our legal costs. All of this is simply untrue: we did not threaten Dr Day with legal costs to pressure him to drop his claim – his legal representatives approached us to settle the claim on Dr Day's behalf"* [page 1159].
40. That point aside, I had not been involved in the negotiations and terms of settlement (about which I understand that the Tribunal will hear evidence). I do not therefore comment on whether the statements were in fact accurate or not. I can confirm however that it was my understanding at the time that the statement was accurate. The statement was approved by Ben Travis. I believed that the key point missing from Dr Day's statements about the negotiations, and the point I wanted to emphasise, was that the proposal of a settlement had been raised by Dr Day's barrister whilst he was giving evidence. The reason I drafted the statement was because I believed it to be true; I believed that it corrected an important omission in Dr Day's statements, and I was trying to respond to the unfair criticism of the Trust. I was not seeking to subject Dr Day to a detriment because he had made protected disclosures years earlier – the thought simply did not cross my mind.
41. Social media interest in the case continued. A series of postings and messages were directed to us via Twitter. On Saturday 8 December 2018, I emailed Mr Travis to report on recent social media activity on Twitter. The email explained I felt nervous about responding to each query, whereas not responding at all was likely to attract criticism. I suggested we could leave this over the weekend and review on Monday or provide a broad holding statement along the lines of our previous statement [pages 1206-1210].
42. Consideration was therefore made to publishing a third statement; primarily to respond to the four threats listed on Dr Day's Crowd Justice case update [pages 1213-1214]. However, this was superseded by the fact that on 11 December 2018, Dr Day made an application to the Employment Tribunal to set aside the settlement agreement and for reconsideration of the dismissal judgment [pages 133-151]. The Trust therefore initially took a step back from making any further statements in light of the fact that Dr Day was seeking to reopen his claims.
43. The Trust received a further email from Mr Greene to my colleague Kirsten Edwards on 20 December 2018 with additional questions about Dr Day's case, in particular stating: *"I've learnt that Dr Day's barrister in the hearing has also confirmed that costs threats were brought against Day by the Respondents. Is Dr Day's barrister lying as*

well" **[page 1247]**. Following that email, I discussed this with Ben Travis and our view was that – with the query from Mr Greene and the increasing demand on social media to respond about the allegations of cost threats – a third statement would be required. In particular, I was concerned that we had left this point hanging unanswered following Dr Day's update to his Crowd Justice page. I responded on 21 December 2018 to confirm that we did not instruct our legal representatives, Capsticks to threaten Dr Day with legal costs at any stage and that Capsticks have confirmed that they did not instruct their barristers to threaten Dr Day with legal costs, and their barristers did not do so **[page 1283]**. Mr Greene emailed me on 21 December with further questions **[pages 1383-1384]**. Events then developed as set out below and I confirmed a statement would follow to address all issues after Christmas **[pages 1381-1383]**.

44. On 21 December 2018, the HSJ published an article following the publication of a report which had been commissioned by Ben Travis shortly after his appointment as Chief Executive which investigated concerns about bullying and harassment at the Trust **[pages 1250-1281]**. I understand that this is detailed in the statement of Ben Travis but I confirm that the report did not relate to the Dr Day case. However, when the HSJ article was published online, many of the comments were not commentary in respect of the report's findings but, instead, commented on the Dr Day case; in particular the alleged costs threat and the four threats named on Dr Day's Crowd Justice page **[pages 1250-1281]**. The comments caused concern for the Trust and I note that some referred to "our CEO" implying they came from members of our staff **[e.g. page 1257-1258]** and that the Trust may have 'lied' regarding denying the cost threats **[e.g. 1254-1255]**. There was speculation that Mr Travis' qualifications were fraudulent and the four specific alleged costs threats were repeated many times. Many of the posts had over 100 likes per post **[e.g. pages 1266 & 1268-1269]**. I understand from the HSJ that this article received one of the highest level of comments for the publication and that ultimately a decision was taken by the HSJ to switch off its comments. This, combined with the large number of questions the Trust and Mr Travis were receiving on social media, confirmed my belief that a third statement was required.
45. Immediately after the HSJ article, I was informed by members of our senior clinical team that lots of staff were asking about the allegation of cost threats and were disappointed that the Trust had not issued a statement on the issue. I was informed by some colleagues before Christmas that the delay in issuing a statement was perceived to be an admission of guilt by the Trust.
46. At this point, in light of Mr Greene's further queries and the continued attention around the settlement of Dr Day's claim, the Trust considered issuing another public statement to further clarify matters. The plan was to issue a statement shortly after Mr Greene's letters, on Monday 24 December 2018. However, Dr Day queried the timing of

releasing a statement on Christmas Eve **[page 1248]**. Dr Day and Mr Travis agreed to have a break on this issue over Christmas. On Christmas Eve, Mr Travis received a number of queries from colleagues on the issue, when he had been visiting frontline areas to thank staff for their hard work over the year. In particular, colleagues were asking Mr Travis about the four specific allegations of threats that Dr Day had made. I was on leave, but due to the high levels of interest from staff, Mr Travis called me and asked me to prepare a holding statement on the Trust intranet, explaining that we would respond to the allegations after the Christmas period. This holding statement was approved by Mr Travis and published on our Trust intranet on Christmas Eve **[page 1286-1287]**.

47. I emailed an embargoed statement to Dr Day on 3 January 2019, a day before publication was planned **[page 1296-1297]**. Ultimately, the decision was taken not to issue that statement and I understand the reasoning for this is detailed in the witness statement for Mr Travis. On 9 January 2019, Dr Day put up a further update to his Crowd Justice page confirming that an embargoed statement had been provided and quoting sections from that statement **[page 1313]**. Dr Day confirmed the statement had then not been issued.
48. The Trust ultimately published a third and final statement online on 10 January 2019. The decision to do so was taken because of the level of interest in the case in conjunction with the need for the Trust to respond to the serious allegations which had been made by Dr Day to the press and on his social media. The 10 January 2019 statement still represents the Trust's final position in respect of this matter **[pages 1314-1317]**.
49. I understand that Dr Day alleges the following comment contained within this statement is a further detriment: *"Dr Day's legal representatives indicated that it would be helpful to them for the Trust: To state what our position would be on costs if the tribunal were to dismiss Dr Day's claims and make findings that he had not been truthful in his evidence...The Trust's legal representatives confirmed that if the tribunal were to dismiss Dr Day's claims and make findings that his evidence was untruthful, then there would be an issue to costs. This reflects that we are an NHS body responsible for public funds"*.
50. As with the previous alleged detriments relating to the October and December 2018 statements, my view is that the detriment claimed is misleading as it does not set out the initial sentence from the quoted section which was that it was Dr Day's representative who made the approach about settlement discussions.
51. That point aside, I would reiterate my earlier point that although I was involved in the drafting of the statement, I had not been involved in the negotiations and terms of

settlement. However, I believed the statement to be accurate. Indeed, the statement was drafted following further discussions involving Ben Travis and Janet Lynch to ensure that we were clear about all the relevant facts. The reason for the statement was to set out the Trust's position in response to what we believed to be misleading or inaccurate statements, in order to protect the Trust's reputation. I was not motivated at any stage by a desire to penalise Dr Day for blowing the whistle years earlier: the focus was on the much more recent events concerning the settlement of Dr Day's claims.

52. I have explained the reasons why the Trust felt the need to publish each of the three statements - namely the concerns that staff would be discouraged from raising safety concerns, concerns about junior doctor recruitment and staff morale, and the need to address the misleading negative publicity which was being generated in the media, particularly in respect of the allegation that the Trust had made costs threats against Dr Day during settlement negotiations. The second and third statements, which I drafted, were released reactively in response to specific questions asked of and allegations made against the Trust. As I have indicated, the decision to publish the statements, and the content of those statements, was in no way motivated by the disclosures Dr Day had made as long ago as five years previously in 2013 and 2014.

Subsequent events


53. Norman Lamb MP (now Sir Norman Lamb) had taken an interest in Dr Day's case and was one of his supporters. The Trust therefore felt that it would be beneficial to open a dialogue with Mr Lamb MP to clarify the Trust's position and to potentially find a suitable way forward for all of us. This was led by Ben Travis and so the details of these events are addressed in his statement. Two meetings took place in 2019. I attended the meeting on 14 January 2019.
54. The meeting on 14 January 2019 had been arranged prior to the publication of the third statement on 10 January 2019. In advance of the meeting, I received an email from Kate Savin, Parliamentary Assistant to Norman Lamb, forwarding an email from Dr Day which stated that the Trust had chosen to release 3 statements which were false and defamatory in places **[page 1354]**. I responded to confirm the reasoning for the statements. I explained that the first statement was intended to set out all the facts relating to the case, which the Trust had not previously done in detail due to the employment tribunal proceedings. I explained the more recent two statements were released reactively in response to specific questions and allegations asked of or made against the Trust. I confirmed that the Trust would be very happy to discuss the most recent two statements given the concerns expressed by Dr Day but that the Trust wished to avoid going through all the details of the original claim dating back to 2014 given that Dr Day was now seeking to reopen that process. However, I emphasised

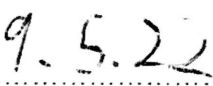
that we thought it would be more productive to try and find common ground and that we would also like to outline some of the improvements made since Dr Day's case in relation to supporting staff to raise concerns [page 1353]. Dr Day responded to confirm that he was only happy to proceed if there was free discussion about all three statements and that if any of the statements could not be defended at the meeting, these should be removed from their website [page 1352]. I deliberately wanted to avoid this type of email correspondence as I considered it best to discuss these issues in person and so I responded to confirm that we would attend for 4pm and that it would be useful to discuss this at the start of the meeting [page 1352].

55. The meeting took place on 14 January 2019 and I understand that this is detailed in the statement of Ben Travis. I took notes in this meeting but did not retain them, as they were not an official record of the meeting, and they were no longer required once Mr Travis decided the below next steps following the meeting. .

56. Following the meeting with Dr Day and Norman Lamb on 14 January 2019, Mr Travis asked Kate Anderson, the Trust's Director of Corporate Affairs who was new to the case and who had a background in auditing, to review the points made in the meeting, including whether we should remove our statements from the website. Ms Anderson's internal review concluded that, taken together, the statements were accurate, and the decision was made not to remove them from the website.

I confirm that the content of this statement is true to the best of my knowledge information and belief.

Signed.....

Dated.....

David Cocke