

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL
BETWEEN

DR CHRIS DAY

CLAIMANT

-and-

LEWISHAM AND GREENWICH NHS TRUST

FIRST RESPONDENT

HEALTH EDUCATION ENGLAND

SECOND RESPONDENT

Further and Better Particulars

Introduction

1. The Respondents have stated that they intend to hold their position on the Claimant's protected disclosures that was agreed at the October 2018 final hearing.
2. If that continues to be the case further and better particulars are required in respect of the Claimant's claim relating to his protected disclosures. In particular, in respect of the claim of the Claimant's reasonable belief in deliberate concealment for the purposes of ERA s43(f).
3. The First Respondent finally accepted in October 2018 that the Claimant made eight protected disclosures containing information tending to show a reasonable belief that the health and safety of NHS patients has been, is being or is likely to be endangered for the purpose of ERA s43(d) but have stated the following in respect of the Claimant's claim of ERAs43(f) in respect of his disclosures;

“ the extent that the alleged disclosures relate to information tending to show that matters are being or are likely to be deliberately concealed (F) (and to the extent that this matters in view of R1's admission in (a) above), R1 denies that any belief by held by the Claimant that any information disclosed tended to show such concealment was reasonable;”

4. The Second Respondent has made no concession at all on the alleged protected disclosures in the Claimant's case despite its status as an employer for the purpose of ERA s43k. It has not pleaded a case to refute the Claimant having a reasonable belief in the relevant failures found in ERA s43.

5. The Claimant submits that given the evidence and in particular the new evidence sent to the former health minister, Sir Norman Lamb by Dr Frankel in January 2019, that the position of both Respondents on the status of the Claimant's protected disclosures has moved past unsustainable which it always was, to unreasonable.

Misrepresentation/Concealment of the Substance of the Claimant's Protected Disclosure

6. Dr Frankel was the Second Respondent's most senior doctor in London (or as the LDA puts it's duly authorized officer) at the time of the Claimant's case and was the medical manager running the Claimant's whistleblowing litigation including at the Tribunal in 2018. Dr Frankel conceded to Sir Norman Lamb in January 2019 the actual reality of a 'Quality Visit' by the Second Respondent in October 2014 to the First Respondent's Intensive Care Unit. This visit occurred a month after the Claimant's September 2014 protected disclosures. Dr Frankel stated to Sir Norman Lamb;

"the visit confirmed the issues raised by Dr Day in relation to his protected disclosures.. Progress was slow and a further visit took place on 15 March 2015..the ICU was reviewed and unfortunately only limited improvement had occurred in this area"

7. The First Respondent stated the absolute opposite in respect of the Second Respondent's quality visit in their formal investigation which both Respondents adopted at the final hearing of the Claimant's case at the Tribunal in October 2018 which misled the Tribunal;

"A recent Deanery Visit concluded that staffing levels (unchanged since January 2014) were safe and there were no concerns about supervision highlighted by them"

8. What Dr Frankel conceded to Sir Norman Lamb in 2019 but not at the 2018 Tribunal is further bolstered by evidence from other junior doctors that raised similar concerns to the Claimant about staffing and the availability of airway doctor support in their evidence to the relevant quality visit. This is set out in the Claimant's witness statements that were sent to Sir Norman Lamb which the Claimant imagines Dr Frankel felt he had to justify. The significance of Second Respondent's quality visits to NHS Trusts is set out in the 2014 LDA between the Second and First Respondent at Schedule F Part D.

9. The Claimant's covert audio records Dr Frankel's stated view on the substance of the Claimant's protected disclosure in a formal meeting with the British Medical Association on 2 September 2014.

"What you describe to me is totally unacceptable for me to have trainees in a situation that you were in. In ICU you are not trained for intubation and airway care and you're in charge 19 never mind all the other issues. the whole things what you described is unsafe.. You were clearly not the only person who had concerns about it."

10. Despite 1. The results of the Second Respondent's quality visit , 2. Dr Frankel's clearly stated position in 2 September 2014 on the Claimant's protected disclosure 3. ICU Core Standards (national staffing standards) 3. Serious Untoward Incidents involving the deaths of patients and their SUI reports; both Respondents adopted and defended the following position on the Claimant's protected disclosures at the 2018 Tribunal;

"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".

"A recent Deanery Visit concluded that staffing levels (unchanged since January 2014) were safe and there were no concerns about supervision highlighted by them"

11. A Critical Care Peer Review commented in 2017 on the Intensive Care Unit at the center of the Claimant's case. The comments obviously support the Claimant's protected disclosures and Dr Frankel's stated position to Sir Norman Lamb in 2019.

"Staffing levels – there were 19 patients to just one consultant, which exceeded the recommended ratio of between 1;8 an 1;15. It was apparent that this is a consistent issue with no clear recognition"

12. The Claimant submits that the Second Respondent and Dr Frankel cannot reinvent history in 2019 with a former health minister and claim that the Second Respondent supported the substance of the Claimant's protected disclosure either in formal reports or at the Tribunal. The Second Respondent's 'on the record' position in 2014 was quite clear and was the complete opposite of the position of the Second Respondent's most senior doctor on covert audio.

"A recent Deanery Visit concluded that staffing levels (unchanged since January 2014) were safe and there were no concerns about supervision highlighted by them"

"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".

13. It follows the Second Respondent deliberately concealed Dr Frankel's true view on the Claimant's protected disclosure and the reality of the October 2014 quality visit.
14. The Claimant submits that any reasonable reading of what is set out in paragraph [5-13] is enough to justify the Claimant's reasonable belief that deliberate concealment occurred in respect of the substance of his protected disclosures.

First Respondent's Response to the Claimant's Protected Disclosure

15. The evidence shows that the senior manager recipient of the Claimant's protected disclosure made by telephone on 10 January 2014 dramatically changed her description of the Claimant's telephone call in her evidence to the First Respondent's formal investigation into the safety issues in the Claimant's whistleblowing case.
16. The Claimant's telephone call on the night of 10 January 2014 was initially described by a Director in the First Respondent after the Director had a meeting with the senior manager that received the Claimant's protected disclosure on 10 January. The Director describes the Claimant's telephone call, *"Dr Day is of course quite welcome to raise his concerns and clearly did so in what seems to be a very amicable conversation with Joanne Jarrett."*
17. The description of the Claimant's 'very amicable conversation' reported in the First Respondent's internal email dated 15 January 2014 was then dramatically changed in evidence to First Respondent's formal investigation by the duty senior manager Joanne Jarrett who subsequently described the Claimant's phone call with the words "communicating in anger", "very offensive" and "a little ridiculous".
18. Jane Dann, a senior nurse witnessed the Claimant's 10 January 2014 protected disclosure confirmed verbally and in writing that the Claimant when making his protected disclosure was "calm, professional and rational during the course of the whole telephone conversation."
19. The Claimant's Intensive Care Unit clinical supervisor contacted him at home to warn him about the actions of the senior manager recipient of his 10 January 2014 protected disclosure. This was commented on by the First Respondent's formal investigation. *"Dr Roberts passing on this to Dr Day in fact escalated the problem, allowing Dr Day to believe that Ms Jarrett had tried to undermine him"*
20. Dr Roberts was listed as a witness for the First Respondent at the October 2018 Tribunal but was withdrawn at short notice. Dr Roberts sent a text message to the Claimant dated 24 June 2018 at 2157 which stated, *"I think you should call me for evidence before the Trust solicitors try to gag me"*. The Claimant responded stating, *"Did the Trust call you as a witness?"*. Dr Roberts replied, *"They have..not sure whether it will stay that way though as I don't think I am saying what they want"*
21. The Claimant submits that any reasonable employer would have concluded from the senior nurse Jane Dann that the Claimant's phone call was calm, professional and important and questioned the credibility of the relevant senior manager given her change in position. The First Respondent's obvious motivation for not doing this was to smear the Claimant and confuse/conceal the substance of his protected disclosure.
22. It is submitted the facts above [15-21] support the Claimant's claim of a reasonable belief in deliberate concealment ERA s43(f) .

Datix Incident Reporting

23. Datix is the system used in the NHS to report safety incidents and other significant events. The Claimant entered his January 2014 protected disclosure onto the Datix system. The First Respondent external investigation made the following criticisms of the way the Datix report was processed by the First Respondent;
- A) “the Datix report was not formally followed up and logged on the system as would be expected.”
 - B) “When a Datix report was submitted on 15 January 2014 it was not dealt with through routine governance processes. The responses to the clinical issues Dr Day raised were addressed in an informal and uncoordinated way”
 - C) “Dr Day then shares his experience with Dr Harding who involves Dr Ward who then copies his response to a wide and senior audience which is undermining and could be perceived as bullying”
24. The Claimant submits that the actions above in [23] demonstrates that it would be reasonable to suspect that the Datix report submitted by the Claimant was being deliberately concealed as opposed to being logged on the system and going through routine governance processes. The actions that followed the Datix report that were described as “undermining and bullying” is yet further evidence of the Claimant’s position being reasonable.

Second Respondent’s Response to the Claimant’s Protected Disclosures

25. On 3 June 2014 the Claimant made a protected disclosure to an ARCP panel of 3 senior doctors and a lay chair at the Second Respondent. The substance of the disclosure has been dealt with at [6-14]. The Claimant also reported to the ARCP panel concerns that the First Respondent had handled his protected disclosures earlier in the year improperly as described above [15-24].
26. The Second Respondent ARCP chair has accepted for some reason that the ARCP panel did not make a record of the substance of the protected disclosure.
27. Similarly to the First Respondent with the 10 January 2014 protected disclosure the Second Respondent attempted to construct a false account of the Claimant making the protected disclosure to discredit and smear the Claimant. (see [15-22])
28. The Second Respondent falsely attributed to Dr Chakravarti, a senior doctor on the Claimant’s ARCP panel a description of the Claimant making his protected disclosure on 3 June 2014 which included the words, “in the grip of angst”, “physically shaking”, “this behavior on the day alone does certainly appear to have raised questions for the panel about his state of mind”.
29. The Claimant wrote to Dr Chakravarti on 29 December 2014 to challenge the statements that had

been attributed to her in the Second Respondent's formal report and made clear in a subsequent email that litigation had commenced and that covert audio would be used in the case to counter false accounts of the Claimant's dialogue in formal meetings.

30. Dr Chakravarti wrote to the Second Respondent on 5 January 2015 stating that "she was baffled by the various quotes attributed to [her]" in the Second Respondents formal report into the Claimant's whistleblowing case. She also ensured Hill Dickinson were aware.

31. The Second Respondent did not remove the statements from their report that baffled Dr Chakravarti. Dr Chakravarti received a response by email from the Second Respondent on 5 January 2015 which ended with a reference to the Second Respondent's intended strike out application to refute employer status (now subject to a wasted costs application and legal regulator investigation);

"We are reasonably hopeful that it will be struck out on the grounds that we (HEE) are not his employer which will be the end of it for you (and me)."

32. Dr Chakravarti described the Second Respondent's formal investigation into the Claimant's whistleblowing case with the following words in her Tribunal statement;

"the notes made by Mr Plummer contain short phrases without giving their context and by stringing the phrases together I feel it gives an exaggerated distorted impression. Upon reading the report, I was very surprised to find various phrases in inverted commas seemingly quoting me, when I could not recall saying those phrases. I did not feel that the report portrayed the situation as accurately from my perspective as I would have wanted."

33. The Second Respondent's formal investigation also failed to interview the ARCP panelist Dr Umu-Etuk. The investigation then ignored/excluded from their formal investigation an email to the Claimant dated 5 December 2014 from Dr Umu-Etuk. In the email Dr Umu-Etuk describes the Claimant making his protected disclosure on 3 June 2014.

"I was of the opinion that you came across confident and assertive.. I do not recall you to be visibly shaking but did form the opinion that the hospital in question failed to provide enough support out of hours..I remember that you had sole responsibility for ITU which seems to be beyond the expected competency of a CT1/2 doctor"

34. Another ARCP Panelist present when the Claimant made his 3 June 2014 protected disclosure, Ms Annette Figuerido, stated to the Second Respondent's formal investigation that she "was unable to recall this particular ARCP"

35. The Second Respondent and their Solicitors pleaded the below as the unanimous view of the ARCP panel with the clear intention to smear the Claimant in the eyes of the employment tribunal;

“the panel noted how the Claimant appeared to live the experience physically shaking whilst he recounted the patient safety issues. The panel noted how the Claimant appeared to lack confidence in his own ability”

36. Dr Sauer, the Claimant’s day to day clinical supervisor at the First Respondent described the Claimant in a report that was sent the Second Respondent’s formal investigation;

“a competent and confident trainee with a skill set which exceeds the expectations of someone of his level of training... 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.”

37. The Claimant submits that the decision by both the Second Respondent and their legal representatives to plead the above account [35] as the unanimous view of the ARCP panel was deliberately dishonest/misleading given the following evidence;

- a) The ARCP panelist Dr Umu-Etuk stating on 5 December 2014 that the Claimant was “confident and assertive” when making his protected disclosure on 3 June 2014 and “not visibly shaking”
- b) The ARCP panelist Ms Annette Figuerido stating that she “was unable to recall this particular ARCP”
- c) The fact ARCP panelist Dr Chakravarti wrote to the Second Respondent on 5 January 2015 stating that “she was baffled by the various quotes attributed to [her]” which included comments about physically shaking, being gripped with angst and unanimous concerns about state of mind. (This email was disclosed late in 2018)
- d) Dr Sauer’s evidence

38. Dr Sauer, the Claimant’s clinical supervisor commented on the First and Second Respondent’s actions towards the Claimant in his Tribunal statement;

“the Second Respondent and senior managers at the First Respondent have made allegations about his performance, state of mind, engagement with supervisors and personal, as well as, professional conduct. 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. It is also surprising that these allegations were never discussed with me. As the Claimant’s clinical supervisor, I would expect to hear about such concerns as a matter of urgency. I confirm that I clearly do not support these allegations and believe they have no grounds. It is also not consistent with anything that has been written in the Claimant’s Eportfolio by the over 30 health professionals that have worked with or assessed the Claimant during his training.”

Culture at the First Respondent

39. The 2017 Critical Care Peer Review made general comments about culture which is relevant to whether the Claimant's belief in deliberate concealment was reasonable;

- a) *"Poor incident reporting culture – two members of staff were approached by their managers after reporting incidents with one being told, "she had created a lot of work while another was told she should have said something verbally rather than submitting a formal incident form."*
- b) *"A complete lack of medical leadership, low consultant staffing levels, inadequate governance and poor culture"*

40. In January 2019, the First Respondent published an external investigation that it had commissioned into culture at the Trust which made the following findings about the First Respondent's culture;

- a) existence of widespread bullying and harassment
- b) menacing, threatening and heavy handed culture
- c) overt bullying at the most senior levels
- d) a lack of action to address
- e) it recommended the past failures of the senior team are publicly acknowledged

Conclusion

The Claimant claims what is set out in these further and better particulars clearly demonstrates the Claimant's reasonable belief in deliberate concealment for the purpose of ERA s43(f).

It is also submitted that they show the Respondents' position on the protected disclosures as unreasonable and in particular the Second Respondent's position on them as patently absurd.

Dr Chris Day
11 November 2020