IN THE EMPLOYMENT TRIBUNAL

LONDON SOUTH

B E T W E E N:

Dr Christopher Day

Claimant

-and-

Lewisham and Greenwich NHS Trust (1)

Health Education England (2)

Respondents

Grounds of Claim

Introduction

1. The Claimant claims that he has suffered several significant detriments from the Respondents between October 2018 and January 2019 on account of protected disclosures that he made when he was employed by the Respondents between the months of August 2013 and September 2014. On 3 October 2018, the First Respondent finally accepted that the Claimant had made eight qualifying protected disclosures to it when he was employed as an anaesthetic and intensive care doctor in 2013/14.

Background to the Claim

2. The Claimant submitted a claim in the Employment Tribunal against the First and Second Respondent (together the "Respondents") on 27 October 2014 under claim number 2302023/2014 (the "First Claim") and a second claim on 10 April 2015 under the claim number (2302023/2014) (the "Second Claim").

3. The Claimant successfully applied to consolidate the First Claim with the Second Claim. The facts set out in the First Claim were relied upon in the Second Claim. The further detriments suffered are a result of the same protected disclosures set out in the First and Second Claims. The Claimant does not seek in the Third Claim to re-open the First and Second claims but the grounds of claim in the First and Second Claims are repeated and relied upon as background in these Grounds of Claim

4. The final hearing of the Claimant's whistleblowing claims commenced at the London South Employment Tribunal on 1 October 2018 and was before a Tribunal chaired by Employment Judge Freer with members Ms Campbell and Miss Brown.

5. The reason for the 4 year delay in the claims reaching a final hearing was that the Second Respondent contested the Claimant's claim that it was his employer under the extended definition of an employer in Section 43K of the Employment Rights Act. On 5 May 2017 the Court of Appeal handed down a judgment that allowed the Claimant's appeal and remitted the case to a fresh employment tribunal in order to adduce evidence and make findings of fact on whether the Second Respondent fell within the definition of ERA s43K employer. The Second Respondent waited until a year after the Court of Appeal's decision; and mere days before the hearing on 14 May 2018 conceded that they were the Claimant's employer and agreed to pay £55,000 of the Claimant's costs as a result of their conduct of the ERA Section 43K point.

6. This jurisdictional contest undermined whistleblowing protection for 54,000 junior doctors and the effect on patient safety was acknowledged by the medical regulator, the General Medical Council;

> *"We recognise that a level of concern now exists among doctors in training in England about whether they are adequately protected in their relationship with*

Health Education England (HEE), and that, as a result, some may feel less secure about raising concerns for fear of suffering detriment to their career."

7. The Claimant withdrew his claims and entered into a settlement agreement with the Respondents on 15 October 2018 after completing 6 days of cross examination. The settlement agreement is not subject to any confidentiality provisions.

8. The settlement agreement included the following agreed statement;

"Dr Day blew the whistle by raising patient safety concerns in good faith.
Dr Day has performed a public service in establishing additional whistleblowing protection for junior doctors.
The Tribunal is likely to find that both the Trust and HEE acted in good faith towards Dr Day following his whistleblowing and that Dr Day has not been treated detrimentally on the grounds of whistleblowing.
Dr Day's claims are dismissed upon withdrawal."

9. The basis for the Claimant entering into that agreement was that the Respondents, through their counsel, during cross examination, after cross examination and during the negotiation of the settlement agreement had made clear expressions to the Claimant's counsel that they would seek substantial costs against the Claimant if the case proceeded and the Claimant was unsuccessful.

10. The Claimant's counsel has also confirmed that that the Respondents made reference to a wasted costs application and a referral for the Claimant to the General Medical Council and the Claimant's solicitors to the Solicitor Regulation Authority.

11. The Claimant's counsel has confirmed that the Respondents' counsel said these things at these stages in the litigation.

12. At no point in the run up to the hearing were cost consequences or a regulator referral referred to. The first time the Respondents mentioned such things was during the period that that the Claimant was under oath.

13. During the settlement negotiations on 12 October, the Respondents through the communications from their counsel to the Claimant's counsel started also to apply the cost threats originally associated with the Claimant proceeding to cross examining the Respondents' witnesses to getting the Claimant to consent to an agreed statement that stated that all individuals employed by the Respondents had acted in good faith. The Claimant was told that this was referred to by the HEE Barrister, Angus Moon QC as a "red line''.

14. On 11 December 2018 an application to set aside the settlement agreement dated 15 October was lodged with an application for reconsideration and revocation of the Judgment that was sent to the parties on 28 November 2018. By letter dated 18 February 2019 the parties were informed that the application for reconsideration had been refused by Judge Martin. The Claimant requested a reconsideration of that decision by letter dated 26 February 2019 and is intending in the alternative to appeal that decision to the EAT.

15. The basis for the reconsideration application was that the Claimant was operating under either a mistake or a misrepresentation given that the Respondents have stated in public statements and to the newspapers that no costs threats or threats of any kind were made during and after cross examination or during negotiation of the terms of the settlement agreement. Yet the Claimant was told on numerous occasions that the Respondents were intending to pursue him for costs if he proceeded to cross examine their witnesses and then was ultimately unsuccessful with the claim. That was the basis for his entry into the settlement agreement.

The Protected Disclosures

16. The Claimant claims the following disclosures set out below were all qualifying protected disclosures for the purposes of section 43B, 43C and or 43G ERA 1996 in relation to the First and Second Respondent. The disclosures were made in good faith and in the public interest to his employer and contained information tending to show either that the health or safety of patients was being (or was likely to be) endangered or that such matters had been, or were being, deliberately concealed.

Communication to the First Respondent

(i) Statements made by the Claimant to Dr Roberts in a phone call and email on 29 August 2013 that, inter alia, doctor/patient ratios and medical supervision was inadequate and a risk to patients at Woolwich ICU;

(ii) Statements made by the Claimant in an email forwarded to Dr Harding, Assistant Medical Director for Professional Standards, on 3 September 2013 that, inter alia, doctor/patient ratios and medical supervision were inadequate and a risk to patients at Woolwich ICU;

(iii) Statements made by the Claimant to Joanne Jarrett, the off-site duty manager, in a phone call and email on 10 January 2014, that, inter alia, the Trust's arrangements at Woolwich hospital for that night were putting patient safety at risk;

(iv) Statements made by the Claimant to Joanne Jarrett in an email on 14 January 2014 that managers were providing false information and failing to investigate and deal with patient safety issues at Woolwich ICU;

(v) Statements made by the Claimant to Joanne Jarrett in an email on 14 January 2014 about attempts to create confusion about the patient safety issues he raised and present what had actually happened as a consequence of his competence rather than a matter of patient safety;

(vi) Statements made by the Claimant to Dr Harding during a meeting on 21 January 2014 that the Trust was failing to investigate and deal with patient safety issues at Woolwich ICU;

(vii) Statements made by the Claimant to Dr Harding and Dr Ward in an email on 29 April 2014 to complain about the level of risk patients and the Claimant were exposed to, giving false information and attempts to confuse and discredit the safety concerns the Claimant had raised;

Communication to the First and Second Respondent

(viii) Statements the Claimant made to Dr Brooke in a meeting on 29 August 2013 where escalation of the ICU safety concerns within HEE were discussed;

(ix) Statements the Claimant made in an email to Dr Brooke, his Educational Supervisor and the Health Education South London (HESL/HEE) Emergency Medicine Training Programme Director, on 2 September 2013 that, inter alia, doctor/patient ratios and medical supervision was inadequate and a risk to patients at Woolwich ICU;

(x) Statements made by the Claimant on 3 June to the ARCP panel (which included a senior doctor from the Trust, Dr Harrison) about patient safety at Woolwich ICU, the hospital arrangements for 10 January 2014, the events of that night and subsequently and attempts by Trust management to discredit him and present the issue as his competence rather than patient safety;

Communication to the Second Respondent

(xi) Statements made to Dr Lacy in an email on 5 June 2014 about, inter alia, patient safety at Woolwich ICU and the false statements included in his ARCP report;

(xii) Statements made to Dr Lacy in a meeting on 6 June 2014, about, inter alia, patient safety at Woolwich ICU and attempts by Trust management to discredit him and present the issue as his competence rather than patient safety;

(xiii) Statements made by the Claimant to Dr Chris Lacy, Deputy Head of School of Emergency Medicine, in a letter on 12 June 2014, that HESL (HEE) was failing to investigate why false statements had been made about his ability to cope, need for support, counselling and psychiatric assistance and lack of engagement with his Education Supervisor;

(xiv) Statements made by the Claimant to Gary Waltham in a letter on 13 August 2014, that HESL (HEE) was failing to investigate why false statements had been included in his ARCP report;

(xv) Statements made to Dr Andrew Frankel and Gary Waltham during a meeting on 2 September 2014 that, inter alia, doctor/patient ratios and medical supervision were inadequate and a risk to patients at Woolwich ICU, the Trust and HESL (HEE) had failed to investigate and deal with this and the Trust and HESL (HEE) had failed to investigate and report what had been said to the ARCP panel about him.

17. On 3 October 2018, Judge Freer asked Counsel for the First Respondent to reflect on its position on the protected disclosures. Counsel for the First Respondent conceded that the disclosures (i)-(v) and (vii)-(ix) set out in paragraph 13 were qualifying protected disclosures. The First Respondent maintained their contention that (vi) was not a qualifying protected disclosure and that disclosure (x) was a matter for the Second Respondent.

18. The Second Respondent made no specific concessions on the alleged protected disclosures other than the agreed statement.

19. As the case had been crowdfunded, on 15 October the Claimant sent the agreed statement in the settlement agreement to his 4,000 backers on Crowd Justice adding only the following words;

"We would like to thank you for your encouragement and generosity. We are very proud of what we have been able to achieve together with our supporters on Crowd Justice."

Press and the Media

20. As a crowdfunded case, the Claimant's case has had significant media coverage on and around the dates of the various hearings.

21. The wording of the agreed statement and the publicly stated need in open Tribunal for the Trust board to approve the settlement agreement led some journalists and NHS activists to speculate on whether the Claimant had received a significant pay-off. When the Claimant denied this it seemed likely to some that he had been threatened in some way especially given the wording of the agreed statement.

22. On 16 October the Claimant was contacted by the British Medical Journal for comment on the outcome of the case. The Claimant forwarded the Crowd Justice email referred to above to the BMJ with the additional words:

"Thanks for your email. I have been advised this is all I can say, please see below. Thanks for covering the story."

23. On 13 November the Claimant was contacted by a journalist working with the Telegraph, Mr Tommy Greene;

> *"We have been in touch in the past about your case. I am currently working with the Daily Telegraph on a news piece concerning your legal battle, in light of events which have taken place over the past few weeks.*
>
> *Over the past 10 days (approximately), I have been contacting a number of parties in relation to the outcome of your recent tribunal hearing. As part of my questions to both HEE and the Trust (Lewisham and Greenwich) over the past week or so, I have been told the following:*
>
> *1) Both HEE and the Trust denied any cost threat was ever made against you, not just during the 6 days of cross-examination, but ever.*
>
> *2) The Trust told me that "settlement negotiations were initiated by Dr. Day himself, firstly through his legal representative while Dr. Day was in the course of giving evidence, and then again at the point when Dr. Day had concluded his evidence. Dr Day and his legal representative made these approaches to the Trust to settle by*

withdrawing the claim, not as a result of any pressure placed upon them by the Trust, but because it was apparent to them that Dr Day's case was not going well. At the point that Dr Day withdrew his claim, the Trust had 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".

3) The Trust also seemed to dismiss the importance of the cost threat, suggesting the alleged cost threat - had it taken place, according to them - didn't play or wouldn't have played any part in the final agreed statement signed by all parties.

How would you respond to these claims made by the two Respondents in your legal case? Would it be possible for you to provide me with a comment in relation to the issues and claims discussed here?"

24. The Claimant responded to this email by providing his side of the story in respect of the Respondents' costs threats during and after his evidence. The Telegraph published the story on 2 December 2018 that included the Claimant's quote,

"After two and a half days of my six day cross examination I was contacted by my legal team and told that the NHS respondents had decided to inform me of their intention to seek costs for the entire four week hearing if I proceeded to cross examine any of the NHS' 14 witnesses and ended up losing the case," he told The Telegraph.

"It seems to me that this was designed to affect my ability to give evidence and to intimidate me into withdrawing my whistleblowing claims.

"After completing my six days of evidence, my wife and I, considering our responsibilities as parents, felt that we had no choice but to drop the case.

"I am disgusted at the way me and my family have been treated given that it has now finally been accepted that I was acting in good faith raising important safety issues and that I have performed a public service defending junior doctor whistleblowing protection from attempts to undermine it from NHS leaders."

25. On 25 November the Claimant sent an email to the Telegraph journalist Tommy Greene requesting the hard copies of the emails from the Respondents that his original email was based on.

26. On 26 November Tommy Greene provided to the Claimant the relevant emails with a cover email;

"I provide the relevant emails on the basis that they potentially serve as key evidence, and that this forms part of the legal process surrounding your case."

27. The emails forwarded to me by Tommy Greene identified Vicki Diaz, a senior communications officer at HEE and Kirsten Edwards at the Trust as the source of the information about my case given to the Telegraph.

Further Detriments

28. Following the settlement agreement entered into on 15 October 2018, the Claimant claims that he has suffered further detriments on account of the above protected disclosures contrary to ERA Section 47B. They demonstrate that the Respondents are still acting to damage the Claimant over 4 years after the end of the Claimant's employment with the Respondents. This is hugely significant for the Claimant as the Second Respondent is the only organisation in England that trains doctors to consultant or GP and operates in all regions.

29. Since the settlement of the case and the agreed position statement. The First Respondent has released 3 damaging public statements about the Claimant's case and provided them to journalists and also published them on their NHS Trust website. The first statement was released on 24 October 2018, the second on 5 December 2018 and the third on 10 January 2019. An embargoed statement was sent to the Claimant on 3 January with view to being published on 4 January but has never been published.

30. In December 2018, the Chief Executive of the First Respondent, Mr Ben Travis, made an approach to The Right Hon Norman Lamb MP to offer "a full briefing on all the background to the case" and to advance the content of the Trust's public statements. Mr Travis has also

endorsed the public statements on social media platforms such as Twitter and authorised for the public statements to be shared with the national newspapers for instance the Telegraph.

31. Mr Travis also made a request to meet Mr Lamb which was agreed and occurred on the 14 January 2019. Mr Lamb invited the Claimant to the meeting. In the meeting the Claimant set out examples of the misleading material in the Trust's public statements. In the meeting Mr Travis elected not to defend his position on the statements but also did not commit to removing the content from the Trust website.

32. Mr Travis did make it very clear that he or the Trust did not instruct the costs consequences described by the Claimant in respect of settling the case and in order to secure the wording of the agreed statement. In the meeting, Mr Travis repeated the substance of this quote given to Private Eye in its December 2018 issue.

"Lewisham and Greenwich NHS Trust did not ask its legal representatives to make a significant cost threat to Dr Day when he was under oath and further, did not make this request at any point. The Trust had decided that it would not pursue Dr Day for costs and we have been clear from the outset that the Trust does not want to discourage other colleagues from raising concerns"

33. The Claimant claims as detriments the following statements released publicly by the Trust about the without prejudice settlement discussions at his October Hearing.

a) In 4 December 2018 public statement;

(i) *"he claims that the Trust threatened him with the prospect of paying our legal costs. All of this is simply untrue".*

(ii) *"we did not threaten Dr Day with legal costs to pressure him to drop his claim"*

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

The Claimants, Counsel, Chris Milsom has confirmed in writing that the Respondents made ordinary and wasted costs threats during and after the Claimant's evidence.

b) In 10 January public statement the Trust change their position; "*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 thot his evidence was untruthful, then there would be an issue to costs. This reflects that we are an NHS body responsible for public funds*'"

34. The Claimant's counsel, Chris Milsom, has confirmed in writing that the costs consequences communicated by Ben Cooper QC for the Trust "did not link matters to the truthfulness of [the Claimant's] evidence" and also that he "certainly made no comments as to [the Claimant's] evidence being untruthful." This position has been further endorsed by the Claimant's Solicitor Tim Johnson in an email dated 13 January 2019, "I don't think for a moment that Chris Milsom said anything to Ben Cooper or anyone else, to suggest that your evidence was untruthful. I have no evidence to suggest Chris did that and I don't believe he would."

35. A letter dated 14 January 2019 from the Claimant's former firm of solicitors to the First Respondent's solicitors states, "As your firm is aware Tim Johnson/Law made no approach to your firm, your client or counsel to ask for settlement discussions in Dr Day's case."

36. The Claimant claims as detriments the following statements released publicly by the Trust about Claimant's case that can be shown not to be true.

a) "*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"*

This statement is not true. The external investigation made the following significant criticisms of the Trust's response to the Claimant's protected disclosures;

i) "Unfortunately appropriate action was not taken. In particular, a formal investigation into Dr Day's concerns was not commissioned until August 2014 when Dr Day wrote to Mr Higginson."

ii) “the Datix report was not formally followed up and logged on the system as would be expected.”

iii) “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.”

iv) “In my opinion, the manner of Dr Ward's dealing with him by email, in effect dressing him down in front of seven people was ill judged. The matter should have remained confidential between Drs Ward, Harding and Day and/or a face-to-face meeting could have been convened to deal with the matter.”

v) “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”

vi) “Dr Harding's reaction that given the opportunity he would not employ Dr Day again also suggests that Dr Harding found Dr Day an irritation rather than a worried colleague who needed support.” (In reference to Dr Harding’s 7 May 2014 email to Dr Brooke, the HEE Training Programme Director, that included the words, "His inability to let these issues go is starting to worry me. I would consider not employing him again as a result")

vii) “Dr Harding's response was more considered and he lets his feelings known which was ill advised given his position in the Trust. Despite his assertions to the contrary he holds influence and power, certainly when compared with a CT2.”

viii) “Although Dr Day's concerns were informally investigated by Dr Ward, there was confusion and ambiguity about the consequent 'report'. Unfortunately the ambiguity was not clarified immediately when it would have been easy to do so.”

ix) "There has been no input that I can see from HR until after Dr Day's letter of complaint to Mr Higginson when this independent investigation began. Those trying to deal with the situation have therefore been unsupported which has meant that they were not advised about process or policy."

The First Respondent knew that their response to the Claimant's protected disclosures had been criticised by their external investigation but none the less released this deliberately misleading statement saying the opposite to discredit the Claimant in respect of the content of his protected disclosures and his claims about how they were handled by the NHS. This has affected the claimant's standing among the public, patients, colleagues, potential employers and his 4,000 backers on Crowdjustice that have given financially to his case.

b) "*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."*

37. The case has been widely publicised and the Claimant has made clear in his crowdfunding campaign that the case is based on protected disclosures that he made in 2013/14 about important safety issues relating to one of the Trust's Intensive care units. These protected disclosures were accepted as such by the Trust at the October tribunal. The content of the protected disclosures are plainly supported by national staffing standards and the 2017 Critical Care Peer Review. It is damaging to the Claimant for the Trust to publicly deny and mislead on the content of the protected disclosures and summarise the safety issues in the case as amounting only to doctor cover on the medical wards and then deny the link to ICU and the Critical Care Peer Review on that basis.

38. On 4 December 2018, the First Respondent's Chief Executive, Mr Travis wrote 18 letters to local MPs and public officials enclosing the 23 October 2018 and 4 December 2018 public statements about the Claimant's case. This material contained untrue and detrimental material (see [33]-[37]). Mr Travis stated in his letters that this material would leave the various MPs and public officials "fully briefed about the case".

39. None of these letters were included in the standard disclosure of 8 January 2021 but were obtained by the Claimant on 26 January 2021 as the Second Respondent made reference to them in an internal email that was disclosed on 8 January 2021 as part of standard disclosure. These letters misled the various MPs/public officials on the scope and nature of the Claimant's protected disclosures about serious patient safety issues, the results of an external investigation and the circumstances that led to settlement of the case.

40. On 23 January 2019, the Claimant wrote to Mr Lamb repeating the above examples and explanation in respect of the false public statements that he had set out in the meeting on the 14 January.

41. It is hugely damaging for the Claimant as a regulated medical professional to have the content of his protected disclosures publicly undermined, the findings of an external investigation into his case misrepresented and for it to be falsely implied that his own legal team thought his evidence was untruthful.

42. On 28 January 2019 Norman Lamb MP wrote a letter to Mr Travis and enclosed the Claimant's letter dated 23 January 2019;

> *"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. lt 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."*

43. The Claimant's letter of 23 January 2019 to Mr Lamb sets out the following;

a) The Claimant's counsel confirming that the costs consequences communicated by Ben Cooper QC for the Trust did not link matters to the truthfulness of the Claimant's evidence and that the Claimant's counsel certainly made no comments as to the Claimant's evidence being untruthful.

b) Several examples of serious criticisms of the First Respondent about its handling of the Claimant's concerns from its external investigation showing that the Trust's claim that they had responded in the right way to the Claimant's concerns not to be true.

c) Information indicating the true content of the Claimant's protected disclosures and how such content was supported by the findings of Serious Untoward Incident (SUI) Investigations, a Peer Review, a CQC Report and national staffing standards. Examples are set out that show a clear link between the issues investigated in the external investigation into the Claimant's case and to the Critical Care Peer Review which the First Respondent has publicly claimed has been incorrectly linked to the Claimant's whistleblowing case.

44. On 7 February Mr Travis wrote back to Mr Lamb but did not refer to the false public statements either to justify them or to remove them. Mr Lamb responded in a letter dated 18 February;

"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."

45. The NHS Whistleblowing expert, Sir Robert Francis QC, wrote to the Care Quality Commission to express concerns about the First Respondent's public statements in the Claimant's case. A letter from the Care Quality Commission to Sir Robert Francis dated 29 May 2019 that Sir Robert Forwarded to the Claimant states;

"*We share your concerns about the content and tone of the publicly available statements on the Trust's website and having taken up the concerns with the Trust, they have advised that*

they have sought the advice of their lawyers and they intend to keep the statements on the Trust website."

46. The Claimant claims as a detriment on account of his protected disclosures the deliberate failure of the First Respondent to remove and or update their public statements once contacted with concerns about the statements from the Care Quality Commission and or Sir Robert Francis QC.

47. The Claimant claims that the First Respondent's treatment of the Claimant is as a result of the Claimant's protected disclosures and an attempt to protect its reputation in respect of the way it has dealt with serious safety issues and responded to the claimant who it accepts raised them in good faith.

48. On 15 July 2020 the Claimant was copied into the following email that was sent to the Solicitor Regulation Authority from the Journalist Tommy Greene;

"Attached to the forwarded email is a response to a Freedom of Information request by Lewisham and Greenwich Trust. It is a fairly straight forward request, asking for the details of a trust board meeting that took place in October 2018. It has been stated in open tribunal that at this board meeting the controversial settlement agreement in Dr Day's whistleblowing case was approved by the trust's board.
I believe the SRA and Dr Day should both seek the records of this conference, as my FOI request and all questions I have put to the trust board secretary on this matter have been met with the same response - they have declined to answer any questions on the meeting (which have been put to them several times) and now claim no records of the meeting can be provided as they say it took the form of a 'confidential teleconference'. Trusts can be referred to the Secretary of State for failing to keep records of their meetings - particularly ones that deal with matters of such public interest as this one - and for failing to disclose them."

The Second Respondent

49. The Second Respondent is a very influential national Government agency with a responsibility for training all England's doctors to consultant or GP. It is hugely detrimental to the Claimant for the Second Respondent to publicly deny attaching cost consequences to proceedings when simultaneously publicly relying on the Claimant conceding that the tribunal is likely to find that that both Respondents acted in good faith towards him. It is the Claimant's position that the Second Respondent's counsel used the cost threat to assert the "good faith" wording as a 'red line' during settlement negotiations.

50. On 12 November 2018 the Second Respondent when asked by the Telegraph newspaper whether they threatened the Claimant for costs responded,

> *"Health Education England did not threaten Dr Day in any way at any point during these proceedings."*

51. On 2 December the Telegraph published an article relying on the above quote from the Second Respondent.

52. By making these statements to the national press the Second Respondent is effectively accusing the Claimant in the national press of lying about the costs consequences attached to continuing his case. This is hugely damaging to the Claimant's reputation and professional standing and also could have regulatory consequences for the Claimant.

53. On 3 December Dr Frankel, who was the Post Graduate Dean in post at the Second Respondent at the time of the Claimant's employment wrote to the Right Hon Norman Lamb MP about the case, he endorsed the narrative in the Respondents public statements and offered a meeting.;

> *"I would be very happy to tell you what actually happened in this doctors case in order to ensure that you really are aware of the true facts."*

54. Dr Frankel met Norman Lamb with the claimant on 8 January 2019 and prior to the meeting provided Norman Lamb with an 11 page document with his view on the Claimant's case that included misleading statements that were not even consistent with the Second Respondent's Tribunal statements or formal reports. Mr Lamb's assistant forwarded the document to the

Claimant. 5 examples of the misleading statements included by Dr Frankel are below but the Claimant will provide further examples if required.

a) *"The statements produced for the ET all confirmed the findings of Malcolm Plummer's report."*

The Second Respondent's own witness, Dr Chakravarti heavily criticises the Plummer report 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 or 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."

b) *"Through the statements issued by all the participants both to our subsequent internal investigation and in the witness statements produced for the employment tribunal it is clear that Dr Brooke spoke up for Dr Day."*

The ARCP panel chair, Dr Harrison stated in his tribunal statement at [48] and [71];

" We mentioned to Dr Brooke that Dr Day had raised concerns about lack of supervision at QEH. Dr Brooke said he was aware of the issue. 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. I recall Dr Brooke giving us his view that Dr Day was not managing this situation well"

Another of the Claimant's ARCP/Appraisal Panellists, Dr Umu-Etuk stated in an email submitted to the Tribunal that she found Dr Brooke's evidence about the claimant *"disheartening".*

The HEE second internal investigation did not take written statements from the ARCP panellists, did not interview Dr Umu-Etuk and excluded some of her email evidence. The first internal investigation didn't speak to any members of the ARCP panel.

c) *"He (the ARCP Chair) was forced to tick those boxes because the emergency medicine e portfolio required this. This affected every doctor in emergency medicine undergoing their annual assessment at the time."*

This explanation attempts to explain the allegations made against the Claimant by the ARCP/Appraisal document as a computer software problem also affecting other doctors.

This is contradicted by data gathering in 2014, commissioned by Dr Frankel but disclosed late to the tribunal, showing that the Claimant was the only doctor in London to have issues with conduct, engagement with supervision and requirement for support indicated on his ARCP/appraisal document.

d) *"A weakness of the report was the failure to interview one of the four panel members (Dr Umu-Etuk). We were however able to review correspondence relating to her contribution. She has confirmed that the contents of the report and the description of the panel meeting given by the other members of the panel was entirely accurate."*

Two dramatically different descriptions were advanced describing the manner in which the Claimant made his protected disclosure to the ARCP/Appraisal panel.

Dr Umu-Etuk in an email dated 5 December 2014 describes her view of the Claimant in the ARCP/appraisal;

> *"I was of the opinion that you came across confident and assertive"*

However the HEE's Plummer report into the Claimant's whistleblowing case excludes this description from Dr Umu-Etuk . The report questions the Claimant's state of mind in the ARCP and describes the claimant in the following terms when making his protected disclosure to the ARCP/appraisal panel.

“in the grip of angst";

"continued to live the experience physically shaking as he recounted the patient safety issues and alleged treatment";

The panel member, Dr Chakravarti confirmed in her tribunal witness statement that the above statements were falsely attributed to her by the Plummer report. On 5 January 2015 Dr Chakravarti sent an email to HEE saying she was *“baffled by the various quotes attributed to [her]”*. HEE’s Director of HR Mr Plummer made no changes to the report and responded,

> *““We are reasonably hopefully that it will be ‘struck out’ on the grounds that we (HEE) are not his employer and that the Public Disclosure Act therefore does not apply to the relationship that existed between him and HEE which will be the end of it for you (and me)”.*

e) “*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.. 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…the ICU was reviewed and unfortunately only limited improvement had occurred in this area.”*

The position advanced by the First Respondent’s 2014 formal investigation about the Claimant’s protected disclosure endorsed by both Respondents at Tribunal stated the opposite for the purposes of discrediting the Claimant;

> “*A recent Deanery (HEE) visit concluded that the staffing levels (unchanged since January 2014) were safe and there were no concerns about supervision highlighted by them.”*

55. When questioned by the Claimant and Mr Lamb, Dr Frankel conceded that the Second Respondent's investigation into the Claimant's case was terrible. This was later clarified by email on the same day with the words "I do not believe that the Plummer report is a perfect report". Dr Frankel also conceded by email that the situation was a "very tragic case that has had significant implications for [the Claimant]."

56. The Second Respondent refuses to reflect the truth about the Claimant's case in public statements and is treating the Claimant in this way as a result of his protected disclosures to mitigate the reputational damage that would come from the truth being known about the way in which the Second Respondent handled the issues raised by the Claimant about patient safety and whistleblowing detriment.

Second Respondent - Dr Frankel's Status in the Claim

57. If it was the case at the material time that Dr Frankel was not employed by the Second Respondent the Claimant claims that he was acting as an agent of the Second Respondent with their authority for the purposes of ERA,s47B(1A).

58. The undisclosed 2014 Learning Development Agreement (LDA) which imposes terms from the Second Respondent that the First Respondent must follow in order to receive funding for the employment and training of doctors clarifies Dr Frankel's status in respect of the Claimant. It must now be common ground that this was the case at time of the Claimant's employment and alleged whistleblowing detriments in 2014. This relevant section of the LDA found at Schedule F (p95).

> *"3.1 The duly authorized officer of the authority (R2) will be the Post Graduate Dean*
> *3.2 The Postgraduate Dean will be the duly authorized representative of the Placement Provider for all purposes connected with Postgraduate Education Service"*

59. The Second Respondent seeks to rely on Dr Frankel's retirement in April 2018 but the Claimant can provide evidence that Dr Frankel is employed as a hospital consultant at Imperial College Healthcare NHS Trust. At Imperial NHS Trust he acts as an agent on behalf of the Second Respondent in respect to other junior doctors and registrars;

a) As a Clinical Supervisor (see 2014 LDA between R2 and Imperial NHS Trust)
b) As an Educational Supervisor (see 2014 LDA between R2 and Imperial NHS Trust)
c) Giving lectures (see Tweet dated 15 May 2019 from the HEE Medical Director)

60. At the meeting in Parliament between the Claimant, Sir Norman Lamb and Dr Frankel on 8 January 2019. Sir Norman Lamb and the Claimant asked Dr Frankel who had responsibility for defending the case at the Tribunal in October 2018. Dr Frankel clearly indicated that he was responsible for all the decisions taken to defend the case.

61. For the reasons set out in [19] the Claimant does not accept the word retired is an accurate term to describe Dr Frankel's status. If it is the case that Dr Frankel's employment with the Second Respondent had ended in April 2018 that is all that can be said. This can only mean that at the Tribunal in October 2018, Dr Frankel when giving instructions to lawyers must have been acting as an agent of the Second Respondent for the purposes of ERAs47B(1A).

62. The Claimant also claims that Dr Frankel was acting as an agent of the Second Respondent for the purposes of ERA s47B(1A);

a) When Dr Frankel emailed the former health minister Sir Norman Lamb on 3 December 2019, "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";

b) When Dr Frankel sent an 11 page document to Sir Norman Lamb relying on confidential information that came from his employment at the Second Respondent and during his time as an agent of the Second Respondent at the Tribunal in October 2018;

c) During the meeting with Sir Norman Lamb on 8 January 2019

63. During the meeting in Parliament on 8 January 2019. Dr Frankel stated that the Second Respondent's Training Program Director Dr Brooke and Second Respondent's Head of Emergency Medicine in London Dr Lacy verified and agreed with the account in the 11 page document that was sent to Sir Norman Lamb. Dr Frankel further stated that these two individuals had suffered reputational damage as a result of Claimant's claims and wanted to

defend their position.

64. The Claimant submits that given this claim was submitted in March 2019, it is not plausible that in May 2019 that the HEE medical director Dr Macleod would invite Dr Frankel to a Second Respondent public speaking event and then tweet a picture of him speaking if she objected to his actions in respect of what is set out in the Claimant's claim.

65. There is further evidence that the narrative advanced by Dr Frankel to Sir Norman Lamb was supported and propagated within the Second Respondent. On 10 November 2018, Mr Keith McKay, the Second Respondent's only witness for the February 2015 preliminary hearing on employer status opened a Twitter account with the express purpose of undermining the Claimant. The account was deleted within half a day. The Claimant can provide screenshots of the relevant tweets and abuse the Claimant was subjected to as a result.

Conclusion

66. In the event that the application to set aside the settlement agreement is ultimately successful. The Claimant will apply to consolidate the Third Claim with the First and Second Claims. In any event, the facts set out in the First Claim and Second Claims are also relied upon in the Third Claim. The further detriments suffered are a result of the same protected disclosures.

67. The Claimant claims that he was an employee of the 1st Respondent from 7 August 2013 to 5 August 2014 and an extended definition worker of the Second Respondent between 3 August 2011 and 10 September 2014 as outlined in Section 43K ERA.

68. Following the settlement agreement entered into in 15 October 2018. The Claimant claims that he has suffered further detriments on account of the above protected disclosures set out in these grounds of claim contrary to ERA 47B.

Detriments in respect of First Respondent

69. In respect of the First Respondent the publication, failure to remove from their website and circulation to a Member of Parliament of false and defamatory public statements including but not limited to the following examples;

70. False statements about the without prejudice settlement discussions

    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":*

    d) *"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 thot his evidence was untruthful, then there would be an issue to costs. This reflects that we are an NHS body responsible for public funds'"*

71. False statements about the whistleblowing case

    a) "*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"*

    b) *"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"*

72. The deliberate failure of the Trust CEO Ben Travis to respond to the Right Hon Norman Lamb's request on 28 January 2019 to either justify or remove the public statements published on the Trust's website.

73. The deliberate failure of the First Respondent to remove and or update their public statements once contacted with concerns about the statements from the Care Quality Commission and or Sir Robert Francis QC.

74. On 4 December 2018, the First Respondent's Chief Executive, Mr Travis wrote 18 letters to local MPs and local public officials enclosing the 23 October 2018 and 4 December 2018 public statements about the Claimant's case. This material, that was purportedly to fully brief those MPs and public officials, contained untrue and detrimental material (see [33]-[37]).

Detriments in respect of the Second Respondent;

75. Detriments in respect of the Second Respondent;

    a) Relying on the wording of the agreed statement stating the Respondents acted in good faith towards the Claimant whilst denying publicly that any cost threats were made with the knowledge that the cost consequences were used to secure the wording in the agreed statement from the Claimant indicating that the Respondents had acted in good faith towards him.

    b) Dr Frankel's approach to Right Hon Norman Lamb MP, an influential former health minister who had written to the Secretary of State about the Claimant's case advancing the content the Respondents public statements and his own 11 page document which included inaccurate and misleading statements that are inconsistent with tribunal statements and formal HEE reports.

76. In the circumstances, the Claimant seeks:

a) A declaration that he has suffered a detriment or detriments contrary to section 47B of the ERA 1996;

b) Compensation for the loss he has suffered and will suffer as a result of the detriment(s) imposed by the Respondents, including the acts and failures to act of the Trust and HEE which infringed the Claimant's rights under Part IVA of the ERA 1996;

c) Compensation for injury to feelings;

d) Aggravated damages

e) Financial loss

Dr Chris Day

2 September 2021