

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL
BETWEEN

DR CHRIS DAY

CLAIMANT

-and-

LEWISHAM AND GREENWICH NHS TRUST

FIRST RESPONDENT

HEALTH EDUCATION ENGLAND

SECOND RESPONDENT

SECOND SUPPLEMENTARY WITNESS STATEMENT OF CLAIMANT

I, **Dr Christopher Day** of [REDACTED], make this second supplementary statement and say as follows: -.

1. I make this statement to comment on documents which have been disclosed by the Respondent since close of the hearing last Friday 1 July 2022, ten days into a fifteen-day hearing, and after seven out of scheduled eight witnesses had given their evidence to the Tribunal.
2. In the limited time available to me, I have not been able to address all of the concerns that I have which arise from the late disclosure. I am even more concerned about the clear failure of the Respondent to ensure that relevant documents were retained and to have conducted a proper discovery exercise in 2020. I am also concerned that the attempts this week to conduct a more comprehensive exercise have foundered on various asserted IT failures. It would appear that a substantial number of relevant documents have not been disclosed, including but not restricted to those that were destroyed on Monday morning by Mr Cocke. The documents that have been disclosed make it clear that there are other documents which have not been disclosed.
3. I spent a long time putting my original witness statement together, with extensive reference to the documents in the bundle. That statement would have been different if I had seen some of the materials in the late disclosure. Questions and answers in cross examination would have been different if we had had access to this material prior to the start of the hearing.

Email chain from 18 October 2018

4. It is clear that the statement was being put together by Janet Lynch, Ben Travis and David Cocke from very shortly after the conclusion of the October 2018 hearing.

Email chain from 13 November 2018

5. It is clear that Elizabeth Aitken had a more prominent role in compiling the public statements than hitherto suggested by the Respondent.

Various emails to and from journalists and internally

6. A number of emails reinforce the point that I have been making about the detrimental effect of the Respondent's public statements – and that the content of those statements was read by an informed observer as the Respondent attempting to undermine my credibility.
7. I also note the tone of some of the hitherto undisclosed internal emails which evidence a clear hostility towards me (e.g., David Cocke's email of 23 November 2018).
8. I note the reference to Dr Mehool Patel's input into the process, despite the absence of any disclosure of documents to and from him (e.g., David Cocke's email of 31 December 2018).

Email chain from 22 and 23 October 2018

9. The first of these emails comprised an email chain provided to my solicitors at 21:32 on Friday 1 July 2022 comprising an email chain from 22 and 23 October 2018 between David Cocke, Janet Lynch, Elizabeth Aitken, Mehool Patel, Peter Luce and, importantly, Dan Harding and Duncan Brooke. The chain evidences that the statement eventually published on 24 October was being planned from at least 22 October and was not therefore a reactive statement as has been claimed. It also went through a number of iterations before the version disclosed within this chain and we have not had access to those earlier versions. It also seems clear it was even then planned for publication to stakeholders and the Respondent's Board.
10. Both Dr Harding and Dr Brooke had been materially involved in the protected disclosures which were the subject of my 2018 hearing.
11. Dr Harding was the Respondent's Assistant Medical Director at the material time in 2014 and 2018.
12. Paragraph 28-29 of my 2018 statement described me forwarding my August 2013 protected disclosure to Dr Harding **[SB p256]** and him failing to respond.

13. The following evidence of Dr Harding causing me detriment is clear from the 2014/15 claim
 - a) The Roddis Associates findings (see my main statement for these proceedings at **[paragraph 116]**).
 - b) Dr Harding's 7 May 2014 email to HEE, with his view on my protected disclosures, 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" **[Page 756]**.
 - c) Dr Harding's support for a false ARCP record, which was eventually removed by Health Education England (the former Second Respondent) and then conceded as inappropriate by them (see my 2018 statement paragraph 94-96 **[SB p269-270]**).
 - d) The Roddis investigation records the allegation from the First Respondent's Assistant Medical Director, Dr Harding, that he found me "markedly self-centred and he thought he [I] hid behind a façade of patient safety" **[Page 751]**
14. Dr Brooke was a Programme Director within HEE (the former Second Respondent) and a Deputy Director of the Respondent. He also had an educational (rather than clinical) supervision role over me.
15. **Paragraphs 18 to 27** of my witness statement to the 2018 hearing at **[SB p 255/6]** of outline the protected disclosures I made to Dr Brooke, and the circumstances in which I raised them with him .
16. At paragraph 23-25 of my 2018 statement **[SB p255]** it described Dr Brooke and Dr Villar agreeing to escalate my protected disclosures within HEE and then both of them changing their minds. Dr Villar provides indication of pressure being applied to him.
17. There is evidence of Dr Brooke being challenged by the ARCP panel about my protected disclosures and responding with a negative briefing on me **[See Sir Norman Lamb's statement paraph 32-34]** and then with Dr Patel (another addressee in the recent disclosed email) refusing to provide a statement on what Dr Brooke told the ARCP panel (**see 2018 statement para 105 [SB p272]**), **see also para 108-109 [SB 272-3]**.
18. Dr Brooke either allowed or failed to correct false statements being attributed to him in the Plummer report (like Dr Chakravarti). When I asked for clarification Dr Brooke responded internally within HEE with a desire to sue me for harassment. This was in response to one reasonable email sent by me on 6 January 2015 with this simple request (**see 2018 statement para 148-149 [SB p280-281]**).

“Please can you confirm that your evidence has been represented accurately in the report. If I do not hear from you, I will take that it to mean that the attached report represents your position entirely accurately.”

19. This email chain from 22 and 23 October 2018 shows in respect of the first public statement claimed as a detriment in this Claim (published on 24 October 2018) that both Dr Brooke and Dr Harding had input into it. Dr Brooke effectively signed it off at 22:28 on 22 October 2018 statement as accurate (which it is not) and further wrongly suggests that my protected disclosures had been resolved to my satisfaction (which they had not), and misleadingly describes the content of my protected disclosures as being answered to my satisfaction (which they were not). This public statement was, as is evident from its description on disclosure, also to be used to brief the Respondent's Board and stakeholders/local MPs.
20. Dr Harding also, in his email of 23 October 2018, expressly makes the point that the draft statement does not mention my earlier more serious protected disclosure [**see August 2013 disclosure in main statement para 51-60**] about ongoing safety and staffing in the Intensive Care Unit. Dr Harding appears to acknowledge the link to this disclosure with the Critical Care Peer Review (I set out the link myself at [**para 130-167 of my main statement**]). However, Dr Harding also attempts to describe my concerns as not including consultant ratios in the ICU despite Roddis Associates acknowledging that this issue was part of my protected disclosure [**See main statement para 140-147**]. Dr Harding also propagates the view that the facts exonerated the trust, which for reasons set out in my earlier statements [**Section 2-3 of my main statement, Dr Smith and Dr Hormaeche statement**], I do not accept.
21. Despite the comments made by Dr Dan Harding, David Cocke nevertheless proceeded to publish a misleading internal staff e-bulletin. [**Email dated 24 October 1039 from David Cocke**]

Norman Lamb Meeting 14 January 2019

22. In para 57 of Mr Travis's witness statement, he stated "*I note in correspondence which I have reviewed for these proceedings that Dr Day was originally under the impression that the Trust's Medical Director, Dr Liz Aitken, would also be in attendance but it was never planned that she would attend*". Contrary to that assertion, I can see from emails from 3 January 2019, that she was planning to attend and that her attendance was seen by Ben Travis as a priority.
23. David Cocke claims at paragraph 55 of his statement;

"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". [emphasis added]

24. I was therefore very surprised to find David Cocke's note of the meeting with Norman Lamb on 14 January 2018 in the documents disclosed at 18:53 on Tuesday 5th July 2022, and would be very surprised if this note had not been circulated at the time when I was making an application to set aside the settlement agreement and in light of the interest in the case at the time. It is also hard to believe that a note of such a significant meeting was not reviewed by the Respondent's solicitors, Capsticks. I note neither Mr Rowland nor Mr Cocke address the denial of the retained existence of the note or the failure to disclose it in their recent statements.

25. I do not agree that the note is accurate and in particular the note suggests that I said that 2 deaths were not investigated and covered up. I distinctly remember making the same point that I have raised previously, and which was that the 2 SUIs were excluded from the Roddis Associates investigation, the tribunal chronology and the Tribunal bundle. That is my basis of claiming cover up over the 2 deaths. The only criticisms made by Roddis Associates attributed to me in the meeting note are the 2 least serious ones about policy which is just not a plausible description of what happened at the meeting. I clearly would have focused on the most serious of the Roddis criticisms, as I make clear in my letter dated 23 January 2019 sent to Norman Lamb and **[paragraph 116 of my statement]**.

26. I note that the note of the meeting records:

*"CD added that the Trust's legal team tried to put CD's solicitor on the stand. BT commented that there were covert recordings. **NL said that in Chris' shoes he would have recorded meetings.** BT said he understands there was an issue about the disclosure of the recording. CD said that the recording has been disclosed well in advance. He referred to evidence of a discussion about a wasted costs threat and a GMC referral".* [emphasis added]

27. I was concerned to read the emails from David Cocke from 23 November 2018 15:53, which references a crowd funded campaign by the Doctors' Association to raise funds for me and my family to have a holiday given how hard the journey to that point had been.

Crowdjustice Campaigns

28. The Respondent has spent considerable time and energy in these proceedings focusing on my Crowdjustice campaign "£700k to Crush a Junior Doctor". It should be noted that this was launched on 27 May 2019 several months after the events material to this claim. It therefore could have played no role in causation in the detriments claimed in the present claim. I have however answered the questions posed about this campaign.

29. Should the Respondent wish to advance my Crowdfjustice campaigns as a cause of the detriments in this claim, the campaign undertaken in August 2018 was the relevant one for the October 2018 hearing. The campaign focused mainly on our victory over HEE in May 2018 but did reference the substance of my August 2013 protected disclosures.


“The serious safety issues at the centre of my case were not acted on in 2013 and the situations described in my protected disclosures were termed acceptable by NHS formal investigations. It has taken until 2017 for the serious staffing issues in my former ICU to be acknowledged by the NHS. [The relevant NHS England Peer Review can be read here.](#)”

“My NHS whistleblowing case was lodged in October 2014. The case involves an understaffed Intensive Care Unit in South London. My claim is that I lost my career and suffered other detriments on account of raising serious safety issues when I was working there. The case has been prevented from being heard by a court or tribunal for 4 years. However, in May 2017, I won the right in the Court of Appeal for the case to be sent back to the Employment Tribunal after it was struck out in February 2015 without a hearing.”

Costs threat

30. When I gave evidence, I made clear that the £500k cost threat was an absolutely worst-case scenario of losing the case with credibility findings on the covert audio, I have seen from the transcript that I suggested that there was a threat of paying costs of up to £500k even if I was successful. I would like to take the opportunity of correcting that, as that statement was self-evidently wrong, and I apologise to the tribunal. I had always understood the cost risk arose in the event that I was unsuccessful and that £500k figure to be a worst-case scenario in circumstances where I lost the case.

This statement is true to the best of my knowledge and belief.

Signed: 

Dr Christopher Day

06 July 2022

