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 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.

39. 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.

40. 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. It is very important that you confirm whether, in the light of the contents of Chris's letter, you stand by all the statements made by the Trust and publicly available on your Trust website. Further, is there anything in Chris Day's letter which you believe is in any way inaccurate? It is my belief that aspects of the Trust's public statements (as referred to in Chris Day's letter) are severely defamatory and should be withdrawn forthwith and that there should be a full apology. I should stress again that the inaccuracies in the public statements by the Trust are not only defamatory but are deeply distressing. They are damaging to Chris Day's reputation."*

41. 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.

42. 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."

43. 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."

44. 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.

45. 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.

46. 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."

47. It is fundamental to the Claimant's claim that the Tribunal understands, establishes and makes findings on exactly what the senior management team of both Respondents understood to be true about the Claimant's case and the reality of what induced the settlement of the case and wording of the agreed public statement. The relevance to the Claimant's case of a record of the Board meeting that approved the settlement is obvious. This record would also have been vital in the just disposal of the Claimant's application to set aside the settlement agreement, yet it was not disclosed.

48. The Claimant respectfully submits that in order for the Tribunal to deal with this case justly that the Tribunal must make findings as to what was actually said during the without prejudice discussions between the relevant lawyers and compare this with the Teleconference record of 14 October 2018 Board meeting and the subsequent public/press statements.

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.

Detriments in respect of the Second Respondent;

74. 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.

75. 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

11 November 2020

CASE NUMBER: 2300819/2019

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. <u>It was apparent that this is a consistent issue with no clear recognition"</u>

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 Claimants 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 Robert's 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's 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 Claimants 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 the 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 patiently absurd.

Dr Chris Day
11 November 2020

IN THE EMPLOYMENT TRIBUNAL **CASE NO: 2300819/2019**
LONDON SOUTH

BETWEEN

DR C DAY

Claimant

-and-

LEWISHAM & GREENWICH NHS TRUST

First Respondent

HEALTH EDUCATION ENGLAND

Second Respondent

AMENDED GROUNDS OF RESISTANCE ON BEHALF OF THE FIRST RESPONDENT

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1. This is the Claimant's third claim before the Employment Tribunal against the First and Second Respondents concerning alleged detriments to which the Claimant claims he was subjected ~~to~~ on the grounds of his protected disclosures.

2. The first two claims (case numbers 2303023/2014 and 2301466/2015) were the subject of a full merits hearing before Employment Judge Freer between 1st to 15th October 2018, at which the Claimant withdrew his claims, following agreement having been reached between the parties. The Claimant was represented by solicitors and Counsel throughout.

3. A public statement agreed by all parties included the following

   "After six days of evidence at the Employment Tribunal brought by Dr Day against Lewisham and Greenwich NHS Trust and Health Education England it has been agreed by all parties that:
   - *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."*

4. The Employment Tribunal promulgated its judgment dismissing the Claimant's claim, consequent upon its withdrawal on 19 October 2018. It was ~~which was~~ sent to the parties on 28th November 2018 ("the judgment").

~~5.~~ By email dated 11th December 2018 the Claimant made an application to set aside the settlement agreement and for reconsideration and revocation of the judgment ~~in respect of the first two claims~~ on the basis of an alleged mistake on the part of the Claimant in respect of his understanding of the Respondents' position concerning costs or an alleged misrepresentation by the Respondents regarding costs allegedly made to his counsel during without prejudice negotiations~~. He further relies on public statements made by the First Respondent on its website and, additionally, his contact with the media, in particular regarding responses provided by the First Respondent to the media regarding settlement negotiations and costs. The Respondents deny the settlement agreement is either invalid or unenforceable or that there was any mistake or misrepresentation during the settlement negotiations.~~

~~6.~~

~~7.~~5. ~~The First Respondent requested the application be dealt with by an Employment Judge other than Employment Judge Freer, given the Claimant's proposed reference to without prejudice and/or privileged discussions. In consequence, the Claimant proposed that it would seem sensible for the application to be referred initially to the Regional Employment Judge, who then directed that the application should be determined by Employment Judge Martin~~.

~~8.~~6. On 18th February 2019, Employment Judge Martin concluded that there were no reasonable prospects of reconsideration being successful and refused the Claimant's application.

~~9. On 26th February 2019, the Claimant wrote to Employment Judge Martin seeking to engage her in further correspondence regarding his unsuccessful application.~~

~~10. On 6th March 2019, Dr Day presented this third claim to the Employment Tribunal. This claim refers to the facts and matters leading up to the settlement and withdrawal of his first two claims and identifies that he requested reconsideration of Employment Judge Martin's decision on 18th February 2019 and in the alternative that he would appeal to the Employment Appeal Tribunal (EAT). In this third claim, he relies upon the protected disclosures which were the subject of his first and second claims.~~

~~11. The third claim outlines the Claimant's contact with the media and what he alleges are misleading or untrue statements made to the media and/or provided in public statements and/or provided to Norman Lamb MP by the Respondents relating to the defence of his previous claims and matters relating to the settlement of those claims, in particular costs. He contends that the Respondents' actions amount to subjecting him to further detriments on the ground that he had made one or more protected disclosures.~~

7. On 28th March 2019, ~~Dr Day~~the Claimant appealed the decision of Employment Judge Martin to refuse his application for reconsideration to the EAT. That appeal ~~is extant before the EAT and duplicates much of the content of the third claim. In that appeal, the Claimant has stated that he does not wish to waive privilege over any advice given by his lawyers.~~was dismissed by the EAT as having no reasonable prospect of success – a decision against which the Claimant in turn sought leave to appeal from the Court of Appeal. The Court of Appeal declined to grant leave to appeal and dismissed the application. The judgment therefore stands, notwithstanding the Claimant's attempts to get it set aside.

8. In the Claimant's challenges to the judgment dismissing his first two claims he made clear that he did not waive privilege in respect of the legal advice he received in relation to the settlement. That remains his position today.

The current claim: summary of the First Respondent's position

9. The Claimant's most recent claim is misconceived and ought to be dismissed. It is in any event denied.

10. In responding to the claim against it, the First Respondent ("the Trust") does not comment on the allegations made against the Second Respondent. Nor, in the interests of brevity, does it respond to every assertion made in the lengthy Amended Grounds of Complaint. A failure to respond to an assertion should not be interpreted as an admission of the same.

11. The Claimant was employed by the Trust for a relatively short period of time a long time ago: between August 2013 and August 2014. The Trust's understanding from the Claimant's various public comments is that he has subsequently been employed as a locum A&E doctor at a variety of different NHS Trusts.

12. During his employment with the Trust, the Claimant made a number of protected disclosures.

13. The Claimant brought his first and second claims against the Trust and the Second Respondent in October 2014 and April 2015 respectively. He alleged that he had been subjected to various detriments by both Respondents as a result of his protected disclosures.

14. As the Claimant states in his Amended Grounds of Claim, there was a delay of several years before his first two claims came to be heard in October 2018, principally because there was an issue (ultimately resolved in the Claimant's favour by the Court of Appeal) as to whether the Employment Tribunal had jurisdiction to determine his claim against the Second Respondent.

15. During the course of those proceedings (and after they had been dismissed upon withdrawal) the Claimant attracted a degree of publicity, much of it self-generated. He describes himself as a Crowdfunder and has received well over £200,000 of supporters' money to finance his litigation. He characterises himself on his crowd funding webpage as "*a junior doctor … on a collision course with established interests for over 4 years just to get a whistleblowing case heard about important safety issues*" and claims to have "*exposed*" a Government agency's [i.e. the Second Respondent's] "*astonishing attempt to argue the nation's junior doctors out of whistleblowing protection*". He refers on the same page to the fact that he has been unable to cross examine a single NHS witness as a result of "*various tactics used by NHS lawyers at great expense to the taxpayer" and states that he was "forced into a settlement*". The Claimant's position is that vast amounts of taxpayers' money have been squandered to "*shut down*" his case rather than allowing a "*fair hearing of the facts*".

16. Some of the statements the Claimant has made about the long running litigation he initiated are- inaccurate and many characterise events in an emotive or partisan way which the Trust considers to be misleading. It is, for instance, inaccurate that the Claimant was "*forced*" into a settlement. He was legally represented throughout and voluntarily entered into the settlement agreement which resulted in the dismissal of his first two claims.

17. In circumstances where the Claimant makes public statements regarding his litigation that the Trust considers to be inaccurate or misleading it is unsurprising that the Trust has responded to the same and given its account of relevant events. The Claimant refers to some of these statements in this claim and characterises them as detriments. On the Claimant's crowd-funding page (referred to above) he describes this current claim as "*a tribunal claim to challenge the false and defamatory statements released about my case*".

18. Whether or not the Trust's statements regarding the circumstances in which the Claimant agreed to the withdrawal and dismissal of his first two claims were inaccurate (as to which, see below) it is denied that they are detriments in the employment field. They were public statements made by or on behalf of the Trust in response to comments made by the Claimant regarding the circumstances in which his first two tribunal claims were dismissed upon withdrawal, or about his claims more generally. The Trust's comments had nothing to do with the Claimant's employment with the Trust which had ended more than 5 years earlier. Any detriment suffered by the Claimant was not suffered by him as an employee (or former employee) but as a litigant (or former litigant). It is therefore denied that they are complaints over which the employment tribunal has jurisdiction (or in respect of which the Claimant can make complaint under the Employment Rights Act 1996 ("ERA 1996")).

19. Further, the Claimant's contention that the post-settlement comments about which he complains were detriments done on the grounds that he had made his protected disclosures in 2013 or 2014 is denied and has no reasonable prospect of success. The comments were made by or on behalf of the Trust in response to what the Trust believed to be misleading or emotive comments made by the Claimant about the circumstances in which he chose to withdraw the first two claims and/or about the claims themselves. They were not made to penalise him for making protected disclosures. As part of the agreement resulting in the withdrawal of the first two claims the Trust acknowledged and acknowledges that the Claimant had "blown the whistle" by raising patient safety concerns in good faith.

20. Finally, the Claimant's complaints about statements made by the Trust about the without prejudice communications that preceded the settlement agreement that resulted in the dismissal of his first two claims cannot fairly be determined while he continues to refuse to waive privilege in respect of the advice that he received at the time. Whether the statements he complains about amount to detriments (and without prejudice to the point made above that they are not detriments in employment in any event) depends in part on the advice he received at the time regarding the risks of an adverse costs order, the risk of a finding that his claim would fail and the risk of a finding that some of his evidence was untrue – none of which can properly be explored while the Claimant refuses to waive privilege in respect of the advice that he received.

The protected disclosures

21. The Trust admits that the Claimant made the communications referred to in paragraphs 16(i) to (ix) of the Amended Grounds of Complaint and that they were

protected disclosures as they relate to information tending to show that the health and safety of any individual has been, is being or is likely to be endangered.

22. In respect of the alleged disclosures at paragraph 16(x), (xi), (xii), (xiv) and (xv) of the Amended Grounds of Complaint these communications were not made to the Trust and it makes no admissions in respect of them. It is however understood that the Second Respondent admits them to be protected disclosures.

The alleged detriments

23. The Trust makes no admissions about the Claimant's interactions with journalists.

24. It is admitted that the Trust made the statements referred to at paragraph 33 of the Amended Grounds of Resistance on 4 December 2018. It did so on its website. The statement on the Trust's website quoted by the Claimant read in full as follows: "*We are extremely disappointed to see that Dr Day has subsequently claimed on social media and in the press that he was forced to withdraw his case as 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*". It is also admitted that the Trust stated that "*… we had decided not to pursue Dr Day for legal fees before he withdrew his case*".

25. It is denied that these statements were inaccurate (or materially inaccurate). It was true that the Claimant's lawyers had initiated settlement discussions; and it was true that the Claimant was not "forced" to withdraw his claim. He did so voluntarily. Since he was being advised at the time it is to be inferred that he knew that the possibility (or "threat") of an adverse costs order being made against him was inherent in the Employment Tribunals Rules of Procedure 2013. It is also to be inferred that the Claimant must also have known that the likelihood of that threat materialising was linked to the likelihood of his claim failing and the likelihood of the tribunal concluding that some of his evidence was untrue. An unsuccessful claim advanced on the back of untruthful evidence is far more likely to result in an adverse costs order than a claim that succeeds, as the Claimant and/or his representatives must have known.

26. It is denied that pointing out the possibility of an adverse costs order (and the fact that a settlement would obviate the risk of such an order) amounts to a "threat". In any event, such a threat would only have persuaded the Claimant to withdraw his claims if he believed that there was a real risk that such an order might be made, and that in turn would only have happened if he believed it likely that his case would fail and/or that the Employment Tribunal would conclude that some of his evidence was untrue.

~~12.~~27. The statement that "*the Trust had decided not to pursue Dr Day for legal fees before he withdrew his case*" was true. It was an inherent part of the settlement agreement that the Trust would give up any possibility of making a costs application against the Claimant in return for his withdrawing his claims. Nor in any event is that statement a detriment.

28. None of these statements was made on the grounds that the Claimant had made the protected disclosures he relies upon. They were made in response to what the Trust believed to be inaccurate or misleading statements made by the Claimant on social media. The Trust was concerned about the impact of the negative publicity on the Trust's relationships with junior doctors and concerned that staff would be discouraged from speaking up and raising concerns. This was the motive for the statements.

29. It is admitted that the statements quoted from the Trust's website on 10 January 2019 in the Amended Grounds of Complaint were made (although the penultimate sentence reads "*… there would be an issue as to costs*"). It is denied that the statements are inaccurate or materially inaccurate or that they amount to a detriment. It is further denied that the statements were made on the grounds that the Claimant had made protected disclosures. They were made (as is obvious from the statement on the website itself) because the Trust had been asked to comment on allegations that the Claimant dropped his Employment Tribunal claim case against the Trust because four specific threats were made against him.

30. It is admitted that the Trust issued the statement quoted at paragraph 36(a) of the Amended Grounds of Complaint – i.e. "*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 statement was a reference to an investigation by two externally appointed investigators in respect of the Claimant's complaints. The Trust referred to this investigation to show what steps had been taken once concerns were raised by the Claimant. It was not intended to be commentary on the specific detail of the report (nor is it accepted that it could reasonably have been interpreted in that way). The Trust considers the statement to be accurate as to the overall conclusions of the report. It is denied that the statement is a detriment or that it stated or implied that no criticisms at all were made of the Trust by the external investigation. It is further denied that it was made on the grounds that the Claimant had made his protected disclosures.

31. It is also admitted that the Trust issued the statement quoted at paragraph 36(b) of the Amended Grounds of Complaint. The Trust considered it was necessary to clarify the implication that there was a link between the Claimant's claim and the wholly separate 2017 peer review within critical care. The Trust further considered

that there were misleading press articles which suggested that the peer review concluded that the earlier concerns raised by the Claimant had not been addressed whereas, in fact, the peer review report addressed a different issue. It is denied that the statement was a detriment or that it was inaccurate. The issues that the Claimant raised in January 2014 did indeed relate to junior doctor cover on the medical wards and pointing that out is not something the Claimant could reasonably object to. In any event the statement was not made on the grounds of the Claimant's protected disclosures.

32. It is admitted that Mr Travis, the Trust's Chief Executive, met with the Claimant and Norman Lamb M.P. on 14th January 2019. It is also admitted that Mr Lamb wrote to Mr Travis on 28th January 2019, enclosing a letter from the Claimant dated 23rd January 2019, and that Mr Travis replied to Mr Lamb by letter dated 7th February 2019. Mr Lamb M.P. in turn wrote a letter in response dated 18th -February 2019. The Trust will refer to the letters in full to the extent that they are relevant.

33. The Claimant complains that Mr Travis' "*failure…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*" was a detriment to which he was subjected because he made protected disclosures. That is denied: the Trust was under no obligation to amend statements on its website and the failure to do so was not a detriment to the Claimant. It anyway was not a deliberate failure to act taken on the grounds of the Claimant's protected disclosures.

34. The Trust has not been provided with a copy of the correspondence from Sir Robert Francis Q.C. to the Care Quality Commission ("CQC") and therefore makes no admissions in respect of this. The Trust admits that the letter was sent from the CQC to Sir Robert Francis Q.C. dated 29 May 2019 as referred to at paragraph 43 of the Amended Grounds of Complaint. The CQC did not provide this correspondence to the Trust; rather the Trust became aware of this correspondence when the Claimant posted this on his social media account. Only the redacted version posted by the Claimant has been seen by the Trust. As this letter had not been directly received by the Trust, the CQC was contacted. The Trust's CQC relationship manager subsequently confirmed to the Trust that the CQC had not and would not be following up further on this correspondence with the Trust.

35. It is admitted that the Trust did not "remove or update" its public statements, however, it is denied that the Trust was contacted by Sir Robert Francis Q.C and/or the CQC. Whilst it is admitted that the Trust took its own proactive steps to contact the CQC, the CQC confirmed in response that it had not and would not be following up further on the issue of the statements with the Trust.

~~13.~~36. It is denied that the failure to remove or update its public statements was a detriment and further denied that it was a decision taken on the grounds that the Claimant had made protected disclosures.

Time limits

37. Further and in any event it is averred that all alleged detriments that took place prior to 1st November 2018 are in any event out of time (as ACAS received the EC notification on 31st January 2019.

Conclusion

38. The Claimant's claims are denied. The Claimant appears to have regretted agreeing to withdraw his initial two claims – even though he acknowledges they were likely to fail – and seems intent on continuing to litigate against the two Respondents bringing this latest claim. However, the current claim, even if it were well founded, will not expose the wrongdoing that he claims he wishes to expose and has nothing to do with his former employment.

39. If (as he claims) he is concerned about the (alleged) squandering of taxpayers' money incurred in responding to unfounded claims that he has initiated, he would and should withdraw the current misconceived claim.

~~Position of the First Respondent & Application for a Stay~~

~~14. The First Respondent does not intend to plead to the factual matters contained within the third claim and considers it would be inappropriate to do so at this stage. There is a clear overlap between the third claim and the reconsideration application and extant appeal. It would be inappropriate, as well as result in duplication of costs and time spent to address the same matters prior to their consideration in those outstanding processes. They should be determined first so that any findings or conclusions about the matters in issue that are reached during those processes, including the extent to which it is appropriate to refer to without prejudice communications, are known before this claim is considered, in particular in order to avoid the risk of parallel litigation processes considering the same issues and reaching different conclusions.~~

~~15. The First Respondent therefore applies for a stay of this claim pending the outcome of the Claimant's outstanding appeal to the EAT and reconsideration application.~~

~~16. For the avoidance of doubt, the First Respondent denies subjecting the Claimant to any detriment on the ground of making any protected disclosure, whether as alleged in the third claim, or at all.~~

~~17. Further, for the reasons already outlined above, the First Respondent objects to any material relating to the third claim being placed before Employment Judge Freer. If any of the Claimant's applications now on appeal were to succeed, it is important that Employment Judge Freer is not tainted by having any other correspondence including without prejudice correspondence brought to his attention.~~

Capsticks Solicitors LLP
Solicitors for the First Respondent
23rd May 2019
Amended 11th December 2020