



# Government Legal Department

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Your ref: NMB/BMA-0001-0043  
Our ref: Z1604817/OKG/B6

8 March 2016

Dear Sir, Madam,

## R (British Medical Association) v Secretary of State for Health Pre-action Protocol Letter

1. This letter sets out the response of the Secretary of State for Health to the proposed claim for judicial review by your client, the British Medical Association (“**the Claimant**”). The proposed claim is stated to relate to the Secretary of State’s decision announced on 11 February 2016 to proceed with the introduction of a new contract for National Health Service junior doctors, without further negotiation on the final terms and conditions of the new contract with the Claimant (“**the Announcement**”).
2. This response has been written in accordance with the pre-action protocol for Judicial Review.
3. You claim that the Secretary of State has acted unlawfully by failing to comply with his Public Sector Equality Duty (“**PSED**”) under section 149 of the Equality Act 2010 (“**the EqA**”). You refer in this regard to the absence of an Equality Impact Assessment (“**EIA**”), and a failure to provide evidence that any equalities analysis has been undertaken by the Secretary of State.
4. Your claim is misconceived. The Secretary of State has had proper regard to the PSED throughout the process thus far. Moreover, a decision as to the final terms and conditions of the new contract has not yet been made. Before making this

Lee John-Charles - Head of Division  
Margaret McNally - Deputy Director, Team Leader B6 - DWP/DH litigation team



decision, the Secretary of State will have sight of, and will take proper account of, a full EIA.

5. The draft final terms and the EIA will be provided to the Secretary of State very shortly. The Secretary of State will then carefully consider those terms, alongside and in the light of the EIA. The Secretary of State will decide, paying proper regard to the PSED, whether to approve those terms or whether amendments should be made. The Secretary of State has an open mind regarding the final terms of the new contract and, if he considers it appropriate, would amend the draft final terms in light of the content of the EIA.
6. In the circumstances, the Secretary of State considers that your client's claim is bound to fail. We note in this regard a report in Health Service Journal dated 19 February 2016 titled: "*BMA lawyers warned that judicial review would not prevent imposition of junior doctors' contract*". The article refers to the Claimant receiving legal advice (*inter alia*) that: (a) there is nothing inherently unlawful about the new contract, and (b) there is no unlawful discrimination in the decision to introduce a new contract. We agree, and we note that there is no suggestion to the contrary in the pre-action letter.
7. We also note, and agree with, the comment by the writer of the article that: "*There will also be questions about the validity of pursuing legal action that will be a drain on taxpayers' resources...given its limited chances of preventing the contract imposition*".
8. Accordingly, we hope that your client will refrain from instituting costly, and ultimately ineffectual, proceedings: costly both to the Claimant's members and to the taxpayer. If, however, proceedings are issued, they will be resisted.

#### **The Proposed Claimant**

9. The Claimant is the British Medical Association, a trade union representing doctors.

#### **The Proposed Defendant**

10. The Defendant is the Secretary of State for Health:

c/o Government Legal Department  
One Kemble Street  
London  
WC2B 4TS

#### **Reference details**

11. The reference for this matter is Z1604817/OKG/B6.

12. Oliver Gilman (Senior Lawyer) has conducted this matter on behalf of the Secretary of State. Any further correspondence or service of documents in relation to this matter should be addressed to him at the above address.

### **The details of the matter being challenged**

13. Your proposed challenge relates to the decision of the Secretary of State on 11 February 2016 to:

*“...end the uncertainty for the [NHS] by proceeding with the introduction of a new contract that [is] safer for patients and fair and reasonable for junior doctors”.*

### **Response to the proposed claim**

#### Background

14. In 2008, the Claimant, the independent pay review body, NHS Employers (“**NHSE**”) and other stakeholders all identified the need for change to the existing national terms and conditions for junior doctors.
15. As your letter correctly notes, discussion and negotiation with the Claimant regarding the development of a new set of national terms and conditions has been ongoing since 2012.
16. As your client well knows, equality considerations were an integral feature of the Secretary of State’s approach to those negotiations from the very outset of the process. Thus, for example, the Heads of Terms agreed between the Claimant and the Secretary of State in July 2013 (“**the HoT**”) expressly provided that the new contract must *“[b]e consistent with all aspects of UK law, including working time regulations and the Equalities Act”*.
17. The Secretary of State’s approach throughout the negotiations with the Claimant has been, and continues to be, that any new contract must comply with United Kingdom equality legislation.
18. During the on-going negotiations with the Claimant there was active discussion of, amongst other things, pay progression and increments (in particular the effect of such arrangements on those taking maternity leave or with caring responsibilities), continuity of service, leave, termination of employment, equality and diversity in terms and conditions, and the rates of pay for out of hours work.
19. On 16 October 2014, the Claimant announced (by social media) that it was withdrawing from negotiations with the Secretary of State.
20. On 31 October 2014, the Secretary of State (and others) invited the independent Review Body on Doctors’ and Dentists’ Remuneration (“**the DDRB**”) to consider,

amongst other things, the HoT and to make recommendations regarding the new contract and the draft terms by July 2015.

21. In July 2015, the DDRB issued its report relating to the new contract. The report expressed DDRB's support for the majority of NHSE's then current proposals in respect of the new contract, and highlighted a number of areas where it considered that there was scope for further discussion and negotiation.
22. On 28 September 2015, the Secretary of State wrote to the Claimant inviting it to resume negotiations and expressing disappointment that the Claimant had chosen to ballot for industrial action before receiving a revised offer regarding the new contract.
23. The Claimant confirmed that it was prepared to meet with the Secretary of State. In advance of the proposed meeting the Secretary of State confirmed that one of the important issues on which he would seek to co-operate with the Claimant was how the EIA in respect of the terms and new contract would be carried out.
24. The Secretary of State has considered equality issues throughout this process, in advance of the production of the EIA. For example, picking up the specific point at paragraph 7(27)(b) of the pre-action letter, the Secretary of State paid particular attention to issues of potential discrimination arising from proposed changes to pay progression arrangements: a move from time-served (which is *prima facie* discriminatory on grounds of age) to progression based on levels of responsibility. The Secretary of State paid particular attention to the equality of opportunity of women returning to training after maternity leave.
25. On 4 November 2015, NHSE published a revised 'firm' offer in respect of the proposed new contract ("**the Firm Offer**"). So far as relevant, the offer document emphasised that:

*"The new pay system and contract will not break any equality laws and will be subject to a full equality impact assessment before implementation."*
26. On the same day, the Secretary of State made a written statement to the House of Commons explaining the Firm Offer and wrote to the Claimant inviting it to resume negotiations.
27. On 5 November 2015, the Claimant responded by balloting its members for industrial action.
28. The Claimant and the Secretary of State subsequently engaged in discussions at ACAS. On 30 November 2015, in connection with the negotiations, the Secretary of State and the Claimant both approved a Memorandum of Understanding that provided (so far as relevant):

*“Collaborative work on pay will include an ‘open-book’ approach to the November 2015 pay calculator and supporting data and models, including cost-neutrality and equality impact, helping ensure clear systems for pay progression and managing transition.” (emphasis added)*

29. On 4 January 2016, the Claimant refused to discuss proposals, withdrew from ACAS negotiations and announced it would take strike action. On the same day, the Secretary of State wrote to the Claimant notifying it that Sir David Dalton was being appointed to deal with the negotiations in connection with the new contract on behalf of the Secretary of State and NHSE.
30. On 9 February 2016, Sir David Dalton wrote to the Claimant setting out a further offer regarding the new contract and the draft terms. On 10 February 2016, the Claimant publicly announced that it was rejecting that offer.
31. On 11 February 2016, the Secretary of State made an oral statement to the House of Commons in which he announced that he would proceed with the introduction of a new contract following advice that further negotiation was unlikely to move matters forward.
32. On 12 and 19 February 2016, NHSE issued a letter to junior doctors updating them on the current position, including by providing a summary of the current state of the draft terms.
33. As at the date of this pre-action response NHSE are currently working up the final draft of the terms of the new contract, in light of the headline terms that the Secretary of State announced on 11 February 2016. At the same time, officials are continuing work on the development of EIA. The draft final terms and the EIA will be provided to the Secretary of State very shortly.
34. The Secretary of State will then carefully consider the draft final terms, alongside and in the light of the EIA. The Secretary of State will decide, paying proper regard to the PSED under s.149 EqA, whether to approve those terms or whether amendments should be made. We can confirm that the Secretary of State has an open mind regarding the final terms and, if he considers it appropriate, would amend the draft final terms in light of the content of the EIA.

### **Response to proposed Ground of Challenge**

35. You assert that the Secretary of State acted unlawfully and in breach of s. 149 EqA by making the Announcement before the EIA was completed. This is misconceived.
36. As you are no doubt aware, the PSED is a continuing duty, and what the duty calls for on the part of the decision-maker varies at each stage of a composite

decision-making process: see, in particular: *R (Bailey) v London Borough of Brent* [2011] EWHC 2572 (Admin) at §122 per Ouseley J.

37. In the present case, the Secretary of State has given significant consideration to the equalities implications of new contractual terms during the on-going negotiations and decision-making process.
38. The Announcement confirmed that in light of the Claimant's refusal to engage in negotiations, and the limited prospects of further productive negotiation, the Secretary of State would proceed to introduce a new contract.
39. Insofar as the proposed claim contends that the Announcement was unlawful because the EIA was not completed and considered by the Secretary of State on or before that date, the claim is bound to fail.
40. Moreover, before making the decision as to whether to approve the draft final terms, or whether amendments should be made, the Secretary of State will have sight of the EIA, and will make his decision accordingly, paying proper regard to the PSED. There is nothing unlawful in that approach. It is entirely consistent with s. 149 EqA and the case law that you cite.

#### **Action the Secretary of State is expected to take and ADR proposals**

41. For the reasons stated above, the Secretary of State will not be taking any of the steps identified in section 8 of the pre-action letter. Similarly, the Secretary of State does not consider that there is any basis for ADR.

#### **Information sought**

42. We consider that points (a)-(g) and (i)-(j) of section 10 the pre-action letter have been adequately addressed by the information provided above. We do not consider that request (h) is relevant to the proposed claim, or that any response is either necessary or proportionate.
43. As to point (k), we note that this appears to be a request for an undertaking, rather than a request for information. In light of the information provided above, we do not consider that any undertaking of this sort is either necessary or appropriate. Indeed, the request would include suspending work on finalising the draft final terms, and finalising the EIA before the Secretary of State could make his decision. That would be absurd, and no such confirmation will be given.

#### **Documents sought**

44. As you know, documentary disclosure is an exceptional approach in the context of a judicial review application. The Secretary of State will comply with his duty of candour. We do not consider that any documentary disclosure is either necessary or proportionate at this stage.

## Conclusion

45. For the reasons explained above, the Secretary of State considers that the proposed claim is misconceived and is bound to fail. In the event that any claim is issued, it will be robustly defended. We also remind you of the headline in the HSJ that "*BMA lawyers warned that judicial review would not prevent imposition of junior doctors' contract.*" We question whether legal proceedings would, in those circumstances, be a good use of members' and taxpayers' resources.
46. We also note that in the HSJ article it was indicated that the BMA had been advised to use the threat of Judicial Review to initiate further negotiations. It is disappointing to read this. The Secretary of State had wanted the BMA to negotiate without the threat of judicial review on all of the contract: 90% of the contract had been mutually agreed through negotiation.
47. If, after proper consideration of this response, proceedings are issued, please arrange for them to be served on Mr. Gilman at the address set out at 10 above.

Yours faithfully



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**For the Treasury Solicitor**

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