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Your ref: SCHA/262916.1
Our ref: Z1608772/OKG/B6

11 April 2016

Dear Ms Chahal,

R (Justice for Health Ltd) -v- Secretary of State for Health

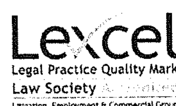
1. This letter sets out the response of the Secretary of State for Health to the proposed claim for judicial review by your client, Justice for Health Limited ("**the Claimant**"), a shelf company, the shares in which we understand to be owned by four junior doctors ("**the shareholders**"). The proposed 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 BMA ("**the Announcement**").

2. This response has been written in accordance with the pre-action protocol for Judicial Review.

3. Your letter suggests that you propose to advance four grounds of claim, which you address under the headings: (i) no power to make a decision with legal effect, (ii) failure to consult, (iii) irrational and/or premature decision to impose a contract, and (iv) lack of evidential or reasoned foundation for this contract.

4. We consider the proposed grounds of claim to be devoid of legal merit. We note that the BMA – the relevant trade union – has (rightly) concluded that no challenge on these grounds should be brought. In circumstances where a shelf company has been established for the purpose of pursuing these proposed grounds of claim, we have serious concerns that what is proposed is: (a) an abuse of the Court's process, and/or (b) is a device intended to prevent the parties driving the litigation being required to bear an appropriate share of the Secretary of State's legal costs once the claim has been dismissed (with the result that the costs will need to be met by the taxpayer).

5. Accordingly, we hope that your client will refrain from instituting costly, and manifestly unfounded, proceeding. If, however, proceedings are issued, they will be resisted.



The Proposed Claimant

6. The Claimant is Justice for Health Limited, a shelf company.

The Proposed Defendant

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

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

Reference details

8. The reference for this matter is Z1609772.

9. Mr. Oliver Gilman (Senior Lawyer) has conduct of 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

10. 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

11. We attach as annex A to this letter the Secretary of State's Pre-action Protocol Response to the proposed claim for judicial review by the BMA ("**the BMA response**"). This letter adopts by reference the account of the Background provided therein.

12. As explained in the BMA response, since 2012 the Secretary of State has been engaged in extensive discussions and negotiations with the BMA and NHS Employers regarding the development of a new national NHS contract for junior doctors.

13. On 9 February 2016, Sir David Dalton wrote to the BMA setting out a further offer regarding the new contract.

14. On 10 February 2016, the BMA publicly announced that it was rejecting that offer. Later that day, Sir David wrote to the Secretary of State in the following terms (so far as relevant):

> *"Dear Secretary of State*
> *I enclose a copy of the letter I sent...yesterday...Before making this offer Clare and I consulted with the senior reference group who have been assisting us since early January and also a wider group of senior leaders in the NHS in England: all of whom agree it to be fair and reasonable for doctors in training and for the service.*
> *The offer...represents a contract that is safer for patients and fairer for doctors than the current contract.*
> *...There has been substantial progress since the end of last year and all significant issues associated with safety and training had largely been addressed before Christmas. Despite the most recent progress and substantial agreement on many elements of the contract, the BMA has refused*

to compromise on its insistence that the whole of Saturday must be paid at a premium rate. In contrast Employers' position has moved several times, on each occasion offering more hours attracting premium pay. Regardless of these changes no agreement has been possible. It became clear that the only way to move forward was to make a 'best and final' proposal in the hope that this would lead to settlement.

Yesterday I asked the BMA to respond to my letter by 3pm today confirming that they would unequivocally recommend this offer to the JDC meeting on 20th February or I would otherwise have no alternative but to conclude that there was no realistic prospect of a negotiated outcome. Regretfully no such assurances have been received.

Everyone's first preference has always been for a negotiated outcome. Unfortunately this no longer seems possible. Following consultation with Chief Executives and other leaders in the service, it is clear that the NHS needs certainty on this contract and that a continuation of a dispute, with a stalemate and without any clear ending, would be harmful to service continuity, with adverse consequences to patients. On this basis I therefore advise the government to do whatever it deems necessary to end uncertainty for the service and to make sure that a new contract is in place which is as close as possible to the final position put forward to the BMA yesterday. I can confirm that this position is supported by both the NHS Confederation and NHS Providers, together with support from Chief Executives across the country, and their names are supplied.

Throughout the discussions between NHS Employers and the BMA both parties have maintained that a settlement should protect the safety and welfare of doctors in training and enable a safe and effective service for the NHS. Both parties have acknowledged that there are underlying issues which, over a number of years, have created the conditions for doctors in training to feel a high level of discontent. I wish to confirm my recommendation to you that an urgent Review of these long standing concerns should be established which can make meaningful recommendations to improve the welfare and morale of trainees. The conduct of this independent review, to be commissioned by the Academy of Medical Royal Colleges, Health Education England and NHS Employers, must also ensure that the voices of junior doctors are directly and personally heard. "

15. Further, an attachment to the letter stated (in relevant part):

> *"The following Chief Executives have confirmed that the best and final position of NHS Employers is considered 'fair and reasonable'. They also confirm that the NHS needs certainty on the Junior Doctors' contract and that a continuation of the dispute, with a stalemate and without clear ending, would be harmful to service continuity, with adverse consequences to patients."*

16. Under this statement were the names of a number of chief executives.

17. 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. The Secretary of State announced (in relevant part):

> *"In January, I asked Sir David Dalton, chief executive of Salford Royal, to lead the negotiating team for the Government. Under his outstanding leadership, for which the whole House will be immensely grateful, progress has been made on almost 100 different points of discussion, with agreement secured with the BMA on approximately 90% of them. Sadly, despite this progress and willingness from the Government to be flexible on the crucial issue of Saturday pay, Sir David wrote to me yesterday advising that a negotiated solution was not realistically possible. Along with other senior NHS leaders and supported by NHS Employers, NHS England, NHS Improvement, the NHS Confederation and NHS Providers, Sir David has asked me <u>to end the uncertainty for the service by proceeding with the introduction of a new contract that he and his colleagues consider both safer for patients and fair and reasonable for junior doctors. I have therefore today decided to do that</u>." (emphasis added)*

18. 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 (then) current state of the draft terms.

19. Work on the draft terms of the new contract continued and in due course the Secretary of State carefully considered proposed terms together with a detailed and robust Equality Analysis ("**the EA**"). Subject to a number of amendments to the draft terms, which the Secretary of State decided were appropriate having considered the EA, the Secretary of State determined that the new contract should be approved.

Preliminary issues – (1) lack of standing, and (2) Security for Costs

Standing

20. The BMA is the relevant trade union. It has significantly greater knowledge of the relevant factual and legal matters than your client. The BMA has, rightly, not even attempted to contend that any of the proposed grounds raised in your letter are arguable. Where the relevant trade union, which in the circumstances is plainly the best-placed claimant, has concluded that grounds of claim of this sort should not be pursued we do not consider that individual trade union members (acting via a shelf company) have sufficient interest for the purposes of bringing a claim for judicial review. This analysis is reinforced by the obvious lack of merit in the proposed grounds of claim. We put you on notice that we reserve the right to raise these matters with the Court in the event that any substantive claim is issued.

Security for Costs

21. As noted above, we are seriously concerned that your client's approach here is a device intended to prevent the parties driving the litigation being required to bear an appropriate share of the Secretary of State's legal costs once the claim has been dismissed. We consider that allowing such an approach would be contrary to the public interest, and deeply unfair to taxpayers.

22. On the basis of your letter, it appears that the proposed claim is designed to ventilate a very wide-range of disparate factual and legal issues related (or not) to the new contract. It appears that resisting the claim is likely to be time consuming and expensive for taxpayers, and divert resources away from patient care. In the event that a substantive claim is issued we consider that it will be appropriate to seek suitable security for costs. In the event the Claimant is not equipped to make such a payment we will consider all options available to us.

Response to proposed Grounds of Challenge

(1) No power to make a decision with legal effects

23. Paragraphs 18-24 of your letter consist of a number of statements regarding the employment relationships of junior doctors, the legal powers of the Secretary of State, the powers or duties of various NHS bodies and a request for the Secretary of State to agree with various propositions of law. You also make a request for documentary disclosure.

24. The Secretary of State acted entirely lawfully in deciding that the appropriate response to Sir David's letter was to announce that he would proceed with the introduction of the new contract without further negotiation with the BMA. Insofar as your letter is intended to assert that the Secretary of State is under some misapprehension as to his legal functions, this is incorrect. We note that your letter fails to identify any coherent basis for any such suggestion.

25. This section of your letter does not appear to identify any grounds on which you propose to invite the Court to hold that the Secretary of State has acted in breach of public law duty. We remind you that it is a first principle of public law – and the most basic purpose of a claimant's judicial review pre-action correspondence – that a claimant must identify with precision any decision that is said to be unlawful and state clearly the public law ground of claim on which any unlawfulness is alleged. This section of your letter signally fails to do either. We do not see anything here that supports any arguable claim for judicial review.

(2) Failure to consult

26. Your argument under this heading proceeds on the basis of a basic legal error. At paragraph 25 of your letter you assert that paragraph 25(4) of Schedule 4 to the National Health Service Act 2006 ("**the NHS Act**") imposes a duty of consultation before directions are issued. This is simply wrong. As the excerpt which your letter reproduces demonstrates, it is only if regulations are to be made that a duty of consultation is imposed. It follows that the correct position is precisely the *opposite* of that stated in your letter: the statutory scheme makes plain that there is no duty to consult before making directions. As an elementary matter of statutory construction, if an Act of Parliament specifically mandates consultation in certain circumstances (e.g. for regulations under para 25(4) of Schedule 4) but does not require it elsewhere (e.g. for directions under paragraph 25(4) of Schedule 4), the Court will not imply a duty to consult where Parliament has deliberately chosen not to require it. In any event, the Secretary of State has not to date issued any directions.

27. Further, and notwithstanding that no duty to consult arises in the present case, we note with surprise the apparent suggestion that any such (*ex hypothesi*) duty would not have been satisfied here. As explained in the BMA letter (which you have adopted in your PAP letter), discussions and negotiations have been on-going between the Secretary of State, NHS Employers and the BMA since 2012. Relevant stakeholders have participated, by a variety of means, throughout that period. The contention that any *ex hypothesi* duty of consultation was not fully discharged is wholly untenable.

(3) Irrational and/or premature decision to impose a contract

28. As at 11 February 2016, discussions and negotiations on the new contract had been on-going since 2012. In the circumstances, the suggestion that the Secretary of State's decision to proceed with introduction of a new contract without further negotiation with the BMA was "premature" or "not properly considered" is a surprising one.

29. Paragraph 36 of your letter is not easy to follow. It appears to complain about the terms of the new contract, though no clear explanation of any specific proposed ground of claim is provided. We note that your apparent suggestion that the new contract *"unlawfully remunerates [NROCs]"* is made without supporting explanation or justification of any sort. This statement is simply incorrect: The National Minimum Wage Regulations 2015 involve a calculation of the remuneration paid over the course of 'the pay reference period', divided by the number of hours worked in that period. In the case of junior doctors, this involves looking at their *monthly* pay, which when divided by the number of hours worked in that period is undoubtedly greater than the statutory minimum wage. Further, in any event, the NROC is an availability payment. It is not a payment for work done. Any work done while on call is separately remunerated at the prevailing rate.

30. As to paragraphs 37-39, we do not consider that any of these arguments raise any point of substance. In brief summary (and without prejudice to a number of further points): (a) the Secretary of State was, of course, aware that the decision to proceed with introduction of a new contract would be opposed by the BMA, and (b) the apparent suggestion at paragraph 39 that the Secretary of State's decision to proceed with the introduction of the new contract is irrational because the BMA opposes it is one with which the Secretary of State respectfully disagrees. It is a most surprising proposition.

(4) Lack of evidential or reasoned foundation for this contract

31. Paragraph 40 of your letter is not easy to understand. However, insofar as you intend to complain that the Secretary of State did not consider what benefits introduction of a new contract would deliver, this is simply wrong. As to the apparent complaint that the Secretary of State did not consider how the contract would be implemented in practice, insofar as such consideration was necessary or appropriate as at 11 February 2016, that is also incorrect.

32. At paragraph 41 onwards, your letter digresses to reproduce various (partial) excerpts from a public accounts committee meeting and makes a number of comments about Government policy regarding a 7-Day NHS. The assertion that the Secretary of State's "principal purported justification" for the decision to proceed with the introduction of a new contract was "the implementation of the seven day service" is not correct. As the Secretary of State has made clear, the new contract will achieve a range of important Government objectives. By way of example only, see paragraph 7 of the EA:

> *"The Key Objectives...are:*
> *a. to enable employers to roster Doctors when needed across seven days including evenings and weekends more affordably to support the delivery of a 7 Day NHS for patients in accordance with the clinical standards developed by the Seven Days a Week Forum;*
> *b. to end time-served automatic annual pay progression ("AAPP") and establish a pay model based on the level of responsibility of the role being performed;*
> *c. to provide Doctors with greater certainty and predictability of earnings by: (i) increasing basic pay, and (ii) reducing the proportion of overall pay that is derived from (variable) additional payments;*
> *d. to ensure that Doctors working the most unsocial hours/patterns are paid accordingly;*
> *e. to provide incentives to encourage entry into hard-to-fill training programmes or clinical academic training programmes and/or undertaking beneficial research work;*
> *f. to provide stronger measures to ensure adherence to safe working hours and patterns;*
> *g. to improve training/support for training; and*
> *h. to achieve cost-neutrality – whilst not seeking to save money overall and not preventing the total pay bill for junior doctors from rising as trusts recruit more Doctors, the new contract seeks no increase or reduction in pay bill (excluding employer pension contributions and transitional pay protection costs) per whole-time equivalent ("WTE")/no change in average earnings for the same average number of hours worked as now."*

33. Further, as your client and the shareholders are surely very well aware, the new contract is only one component of a much wider, and more long-term, Government policy regarding more seven day services in hospitals, to ensure the same high quality safe care seven days a week.

34. We cannot identify any arguable ground of claim in this section of your letter.

<u>Action the Secretary of State is "required" to take</u>

35. We note that paragraphs 49 and 50 of your letter do not in fact identify any substantive steps which you wish the Secretary of State to take, other than provide a response to your letter within 7 days (on the footing that you will commence judicial review proceedings if a response is not provided within that timeframe and "seek to have them heard at the same time as...the BMA"). In the circumstances, it appears clear that your client has already decided to issue proceedings regardless of the content of this response.

<u>Information sought</u>

36. Insofar as you ask the Secretary of State to opine on various legal issues, we do not consider that any response is necessary or appropriate. For the avoidance of doubt, we can assure you that the Secretary of State takes his legal duties seriously.

<u>Documents sought</u>

37. 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

38. 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.

39. If, after proper consideration of this response, proceedings are issued, please arrange for them to be served on Mr. Oliver Gilman at the address set out at paragraph 7 above.

Yours sincerely

For the Treasury Solicitor