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| Date: 12 April 2016 |  |
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Dear Mr Gilman,

**Justice for Health Ltd V SOS**

Thank you for your letter dated 11 April 2016.

**Standing**

1. With regard to the BMA challenge, we do not understand how the Secretary of State can know what is in the mind of the BMA when bringing their legal challenge. A legal challenge initiated by the BMA on different grounds does not preclude our client’s right to challenge the Secretary of State’s unlawful decision.
2. We refute any suggestion that our client is acting in any way inappropriately by litigating as a company. The Directors bring this claim with the best of motives – which is to ensure that there is scrutiny over the decision making process by the Secretary of State to “impose the junior doctors’ contract. They are directly affected by the decision. It is one of overwhelming importance to many doctors. Standing can hardly be in issue. If you say it is- please advise what authority you rely on? It is not only in their interest but in the public interest that these matters should be considered by the court given the effect of the “decision” on the operation of the health service.

**Security for costs**

1. With regard to security for costs, we think that this is a distraction from the substantive issues and designed to be a punitive step to halt our client’s claim. Please advise by return what you seek in terms of security of costs. We would like to take early instructions from our client on this point to see what agreement, if any, can be reached. Please advise of any legal authorities relied on.

**Substantive grounds for challenge**

1. We were more than a little surprised to note that the Secretary of State has declined to provide any coherent response to our Ground 1, namely that the Secretary of State is acting unlawfully because the scheme of the National Health Service Act 2006 does not give the Secretary of State any power to make a binding decision as to the terms of the employment contracts to be offered by NHS bodies and others to junior doctors.
2. We also note your concession that the Secretary of State has not issued any directions to require any NHS trust to comply with the terms of the decision taken by the Secretary of State on 11 February 2016.
3. It also appears common ground that the Secretary of State has made no Regulations which purport to implement this decision.
4. In 2013 the Court of Appeal confirmed in *Trust Special Administrator Appointed To South London Healthcare NHS Trust & Anor v London Borough of Lewisham & Anor* [2013] EWCA Civ 1409 that the Secretary of State could only take decisions (even if announced in Parliament) where he had been given powers to take that decision under the National Health Service Act 2006 and that the Secretary of State would be acting unlawfully if he purported to take a decision which was outside his powers.
5. The case that the Secretary of State acted beyond his powers has been clearly set out in our letter before action.  The complaint made in your letter of response that we have failed to provide details of the powers relied upon by the Secretary of State appears to us to be disingenuous.  Our case is that the Secretary of State has no power to make a binding decision on the terms of the employment contracts to be offered by NHS bodies and others to junior doctors.  We are therefore unable to particularise our case further because it is based upon an absence of legal powers.
6. May we remind you that the Secretary of State said on 31 January 2011 as follows in Parliament:

“The Bill explicitly defines roles and responsibilities that were previously at the discretion of Ministers. Until now, legislation on the NHS has more or less said, “The NHS is whatever the Secretary of State chooses to make it at any given moment.” That was why, in the past, reorganisations took place on a practically annual basis under the Labour Government, without there ever being any consistency or coherence to them. I intend to be the first Secretary of State in the history of the NHS who, rather than grabbing more power or holding on to it, will give it away”

1. It is clear from an examination of the carefully defined roles and responsibilities of the Secretary of State as a result of the Health and Social Care Act 2012 that the Secretary of State does not have the power to require NHS employers to employ staff on particular terms and conditions.  However, despite the fact that the Secretary of State’s predecessor carefully defined the limitations to the powers of the Secretary of State, it appears to us that the present incumbent is asserting the right to take legally binding decisions when he has no power to do so.
2. We therefore invite you to accept that, whatever the Secretary of State may have thought at the time, he now accepts that he had no power to take a decision about the terms under which junior doctors were to be employed and which was legally binding on a range of NHS employers.

**Disclosure of the nature of the Secretary of State’s case on powers and disclosure of documents.**

1. You have refused to supply us with the information and documents we have requested. May we refer you to the Treasury Solicitor’s Department “*Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review proceedings*”.  This Guidance provides at paragraph 1.2:

“The duty of candour gives rise to a weighty responsibility.  The obligation of candour is the reason why the rules as to standard disclosure do not apply to applications for judicial review as a matter of course. When responding to an application for judicial review public authorities must be open and honest in disclosing the facts and information needed for the determination of the issue.  The duty extends to documents/information which will assist the claimant’s case and/or give rise to additional (and otherwise unknown) grounds of challenge.

1. The Court in *Al Sweedy* and in reliance on Laws J in *Quark Fishing* described it as “a very high duty on central government to assist the court with full and accurate explanations of all the facts relevant to the issue that the court must decide”
2. This Guidance also stated in clear terms:

“The duty of candour applies as soon as the department is aware that someone is likely to test a decision or action affecting them**.** It applies at every stage of the proceedings including the of response under the pre-action protocol, summary Grounds of resistance, detailed grounds of resistance, witness statements and counsel’s written and oral submissions”

1. We consider that it is a serious breach of the Secretary of State’s duty of candour to fail to explain what legal power is relied upon by the Secretary of State (if any) when responding to a detailed letter which asserts that the Secretary of State has no power to take the relevant decision.
2. Paragraph 23 to 25 of your letter of response strongly suggest that those advising the Secretary of State consider that they are unable to point to any specific power relied upon by the Secretary of State to take the relevant decision.
3. You have suggested at paragraph 37 that the Secretary of State will comply with his duty of candour.  This sentence appears to misunderstand the nature of the duty (as set out in your own Guidance) because the Secretary of State is already under this duty and is therefore required to disclose the documentation we have requested.
4. We therefore invite you to correct this serious breach of the duty of candour by providing us with an immediate response to this letter to explain the precise nature of the power relied upon by the Secretary of State.  Alternatively, if the Secretary of State’s case is that this was a purely political decision with no legal effect, we invite you to make this clear.  We also invite you to provide disclosure of the various documents we have requested.
5. We are in the process of preparing an application for Judicial Review and will rely upon the grounds set out in our letter before action to assert that this was a decision which was taken by the Secretary of State without any power to do so.
6. For the avoidance of doubt, your assertion in paragraph 35 of your letter that the Claimant had already decided to issue proceedings is incorrect. The Claimant has been awaiting your response and very much hoped that the Secretary of State would accept that he had acted unlawfully so that litigation could be avoided. However, in the light of your response, the Claimant remains of the view that the Secretary of State has acted unlawfully.
7. If the Secretary of State fails to give you instructions to identify the relevant power under which he believed he was acting at subsequently (and successfully) relies upon any specific power to take the relevant decision (whether under the National Health Service Act 2006 or otherwise), we would anticipate that a Judge would order costs against the Secretary of State as a result of the breach of duty of candour identified in this letter.

We look forward hearing from you.

Yours faithfully



**Bindmans LLP**

Cc Interested parties