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Dear Mr Gilman

**Justice for Health Ltd -v- Secretary of State for Health & Ors
CO/2054/ 2016**

1. As you are aware, our client's case has now been joined with the BMA case for a rolled up hearing on 8-10 June 2016. We are in discussion with the BMA, as to whether our client's case should be heard first for 1.5 days commencing 8 June 2016, and this is likely to be agreed. We will confirm the position shortly.
2. In light of the impending hearing date and the recent correspondence back and forth, together with consideration of your pleadings, we now seek to be absolutely clear about what the Secretary of State's position is with regard to the junior doctors' contract. It seems to us, that the question that has been posed in correspondence and pleadings by our client is whether the Secretary of State had powers to make a decision that all or any NHS Employers were required to use a form of contract approved by the Secretary of State and whether the Secretary of State had effectively, by his actions and/or statements, imposed the form of contract as it was drafted on 11 February 2016 and then finally amended and re-issued on 31 March 2016 and/or led others to believe that to be the case.
3. We understand from your letter of 15 April 2016 that the Secretary of State is (in that letter at least) asserting that he was not "imposing the junior doctors' contract" but merely taking a lead role in negotiations and discussions between NHS Employers and the BMA. Further, that the Secretary of State is entitled to

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approve the terms of model national contracts for among others junior doctors and “to take steps leading to the introduction of model national contracts by the various employers...”

4. This now appears to be the Secretary of State’s position after taking legal advice and after giving due consideration to the consequences of what his actions look like prior to that. We consider that the Secretary of State’s position has lacked, and continues to lack, clarity and has led to the near-universal understanding that the Secretary of State was deciding on imposition rather than merely leading on negotiations. We would thus like to be very clear as to the Secretary of State’s current position.

A number of confusing statements made by the Secretary of State for Health

5. The Claimant accepts that there have been protracted negotiations between NHS Employers and the BMA representing junior doctors over a number of years leading up to a breakdown of those negotiations, on 9 February 2016. At various junctures during the negotiations the Secretary of State threatened to take the decision to “impose” a form of contract on junior doctors if the negotiations did not reach a conclusion to change the terms of the existing junior doctors’ contract to a form which was acceptable to both sides.

6. On **16 July 2015** the Secretary of State said:-

“There will now be 6 weeks to work with the BMA Union negotiators before a September decision point, but be in no doubt: if we can’t negotiate, we are ready to impose a new contract”.¹

7. On **11 February 2016** the Secretary of State made a parliamentary statement concerning junior doctors’ contracts as follows:-

“Along with other NHS leaders and supported by NHS Employers, NHS England, NHS Improvement, the NHS Confederation and NHS Providers, Sir David has asked me to end this 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 decided to do that”.²

¹See <https://www.government.uk/government/speeches/makinghealthcaremorehumancentredandnotsystemcentred>

² See <http://www.publications.parliament.co.uk>

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8. Speaking later in the debate in response to questions from the Chair of the Health Select Committee, the Secretary of State made clear that he was taking the decision to implement a new contract, (Hansard, column 1770):

“When, as a government, we took the decision to proceed with implementing new contract we have the choice of many routes, because essentially we can decide exactly what to choose. We have chosen to implement the contract recommended by NHS Chief Executive as being fair and reasonable”.

9. Others closely involved with the junior doctors contract dispute, certainly took from the Secretary of State’s speeches the fact that he had power to impose or introduce a new contract: thus on 12 February 2016 Mr Daniel Mortimer, the Chief Executive of NHS Employers, sent an open letter to every junior doctor working in the NHS saying:-

“The Secretary of State has decided that the NHS must now introduce a new contract, without the agreement of the BMA, from 2016”.

10. **On 8 March 2016** the Government Legal Department, (GLD) wrote to the BMA lawyers concerning the contract as follows:-

“... Moreover, a decision as to the final terms and conditions of the new contract has not yet been made. Before making this decision, the Secretary of State will have sight of and will take proper account of a full EIA”.

11. That letter also added:-

“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 final terms in the light and context of the EIA”.

That letter makes it clear that the Secretary of State regarded the decision as to the terms of the contract to be a decision for him.

12. **On 4 April 2016**, we wrote on behalf of Justice for Health Ltd a Letter before Claim arguing that the Secretary of State has no power to impose the junior doctors’ contract. The GLD responded by letter dated **11 April 2016** stating:-

“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...”

13. Further, at paragraph 28 of that letter it is argued that:-

“In the circumstances, the suggestion 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.

14. Again there is the assertion that the Secretary of State has power to impose/introduce/decide upon the terms of a new contract.

There is again reference to the Secretary of State’s decision to proceed with the introduction of a new contract at paragraph 30, 31.

15. It is interesting to note that NHS Employers by their solicitors Capsticks wrote to the Claimant’s solicitors on **14 April 2016** stating that they had seen a copy of the Secretary of State’s response of **11 April 2016** and were in agreement with the content of that correspondence.

16. By the GLD’s letter dated **15 April 2016** the GLD responded by shifting its position to now suggest that the Secretary of State was “announc[ing] that he would proceed with the introduction of a new contract without further negotiation with the BMA” and suggesting that the Secretary of State was merely taking a leading role in negotiations and discussions between NHS Employers and others.

17. Then, speaking in the House of Commons on **18 April 2016**, the Secretary of State claimed that he had the legal power to impose the contract and this is what he had done save in relation to Foundation Trusts. The Secretary of State had the following exchange with Mr John Cryer MP:-

Q:On the basis of the Secretary of State’s previous comments and particularly his opening comment, is he absolutely confident that he has the legal power to impose the new contract?

A: Yes.

18. It is clear that members of the House of Commons, NHS Employers, the BMA and the media commenting on the Secretary of State’s pronouncements at various junctures all understood that the Secretary of State had the legal power to impose the junior doctors’ contract on them and had taken the decision to impose the new contract on all bodies employing NHS junior doctors as from August 2016. No public statement to different effect has, to our knowledge, ever been made by the Secretary

of State. See also paragraph 1 and 3 of the BMA's Statements of Facts and Grounds.

19. The Secretary of State's shifting position as outlined above has been, and continues to be, unclear and confusing. It has lacked transparency and clarity (see *Limbu -v- Secretary of State for the Home Department* [2008] EWHC 2261 (Admin)).
20. In the detailed Grounds of Resistance on behalf of the NHS Confederation dated **5 May 2016** the Secretary of State's role is described differently. In particular at paragraph 35:-

“Accordingly on **11 February 2016** the Secretary of State announced his Decision. The effect of the decision was that the Secretary of State endorsed the final offer made on **9 February 2016**”.

21. Further at paragraph 67 it is said that:-

“The Secretary of State did not announce, publish or decide the final terms of the contract. He could not have done so, because at that point they had not been determined”.

So what is the position now?

22. If the position of the Secretary of State now is that he accepts that he has no power to impose or introduce or take a decision as to the terms of the junior doctors' contract, that he has not taken a decision with any legal effect and that he has merely been making recommendations to NHS Employers and indicating his agreement with the terms of the contract issued on **30 March 2016** then we would like him to say so explicitly, unambiguously and clearly so that all parties and the public are clear. We would invite the Secretary of State to consider further what corrective action he could take to ensure that the public, NHS Employers and Parliament understand the true nature and effect of his various announcements and statements.
23. Conversely, if the position of the Secretary of State is that he considers he did have the power to impose, introduce or take a decision as to the terms of the junior doctors' contract and/or to take a decision with legal effect, we request you to explain the legal basis of that power, as we have repeatedly requested in previous correspondence.

Declaration required

24. In the interests of reducing or eliminating the areas of dispute between the parties, we would invite the Secretary of State to agree to declarations in the following terms:-

- 1) It is declared that the Secretary of State had no power to make the decisions which he purported to make on **11 February 2016** and **31 March 2016**.
- 2) It is declared that the Secretary of State had no power to impose or introduce or decide upon the terms of a new junior doctors' contract to commence on **3 August 2016**.
- 3) It is declared that the terms of the junior doctors' contract are a matter of negotiation between NHS Employers, and junior doctors and their representative body, and that whilst the Secretary of State can show his approval or disapproval of the contract he does not have the legal power to impose or introduce the new contract or to determine its terms or take any other decision with legal effect.

Further we invite the Secretary of State to take action to address the confusion which has been caused by his various statements to Parliament and elsewhere.

25. In addition to a declaration in the terms above our clients will seek their legal costs up to the date of any agreement.

Mediation

26. Our clients confirm that there is an ongoing duty to consider mediation and our clients would be willing to enter into mediation urgently but they will not accept a stay of proceedings. This would with a view to reaching a settlement of the case.

Yours faithfully

Bindmans LLP

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