Q1: What is whistleblowing? Why are the new protections important for junior doctors?
A1: “Whistleblowing” is the common term for reporting concerns about wrongdoing in the workplace. And in UK employment law, we call that making a protected disclosure. In the NHS, that commonly relates to patient safety, but the law also applies to disclosures about criminal behaviour, breach of legal obligations, health and safety, environmental issues, that kind of thing, provided that in each case it is in the public interest to report the wrongdoing. Protection is obviously important because it allows workers to raise concerns without fear of reprisals from their employer.

Q2: How did the agreement with Health Education England come about?
A2: When junior doctors make a protected disclosure, they are fully protected in employment law from detrimental treatment by their NHS employer. It is not clear however whether Health Education England is also an “employer” within the meaning of the Employment Rights Act 1996. The term “employer” in this context is much wider than the usually understood meaning where there is an employee under a contract of employment. It’s been alleged in an ongoing case that a doctor under a training program with Health Education England is a worker of Health Education England under the extended definitions of “worker” in s43K of the Act.

The Employment Appeal Tribunal found in February 2016 that that doctor was not a worker under this section and Health Education England was not his employer. As a result of that, junior doctors currently aren’t able to bring proceedings in the employment tribunal on the same basis, and that presents a gap in the law. The Health Education England agreement was suggested by the BMA as a way to close that gap, without having to rely on the much longer processes of attempting to change the law, or a successful legal challenge to the EAT.

Health Education England on their part has accepted that it can have a significant influence over a junior doctor’s career, and it recognises the need for doctors in training to be able to raise issues in the workplace without fear of reprisal, so it also agreed to enter into negotiations. Those were undertaken in parallel with the main terms and conditions of service negotiations with the government and I was instructed in May this year to draft and negotiate the terms of the agreement on behalf of the BMA. It took a few months to reach a final agreement as there were four teams of lawyers involved, but what I think we have achieved on behalf of junior doctors is an agreement which is very full and robust and effective.

Q3: How does the agreement work?
A3: The BMA and Health Education England aren’t in a position to simply rewrite the Employment Rights Act themselves, so it was agreed to approach it on the basis that protection would be provided with a contractual arrangement rather than a statutory arrangement. It’s really a series of contracts and the parties to the contracts are Health Education England and individual NHS employers. The agreement then uses a legal mechanism in the Contracts (Rights of Third Parties Act 1999) so that once it is entered into by one of those employers, the doctors in training specified in the agreement are entitled to enforce all of the contractual rights contained within it as against Health Education England. So that way, they get all the benefits of the agreement without having to be a party to it themselves.
Q4: When does the agreement come into force?
A4: The agreement is actually already in force, there are some employers who have already signed it, and it’s been made retrospective with effect from 3rd August 2016.

Q5: Do the new protections apply to all junior doctors in England?
A5: The term “junior doctors” is not a legal one, so we have had to take care when we were drafting the agreement to ensure that it covers the appropriate categories of doctors in training. Under the agreement these are referred to as Postgraduate Trainees. The categories are pretty broad, they include all doctors in training in England who have a contract of employment in the NHS under the old national terms and conditions, the 2016 national terms and conditions for junior doctors, or under a different contract for foundation or speciality training with a NHS Foundation Trust, and that’s provided in each case they have been appointed by Health Education England and they hold a training number with Health Education England. The agreement also extends to doctors in a GP Foundation or Speciality training programme, and to equivalent categories of junior dentists.

We also made sure that doctors are protected when they are attempting to commence or recommence this type of training. So for example, the agreement will cover junior doctors taking time out of programme.

Q6: What protection does the agreement provide?
A6: The agreement provides protection to the Postgraduate Trainees equivalent to the protection available to “workers” under the extended definition in s43K of the Employment Rights Act. So where a Postgraduate Trainee makes a protected disclosure, and they believe they have been subjected to a detriment by Health Education England as a result, then they will have the right to bring a breach of contract claim against Health Education England in the County Court or High Court. The remedies they will be able to claim there are exactly the same as a worker falling under s43K of the Employment Rights Act could claim in an employment tribunal.

Q7: What remedies are available to junior doctors under the agreement?
A7: Where a detriment claim is brought in an employment tribunal, the worker is able to claim unlimited compensation, which can include compensation for injury to feelings, and the tribunal can also make declarations that what has occurred is unlawful. The remedies under the agreement are exactly the same, and they’ll be assessed in exactly the same way. So that means if a Postgraduate Trainee successfully shows for example that they have lost their entire career as a result of Health Education England’s actions, then they could claim career long losses, subject of course to the usual principles of mitigating those losses by finding other work. I would add though that career long losses cases are extremely rare. Compensation will also be subject to the other limitations which exist in the employment tribunal proceedings, such as a reduction in damages where there is contributory fault, or where the protected disclosure isn’t made in good faith.

One question I have been asked a lot is whether the courts could order reinstatement under the agreement. Reinstatement is a term in the Employment Rights Act which specifically refers to resurrecting a contract of employment, and it’s only available as a remedy in the employment tribunal in an unfair dismissal claim by an employee against their employer. Now as we discussed earlier, the term “employer” in a whistleblowing context can be a bit misleading, because it covers not only employees but also other types of workers. And only employees can bring an unfair dismissal claim if they are dismissed following a protection disclosure, not workers falling under section 43K. There is no contract of employment between a Postgraduate Trainee and Health Education England, they can’t claim unfair dismissal, and there is no contract of employment which can then be reinstated. Now in certain circumstances however the Postgraduate Trainee might have a claim against both Health Education England for detriment, and against their former NHS employer for unfair dismissal.
Q8: Is there any difference between the new protections in the agreement and those available to all other permanent (non-training) NHS staff?
A8: Well junior doctors already enjoy exactly the same protection afforded to permanent non-training NHS staff as against their NHS employer. What the agreement does is provide an extra layer of protection against any detrimental treatment by Health Education England, as if the Postgraduate Trainee was a worker of Health Education England under s43K. A Postgraduate Trainee bringing a claim under the agreement against Health Education England will therefore have exactly the same level of protection as a consultant bringing a claim for detriment against their NHS employer for example. The only difference is that the claim will have to be brought in the County Court or High Court instead of an employment tribunal.

Q9: What support is available to BMA members making a claim in the courts?
A9: For BMA members the cost of the claim will be paid in full by the BMA, provided the claim meets the normal merit criterion of greater than 50% prospects of success.

The BMA use a team of specialist employment law solicitors, who will apply exactly the same criteria to determine the merits of a claim under the agreement as they do when determining whether to fund a whistleblowing claim in an employment tribunal. So if they assess that the case has a greater than 50% prospects of success, and doesn’t predate the doctor’s membership, then the doctor will be eligible for discretionary legal support and a full indemnity in respect of legal costs just as any other member would be.

Q10: Is this agreement a long-term solution to ensure robust whistleblowing protection for junior doctors?
A10: Well I do believe the agreement is a robust long term solution to the present gap in the law. It’s not designed as a temporary solution. There is no end date to the agreement, and it has been future-proofed. I’ll give you an example of that, NHS Foundation Trusts currently all use national terms and conditions, but they are not obliged to. If a NHS Foundation Trust decides in the future to move to a different contract for doctors in training, the agreement will still cover that.

There are really only three situations in which the agreement will come to an end: firstly if the protection against detriment in the Employment Rights Act is repealed; secondly if there is a change to the Employment Rights Act to allow this type of claim to be brought against Health Education England, and thirdly if there is a final determination or ruling which is binding on Health Education England that Postgraduate Trainees are entitled to bring proceedings under the Employment Rights Act in the tribunal against Health Education England.

This is something that I spoke about in the Junior Doctors Committee and it has been reported that I said there that the agreement was a stop gap until a definitive solution could be found. And that is not correct, and I didn’t intend to imply that there is any sort of temporary nature to this agreement. Except of course where these termination situations occur. The agreement itself is a definitive, and effective, solution. But it is true that if one of the three termination situations occur, the agreement wouldn’t be required. And it would then come to an automatic end, except where Postgraduate Trainees have already accrued a cause of action or are already bringing proceedings under the agreement.

Q11: What would happen in the Court of Appeal were to find that Health Education England is an employer?
A11: Any ongoing proceedings before the courts will not affect the current operation of the agreement, so if a Postgraduate Trainee has suffered a detriment as a result of making a protected disclosure, they are fully protected right now.

Speaking hypothetically though, if the Court of Appeal did find that Health Education England was an “employer” under the extended definition, it wouldn’t necessarily mean that the agreement would come to an end. There could be a further appeal to the Supreme Court. However, in order to provide certainty in this type of situation, the agreement provides that where there is a right of appeal available to Health Education England, it can give notice to the BMA and to the British Dental Association that it won’t appeal and intends to be bound by the court’s decision. Now if that were to happen, and I should stress there is no guarantee of that, there would no longer be a gap in the law and the agreement would come to an end.
Q12: If the Court of Appeal were to find that Health Education England is an employer, would junior doctors be in a better position under the new agreement than they are now?
A12: No, they would actually have exactly the same level of protection. As we discussed earlier, the remedies available under the agreement are identical to those available in the employment tribunal, and the BMA will fund claims in exactly the same way. The only difference is where the claim can be brought. The benefit of the agreement is that it provides protection right now, without the uncertainty of a prolonged legal dispute.

Q13: How can a junior doctor clear her/his name where there’s a claim against both Health Education England and an NHS employer?
A13: If a doctor falling under the Agreement believes that they have been subjected to a detriment by both their NHS employer and by HEE, they can bring a claim against both of them. The Agreement contains indemnity provisions as between Health Education England and any NHS employer who signs up to the Agreement, so that a court can determine where the fault lies between them. In an appropriate case Health Education England might decide to bring an employer into the County Court or High Court proceedings so that the matter would be determined in one forum.

What a doctor can’t do is claim for the same losses in both claims. So just as the employment tribunal would not allow double recovery, the agreement provides that any remedy awarded in an employment tribunal or payment made under a settlement agreement, for example, will be taken into account by the court in determining what remedy should be awarded in a successful claim under the agreement.

As regards funding, BMA members would be eligible to seek the normal discretionary legal support in respect to both claims, subject to the merits assessment we discussed earlier.

Q14: What does this agreement mean for junior doctors?
A14: Well this is something I was asked at the Junior Doctors Committee, and I think the same applies, it’s really political rather than a legal question so whether it’s a victory is really a matter for junior doctors to decide. However, what we have done is worked very hard in negotiations to provide what I believe is a full and robust agreement which provides an excellent level of protection. And as I said at the JDC, I do personally believe that that’s a victory for junior doctors.

Q15: You have provided us with a lot of information today, is there anywhere members can see your advice in writing?
A15: The BMA have published a range of materials on their website detailing the protection that the agreement offers, and that includes guidance that has been jointly authored by Health Education England, and a full written opinion from myself and Mark Sutton QC. If a member requires individual advice though they should get in touch with the BMA’s First Point of Contact employment advisers as usual.