

## **Junior doctor contract - application for judicial review issued**

This judicial review is being brought by the British Medical Association together with five individual Claimants – four junior doctors and one medical student – challenging the lawfulness of the Secretary of State for Health’s decision to impose the new junior doctor contract on relevant practitioners in England.

On 11 February 2016, Jeremy Hunt announced to Parliament that he was imposing the new junior doctor contract (the Decision). A day later, NHS Employers issued a letter to all junior doctors in England providing a summary of the new contract described as the “Final Contract”. On the same day, the Department of Health announced an “Independent review of junior doctors’ morale, training and support” to be led by Professor Dame Sue Bailey; however, the Terms of Reference for the review (due to report in the autumn) expressly excludes any consideration of the impact of the new contract.

NHS Confederation (the legal entity of which NHS Employers is a part) and the British Dental Association are Interested Parties in the case; the latter by virtue of the impact of the new contract on certain NHS dentists.

### **The key issue**

The key issue in the challenge is the failure of the Secretary of State to have “due regard” to the Public Sector Equality Duty (PSED) under section 149 of the Equality Act 2010 (the Act) in arriving at his Decision. The BMA raised various equalities issues during the course of the negotiations between the parties regarding the potential impact of changes to the junior doctor contract. However, it has, despite various letters asking for clarification being sent before the start of the case, seen no contemporaneous evidence of any equality analysis/ analysed being undertaken before the Decision was made.

The three elements of the PSED are: (1) the need to eliminate discrimination; (2) to advance equality of opportunity; and (3) to foster good relations between persons who share a relevant “protected characteristic” and persons who don’t share it. “Protected characteristics” include: age; pregnancy and maternity; race; religion or belief; sex; and disability.

There are a number of changes introduced by the new contract which may give rise to equalities issues including (but not limited to) changes to pay relating to unsocial hours; pay progression; and, non-resident on-call patterns. The BMA has not seen any evidence of the Secretary of State having analysed the potential impacts of these changes on individuals/ groups within the junior doctor population with protected characteristics prior to arriving at the Decision.

### **The evidence**

The BMA has produced evidence in support of the application for judicial review which explains the above issues in the context of the negotiations between the association and NHS Employers between 2013 and 2016; the changes between the current contract and new junior doctor contract; potential equalities issues which the BMA is concerned the new contract raises (but have not been given “due regard” by the Secretary of State or NHS Employers sufficient to discharge the PSED); and

a consideration of pay protection proposals – including problems with the NHS Employers’ junior doctor contract Pay Calculator.

The individual Claimants have also advanced their own stories as to how they envisage the new junior doctor contract affecting them in their future careers and the impact on their home lives. They include individuals with disabilities under the Equality Act; single parents; parents; individuals returning from maternity leave; and a medical student. They are all concerned that the new junior doctor contract will have serious ramifications for them personally and that the impacts, from an Equality Act perspective, have not been properly considered so as to discharge the PSED prior to the Secretary of State coming to the Decision.

### **Letters exchanged before proceedings were commenced**

The BMA complied with the Pre-Action Protocol which requires that a formal letter of claim is sent to the Defendant prior to issue proceedings. The initial letter made a number of requests for information and clarification; the vast majority of which were not adequately responded to by the Secretary of State’s legal team. During the course of that correspondence, the Secretary of State asserted:

- He has had “proper regard” and “significant consideration” to/ of the equalities impacts of the new contract – but provided no contemporaneous evidence of the same, despite repeated requests;
- Suggested, entirely contrary to his parliamentary address on 11 February, that the new junior doctor contract was not “final” but that “draft final terms” (which the BMA considers is a contradiction in terms) were being worked on;
- An Equality Impact Assessment (EIA) was being worked on and would be available “very shortly”. Different deadlines for the finalisation and publication of the EIA were given in separate letters. He did not adequately respond to questions regarding when the EIA was instructed or what the parameters were for the same.

In the BMA’s view, any EIA being carried out after the Decision is the definition of a “rear-guard action”, i.e. an action done after the decision/process to which it was supposed to relate. If the BMA is correct, this would render it and – more importantly – the Decision unlawful according to case law connected to the Act.

### **Next steps**

In light of the public interest issues related to the case, the short period of time before the roll out of the contract commencing in August 2016, and the steps being taken by NHS Employers to inform NHS Trusts across England about the new contract, the Claimants have made an application for urgent consideration of the matter by the Courts; and requested that the Court “roll up” the permission and (assuming that permission is granted) substantive hearing, i.e. hear them at the same time.

The issues can then be fully considered by the Administrative Court; and the questions which the judicial review raises answered.