Justice for Health Limited v Secretary of State for Health (NHS Confederation and British Medical Association (BMA) intervening)

Summary: Press Note (28th September 2016)

(This Note is not a part of the formal judgment)

Introduction

1. This case concerns a challenge by a group of junior doctors who object to the manner in which a new set of terms and conditions of employment are to be rolled out across the NHS. The expression "junior doctors" is a misnomer since it includes, in addition to doctors in training, hugely skilled clinicians and practitioners who routinely perform some of the most complex medical procedures, some of whom have many years of experience and are on the cusp of becoming consultants. The actual Claimant to this litigation however is a company which has been formed for the purpose of bringing this claim and representing the interests of the junior doctors who object to the new terms and conditions.

2. In this judicial review I am required to decide three relatively specific issues of law. The issue of the proposed new contract generates strong feelings and evidence before the Court demonstrates the level of disenchantment which many junior doctors feel about their working conditions within the NHS. But whilst undoubtedly heartfelt some of the evidence is not of direct relevance to the particular issues that I have to decide.

3. In the written judgment I have endeavoured to summarise the views of all sides to this issue. In recording these views I emphasise that I am not expressing *any* sort of opinion or conclusion on the competing arguments about the merits or otherwise of the new contract either as a whole package or as to its individual components; nor am I expressing any view as to the merits of the arguments over the "7-day NHS" which includes the issue of weekend mortality rates.

The three issues in the case

4. In this litigation the Claimant has identified three points of law which I can summarise as follows.

5. First, it is said that properly analysed the facts demonstrate that on 6th July 2016 the Secretary of State adopted a decision that a new contract would be <u>imposed</u> on all employers in the NHS even though under the governing legislation the Minister had no lawful power or jurisdiction to impose such a contract, with the consequence that he exceeded his lawful powers and acted in an unlawful manner. The nub of the issue arises because after a lengthy period of negotiation between representative bodies of employers and employees, the BMA (for the junior doctors) ostensibly recommended acceptance of a set of terms and conditions to its members which the junior doctors then rejected in a referendum by a strong majority of 58/42% on a turnout of about 68%. On 6th July 2016 the Secretary of State in the immediate aftermath of being informed of the outcome of the referendum took a decision that the contract that the doctors had rejected should nonetheless be implemented. He then made a statement to Parliament in which he set out his reasons for the "decision" he had taken. The issue here is, first, whether the Secretary of State did in fact seek to *impose* new terms on employers (and

thereby shut out the possibility for further negotiation) and, second, as to his legal powers in relation to the approval or setting of terms and conditions of employment.

6. Second, it is argued that in any event the manner in which the relevant policy and decision was taken and announced was so opaque and confused that it violated the principles of "*transparency*" and "*good administration*". These are important principles of public law and, in essence, require public bodies to formulate and apply policies in a clear, precise and transparent manner so that those subject to or affected by them know where they stand and can regulate their affairs accordingly. The principles are also important so that those affected by a decision that might be adverse to them can make representations to the decision maker before the decision is taken and/or know the reasons for the decision taken subsequently so that they can decide whether to challenge it in the courts. This issue arises if in fact the Secretary of State's Statement to Parliament on 6th July 2016 conveyed a false impression and/or is inconsistent with his present position.

7. Third, it is argued that the basis of the decision to introduce the new contract was the Conservative Manifesto commitment to introduce the "7-Day NHS" and was based upon the premise that the higher mortality rate which occurred across the NHS at weekends could be remedied by the new contracts. As to this it is argued that the causal connection said to exist between the introduction of the contract and the prevention of avoidable mortality is not based upon any credible or adequate evidence and the decision of the Secretary of State to introduce the new contract without proper evidence is accordingly illogical, irrational and unlawful.

Conclusions on the three grounds

8. In relation to the three grounds of challenge I have reached the following conclusions.

9. First, in relation to the first ground and as to the nature of the decision that the Secretary of State took on 6th July 2016 in my judgment this was a decision to approve the terms and conditions which the Minister considered had hitherto been accepted by the BMA. The decision of approval did not, however, *compel* employers to apply the contract to their respective employees. It follows that employers retain freedom of contract and that in principle the scope for further negotiation has not been removed. The decision did, nonetheless, contemplate that the contract would be introduced without the collective agreement of the junior doctors. Further the Secretary of State also adopts the position that the contract should in practice be introduced and he reserves the right to consider the exercise of statutory powers of compulsion in the event that implementation is inconsistent or fragmentary and thereby threatens the pursuit of the objectives he seeks to achieve. But, as already observed, he accepts that in principle the employers retain freedom of contract. The Secretary of State has also made clear that once the agreement is introduced he is prepared to engage in further discussions about a range of matters and he confirmed during the hearing that there would be a joint review of the contract between the employers and the BMA commencing in August 2018. In relation to the legal powers of the Secretary of State to take these steps I have concluded that all of the various decisions and steps taken by the him fell squarely within the scope of his statutory powers and as such he acted lawfully.

10. With regard to the second ground, which concerns whether the decision taken was sufficiently clear and transparent, I accept the submission of the junior doctors that on the evidence the Statement made to Parliament on 6th July 2016 did in actual fact lead the junior doctors to conclude that, contrary to the reality, the Secretary of State did intend to "*impose*" the new contract thereby excluding altogether any daylight for negotiation either with the Secretary of State or with employers. I accept that on the evidence *employers* understood the Statement of the Minister as he wished and intended it to be understood, but for reasons which are readily comprehensible and explicable that was not the case for the doctors. However, crucially, shortly afterwards and essentially in the course of these expedited proceedings, the Secretary of State has formally provided elaboration and clarification of his decision and he has confirmed that he is not exercising compulsory powers and therefore, in principle, individual employers retain freedom of contract. He has provided this elaboration in good time and well before the formal date for the implementation of the new contract. This means that when all the relevant material is read objectively and in its proper context there is no lack of clarity or transparency. For this reason the ultimate position is that there has been no breach of the principle of transparency. In coming to the conclusion that at an earlier stage the Statement to Parliament on 6th July 2016 was couched in terms that led the doctors to misunderstand it, I am not to be taken as suggesting that the Minister misled Parliament or acted improperly. When the reasons given for a decision or policy do, in fact, lead a relevant category of person to misunderstand or to be misled in a material way then it is good administrative practice for the decision maker to elaborate and clarify in a timely fashion, and that is what has occurred in this case.

11. As to the third and final ground, which attacks the evidence upon which the Secretary of State decided to introduce the new contract, I also reject this complaint. In my judgment the Secretary of State had a broad margin of discretion under the relevant legislation to introduce the new contract. That contract is said, by the Secretary of State, to serve a multiplicity of purposes only one of which is to assist in addressing problems related to increased mortality at weekends. And in relation to that particular issue, whilst the Secretary of State acknowledges that there is evidence going both ways on the complex issue of weekend mortality rates and the extent to which the new contracts will assist in reducing any such problem, he is entitled to accept that there is a body of cogent and authoritative evidence indicating that an increase in the availability and deployment of experienced doctors at the weekend will make some, material, contribution to the problem of weekend mortality rates. Further, as I have already explained the Secretary of State has acknowledged that he will mandate a review of the contract in 2018 and, it follows, make adjustment if necessary. In these circumstances I am satisfied that the Secretary of State acted rationally and lawfully.

Relief

12. It follows from the conclusions that I have arrived at that it would not be appropriate to grant any relief to the Claimant. Nonetheless an important reason which led the junior doctors to embark upon this litigation was their concern that by virtue of the Minister's decision every possible negotiating avenue had in fact been closed off. A significant consequence of this litigation therefore has been that the Secretary of State has taken the opportunity to put his position beyond doubt. Without granting any declarations I can nonetheless, formally, record the position of the Secretary of State as articulated in these proceedings.

13. First, the Secretary of State does not purport to exercise any statutory power that he may have to compel employers within the NHS to introduce the proposed terms and conditions.

14. Second, he acknowledges, therefore, that in principle individual employers are free to negotiate different terms with employees.

15. Third, he considers that the scope for individual negotiation may be limited because he has achieved consensus with the employers that the proposed new terms and conditions represent a fair and workable basis upon which to proceed to introduce a consistent, nationwide contract.

16. Fourth, the Secretary of State reserves the right, should problems arise in relation to implementation, to consider the exercise of such statutory powers of compulsion as he has in order to achieve a consistent and uniform introduction of terms across the NHS.

Conclusion

17. Ultimately however for the reasons that I give in full in the written judgment the application for judicial review does not succeed.

Mr Justice Green