

By email

**Private Office**  
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21 September 2016

Dear colleague

## **Junior Doctors Whistleblowing Third Party Rights**

You may be aware that we propose to make a specific contractual revision to the arrangements between HEE and your organisation as the employer of, or host to, doctors and dentists in training (postgraduate trainees). This change is required to address one issue of the relationship of HEE and postgraduate trainees. It is to be backdated to take effect on 3rd August 2016 to coincide with the recently commenced rotation.

Within the negotiations of the junior doctors' contract in England, a distinct issue has received a lot of attention; namely whether trainees can take claims in the Employment Tribunal against HEE for whistleblowing detriment. HEE does not currently fulfil the definition of an employer within the Employment Rights Act and whistleblowing claims can only be made against this classification of 'employer'.

Following discussions between the BMA, NHS Employers (representing NHS bodies) and HEE, a solution has been identified. Although this issue featured in the recent ACAS negotiations and has received some publicity in this context, it is important to note that it does not amount to an amendment to the terms and conditions of postgraduate trainees' employment.

The proposed solution is to grant, as a third party right, the ability for postgraduate trainees to advance claims as a breach of contract directly against HEE. This means that if a trainee considers that they have suffered whistleblowing detriment by HEE they can mount a claim in the Courts. This change does not detract from the current relationship between trainees and employers and any whistleblowing cases against employers will remain available to be advanced in the Employment Tribunal.

I attach the contract by which this third party right will be provided. HEE has a contractual

relationship with you in providing trainees and this contract is an addition to that relationship which provides clarification as to the respective responsibilities. In short, the third party right will avoid the current circumstances where alleged impropriety on the part of HEE cannot be pursued against HEE, but may be against the employer. It also provides for the indemnity of HEE in the alternative where HEE is pursued, but responsibility lies with the employer.

These negotiations have taken some time and involved careful consideration of the circumstances. We have worked closely with partners in NHS Employers and the Department of Health, as well as the BMA.

We are happy that this resolution has been found because even if the numbers of cases are low, and the circumstances rare, the effect of the perception that HEE's actions could not be challenged is counterproductive. In addition, it helps achieve a further recommendation of the Francis inquiry to improve awareness of whistleblowing. The agreement also applies to postgraduate dental trainees and the BDA have also been involved in the negotiations which have led to this agreement.

The third party right will be granted to all trainees and does not require the agreement of individual employers or hosts. Nevertheless, we consider it important that you are aware of and agree to the implementation of the attached terms in full.

I know you will all agree with us that it is important to illustrate that everyone involved in postgraduate education, from whatever perspective, works openly and collaboratively to minimise whistleblowing detriments and to increase the confidence of those who are encouraged to raise issues if they find them.

I ask that you return the countersigned agreement and I look forward to hearing from you.

If you have any queries in this regard please contact your local Postgraduate Dean.

Yours sincerely,



Ian Cumming  
Chief Executive, Health Education England



Ellen McCourt,  
Chair of JDC, British Medical Association



Charlie Massey  
Director General for Acute Care and Workforce, Department of Health



Danny Mortimer  
Chief Executive, NHS Employers