Junior Doctors Industrial Action – NHS Employers Webinar

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Agenda

- Introduction – Paul Wallace
- Update on contract negotiations – Paul Wallace
- Overview of NHS Employers website and support
- Hot legal topics – Capsticks
- Questions - All
Hot Legal Topics - The Junior Doctors’ Ballot
Practical issues to consider

- Contingency planning
- Lawful action
- Ballot requirements
- Payments
- Helpline details
Contingency Planning (1) – Exemptions?

- No right as such for an employer to enforce exemptions
- But Section 240 establishes that an individual commits a criminal offence if they
  - Wilfully or maliciously break a contract
  - Knowing or having reasonable knowledge to believe a probable consequence will
  - Endanger life or cause serious bodily injury
- Key action now – negotiate agreement on which areas of service will in practice be exempt from action; or how service will be maintained
Contingency Planning (2) - Actions

- Early BMA discussion of likely impact at a local level
- May ask staff if they intend to strike to help with contingency planning and explanation of what will happen
- Consultant cover and who can take part
- Protocol for ensuring critical and emergency care is not disrupted
Contingency planning (3) – arranging cover

- Agency workers
  - Unlawful for an agency to supply a worker to cover work normally performed by the striking worker
  - What about pre-booked agency staff?
- Fellow employees and bank workers
- Volunteers
- Workers from another Trust
The BMA is protected against legal action for calling its members out on strike provided:

- There is a “Trade Dispute”
- Its members are balloted in the required manner
- Employers are given notice of ballot in the correct way
Is There a Trade Dispute? (1)

*Wide definition which includes*

- **Terms and conditions of employment**
- Engagement, termination or suspension of one or more workers
- Allocation of work
- Matters of discipline
- A worker’s trade union membership
- TU officer facilities
- TU recognition and representation
Must be with the particular employer. BUT

Where the dispute is with the Government, a dispute with a Minster of the Crown shall be treated as a dispute between the worker and their employer if

- the dispute has been referred for consideration by a joint body on which the Minster is represented
- the dispute cannot be settled without the Minister exercising his power
Specific Balloting Requirements

- Independent scrutineer
- Entitlement to vote accorded equally to all those who it is believed will be induced to take industrial action
- Separate ballots for each workplace
- Ballot papers: The question
- Secret postal ballot
- Notice to employer at 7 and 3 day mark – notice of ballot; ballot paper itself
Notice of Ballot (1)

- Information about employees:
  - Numbers
  - Categories
  - Workplaces
  - ... Not names

- Some issues arising so far with accuracy of data: incorrect workplaces; balloting of staff / Trust grades
Notice of Ballot (2): Accidental Failures

- Is failure accidental and unlikely to affect result of ballot?

- *British Airways v Unite* [2010] – not small, accidental or small scale: 1,000 ballot papers sent to members ineligible to vote

- *RMT v Serco* [2011] – accidental balloting of two members ineligible to vote
What Is Action Short of A Strike?

- A work to rule (i.e. only fulfilling the letter of your contract and job description)
- A go slow
- An overtime ban
- A withdrawal of co-operation to carry out certain duties e.g. only undertaking emergency procedures
- Not carrying out certain tasks on any given day
- Refusing to train or supervise colleagues
- Not attending meetings (e.g. clinical team meetings)
- Refusing to cover a colleague’s tasks
Is Action Short of A Strike Covered by the BMA Ballot?

- Yes

- As a result, junior doctors are protected from action which the Trust could otherwise take for breach of contract

- Relevant factors are (a) contingency cover (b) how junior doctors should be paid
Do We Have to Pay If There is Only Partial Performance of Work? (1)

The options are:

1. Accept partial performance and pay normally
   - Consider only if minimal disruption anticipated?

2. Qualified acceptance of part performance making clear that you will deduct a proportion of the doctor’s wage to reflect that part of the job not being done
   - Consider how to quantify the amount to be deducted
Do We Have to Pay If There is Only Partial Performance of Work? (2)

3. **Reject part performance and pay nothing for any day(s) of such action**
   - The Trust should make clear in advance that the doctor is not required to work unless s/he works normally and that if they come in to work it will be on a voluntary basis.
Capsticks Helpline details

- FAQs and guidance (www.nhsemployers.org/juniordoctors)
- Telephone contact: 020 8780 4756 – 9 - 5.30pm
- Email contact: juniordoctorsdispute@capsticks.com