

Record No.

Between/

THE HIGH COURT

Plaintiff

AND

AND

HEALTH SERVICE EXECUTIVE

Defendants

TERMS OF SETTLEMENT

Generic copy

WHEREAS

- (a) In excess of 700 hospital Consultants have commenced proceedings against their employers and other parties alleging a failure to pay remuneration and/or pension in accordance with the terms of their contract of employment, the Consultants' Contract 2008.
- (b) A significant number of Consultants are members of the Irish Hospital Consultants Association or the Irish Medical Organisation (**"the Professional Organisations"**).
- (c) The High Court directed that the 10 cases set out at Appendix One hereto should act as lead cases in respect of such litigation.
- (d) The parties in the lead cases have agreed upon Terms of Settlement.
- (e) The arrangements set out in the said Terms of Settlement are to be made available to the other litigating Consultants who fall within the Terms of Settlement, for acceptance or rejection by them.
- (f) In view of the commitments made by the [Irish Hospital Consultants' Association] / [Irish Medical Organisation] in these Terms of Settlement, it is appropriate that it should be a party to these Terms of Settlement.
- (f) The arrangements set out in the said Terms of Settlement are to be made available to other non-litigating Consultants who fall within the Terms of Settlement, for acceptance or rejection by them.

The parties have agreed to settle and compromise the proceedings referred to in the recitals hereto on the following terms:

1. For the purposes of these Terms of Settlement the following definitions shall apply.

“corrected pension entitlements” means payment in full of all elements of an eligible Consultants’ pension entitlements calculated on the basis of and having regard to the provisions of version 1 of the Consultants’ Contract 2008, having regard to applicable deductions under law including the FEMPI legislation.

“corrected remuneration” means payment in full of all elements of a Consultant’s remuneration as provided and specified in version 1 of the Consultants’ Contract 2008, having regard to applicable deductions under law including the FEMPI legislation.

“date of settlement” means the 15th of June 2018.

“eligible Consultant” means a Consultant who is or was employed under the Consultants’ Contract 2008 and who first signed any version of such a contract in the Period or who first signed such a contract after the Period but had been successfully interviewed for the relevant post in the Period.

The term includes:

- (i) Consultants who continue to work in the Public health service, whether under the Consultants’ Contract 2008, or otherwise;
- (ii) Consultants who retired from the Public health service subsequent to signing the Consultants’ Contract 2008;
- (iii) Consultants who left (ceased service in) the Public health service subsequent to signing their Consultants’ Contract 2008 (whether or not they are now retired) save that such Consultants shall not be entitled to the terms of the Consultant Contract 2008 in respect of any new term of employment after the period. For the avoidance of doubt Consultants who take a career break have not ceased service by reason thereof.

- (iv) Consultants who signed any version of the Consultants' Contract 2008 after the Period but prior to the settlement date, and have not broken service, having previously held either a 1991 or a 1997 Common Contract (or held a permanent Consultant post in the public service of another EU Member State) immediately prior to signing the Consultants' Contract 2008.
- (v) Consultants who on 30th September 2012 were employed on a fixed term or specified purpose Consultants' Contract 2008 for a continuous period of at least 6 months immediately prior to that date and who subsequently without a break in service executed a permanent version of the Consultants' Contract 2008 as referenced at Appendix 2 prior to the date of settlement. All other Consultants who signed fixed or specified purpose contracts are excluded.

"Later Entrant" means an eligible Consultant who first signed the Consultants' Contract 2008 on or after 1st January 2011 and who was subject to the 10% reduction applicable to all new entrant public servants from that date.

"lead Consultant" means a Consultant who is an eligible Consultant and is a plaintiff in one of the lead cases.

"litigating Consultant" means an eligible Consultant who has commenced proceedings prior to the 14th June 2018 alleging a failure to pay the appropriate rate of remuneration or rate of pension in accordance with the terms of the Consultants' Contract 2008 and who is not a lead Consultant.

"non-litigating Consultant" means an eligible Consultant who has not commenced proceedings prior to the 14th June 2018 alleging a failure to pay the appropriate rate of remuneration or rate of pension in accordance with the terms of the Consultants' Contract 2008.

“pension entitlements” means all elements of pension payable under any applicable pension scheme including, but not limited to,

- (i) a pension lump sum
- (ii) retirement benefit
- (iii) spousal or dependants benefit
- (iv) death in service or death in retirement payments.

“period” means the period of time between the 25th July 2008 and the 30th September 2012 (inclusive).

“Public Health Service” meaning those public service bodies falling within the ambit of the Financial Emergency Measures in the Public Interest Acts.

“remuneration” means any and all sums payable to Consultants pursuant to version 1 of the Consultants’ Contracts 2008 including, but not limited to,

- (i) Annual salary as set out and defined in paragraph 23 of the said contract.
- (ii) B and/or C Factor payments
- (iii) On-call, structured weekend or other arrangements to which separate payments attaches pursuant to any of the terms of the said contract
- (iv) Clinical Directors Allowance
- (v) Payments during periods of approved paid leave
- (vi) Rest days for which payment was made to a Consultant during the period of retrospection (in lieu of the provision of rest days),

save that Later Entrants shall remain subject to the 10% reduction of salary and allowances applicable to all new entrant public servants from that date while they remain on a point on the scale to which the said reduction applies and ‘remuneration’ shall be construed accordingly.

“retrospective payment of remuneration” means 55% of the difference between the remuneration actually paid to a Consultant during the period of

retrospection and the remuneration which he or she would have been paid if the provisions of paragraph 23 of version 1 of the Consultants' Contracts 2008 had been properly and fully applied to him or her, including payment of all increases of whatever nature provided for therein. Retrospective payment shall have regard to applicable deductions under law including FEMPI legislation and the deductions applicable to Later Entrants. The calculation of the difference shall exclude the elements of remuneration set out at number (ii) and Structured Overtime at the rate of time and a half after 1st July 2013 which shall from that date be paid at time and a quarter in the definition of remuneration above.

“retrospective payment of pension entitlements” means 55% of the difference between the pension entitlements actually paid to a Consultant during the period of retrospection and the pension entitlements which he or she would have been paid during such period if such entitlements had been calculated having regard to the level of remuneration to which he or she was entitled pursuant to the provisions of paragraph 23 of version 1 of the Consultants' Contracts 2008, including any increases of whatever nature provided for therein. Retrospective payment shall have regard to applicable deductions under law including FEMPI legislation and the deductions applicable to Later Entrants. The calculation of the difference shall exclude the elements of remuneration set out at number (ii) and Structured Overtime at the rate of time and a half after 1st July 2013 which shall from that date be paid at time and a quarter in the definition of remuneration above.

“period of retrospection” means the period during which an eligible Consultant is entitled to receive retrospective payment of remuneration or retrospective payment of pension entitlements pursuant to paragraph 3 hereof.

“Version 1 of the Consultants' Contract 2008” means the Consultants' Contract 2008 containing the version of paragraph 23 contained in Appendix 2 hereto.

2. An eligible Consultant who has accepted the offer within the specified timeframe shall be entitled to full correction of remuneration or full correction of pension entitlements as the case may be effective from the Date of Settlement but payable from 1st January 2019. Payment of corrected remuneration for the period from the Date of Settlement up to the date of commencement of payment of corrected remuneration shall be made no later than the 1st March 2019.
3. An eligible Consultant who has accepted the offer within the specified timeframe shall be entitled to retrospective payment of remuneration in respect of the period of employment and/or retrospective payment of associated pension entitlements as follows
 - (i) Lead Consultants and litigating Consultants: for a period commencing up to six years prior to the date of issue of proceedings and ending on the Date of Settlement
 - (ii) Non-litigating Consultants: for a period of up to six years prior to the Date of Settlement and ending on the Date of Settlement.
4. All sums due by way of retrospective payment of remuneration and/or retrospective payment of pension entitlements shall be paid to the eligible Consultant who has accepted the offer within the specified timeframe on or before the following dates and in the following amounts:
 - (i) 40% on or before 1st June 2019; and
 - (ii) 60% on or before 1st March 2020,

and such sums shall be paid net of all taxes or any other deductions required by law.

5. It is noted that for the purposes of the Public Service Pay and Pensions Act 2017 the “basic pay” of eligible Consultants immediately prior to the enactment of the Financial Emergency Measures in the Public Interest (No 2) Act 2009 was and is the full corrected remuneration applicable under the provisions of the 2008 Consultants Contract. Nothing in this Settlement shall remove or prejudice the right of eligible Consultants to receive restorations of pay pursuant to the provisions of the 2017 Act or the Financial Emergency Measures in the Public Interest Act 2015 or otherwise.
6. For the purposes of calculating the pension entitlements of eligible Consultants who retire from the public health service within three years of the Date of Settlement, their remuneration shall be treated as, and deemed to be, the corrected remuneration payable pursuant to the provisions of the Consultants’ Contract 2008, in accordance with applicable pension rules.
7. Each lead case shall be settled and compromised on the terms set out herein and an Order made therein in the terms of the draft Order set out at Appendix 4.
8. A litigating Consultant who has served or serves proceedings shall be offered the opportunity to compromise his or her proceedings on the basis of the terms set out in this Settlement providing such proceedings are served within 14 days of the date of settlement. Such offer shall be made in writing by a solicitor for any of the Defendants to the Solicitor for the Consultant on or before 26th October 2018. The Consultant shall have a period of six weeks to accept or reject the offer. In exceptional cases an application to extend such period can be made to the National Director of Human Resources, Health Service Executive whose consent shall not be unreasonably withheld. If the National Director refuses to grant such extension, the Consultant can apply to Court to extend the time for acceptance. Acceptance of the offer shall be by way of the execution of a Letter of Consent and Release in the terms set out at Appendix 4 hereof. Upon acceptance of the offer, an Order shall be made as soon as practicable thereafter striking out the

proceedings and providing that the reasonable costs of the proceedings up to the date of acceptance shall be paid by the Minister for Health and/or Minister for Finance and/or Minister for Public Expenditure and Reform, as appropriate having regard to the named ministerial defendants, and in circumstances where none of the foregoing is a party to the proceedings, the Minister for Health, to be taxed in default of agreement. A Consultant who fails or refuses to accept the offer shall be free to proceed with his or her litigation. In circumstances where the Consultant and his or her employer cannot agree the amount due to the Consultant under the Terms of Settlement, he or she shall be bound by and entitled to rely upon the Terms of Settlement including in any process or proceedings. Nothing in this paragraph shall remove the entitlement of a Consultant to maintain a claim which is permitted by the provisions of paragraph 14.

9. The Defendants will contact such existing Consultant employees as they believe are non-litigating Consultants to circulate the terms of settlement within eight weeks of the date of settlement. A non-litigating Consultant shall apply in a prescribed form to be offered the opportunity to receive the benefits of these terms of settlement. Such applications will be made by the 14th of September 2018. Offers shall be made in writing by on or on behalf of the Health Service Executive on or before 26th October 2018. The Consultants shall have a period of four weeks to accept the terms of the said offer. In exceptional cases an application to extend such period can be made to the National Director of Human Resources, Health Service Executive whose consent shall not be unreasonably withheld. Acceptance of the offer shall be by way of the execution of a Letter of Consent and Release in the terms set out at Appendix 5. In circumstances where the Consultant and his or her employer cannot agree the amount due to the Consultant under the Terms of Settlement, he or she shall be bound by and entitled to rely upon the Terms of Settlement including in any process or proceedings.

10. In the case of an eligible Consultant who has died prior to the date of the execution of these Terms of Settlement, but would have been entitled to payments in accordance with the provisions thereof, such payments subject to application by his/her Executors/Personal Representatives/surviving spouse, dependent or next of kin in accordance with the terms set out above shall accrue to the benefit of his or her Estate and any necessary Letter of Consent and Release may be executed by his/her Executors/Personal Representatives.
11. The relevant signatory Ministers sanction these Terms and the implementation of these Terms of Settlement. The making of payments due thereunder is not subject to any further Ministerial approval and/or sanction.
12. For the avoidance of doubt, the making of payments to which Consultants are entitled under these Terms of Settlement is not subject to any condition or requirement other than the provision of an appropriate Letter of Consent and Release as may be required in accordance with the terms of paragraphs 8, 9 and 10 hereof.
13. Having regard to, and in consideration of, the provisions of these Terms of Settlement, the professional organisations shall furnish a letter of confirmation to the Minister for Health in the terms set out in Appendix 6 hereto.
14. The parties acknowledge and agree that acceptance of these Terms of Settlement by an eligible Consultant shall not remove or prejudice the right of such a Consultant to maintain a claim in respect of a matter other than an alleged failure to pay or provide full remuneration or full pension entitlements in accordance with provisions of the Consultants' Contract 2008 as claimed in the "lead cases", for example a claim in relation to rest days, holiday entitlements, sick pay, structured weekend pay and claims in respect of Clinical Directors' allowance.

15. Without prejudice to the generality of paragraph 14, the within terms of settlement are in full and final settlement of all or any claims that the lead Consultants or any litigating or non-litigating Consultant who accepts an offer to receive the benefits of the terms thereof, may have in respect of an alleged failure to pay or provide full remuneration or full pension entitlements in accordance with provisions of the Consultants' Contract 2008 including but not limited to any claim pursuant to the Payment of Wages Act 1991 as amended.

16. The parties hereto acknowledge the following:

The IMO, the IHCA, Consultants, the Department of Health, the HSE and health employers are committed to the provision of a public health service of the highest quality and recognise that Consultants' Contract 2008 is fundamental to such provision.

All eligible Consultants who settle their claims under this agreement affirm the terms of the Consultants' Contract 2008. The parties accept the importance of compliance by all parties with the terms of the Consultants' Contract 2008 with a view to ensuring the more timely delivery of effective care to patients. These include, in particular, terms relating to the scope and extent of private practice on-site and off-site, the ratio of public to private practice, working hours, different work patterns, work scheduling, and arrangements for monitoring and audit of same.

The parties recognise the need for mutual trust, confidence and respect in giving effect to the terms of the Consultants' Contract 2008.

The parties reaffirm the mutual obligations set out at Section 4 b) and the regulation of private practice provisions set out at Section 20 of the Consultants' Contract 2008 and affirm that they shall co-operate in giving effect to such

arrangements as are put into place to verify the delivery of the Consultant's contractual commitments.

Dated this day of 2018.

Signed: _____

Witnessed: _____

Solicitor for the above named lead Plaintiff

Signed: _____

On behalf of the Minister for Finance

Signed: _____

On behalf of the Minister for Public Expenditure and Reform

Signed: _____

On behalf of the Minister for Health

Witnessed: _____

Chief State Solicitors

Solicitors for the above named Ministers

Signed: _____
On behalf of the Health Service Executive

Witnessed: _____
Philip Lee Solicitors
Solicitors for the HSE and

Signed: _____
On behalf of the [Appropriate Professional Organisation]

APPENDIX 1

List of Lead cases

APPENDIX 2

Paragraph 23 of 2008 Consultants Contract as per Consultant Contract 2008 at 25th July 2008:

23) Salary and other payments

- a) The Consultant's annual salary shall be as follows (in June 2007 terms) and shall be implemented on a phased basis as set out at d) below:
 - i) for Type A Contracts a salary scale in four points as follows will apply: €222,000, €228,000, €234,000, €240,000;
 - ii) for Type B Contracts a salary scale in four points as follows will apply: €205,000, €210,000, €215,000, €220,000;
 - iii) for Type B* Contracts a salary rate of €190,000 will apply.
 - iv) for Type C Contracts a salary scale in four points as follows will apply: €160,000, €165,000, €170,000, €175,000.
- b) The annual salary for Consultant Academics shall be as follows:
 - i) For a Professor (Type A Contract) a salary scale in four points as follows will apply: €272,860, €280,240, €287,620, €295,000.
 - ii) For a Professor (Type B Contract) a salary scale in four points as follows will apply: €265,650, €272,100, €278,550, €285,000
 - iii) For a Professor (Type B* Contract) a salary of €255,000 will apply.
 - iv) For a Professor (Type C Contract) a salary scale in four points as follows will apply: €219,450, €226,300, €233,150, €240,000

- c) All serving Consultants who take up the offer of the Consultant Contract 2008 by 31st August 2008 will be assimilated to the maximum point of the applicable new salary scale.
- d) The salary scales at a) and b) above will be phased on the following basis:
 - i) a 5% increase on the Consultant's existing (June 2007) rate from the 14th of September 2007;
 - ii) half the balance¹⁶ from 1st June 2008;
 - iii) the remaining balance from 1st June 2009.

These rates will attract a 2.5% Towards 2016 general round increase from the 1st of March 2008 and a further 2.5% Towards 2016 general round increase from 1st September 2008.

- e) An allowance of €50,000 per annum will be paid to those Consultants appointed as Clinical Directors.
- f) Saturday, Sunday and Public Holidays:

Structured on-site attendance at weekends and on public holidays will be subject to the following premium payments:

- i) Time + ½ on Saturdays
- ii) Double time on Sundays and Public Holidays

- g) Continuing Medical Education

The CME allowance will be increased to €3,000 with effect from the 1st June 2008. Payment will continue to be on a vouched basis, to be adjusted in line with the Consumer Price Index (C.P.I.). This allowance may be carried over annually for a maximum of five years.

- h) Telecommunications

The Consultant shall be reimbursed either the cost of home or mobile phone rental.

- i) B Factor (On-Call) Payments

An increase in the flat annual payment to €6,000 will take effect from the 1st June 2008. The payments for more onerous rosters will increase by 5% from the same date.

- j) C Factor (Call-Out) Payments

The Consultant will be eligible for payment on a per call-out basis for the provision of on-site services when:

- i) rostered for on-call duty and is contacted by another medical practitioner in the hospital, by a senior nurse or other member of staff specifically

¹⁶ The term 'half the balance' refers to the difference between the 14th September 2007 rate and the fully implemented salary scale.

designated for that purpose and attends on-site to provide emergency services;

- ii) rostered for on-call duty and who, in the exercise of his/her professional judgment, attends on-site and performs clinical work of an urgent nature or carries out urgent diagnostic or therapeutic procedures;
- iii) requested by another Consultant to provide on-site services in public hospital / agency to which the Consultant does not have a scheduled commitment and where such services cannot be provided within the Consultant's scheduled commitment as adjusted by the Clinical Director / Employer. This payment shall be on the basis of the equivalent payment per call-out.

Revised structures and rates for C Factor payments from the 1st June 2008 are as follows:

	<i>First 30 Call-Outs</i>	<i>31-120 Call-Outs</i>	<i>121 Call-Outs or More</i>
Per Call-Out (Hourly rate or part thereof):	€100	€150	€200
If Call-Out Occurs After Midnight (hourly rate or part thereof):	€125	€187.50	€250
Annual limit €30,000			

With the exception of the payments referred to at sub-paragraphs g) and h) above the foregoing rates will be increased in line with general round increases under National Pay Agreements.

APPENDIX 3

Draft Order in Lead cases

“The Court having received the Terms of Settlement made between the parties herein dated the 15th day of June 2018 which is set out in the Schedule to this Order the Court dismisses the claims and counterclaims save for the granting of orders in the following terms.

A Declaration that the Plaintiff shall be entitled to be paid corrected remuneration as provided for in the Terms of Settlement set out in the Schedule to this Order.

A Declaration that the Plaintiff shall be entitled to retrospective payment of remuneration as provided for in the Terms of Settlement set out in the Schedule to this Order.

The Plaintiff shall be entitled to an Order for Costs as against the Defendants, such costs to include all reserved costs, costs of motions issued and/or court hearings not covered by specific costs orders, including costs of discovery (including making discovery), costs of counterclaims, outlay (including refresher fees of counsel, the trial having commenced on 5th June 2018) for the period of negotiation of this settlement from June 6th to 15th June 2018), to be taxed in default of agreement.

The proceedings shall be struck out with liberty to the parties to apply in relation to any issues arising in relation to the implementation of this Order and the Terms of Settlement.”

APPENDIX 4

DRAFT Letter of Consent and Release to be signed by litigating Consultants

“To The HSE

Re: Litigation concerning the level of remuneration and pension benefits payable to Consultants pursuant to the 2008 Consultants Contract.

Dear Sir,

I refer to your Letter of Offer of the ____ day of _____ 20 in regard to the above. I confirm that I am willing to settle and compromise my proceedings on the basis of the Terms of Settlement arrived at in the lead cases in relation to Consultants' entitlements under the Consultants' Contract 2008.

I note and accept that I am bound by clause 16 of the Terms of Settlement to the extent that that clause applies to individual Consultants.

Finally, I confirm that I have taken such legal advice as I consider appropriate prior to signing this Letter of Consent and Release.

Yours faithfully

Consultant: _____

Witness: _____

Solicitor: _____”

APPENDIX 5

DRAFT Letter of Consent and Release to be signed by non-litigating Consultants

“To The HSE

Re: Litigation concerning the level of remuneration and pension benefits payable to Consultants pursuant to the 2008 Consultants Contract.

Dear Sir,

I refer to your Letter of Offer of the ____ day of _____ 20 in regard to the above.

I confirm that I am willing to accept the offer to apply the provisions of the Terms of Settlement to me. Further I confirm that I am agreeable to be bound by the provisions of the said Terms of Settlement insofar as same relate to my appropriate remuneration and my appropriate pension entitlements based upon the Consultants' Contract 2008.

I note and accept that I am bound by clause 16 of the Terms of Settlement to the extent that that clause applies to individual Consultants.

Finally, I confirm that I have taken such legal advice as I consider appropriate prior to signing this Letter of Consent and Release.

Yours faithfully

Consultant: _____”

APPENDIX 6

Draft Letter of Confirmation to the Minister for Health

“Re: Litigation in relation to remuneration and pension entitlements of Hospital Consultants under the 2008 Consultants Contract

Dear Sir,

I refer to the above matter and to the Terms of Settlement which were arrived at in the lead cases in relation to Consultants’ remuneration and pension entitlements under the 2008 Consultants Contract. I confirm, that in consideration of and having regard to, the said Terms of Settlement, the (name of professional organisation) will

- (a) recommend, and use its best endeavours to ensure, that its members settle and compromise any outstanding proceedings seeking arrears of remuneration and /or pension entitlements on the basis of the said Terms of Settlement.
- (b) recommend, and use its best endeavours, to ensure, that its members who have not commenced proceedings, accept an offer to apply the said Terms of Settlement to them.
- (c) not take any measures to support any outstanding litigation or any new litigation, seeking arrears of remuneration or pension entitlements pursuant to the 2008 Consultants Contract, to the extent that same are included by way of claim in the “lead cases”, save as may be necessary and required to ensure implementation of the terms of the said Settlement.

Finally, the (professional organisation) confirms that it is committed to the provision of a public health service of the highest quality and recognises that it is bound by clause 16 of the Terms of Settlement to the extent that that clause applies to [insert organisation]

Yours faithfully,

For and on behalf of the (Professional Organisation)”