

healthmatters



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Welcome

to the first edition of our new publication, healthmatters.

We have restructured Birketts' Public Sector team to provide greater focus on the individual sectors of health, education and local government. We will continue to publish Public Opinion - many issues we deal with in that magazine are relevant to all parts of the public sector - but separate publications for the three main sectors allow us to concentrate on issues of particular relevance to you.

To start our Health team's new venture we have compiled a list of topics that we hope will appeal. Our aim is to present a punchy overview of the main points: should you require further information then please contact the author (whose details appear at the foot of the article) or, alternatively myself or Richard Eaton (contact details opposite). Richard is our Head of Health and his background is in public law, human rights and judicial review as well as planning. Richard has acted for a number of NHS trusts and PCTs on sensitive matters including challenges to decisions to close facilities and in connection with inquiries into serious incidents.

Our first issue has an NHS theme in the main. Future issues will see us addressing topical points for the care home sector and private contractors within the health market.

We open with an article on the NHS Constitution, further bolstered by a recent announcement that legislation will be introduced to give a legal right to patients to receive private care where they fail to receive the required treatment from the NHS within the 18 week target period. We await the details (and the debates) with interest. We also deal with the proposed EU Directive on cross - border healthcare. The impact of the Directive could be significant on funding and planning of services as well as providing opportunities for those in the private sector. We will return to this subject in greater detail through other media. We end this issue with two articles dealing with topical employment issues in the NHS - Lottie Seaborn looks at legal representation at disciplinary hearings and Mat Newnham considers compensation payments to outgoing senior employees.

I hope you enjoy reading the articles. We would be pleased to receive feedback on this issue or your suggestions for articles for future issues.

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NHS Constitution – A lawyers’ charter?

2009 has seen the introduction of the NHS Constitution for England after a comprehensive consultation exercise.

The Constitution is a formal document and seeks to encapsulate the objectives of the NHS, the rights and responsibilities of healthcare providers and the guiding principles which govern the service. The Constitution is open in declaring rights that will be legally binding, but does the document create new rights where none existed before?

The Constitution handbook explains that the Constitution itself is a “declaratory document” that does no more than articulate existing rights and duties in one place. Such existing rights derive from an evolved body of common law, UK Statute, and EU Law. It is, perhaps, timely that the Constitution should arrive to clarify the extent of such rights given, for instance, the case law on the applicability of the Article 2 duty from the European Convention on Human Rights. But such rights are evolving and the Constitution does not provide the detail of healthcare rights and duties in encyclopaedic fashion. It is not really then a comprehensive declaration of legal rights.

Some areas are likely to be valuable to patients, especially in areas such as GP or Doctor choice or the right to NICE (National Institute for Health and Clinical Excellence) approved drugs. Other rights, such as the right to free NHS Care, are more a restating of long-established principles of the NHS. The “legally enforceable rights” also have to be considered alongside statements of non binding policy pledges on which legal reliance is not to be placed.

So, do these new rights give rise to the ability to sue, and if so, who may be sued: GPs, hospitals, PCTs or the government directly? Just such a question was put to the former health minister Alan Johnson in a recent BBC interview. The answer was not quite as specific as the question required, but he replied by indicating that the patient would be able to take their rights to the courts for enforcement. However, the Constitution and Health Act will not provide specific sanctions for breach. It is, perhaps, similar to the statutory duties NHS bodies are under currently, the breach of which rarely gives rise to an individual cause of action.

The matter is made more uncertain by the language of the Constitution, which requires NHS organisations to “strive to” and “have regard to” and “take account of” the provisions and standards within it. These criticisms of imprecise language were highlighted by many in the consultation process.

So what then is the route to court, in the absence of any directly enforceable patient rights? It is anticipated that the first port of complaint would be the complaints procedure of the organisation itself or, if necessary, to the Health Service Ombudsman. It would also be open to a complainant to seek a judicial review of a decision made in any part of the NHS. It is surely this area where the Administrative Court is likely to see a significant number of cases seeking to clarify the precise scope of “taking account” and other such expressions. Each case will turn on its facts, but well established principles of administrative law will allow the courts to apply a supervisory jurisdiction when necessary.



The threshold of intervention, however, is high. Proving that an organisation failed to have regard to the Constitution is likely to be a difficult burden to discharge in all but the most clear cut of cases. Even then, because the duty is often only to have regard to the Constitution, it is possible those organisations that wish to depart from the principles of the Constitution might do so lawfully if they have considered it but have sufficiently well expressed reasons for departing from it. We shall see...

by
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Partner



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The proposed EU Directive on cross-border health care

Under Article 3(1)(p) EC Treaty the goals of the EU include contributing to “the attainment of a high level of health protection”. Whilst Article 152 EC states that the EU should seek to improve public health, it also recognises that EU steps in this area must be complementary to and fully respect national health care responsibilities and policies.



The European Court of Justice has, however, in a number of landmark decisions, used the prohibition against restrictions on the right to provide services within the EU (Article 49 EC) to rule that patients in one member state may seek health care in another, a right to receive rather than to provide services on a cross-border basis. According to the European Court, the patient may then recover the cost of treatment from the state in which he lives at the rates applicable under the health care scheme in operation in his home state. The health authorities in his home state may only demand prior approval for hospital care and then only if the authorisation is objectively justifiable and proportionate, e.g. it avoids “undue delay”.

Judicial decision making is no substitute for detailed procedural rules if EU citizens are to receive the full practical benefits of cross-border health care. There was a limited political appetite in member states for these judicial developments given the budgetary, resource planning and administrative burdens which the court decisions entailed. Continuing demand by home state authorities for prior authorisation, lack of information, procedural problems and delays meant that patients were either unaware of or unwilling to take advantage of these rights.

A proposed new Directive has been introduced by the European Commission which attempts to establish patient rights to cross-border health care on a clearer basis. The key provisions are that EU citizens would have the right to seek non-hospital care, including dental and optical care, in another member state without prior authorisation. Member states can require prior authorisation for hospital care, which is defined as involving one night in hospital, where this could have been provided in the home state or if the outflow of patients jeopardises the home state’s finances. Hospital care will also include certain highly specialised and cost-intensive or risky care, details of which are yet to be specified by the Commission.

The patient is required to pay for the care and then seek reimbursement from the home state at the rate which would have been paid under the home state’s health care scheme.

The Directive allows EU citizens to seek either public or private health care in another member state, provided that it is of a type covered by his home state’s national health care scheme.

The Directive seeks to establish member state co-operation in health care relating

to such matters as the transfer of patient data and the recognition of prescriptions written in another member state.

The Directive will not receive much legislative progress until later in the year. It strengthens patients’ rights and will increase health care mobility, but by how much, for whom and at what cost still remains to be seen.

by
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Legal representation at disciplinary hearings

It is well known that employees have the right to be accompanied at disciplinary and grievance meetings by a trade union representative or colleague. Employees will frequently seek permission to be accompanied by some other person, usually a friend or family member. In many cases, there will be no harm caused in allowing this. But what if the employee wishes to be accompanied by a legal representative?

There is no statutory right for an employee to be accompanied by a legal representative. The MHPS framework (“Maintaining High Professional Standards in the Modern NHS”) which governs the management of misconduct, incapability and poor performance among doctors and dentists in the NHS states (at paragraph 22) that a companion “*may be legally qualified but will not be acting in a legal capacity*”. Most NHS Trusts have taken this to mean that doctors and dentists do not have a right to be represented by a lawyer. Ask most employment lawyers and they too will generally say that the participation of lawyers in internal disciplinary and grievance meetings can be counter-productive by transforming the process into a more formal, quasi-judicial one. The recent case of *Kulkarni v Milton Keynes Hospital NHS Foundation Trust [2009]*¹ has nevertheless made it clear that NHS doctors and dentists have the right to legal representation at disciplinary hearings.

Dr Kulkarni started work as a doctor with the Milton Keynes Hospital NHS Trust on 31 July 2007. In August 2007, he was suspended after a patient complained that he had placed his stethoscope beneath her underwear without her consent. The Trust commenced disciplinary proceedings for serious professional misconduct and Dr Kulkarni requested permission from the Trust to bring a legal representative to the disciplinary hearing. The Trust denied him permission on the grounds that its

disciplinary procedures, which were based on MHPS, expressly excluded this right. Dr Kulkarni applied to the High Court for a declaration that the Trust was acting unlawfully in refusing to allow him legal representation and requested an injunction preventing the Trust from continuing with the disciplinary proceedings until permission was given. He argued that the Trust’s refusal amounted to a breach of both the implied term of trust and confidence and Article 6 of the European Convention on Human Rights (“ECHR”). As a public authority the Trust had to act in compliance with the ECHR and Article 6 requires that in a hearing determining civil rights and obligations, a party is entitled to have legal representation. The High Court refused to order the declaration and injunction and Dr Kulkarni appealed to the Court of Appeal.

The Court of Appeal upheld Dr Kulkarni’s claim. Interpreting paragraph 22 of the MHPS, it found that doctors and dentists employed by the NHS are, under the MHPS, contractually entitled to be legally represented at internal disciplinary hearings for misconduct or capability grounds, by a lawyer employed or instructed by a trade union or his defence organisation (in Dr Kulkarni’s case, the Medical Protection Society).

Despite not needing to do so, the Court went on to say that it would have found that Article 6 of ECHR applied where the allegations forming the subject of

disciplinary proceedings were so serious that if proven, they could effectively bar the employee the right to practise his or her profession. In this case, it accepted that Dr Kulkarni would have effectively been unable to work in the NHS again if found guilty of the allegations. The Court said it would have found that Article 6 implies a right to legal representation at disciplinary meetings because the doctor is, in effect, facing a criminal charge. The MHPS is only advisory for Foundation Trusts but any Foundation Trust and indeed more widely, any public sector employer, will need to think very carefully before denying an employee the right to legal representation in view of the Court’s comments on Article 6. It is likely that this case will be appealed so watch this space...!

by
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¹ *Kulkarni v Milton Keynes Hospital NHS Foundation Trust [2009]* EWCA Civ 789

Beware of agreeing “irrationally generous” compensation payments

Earlier this year the judgment from the High Court in the case of *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2009] EWAC 862 was handed down. The case held that a Compromise Agreement entered into between an NHS Trust and its then Chief Executive was unenforceable because the NHS Trust acted outside its powers in agreeing an “irrationally generous” compensation payment.

Public bodies may only do what they are empowered or required to do by statute and **must** exercise their powers in the public interest in a way that is reasonable. Any decision should exclude irrelevant considerations otherwise it is at risk of being *ultra vires* and, therefore, void. Section 26 of the National Health Service Act 2006 provides that “an NHS Trust must exercise its functions effectively, efficiently and economically”. It would appear that Maidstone and Tunbridge Wells NHS Trust (the “Trust”) did not have this provision at the forefront of their thinking when they entered into a Compromise Agreement with Rose Gibb.

Rose Gibb was Chief Executive of the Trust. Ms Gibb was entitled to six months’ notice of termination under the terms of her contract of employment.

In 2006, hospitals under the Trust’s control suffered a significant number of deaths and negative publicity following outbreaks of the superbug – C.difficile. The outbreaks were investigated and measures were recommended by the Health Care Commission. The draft report prepared by the Health Care Commission was highly critical of the leadership of the Trust.

The decision was taken to terminate Ms Gibb’s employment in October 2007.

A severance payment of approximately £250,000 was made by the Trust to Ms Gibb under the terms of the Compromise Agreement. Approximately £75,000 of this represented a payment in lieu of her notice, with the rest being compensation for loss of office. The Compromise Agreement was in a standard form and included provisions stating that Ms Gibb would not pursue any contractual or statutory claims against the Trust in return for the compensation being paid. However, after the publication of the final version of the Health Care Commission’s report (and after the Compromise Agreement had become binding), the Department of Health instructed the Trust to withhold the severance payment until further notice.

Later in 2008, the Department of Health authorised the Trust to pay £75,000 to Ms Gibb in respect of her six month notice period but to withhold payment of the remaining sum.

As a result of the payment being withheld, Ms Gibb brought a claim in the High Court for the £175,000 that she believed she was owed under the Compromise Agreement. The Trust asserted that it was not obliged to pay the compensation payment as it was “irrationally generous” and, as such, fell outside the Trust’s power.

Ms Gibb argued that she was contractually entitled to the sum under the terms of the Compromise Agreement but, if the compensation payment was held to be *ultra vires* (because the Trust had exceeded its powers), she was entitled to equitable

damages of such amount as the Court assessed to be within the Trust’s power.

The High Court held that Ms Gibb’s claim should fail on all counts.

The Judge, when determining the reasonableness of the Trust’s decision to make a severance payment of £250,000 to Ms Gibb, concluded that a reasonable assessment of the liabilities arising on the termination of her contract of employment would have been approximately £145,000. He made this decision by adding together the value of her contractual notice period and the current maximum for unfair dismissal award. Ms Gibb argued that the additional compensation she should have received related to the legal and management costs that the Trust would have incurred had an Employment Tribunal period gone ahead. She also argued that the payment covered the fact that the Trust would not have to face potentially damaging publicity. This argument was rejected by the Judge on the basis that there was no proper financial analysis carried out by the Trust to justify the additional sums.

The Judge made it clear that he felt that the Non-Executive Directors of the Trust had been too generous in the compensation offered to Ms Gibb because of their personal views that she should be awarded for her previous good service. The Judge’s conclusion was that the Compromise Agreement was “irrationally generous” and that it was *ultra vires*.

Ms Gibb’s claim that she should be entitled to equitable damages failed on the basis that Ms Gibb had access to legal advice about the Trust’s reasons for withholding

“Irrationally generous” payments

the payment owed to her before the expiry of the three month time limit for bringing an unfair dismissal claim. There was no evidence to suggest that the Trust had deliberately delayed setting out its legal position until after that deadline to prevent Ms Gibb making a claim. The Judge’s view was that Ms Gibb could have issued a claim for unfair dismissal within the normal time limits on a without prejudice basis to her contentions as to the validity of the Compromise Agreement.

The High Court decision should provide a reminder to all NHS employers about the consequences of agreeing to compensation payments over and above those to which the employee would be entitled under their contract of employment and by statute. Contracts of employment for senior executives in the public sector and, in particular, the NHS often are terminated by simply invoking the notice provisions in the contract of employment without following any kind of disciplinary or capability procedure. Where employers intend to pay increased compensation over and above notice to induce employees not to litigate or make derogatory comments against an employer, it must make sure that it has followed the relevant guidance to ensure that it can make such payments legally. NHS Trusts will need to get relevant Remuneration Committee, Strategic Health Authority, and Treasury (or Monitor in the case of a Foundation Trust) approval before making such payments.

by
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