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1. Federation or Commission?

Opinion is divided on the latest proposals from the Royal College of General Practitioners (RCGP) for GPs to create federations for the purposes of providing a broader range of services, improving access and delivering greater economies of scale.

In a report published in June 2008, "Primary Care Federations: Putting Patients First", the RCGP urges GPs to form federations with staff and other primary care professionals in order to share responsibility for developing better and more patient focused primary care services. The federations would involve patients in designing services which are tailored to the needs of their particular community.

The report is an attempt to "refocus the debate" on the future direction of primary care following Lord Darzi's recommendations for a network of large health centres, or polyclinics (says Professor Stephen Field, Chairman of the RCGP). In the aftermath of the Darzi recommendations there has been, in Professor Field's view, a "battle of words between the government and the British Medical Association" in which the "patient is being forgotten".

The RCGP view is that there is a place for polyclinics but that there is also room for an alternative approach, in which smaller GP practices remain, but join together with others to offer equally effective patient care, sharing "back room" functions and pooling resources to provide services which the individual practices would not be able to provide alone. The RCGP report envisages, in the main, formal legal structures, but acknowledges that there may be a wide variety of governance models.

Dr James Kingsland, chairman of the National Association of Primary Care and an adviser to the Darzi review is reported in GP magazine [27 June] as saying that the review's Primary Care Strategy would not endorse the RCGP model but would urge practices to instead use their commissioning powers to "take control" of primary care.

While it is not Lockharts' place to take a position of principle on the merits of the different proposals, we are well placed to advise on the legal considerations in respect of the various models. We are certainly aware of a number of initiatives along the lines of those envisaged by the RCGP and are increasingly being instructed by practices to put in place legal structures to enable them to work collaboratively in order to deliver more and better services.

We are always happy to discuss your ideas and advise on the most appropriate legal arrangement for your particular situation. In the first place ask Alison Oliver – ao@lockharts.co.uk

2. SDLT Appeal on Transfers of Partnership Property

We have recently been successful in appealing against a decision of HMRC that Stamp Duty Land Tax was payable by a client on a property transaction where the partners had purchased a retiring partner's share. We argued that the transaction fell within the

exemption introduced by Schedule 15 of the Finance Act 2003 and therefore did not attract SDLT. Our client's lender agreed with our understanding of the legislation that transfers of shares in non-investment partnership property are no longer subject to SDLT.

HMRC accepted our argument and as a result cancelled their penalty notice and interest charge for the transfer of the share in the property.

We can not guarantee any result with the HMRC and would need to consider each case on it's own facts.

For further information please contact Puja Patel at prp@lockharts.co.uk

3. Superannuation Leavers and Joiners

a) An employee that joins a practice prior to the new contract and has indicated they do not want to join the superannuation scheme.

Where a practice is an Employing Authority, it is able to offer the Pension Scheme to (a) medical practitioners and (b) officers ("eligible persons"). Where such an eligible person does not wish to participate in the Pension Scheme, they must give notice, in writing, to their employer (i.e. the practice). Such person will be deemed to have left pensionable employment from the date the notice takes effect. A notice takes effect on the first day of the pay period following receipt of the notice by the Employing Authority (Paragraph 1 of Regulation B4).

b) An employee who has joined the practice after the new contract, what should the practice legally do? Offer the scheme or wait until they are asked?

Where an employee joins a practice after the new contract (and the practice is an Employing Authority) they will, on the commencement of their employment,

automatically be included in the scheme (Paragraph 2 of Regulation B1) unless they give notice as per Paragraph 1 of Regulation B4, to opt out of the Pension Scheme.

c) What is the position of an employee who has declined the scheme under 1 or 2 but now wants to join?

Where an employee has opted out of the Pension Scheme (under Paragraph 1 of Regulation B4), but now wants to join, they must give notice in writing to the practice (i.e. the Employing Authority). (This is provided they still meet the eligibility criteria).

They will then be included in the Pension Scheme on the first day of the first pay period after the notice is received.

If a person (who initially opted out of the scheme) gives notice to re-join the Pension Scheme during a period of absence from work for any reason they will not be eligible to join the Pension Scheme (Paragraph 6 of Regulation B4).

4. Apologies Could Avoid Litigation

Surveys carried out by the Healthcare Commission found that out of 140,000 complaints received in one year more than half of the complainants simply wanted an apology, a better explanation or just recognition of the event. The Commission states that it recommends apologies in 23% of the cases that it reviews.

Not many people want to take legal action. It was found by the charity Action Against Medical Accidents that out of the 4,000 people that they advised last year less than one in ten took legal action and half of those people would not have taken this step if they had received an apology or had the right explanation.

For any medical professionals reluctant to give an apology it should be noted that by section 2 of the Compensation Act 2006 that 'an apology, an offer of treatment or other redress, shall not of itself amount to an

admission of negligence or breach of statutory duty.'

The General Medical Council's Good Medical Practice guidelines 2006 states that, 'patients who have a right to expect a prompt, open, constructive and honest response including an explanation and, if appropriate, an apology.' Therefore, if a matter can be resolved by a mere apology this should be best practice.

5. PBC Groups

An increasing number of PCTs are entering into provider arrangements with PBC groups, either on a term basis using APMS Contracts or SPMS Agreements or on a simple 'willing provider' basis where work is carried out from time to time without there being any guarantee of price or volume.

Where groups have formed themselves into legal entities, and the PCTs are offering full services through APMS or SPMS, the provisions of the agreements will, as a minimum, have to reflect the legislative requirements set out in the APMS Directions 2008 or the NHS (PMS Agreements) Regulations 2004 respectively. However, the contracts or agreements offered can sometimes include terms which are more onerous than legislation requires or perhaps even terms which are contrary to legislation and we believe that all groups should seek legal advice with regard to highlighting these and assisting with the negotiation of the terms. It is also the case that some agreements include phrases such as 'using best endeavours'. This sounds innocuous enough but behind it lies a legal minefield for the unwary. It is also important that groups understand that the type of legal vehicle they choose may limit the type of contract that it can enter into or even prevent its employees from participating in the NHS Pension Scheme.

It is also possible that groups may enter into the tendering process for the new Equitable Access contracts. These are based on APMS but often go much further, including quite onerous terms. In such instances, it is important to seek legal advice at an early

stage since many PCTs are reluctant to make any substantial amendments once into the Invitation to Tender (ITT) stage. Potential bidders must be aware of the need to raise concerns about the standard contract at an early stage.

Other contractual relationships on providing include the 'willing provider' model and since there is no specific legislation governing the contents of such agreements, there are a wide range of contracts which are drafted, usually by individual PCTs. If a provider is concerned about the contract it has been offered, we would advise they seek legal advice early in the proceedings.

Finally, if practices or provider groups are only taking on limited services, such as further enhanced services, then this can be done by a variation to their existing PMS/GMS/SPMS or APMS arrangements. Such variations can take the form of a simple agreement, with provisions dealing with matters such as duration, remuneration and service specifications.

For further information please contact Mark Jarvis at mj@lockharts.co.uk

6. Unfair Job Adverts

A job advert may be short but preparing one still needs care or you could inadvertently be discriminating against potential applicants. For example, a simple advert stating 'This post is restricted to UK and EEA (European Economic Area) nationals,' is likely to be race discrimination as it excludes non-UK/EEA applicants who may have the required permission to work in the UK.

Employers can breach age discrimination laws by using words and phrases such as 'dynamic and young' and 'minimum of ten years experience.' These words can be construed as revealing an age bias. Although there is a defence if the employer can show that a genuine occupational requirement requires an employee to be of a certain age or experience, you should seek advice on this before publishing the advert.

All employers must ensure that they comply with anti-discrimination legislation and do not

discriminate against people looking to take up employment with them. Discriminatory practices or procedures, whether these are intended or not, may result in an Employment Tribunal claim and therefore discrimination on the basis of age, sex, disability, race, religious beliefs or sexual orientation, must be considered by employers at every stage of the employment process.

For further information please contact Paul Werrell at pw@lockharts.co.uk

7. Firm News

We are pleased to announce that the Partnership Team has been joined by Laura Pearce who will be working alongside Ros Parkin as a paralegal.

We are also pleased to announce that the Support Team has been joined by Karis Lloyd who is our new administrative assistant.

Previous Issues

If you would like to receive previous issues of the Lockharts Newsletter please contact Richard Gilligan at csd@lockharts.co.uk.

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Lockharts Solicitors
Tavistock House South
Tavistock Square
London
WC1H 9LS

Tel: +44 (0)20 7383 7111
Fax: +44(0)20 7383 7117
Email: csd@lockharts.co.uk
Web: www.lockharts.co.uk



'... Lockharts leap frogs the lower tiers to the top, following market recommendation... Having acted for over 1,500 GP practices, the firm was pivotal in the formation of and structure of GP contracts, and regularly advises medical committees in London and across the country ... a team that "definitely knows its onions."

Chambers UK, A Client's Guide to the Legal Profession 2008

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