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**The NHS Litigation Authority and Pitfalls**

Disputes between medical and dental practices and PCT's can arise at any time, and many practices will have experienced a disagreement with their local PCT at some stage or other. Frequently practices resolve these disputes without recourse to lawyers or invoking the Dispute Resolution procedures under their contract and matters are resolved amicably or are dropped by the practice following correspondence with the PCT.

Where matters do not settle and where a practice does not wish to leave the dispute unresolved there is a statutory body with jurisdiction to hear disputes between NHS bodies. As most practices will be aware for the majority of disputes involving NHS bodies the parties are obliged to seek redress using the NHS Litigation Authority.

Many practitioners may not realise that the determination of the Authority is final. There is no inbuilt appeal body, and the only challenge that can be raised to a decision of the Authority is by way of Judicial Review. This can be an extremely expensive and difficult

method of appeal. The Authority does not have the jurisdiction to hear the same substantive case from the same parties for a second time and it will not review its own decision. It is therefore vital that practices put their best case forward, and present their case in the best way possible when they first approach the Authority to resolve a dispute.

It is essential that every case put to the Litigation Authority sets out:

- the contractual term or obligation which is the subject of the dispute,
- a narrative statement setting out how this term has been breached by the PCT,
- copies of all evidence that supports the claim (including letters emails, minutes of meetings telephone notes etc),
- details of what the practice believes should have occurred under the contract, and
- details of the determination the practice seeks.

Many practices take their own appeal to the Authority without seeking legal advice on either the substantive merit of their claim or on the presentation of the claim to the Authority. Unfortunately, practices can severely reduce their chances of succeeding before the Authority by failing adequately to address the above in their submissions.

Some practices also do not take full advantage of the opportunity to comment on and respond to any submissions made by the PCT to the Authority which can further weaken their chances.

The Authority will not investigate a dispute put before it, although it can request further submissions where required. The function of the Authority is to determine, based on the evidence supplied to it, whether any breach of NHS contract has occurred and how this can be corrected. Any determination that the Authority makes can only be based on the submissions that are made to it. Where these submissions fail to set out the basis of the grievance, or where a practice fails to address the points raised by the PCT they stand a very high chance of being determined in favour of the PCT. Practices should remember that every PCT will have staff experienced in handling claims, whether in the courts or before the Authority. A practice may only ever bring perhaps one grievance to the Authority and, compared with the PCT, will not have much experience in presenting their case.

If your practice wishes to instruct Lockharts about matters either before or going to the NHS Litigation Authority please contact our Mr Andrew Lockhart-Miramis the Senior Partner at Lockharts and leader of our litigation and regulatory law teams on [alm@lockharts.co.uk](mailto:alm@lockharts.co.uk).

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### **Directors' Duties**

From 1 October 2007 new statutory obligations will be placed on Company Directors as parts of the Companies Act 2006 come into force.

Directors will be under a duty to act in a way they consider most likely to promote the success of the company, having regard to the following matters:

- the likely long-term consequences of their decisions,
- the interests of employees,

- the need to foster the company's business relationships with suppliers, customers [patients] and others,
- the impact of the company's operations on the community [local provision of primary care services] and the environment,
- the desirability of the company maintaining a reputation for high standards of business conduct, and
- the need to act fairly as between shareholders.

The Act also requires directors to act in accordance with the company's memorandum and articles of association, and to exercise their powers only for the purposes for which they were conferred. It obliges directors to exercise independent judgment as well as reasonable care, skill and diligence.

The legislation does not include a definition of the "success of the company" but Lord Goldsmith, the Government's spokesman on this part of the Act, said that success "means what the members collectively want the company to achieve" and that for a commercial company this "will usually mean long-term increase in value". For companies operating in the primary care sector, whether as APMS providers or as Commissioning groups, where it is necessary for directors to balance the requirements of patients with their duties towards shareholders, the definition of success may be slightly different. This is highlighted in the third and fourth bullet points above.

For further information about your duties as a director, or the formation of company, please contact Michael Barrett on [mb@lockharts.co.uk](mailto:mb@lockharts.co.uk).

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## **Partnership Deeds**

Without a valid Partnership Deed in place, a partnership runs the risk of encountering a great deal of expense, inconvenience, and stress if the relationship breaks down.

Our Partnership team, led by managing partner Ros Parkin, has extensive experience of drafting Partnership Deeds tailored to the specific requirements of our clients.

The drafting process will be led by a named solicitor from the Partnership team who will be in contact with you throughout the process to help clarify any problems that you may have regarding the various stages or to advise on potential courses of action specific to your needs.

Our highly sensitive questionnaire enables us to identify from an early stage the specific requirements and situations that a partnership will face. This document evolves continually to reflect any changes to legislation regulations.

The detailed drafting process does not end with the first draft as this provides the Partnership with the opportunity to reflect on the impact of their answers to the questionnaire and how these relate to the Partnership in practice.

Whilst this may appear a lengthy process, such detail is necessary to ensure that the partnership is protected, not only in the event of foreseeable events but also anything that might arise several years down the line.

Our precedent documents are amended at least once a month to reflect any changes that are necessary and the updating process is a continuous one.

All work is covered by the solicitor's professional duty of care which is owed to all members of the partnership and is protected by Law Society approved professional indemnity.

Further information regarding our Partnership services can be found on the Lockharts Website at [www.lockharts.co.uk](http://www.lockharts.co.uk) or please contact Ros Parkin on [rap@lockharts.co.uk](mailto:rap@lockharts.co.uk).

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## **Employment Pitfalls**

There are a number of Employment pitfalls facing practices, and it is imperative to prepare for the implementation of any changes needed to comply with new and changing regulations. The increasing complexity of new employment law means that practice managers must get things right from the outset in order to avoid misunderstandings. This article offers a snapshot of up-to-date employment-related legislation.

### **Discrimination**

There is legislation to protect people against discrimination on the grounds of age, disability, gender, race, religion or sexual orientation. Eliminating discrimination helps to motivate and retain staff, and gives everyone the opportunity to give contributions equally. If employers are in breach of the anti-discrimination laws, they may find themselves liable to pay unlimited compensation and their reputation damaged.

### **Health and Safety**

Specific legal responsibilities are imposed on employers for the health and safety of the employees and anyone affected by the practice and its activities. A breach of this duty will result in serious ramifications, including criminal penalties. Implementing good health and safety

measures will help provide a safer and more efficient working environment.

### **Statutory Holiday entitlements**

The annual holiday entitlement of an employee will be increased to 4.8 weeks from 1 October this year. The entitlement will again be increased to 5.6 weeks from 1 April 2009. Bank holidays will be included in the holiday entitlements. If employers do not comply with the minimum requirement, then there is a need to amend Contracts of Employment or inform staff on the increased holiday entitlement in writing.

### **TUPE**

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is the main piece of legislation governing the transfer of an undertaking to another or the re-provisions of services. Where a practice is being transferred, both parties should seek legal advice at the earliest possible time. Certain obligations are imposed on the transferee concerning a transfer.

### **Work and Families**

There have been massive changes to the family-friendly legislation, including the right to flexible working and more time off work for dependants. The Government has introduced a statutory right to encourage applications for flexible working. A further development is the extension of the right to request flexible working to carers of adults. Under the law, the employer must seriously consider any application, unless there is a good business reason not to.

We are able to offer lectures addressing all Employment Law threats facing surgeries and give advice on how to prepare for changes in employment laws. This would keep practice managers up-to-date with the

legal developments affecting practices, and help to avoid many of the pitfalls which could cost practices a lot of money. With our specialist knowledge of the health sector, we are well equipped to handle all the aspects of Employment Law, helping practice managers to:

- understand the key developments in Employment Legislation,
- recognise and avoid the pitfalls in anti-discrimination law,
- understand different types of absence and how to manage them effectively,
- handle requests for flexible working, and
- learn how to ensure the health, welfare and safety of employees

For further information and lecture details, please contact Carrie Wong on [csd@lockharts.co.uk](mailto:csd@lockharts.co.uk).

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### **Local Dental Committees**

We currently provide legal services for Local Dental Committees (LDCs) in setting up Limited Liability Companies. LDCs might consider changing their status to Limited Liability Companies in order to limit the liability of members in the operation of the LDC businesses. Under the limited liability structure, the liability of members would be limited and as such the interests of members would be protected.

Lockharts is able to offer a range of legal advices and services required for setting up a Limited Liability Company. For further enquiries, please contact Mark Jarvis on [mj@lockharts.co.uk](mailto:mj@lockharts.co.uk).

## **Pharmacy Companies**

Solicitors from our NHS Regulatory team can advise on all aspects of GP Pharmacy provision. The regulatory framework that governs these provisions is a complex but, through our extensive experience, we are able to assist you in amongst others, the following areas:

- How to apply for an NHS pharmacy contract
- Setting up a separate company
- Operating arrangements
- The relationship between pharmacy and general practice
- Premises issues

For further information about how we can assist you with GP pharmacy provision, please contact Alison Oliver on [ao@lockharts.co.uk](mailto:ao@lockharts.co.uk).

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## **Dispensing Doctors**

In addition to advising about the establishment of pharmacy companies, we also assist many dispensing practices where they may be affected by PCT rurality determinations and/or by applications by chemists to open pharmacies in rural communities which would materially damage their existing dispensing rights.

For further information on dispensing issues, please contact Andrew Lockhart-Mirams the senior partner on [alm@lockharts.co.uk](mailto:alm@lockharts.co.uk).

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## **Intellectual Property: Trade Marks**

A trade mark is a distinctive sign which clearly identifies and distinguishes goods or services from those of another. Trade marks can be an effective marketing tool, as they make it easier for clients to quickly identify

the brand and its services. They become associated with quality and client expectations in the goods or services. This helps to protect business reputation and goodwill, raise brand awareness, and build up loyalty among your clients.

Trade marks can be protected by registration. This provides the exclusive right to use the sign and stop others from using it for their businesses. It prevents competitors from passing-off, which occurs when competitors represent their goods and services as those of yours. Registration can also serve as a defence to infringement of another registered mark.

There are a number of incidences when trade mark protection cannot be granted to a particular name or logo. A mark cannot be registered if it is too descriptive. In order to serve as a trademark, the sign must be distinctive. The idea behind a trade mark is to enable people to easily identify the brand and the level of service standards. Trade mark protection would be refused by the Registry if the mark misleads people about the nature of the services or goods being provided. The trade mark must also avoid conflict with another which is already registered. Up until October 2007, the trade mark registration would be refused if it conflicts with an earlier registration. From 1 October 2007, any new mark which conflicts with an earlier registration will simply be notified to the holder of the earlier right, who will have the opportunity to oppose the registration during the 3 month opposition period.

The normal time for registering a trademark in the UK is between 6 and 9 months. It is possible to register a Community Trade Mark (covering the whole of the EC) although this process

takes considerably longer (typically between 12 and 24 months) and is more expensive.

When registering marks for clients, we need to be told how the mark is being used or to be used and be provided with a representation of the mark. We also require a list of goods or services on which the mark will be used.

We can assist with all aspects of trade mark advice including:

- Clearing a mark for use/advising whether or not a trade mark is suitable for registration
- Counterfeiting issues
- Trade mark portfolio management and maintenance.

We will provide a competitive costing at the outset of any matter and can provide additional advice in relation to the marketing of medical, pharmaceutical and veterinary services relevant to your business.

For further information about Lockharts' trade mark services please see our service information, available on our website at [www.lockharts.co.uk](http://www.lockharts.co.uk) or contact Michael Barrett on [mb@lockharts.co.uk](mailto:mb@lockharts.co.uk).

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### **Dual Registration**

Although it is far too early to assess all the ramifications that will flow from the Government's proposal to introduce dual registration, it will clearly have substantial effects on both the finances and structures of out of town practices and those accepting registration from commuters in town areas. In many cases, substantial partnership restructuring may be necessary and further issues will arise with regard to space requirements and contractual arrangements.

Lockharts will be monitoring the situation very closely and will be happy to advise clients, even on a preliminary basis at this stage.

For further information, please contact Andrew Lockhart-Miramis the senior partner on [alm@lockharts.co.uk](mailto:alm@lockharts.co.uk).

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### **Increase in National Minimum Wage**

From 1 October 2007, the national minimum wage will increase for workers aged 22 and over from £5.35 to £5.52 per hour. The rate for 18- to 21-year-olds will increase from £4.45 to £4.60, and for 16- to 17-year-olds from £3.30 to £3.40.

If you would like further information about any Employment issue, please contact Paul Werrell on [pw@lockharts.co.uk](mailto:pw@lockharts.co.uk).

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### **Home Information Packs**

Home Information Packs (HIPs) were introduced in the housing market from 1 August 2007. HIPs were initially rolled out on a phased basis in order to ensure a smooth transition. The initial introduction of HIPs to the average four bedroom homes helps to enhance transparency and competition in home purchase and sale, and cut carbon emissions and save fuel bills.

The Government has reinforced its commitment to the successful implementation of HIPs by announcing the extended roll out a month after the introduction of HIPs. It has extended HIPs to three bedroom homes from 10 September 2007 so that more buyers could improve energy efficiency and make savings.

## **The Firm**

Over the summer there has been a lot of activity in the firm. Congratulations go to Michael Rourke and Alison Oliver who have been admitted to the Solicitors' Roll having completed their training with Lockharts. Michael will be working in the Litigation team alongside Paul Werrell while Alison will continue in the NHS Team with a special focus on mergers and acquisitions.

We have also welcomed Nicholas Fry, Carrie Wong and Diane Thompson to the firm.

Nicholas is working as a research paralegal, primarily within the NHS team while Carrie has joined the Client Services Development team alongside Richard Gilligan. Diane joined the legal secretaries providing assistance to the NHS Team.

Next month Lockharts will be exhibiting at the Management in Practice conference in Birmingham and solicitors from the firm will be lecturing at several events. Andrew Lockhart-Mirams will be giving two lectures at the inaugural Primary Care Live event in London and Alison Oliver will be lecturing to the Kent LMC. We hope to meet a number of you across these engagements.

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## **Back Numbers**

If you are a GP or Practice Manager and you have missed any of the previous issues please contact Carrie Wong at [csd@lockharts.co.uk](mailto:csd@lockharts.co.uk) quoting 'Back Numbers'.

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## **Disclaimer**

The content of this newsletter is only intended as information and should not be considered to be legal advice. Lockharts cannot be held liable for any loss caused by any act or omission as a result of the information in this newsletter.

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