Health and Social Care

NEWS AND ADVICE FOR HEALTHCARE PROFESSIONALS FROM BIRKETT LONG

Zero hours contracts

A recent case in the healthcare sector has revisited the thorny issue of employee status for carers "employed" on a zero hours contract.

Carers employed by Carewatch Care Services Limited were given zero hours contracts, which stated that there was no obligation on the company to provide work to the individuals and that they were free to work for another employer.

Mutuality of obligation (that is, an obligation on the employer to offer work and an obligation on the individual to do it) is an essential prerequisite for an employment relationship to exist, which is what zero hours contracts are designed to avoid. Another essential prerequisite is the need for personal service from the individual, rather than someone else substituting for them.

However, the Employment Tribunal found that the zero hours contracts in this case did not reflect the true agreement. In practice, the individuals were obliged to carry out the work offered and had to do it personally, given that the care they provided was to a severely disabled individual and amounted to a critical care package of the most challenging kind. The Employment Tribunal also found that it was "fanciful" to suppose that the employer relied on an ad hoc arrangement in the provision of such a service to confirm a global employment contract between the parties.

Given the prevalence of zero hours contracts in the health and social care sector, this is a reminder to all employers to ensure that such working arrangements do actually reflect the agreements behind them. Mere words will not always suffice.

Pulse Healthcare v Carewatch Care

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Providers challenge fee payments

The middle of October 2012 saw the conclusion of the judicial review hearing relating to Devon Council, which was challenged by a group of care home providers over the way it set care home fees for 2012-13.

The council froze its care home fees in 2010-11 and 2011-12 but provided an increase of 6.6% for 2012-13, the provider representative body the Devon Quality Care Forum (DQCF) maintain fee levels are not sufficient.

In the first judicial review brought by DQCF, at the High Court in Birmingham in May, Mr Justice Singh rejected providers' claims that the council had failed to have due regard to the cost of care in its decision to freeze fees in 2011-12, but accepted their claim that Devon Council had not conducted a lawful consultation process. The Council's failure to invite providers to comment on whether there should be an increase in fees for 2011-12, and the fact that it only gave notice of the proposed fee freeze a week before it ratified the decision, led to the ruling. However, unlike in other cases, Mr Justice Singh did not quash the fee freeze instituted by Devon in 2011-12 because of the costs and disruption that would cause.

This is one of a string of cases in the past two years in which providers have successfully challenged councils' fee-setting processes for care.

- At the end of 2011 Sefton Care Association successfully argued that Sefton Council's refusal to increase fees payable to care homes was a breach of the directions and the applicable guidance, as they made it clear that the usual cost should reflect the actual cost of providing care. Therefore, the council's decision to freeze fees was unlawful, having refused to even assess the actual cost of providing the services
- Pembrokeshire County Council and Leicestershire County Council, like Sefton Council, have also lost high-profile cases

However, in February this year Neath Port Talbot County Borough Council was successful in defending a claim brought over its rates for 2011/12. The providers claimed that Neath Port Talbot's approach was not underpinned by an appropriate methodology or a lawful rationale, but the judge found that the authority had taken account of the information it had about providers' costs, decided the budgeted

Bare essentials

Legal facts you can't do without

Just hot air?

If your premises have air conditioning or climate control, be aware of a change in the law from 1 January 2015. From that date, the use of reclaimed or recycled refrigerant gas, R22, to top up existing air conditioning systems, will become illegal. R22 was banned under the Ozone Regulations 2000 from all new plant and systems with effect from 2004. The reason, of course, is its potentially damaging effect on the ozone layer, although there are some experts who still dispute this fact.

In the run up to January 2015 owners and occupiers will need to consider whether existing systems that still use R22 should be replaced or modified so that new drop-in gases can be used. Using a drop-in gas may or may not work in your existing system and there is a possibility that it will reduce the efficiency of that system or create operational problems. The cost of replacing out-of-date systems is likely to be significant and so it makes sense to plan ahead. If you are in leased premises, you should look carefully at the terms of your lease to see whether you or the landlord is responsible for maintaining the air conditioning system, or whether the cost may be charged to you through a service charge.

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figure for care, and recommended increases for four years – the providers' challenge was therefore quashed.

Recent calls on the Government to ensure appropriate levels of fees are paid for residential care, in particular to ensure care homes remain sustainable, can only get louder in the wake of these cases - if for any reason in order to divert the costs of bringing and defending these claims to the provision of care.

For more information contact Tracey Dickens on 01206 217326 or email tracey.dickens@birkettlong.co.uk

Meet the team

Tracey Dickens

Tracey is a partner and heads our firm's Commercial and Corporate Finance team. She deals with buying and selling of companies and businesses, shareholder and joint venture agreements, company and share restructuring, as well as review and preparation of commercial agreements.

A specialist in partnership and LLP agreements for doctors and other health professionals, Tracey is responsible for our Health & Social Care team, which draws together health specialists from across the firm. The Legal 500 directory identifies the firm as a "regional heavyweight" and the team as "very knowledgeable" in its dealings with healthcare clients. Birkett Long is the only Essex law firm rated for health and social care in the directory.

As a commercial lawyer, Tracey is often involved with the purchase of care homes and domiciliary care agencies but she is equally at home advising smaller businesses on care home sales or purchases, always ensuring that the transaction is handled commercially and at the right level for the particular circumstances. Tracey advises on all aspects of medical partnerships including retirement, incoming or outgoing partners, disputes and regulatory issues.

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Tips
and reminders

GP Partnership Agreements - is yours up to date?

When did you review your practice's partnership agreement last?

Things are always changing and particular changes, like a partner leaving or joining the practice, can be a good reason to get your agreement reviewed and updated. Even if there isn't a trigger it is beneficial to keep your agreement up to date so that it meets the partners' requirements when it has to be relied upon. Some of the key updates appropriate for GP partnership agreements right now include:

- Dealing with ownership of the surgery premises if all partners no longer own a beneficial interest;
- Incorporating obligations on the partners to comply with the revalidation requirements
- Indemnifying the partner who undertakes the registered manager role for CQC registration
- Incorporating up to date provisions in relation to superannuation
- Provisions for 24 hour retirement.

GP revalidation - five key things to do now!

Revalidation is likely to be introduced across the UK in December 2012, starting with responsible officers in the first few months, although the majority of licensed doctors will be revalidated for the first time by the end of March 2016.

The RCGP Guide to the Revalidation of General Practitioners published in June 12 recommends that you should:

- Ensure that you have a responsible officer – if not, inform the GMC
- Ensure that your annual appraisals are properly conducted
- Register with and use a revalidation e-portfolio or equivalent for your appraisals
- If you haven't done a patient or colleague feedback survey in the past three years, plan to do them
- If you haven't done a full cycle clinical audit in the past three years, plan to do one.

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