

The newsletter of the Healthcare People Management Association

Inside

2

Right to legal representation at disciplinary hearings

3

How the NHS can use the Olympics to improve staff performance: a personal view

2nd Annual *Nursing Times* Nursing Workforce Forum

4

Keeping the best people during difficult times

HPMA consultant proposals

5

Adsett's Law

6

Equal pay piggy back claims

7

Study shows staff sickness levels linked to cutbacks

Relocation of the GMC Clinical Assessment Centre to Manchester in 2010

Kelvin Cheatle
President

HPMA head office
Gothic House, 3 The Green
Richmond TW9 1PL
Tel: 020 8334 4530
Fax: 020 8334 4531
Email: admin@hpma.org.uk

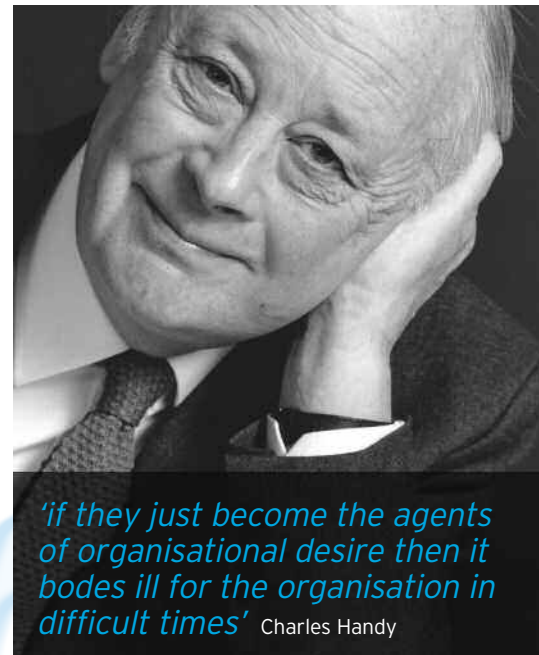
Delivering HR with integrity in difficult times

I attended a conference with GPs in the 1990s at which the management guru Charles Handy spoke. He spoke of the need for somebody to be the guardian of good practice in strong organisations and how he felt this was the justifiable remit of the HR function and 'if they just become the agents of organisational desire then it bodes ill for the organisation in difficult times.' Those words resonated with me then, and I thought of them recently when drawing parallels between some of the current political debates and the challenges we face in our own jobs.

In the USA, president Obama is taking a fearful backlash from the right wing and vested interests over his planned healthcare reforms. But what has struck and impressed me is that in the midst of the maelstrom of statistics, opinion and hype he has hung on to his central message which is that the case for reform is essentially a moral one. A true leader in my opinion.

By contrast the pre-election sound bites emerging from the main UK political parties sound sterile to me. The Liberal Democrats are sounding tougher than the Tories; the Tories sound at times like Old Labour; and New Labour sound... well I'm just not sure what the message is there.

It all cries out for somebody to take the higher ground. Economic crisis or not we need values,



'if they just become the agents of organisational desire then it bodes ill for the organisation in difficult times' Charles Handy

integrity if you like. As Charles Handy said, it's what defines good leaders and organisations in difficult times.

Kelvin Cheatle HPMA President
Director of Workforce/Environment, WLMHT



Adsett's Law is back

This month's *Network* sees the return of Adsett's Law written by HPMA Secretary John Adsett, the editorial team are always delighted to receive articles from members so if you have a comment piece, research summary or good practice report please do consider submitting it to *Network* by 24th of the month prior to publication.

Email Lauren@chamberdunn.co.uk or call 020 8334 4530 to discuss your ideas.

Right to legal representation at disciplinary hearings

Bevan Brittan 



Raj Basi
Associate, Bevan Brittan LLP
Raj.Basi@bevanbrittan.com

The case of *Kulkarni v Milton Keynes Hospital NHS Foundation Trust and The Secretary of State for Health* falls hot on the heels of *R (on the application of G) v The Governors of X School* reported on in May's edition of HPM Network. In *Kulkarni*, the Court of Appeal has effectively reintroduced the right to legal representation at internal disciplinary hearings for all doctors and dentists employed by the NHS who are the subject of serious disciplinary charges.

Facts

In connection with disciplinary proceedings relating to serious professional misconduct, the Trust confirmed that Dr Kulkarni had the right to be accompanied by a representative "not acting in a legal capacity".

Dr Kulkarni, through the Medical Protection Society (MPS), requested permission to bring along a legal representative to his disciplinary hearing but the Trust decided there were no exceptional circumstances that would justify deviating from its disciplinary procedure, which was based on the Department of Health's 'Maintaining High Professional Standards in the Modern NHS' (MHPS) policy.

Dr Kulkarni issued proceedings seeking a declaration that the Trust was acting unlawfully and in breach of contract in refusing to allow him legal representation at his disciplinary hearing. He also argued that Article 6 of The European Convention on Human Rights (ECHR) required him to be allowed legal representation. His application was refused and Dr Kulkarni appealed to the Court of Appeal.

Decision

The Court of Appeal held that Dr Kulkarni was contractually entitled to be represented at his disciplinary hearing by a lawyer instructed or employed by the MPS. The Court focused on the wording of the relevant paragraphs of MHPS which deal with doctors' and dentists' rights to representation in both conduct and capability hearings and determined that the expression "not representing the practitioner formally in a legal capacity" was meaningless and should be removed.

Although not central to its decision, the Court of Appeal also suggested that Article 6 ECHR is engaged where an NHS doctor faces charges which are of such gravity that, in the event they are found to be proved, he or she will be effectively barred from employment in the NHS and that in circumstances such as this case (where the employee was facing what was in effect a criminal charge), Article 6 implied a right to legal representation in civil proceedings.

Practical Implications

The decision is likely to be appealed to the House of Lords by the Secretary of State but effectively any doctors or dentists that are employed by the NHS and are facing serious disciplinary charges on misconduct or capability grounds will rely on this decision to argue that they have a contractual right to legal representation by someone instructed or retained by their medical defence union.

HPMA membership

Discounted individual and corporate HPMA membership is now available for the remainder of 2009/10 membership year (ending 31 March 2010):

Individual (band 4 or below and retired members)	£12	(Previously £20)
Individual (band 4 or above)	£25	(Previously £45)
Corporate (turnover <£150m)	£195	(Previously £350)
Corporate (turnover >£150m)	£250	(Previously £450)

Inform your network - let's build our membership.

Download a membership form online at www.hpma.org.uk or call 020 8334 4530

How the NHS can use the Olympics to improve staff performance: a personal view

Sickness levels in the NHS made national headlines last month after the first national audit of staff habits found that rates of obesity, smoking, absenteeism and poor mental health are reducing the quality of patient care. With 45,000 NHS workers calling in sick each day, the figures were both provocative and worrying.

As the NHS focuses on the public health agenda, increasingly using the 2012 Olympics as a catalyst, leaders and HR professionals must think more creatively about how they can use lessons from the Games to improve not only the health of staff, but also their engagement and performance.

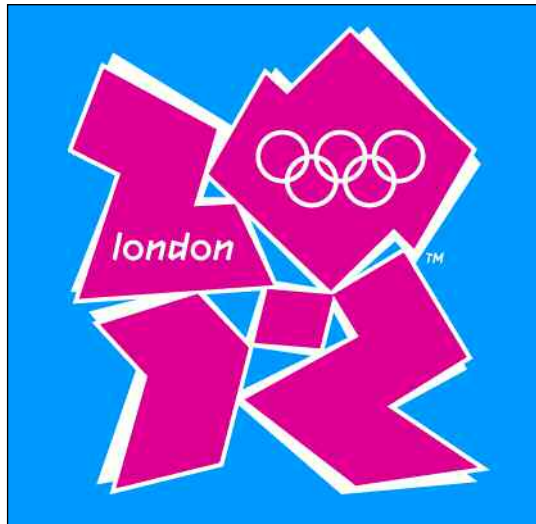
As the largest single employer in Europe and, with the greatest global showcase of health and performance on our doorstep, the NHS is well-placed to use lessons from sport to improve employee engagement and performance inside the organisation.

Our extensive experience in the private and public sector shows that the sporting metaphor is a powerful tool for organisational performance. Achieving goals and targets, hard work, determination, teamwork, dealing with success and recovering from failure and setbacks are all key elements of both worlds.

Lessons from elite sporting performance can be used in a number of ways in the NHS. They can be used in a physical way, for example holding events or initiatives that would increase physical well-being and potentially decrease sickness or, they can be used as a learning and development tool for multi professional staff.

This could include tailoring training and development programmes to provide staff with a mindset and language for talking about performance; a context for understanding individual, team and organisational performance and a stimulus for realising significant, goal-driven change.

Used creatively within learning and development activity, lessons from elite sporting performance (including coaching skills and developing mental toughness) can take staff outside of the regular working environment, challenge how they do things and develop tools and techniques from a different performance environment.



Lane4

Dr Liz Campbell
For more information visit:
www.lane4performance.com

2nd Annual *Nursing Times* Nursing Workforce Forum

Workforce strategies to deliver high quality nursing care
6 October 2009 London www.nt-workforce.com

The Nursing Workforce Forum from *Nursing Times* is your annual one-stop shop for nursing workforce issues. Covering all the key issues and providing unrivalled networking. If you're a nursing leader or manager, a workforce planner, an HR manager or involved in the education, training and development of nurses, it's the only workforce event you need to attend this year.

Clare Chapman, Director General of Workforce at the **Department of Health** will be delivering the keynote presentation at this important event.

Also features special post-conference seminar:

Transforming the Community and Primary Care Nursing Workforce 7th October 2009, London
Discounts available for HPMA members

NURSING times

Keeping the best people during difficult times



Sally Gitkin
Programme manager,
Aspiring Future Public Sector Leaders,
SOLACE Enterprises

Further information

For further information and support on how we can help your organisation to develop and improve, please contact Rita Sammons, Director on 0845 601 0649.

The current interest in managing talent within the HR community in the NHS (as seen in the July issue) is a reflection of a wider concern across the public sector about how to keep and develop staff during a time of economic hardship and potential lack of resources. We have to come up with creative solutions to ensure that we can deliver excellent services and maintain our performance which is under greater scrutiny than ever from both external bodies and service users.

Formal qualifications provide a professional route for staff and will always form the basis of a successful career. However, beyond technical capability, there are competencies that successful managers need to work at to achieve their full potential in organisations - to take on their role as leaders. How do they gain that depth of understanding and experience in departments that are pressed for both time and money? The key is to facilitate a variety of learning opportunities within organisations and across organisational boundaries. This can be achieved through exposure to different ways of working across the NHS and in the wider public sector.

Opportunities such as coaching and mentoring across organisational boundaries afford the chance to understand how partner cultures function, building working relationships and helping to

sustain the business in challenging times.

Shadowing within a highly structured framework can also be helpful as long as both partners are fully briefed and prepared. On a longer-term basis, secondments are a great opportunity for exchange of ideas and learning about working outside organisational constraints.

However, all of these development opportunities need to be properly funded and this will only happen if employers see the benefits through outcomes from projects and joint working. This may be the greatest challenge to facilitate, but will generate better learning for individuals too. To support these projects, action learning can be used as a way of supporting managers as they grapple with putting ideas in practice in new environments.

We develop our best people by offering them the chance to improve and offer more - most will rise to that challenge with enthusiasm. Retaining our best people is a much more cost-effective way of ensuring we have the right workforce profile than just recruiting externally. Offering coaching, mentoring, shadowing, secondments and action learning to support excellence across the wider public sector may be our opportunity to be creative and build our ability to deliver for our communities despite hard times.

HPMA consultant proposals

With new funding to support branch development work the Association is keen to use the best consultant support available. So HPMA have now opened a preferred supplier list for consultant services.

The development work will hopefully be interesting and challenging, we expect opportunities to become available across the UK. In principal projects will fill in the gaps for HPMA branch and council officers who have 'day-job' commitments.

To join this list you simple need to complete an application form - questions include areas of specialism, experience, references and confirmation of professional indemnity insurance. This pool of consultants will then be used for ad-hoc projects, based on a process of matching skills and expertise.

In light of the great work branch and council members already do in their free time, we are asking that any consultant interested in joining the preferred supplier list agrees to offer up to 2 free 'pro bono' days over the 12 month period.

Download the application at www.hpma.org.uk

We look forward to developing a strong list to help take HPMA branch development to the next level.

Adsett's Law

Described by John Adsett himself as 'the musings of a cynical old HR Practitioner', please enjoy the resurrection of Adsett's Law, last seen in 2006!

It seems like disputes about the effective date of termination (EDT) have been around for years (and years!). Yet there was a CA case (no less) recently on just that point. In *Kirklees MC v Radecki* the dispute arose because the Council suspended R, a teacher, amid concerns regarding his skills and his relationships with other members of staff. Negotiations took place and a "draft" compromise agreement was drawn up. R signed an "acceptance slip" that accompanied the draft, but did not sign the document itself, nor did he fill in details like the name of his legal representative. Nevertheless, the Council removed him from the payroll with effect from 31 October 2006. On 22 February 2007, R told the Council that he was rejecting the compromise. The Council replied on 5th March that he had been terminated at the end of the previous October on the basis that he had agreed to enter into a compromise and would sign the agreement once it had been forwarded to his solicitor for completion. Shortly afterwards R was sent his P45 showing the EDT of 31 October 2006.

R promptly submitted a claim to ET, which found that employment had been terminated "by mutual consent" on 31 October 2006 and that the claim was out of time. At the inevitable EAT, there was a finding that the draft agreement was "without prejudice" and therefore could not be relied upon and that the facts that R was not attending for work, was not being paid and had not been called to a disciplinary hearing were all consistent with him being on suspension. EAT decided that the Council's letter 5 March 2007 was the first "unequivocal" statement of termination so regarded that date as EDT.

The Council appealed to CA, where it ran an argument that it had committed a repudiatory breach of contract by stopping pay on or around 31 October 2006 and that the contract had automatically ceased on that date without R having to accept the repudiation. Moreover R had known about the breach fairly soon afterwards when his salary was not paid into his bank account. CA accepted this argument and found the ET claim was out of time.

Now compare that to *Gisda Cyf v Barratt* where CA decided that, where the employee was summarily dismissed by letter, EDT was the date on which the employee read the dismissal letter

and not the date it was written, the date it was posted or even the date it was delivered!

One that seems to have slipped under the radar was a claim under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations in *Carl V University of Sheffield*. Here C, a part time lecturer claimed less favourable treatment than a named comparator (M) who worked under a full time contract because he was paid for preparation time and she was not. ET found that M was a full time teacher in Sociology up to PhD level and was not doing "similar work" to C who was a part time teacher of shorthand to NVQ3 level, because her work required no academic content. ET found however that C could compare herself to a hypothetical comparator, but even then failed to find any less favourable treatment. C appealed and the University cross appealed against the finding that C could rely on a hypothetical comparator. Taking the University's appeal first, EAT drew comparisons with the Equal Pay Act and concluded that the Regulations required an actual comparator. This appeal was therefore allowed. C's appeal was dismissed because it was noted that her original claim failed because of the absence of a full time comparator and there was no need to consider the matter further.

Hopefully *Cheltenham Borough Council v Laird* had a few employers reaching for their pre-employment occupational health questionnaires. This was a High Court case where the council tried to sue L, its former Managing Director, for damages, amounting to just short of £1 million, for fraudulent and negligent misrepresentations because she failed to disclose a history of recurrent depressive illness. The Council's case failed for the very simple reason that the questionnaire asked the "wrong" questions. It seems that the salient questions focussed on "now" rather than the prospective employee's medical history, so did not ask if "you have ever suffered from a depressive illness" or whether "you are undergoing any continuing treatment or medication", both of which should have picked up her condition. Similarly there was no "is there anything else you ought to tell us" - type question. As it was, L answered truthfully all the questions that were there.



John Adsett is an independent HR consultant and lay member of tribunals and is always interested to hear of new cases.

Contact John by emailing jadsett@dialstart.net or visit the commercial members area of the HPMA website for more information.

Continued on page 6

Adsett's Law continued

With all the "interesting" judgements on Equal Pay hitting the headlines, particularly with regard to identification of comparators at Stage 1, which even one division of EAT famously tagged a "pig's breakfast", there was one small positive glimmer in *Dumfries and Galloway Council v North*. Here EAT decided that, where

a comparator works at a different establishment, there must be a very real possibility that work of that nature could be carried out at the claimant's place of work. If not closing off entirely the "fishing expedition" claims, this ruling should at least give employers the chance to fight back.

Equal pay piggy back claims



Surbhi Shah, associate,
Eversheds LLP
surbhishah@eversheds.com

Can a male employee who has been paid less than another male colleague bring an equal pay claim? According to the Employment Appeal Tribunal (EAT) he can.

Background

A number of employees brought equal pay claims against Hartlepool, Middlesbrough and South Tyneside Borough Council. Most of the claimants were women. In addition, however, 300 or so men doing the 'same work' for the same pay as the women also brought claims. The men brought the claims on the basis that, if the women's claims succeeded, they (the men) were entitled to an equivalent uplift in pay, using the successful women as comparators. These were referred to as 'male contingent' or 'piggy back' claims.

Some of the women's claims were successful. Consequently, South Tyneside decided to settle many of the women's claims. The council did not, however, settle the male 'piggy back' claims.

Decision

The Employment Appeal Tribunal (EAT) ruled that the male contingent claims were valid and that the male claimants were allowed to claim arrears of pay

for the same period as their female comparators.

The EAT made it clear that 'piggy back' claims like this can only succeed where there is a successful female claimant. But that 'success' need not take the form of a tribunal or court ruling. In the case of South Tyneside, the council had settled the women's claims rather than opposing them. The EAT said men could still bring piggy back claims in those circumstances, although technically the claims may have to be brought under the Sex Discrimination Act 1975 rather than the Equal Pay Act 1970.

What does this decision mean for NHS employers?

Whilst it is welcomed that the EAT has given a clear ruling on this issue, those attempting to settle potential equal pay claims may now find the cost of doing so higher than anticipated. Failure to settle any male 'piggy back' claims on the same terms as those brought by the female claimants will amount to sex discrimination according to the EAT.

South Tyneside has appealed to the Court of Appeal. The progress of that appeal will be watched with interest across the public sector.

McAvoy and others v South Tyneside Borough Council and others, 24 June 2009

DATES FOR YOUR DIARY

- **2nd Annual Nursing Times Nursing Workforce Forum**
Workforce strategies to deliver high quality nursing care 6 October 2009 London
- **NHS Employers annual conference and exhibition** 3-5 November 2009
Birmingham ICC
- **HSJ World Class Workforce** 19-20 January 2010

Letters and contributions

Network is your membership newsletter so we always welcome comments, articles and news from any of our members.

You can send contributions directly through to the production team (lauren@chamberdunn.co.uk) or call 020 8334 4530 for an informal chat first.

The newsletter is published every month and circulated to all HPMAs members so it's a great way to share success, ask for help or get colleagues thinking.

Study shows staff sickness levels linked to cutbacks

Financial cutbacks in the NHS adversely affect the safety of nurses, midwives and patients, according to research published in the September edition of *Health Care Risk Report*.

Researchers from Loughborough University found that a vacancy freeze plus restrictions on the use of bank and agency staff at an NHS trust led to significantly higher levels of staff sickness, and an increased prevalence of pressure sores among patients. Hours lost to sickness on one ward rose by 120% and pressure sore rates across three wards doubled.

The researchers say: 'Qualified nursing staff had significantly higher levels of sickness following the introduction of the cost reduction policy. This policy did increase the risk to patients but the risks to staff were much more evident.'

The research compared risks to patients, staff and the organisation in five wards in two periods, November-January 2005/6 and November-January 2006/7. The trust implemented a vacancy freeze

and stringent limits on the use of agency and bank staff in October 2006.

In the 2006/7 period compared to the year before, total nursing hours lost to sickness rose 120 per cent on a gastroenterology ward and 91 per cent on a medicine for the elderly ward. Among midwives, total hours lost to sickness rose 56 per cent.

The researchers conclude that: 'The impact on the qualified nursing staff was very significant, and sickness and absence levels indicated a significant shift in the risk to staff that could in the longer term have had more serious consequences for patient safety.'

Jones H, Hancock C, Evans S (2009) *How budgetary pressure affected staff and patient safety at an NHS trust*, HCRR vol 15 no 9, (Sept) pp12-14.

Alison Dunn
Editor in chief,
Health Workforce Bulletin
www.health-workforce.com



Relocation of the GMC Clinical Assessment Centre to Manchester in 2010

The General Medical Council (GMC) Clinical Assessment Centre, which hosts the **Professional and Linguistic Assessments Board (PLAB) Part 2** exam for International Medical Graduates (IMGs), is moving to Manchester in 2010.

The GMC are quick to reassure colleagues that the PLAB Part 1 exam will not be affected. As you know the PLAB test is the main route by which IMGs demonstrate that they have the necessary skills and knowledge to practise medicine in the UK.

Since the Clinical Assessment Centre opened in 2003, over 23,000 IMGs from over 90 different countries have been assessed. The Centre, which is currently located in London at 350 Euston

Road, will be closing on 2 December 2009 and **will open in Manchester in March 2010.**

There will be no PLAB Part 2 exams between 3 December 2009 and the end of February 2010. 2010 exam dates will be made available in early 2010 and candidates will be able to book them in the normal way.

Please circulate this information among any colleagues who may work with International Medical Graduates.

For further information, please visit the GMC website:
www.gmc-uk.org/doctors/plab/index.asp

General Medical Council

Are your HPMAs colleagues getting eNetwork?

If you or any of your colleagues have experienced problems downloading, viewing or receiving the latest issues of the electronic newsletter please email Lauren@chamberdunn.co.uk at Chamberlain Dunn Associates.

BRANCH MEETINGS

Meetings at branch level take place usually on a bi-monthly or quarterly basis. They typically include speakers, presentations, social gatherings, workshops or educational activity and many branches run regular employment law updates.

Contact HPMAs administrator Lauren Crawford on 020 8334 4530 or admin@hpmas.org.uk for details on your local branch.