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Extended opening hours – changes required to your staff contracts

Lord Darzi's report makes clear that GP practices must open for longer hours, both during the weekends and into the evenings. It has been made clear that those surgeries which refuse to offer Saturday or evening openings could receive a smaller slice of NHS funds under a new structure of financial incentives to reward the most flexible.

Certainly most practices will be seeking to extend the opening and closing times to comply with the Government's new requirements. In this article, we examine how surgeries can vary the contracts of employment of staff and what happens if the staff refuse to accept the changes.

The Right to Vary the Contract of Employment

In deciding whether it is possible to change the contract of employment, the starting point is always to examine the terms of the contract itself and establish whether there is a right to make the change. Finding a clause which would appear to allow the employer to make the change is a useful starting point for the employer, but it will not give the employer *carte blanche*. For example, in the case of [McCann v Allander Security EAT 485/99](#) there was an express variation clause reserving the right for the employer to vary rates of pay, working hours and allocation of duties. When the employers cut the employee's hours and pay without his consent, they were found to have acted in breach of contract.

The risk is not simply a potential claim for breach of contract, it should be remembered that even if the partners have an express clause allowing a variation to the employee's hours, the change could nevertheless be discriminatory. For example an attempt by the partners to enforce extended hours upon a woman with child care commitments could be discriminatory.

Obtaining Consent to the Change - Consultation

Whether or not there is an express clause permitting the amendment, the partners would be required to try to seek consent from the employees in the first instance.

A Tribunal would expect a proper consultation process to take place with each affected employee individually. This will involve listening to the employee's views and reiterating the reasons for the proposed change and re-hearing the issues at a later date, having given the employee time to consider the issues. The consultation process would normally take several weeks and would not be something that should be undertaken swiftly.

If the employee is not willing to accept the proposed change, the employer would need to engage in as many meetings as are necessary, with the employee in order to try and obtain their consent to the change. It is perfectly acceptable to offer the employee incentives to try to get them to agree to the change. Some incentives that often work are increased pay, a one off bonus, or additional holiday entitlement.

As we shall see below, if agreement is unlikely, in certain circumstances, an employer may be able to enforce a change to the employee's contract without the employee's consent.

Forcing the Changes

Where employees refuse to agree to the proposed change, the employer may decide to terminate the old contract and offer the employees a new one incorporating the desired changes. If the old contract is terminated with proper notice, there will be no breach of contract. Therefore, the employees will not be able to claim constructive dismissal or bring an action for damages for breach of contract.

However, the position is not as simple as it may seem! The difficulty is that a dismissal in these circumstances may be found to be unfair. In order to prove that the dismissal was fair, an employer must be able to show the surgery had sound business reasons for dismissing an employee who refused to accept a change in his or her terms and conditions, this may be sufficient to establish 'some other substantial reason' for dismissing him or her. The change need not have been essential to the survival of the practice but there must be some fairly important reasons why the employee should have to accept.

The employer must still show that the partners acted reasonably in dismissing the employee for that reason. A Tribunal will consider a number of factors such as-whether the disadvantages which the employee would suffer were considered, whether these disadvantages outweighed the advantages to the employer, whether genuine consultation took place with a fair dismissal procedure involving a right of appeal and whether alternative jobs for the employee was considered.

Forcing staff to put in the extra hours to meet the new requirements will be a challenge but it should be possible to achieve the changes in most circumstances especially where the surgery is able to show that the changes are as a result of Government requirements.

Conclusion

In all cases, obtaining consent will be the least troublesome way forward and a decision to force staff to undertake the extra hours should always be a last resort. Doctors should however make certain that all staff contracts of employment reflect the new working arrangements before the change is made.

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