Shared Insights

Looking ahead to 2023 – what Health and Care employers need to know

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In our first Shared Insights session of 2023, Helen and Claire looked at several key areas which will continue to be hot topics for employers in 2023, including winter pressures and the impact of the current staffing crisis, industrial action, retention and fostering a speak up culture. But firstly, Claire discussed the issue of holiday pay following the recent Supreme Court decision in the case of Brazel.

Holiday Pay

We have prepared a detailed briefing note on the case of Harpur Trust (Appellant) v Brazel (Respondent) (supremecourt.uk) but the key points are

- Historically organisations used 12.07% method to calculate holiday pay for bank staff.
- Paid rolled up holiday pay – technically unlawful but set off against the amounts that were owed.
- Recent Supreme Court decision Brazel v Harpur Trust ruled that the 12.07% calculation is unlawful for atypical workers engaged on permanent contracts.
- Correct entitlement is 5.6 weeks of annual leave each year, which should be paid based on their average pay in the previous 52 weeks, discounting any weeks where no work was done (up to a maximum of 104 weeks)
- Potentially significant impact in respect of backdated holiday pay claims so boards need to be prepared.

Practical steps

- review your atypical workforce (bank, zero hours, term-time only) and check the basis on which such workers' holiday entitlement and pay has previously been calculated.
- consider how to calculate the payments going forward to ensure compliance.
- use networks to establish how other NHS organisations are responding to the developments in the law and whether there is likely to be a national framework for managing potential claims (as with the Flowers case).

Action – audit behind scenes and await further guidance.

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Winter pressures and effects of the current staffing crisis

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Winter pressures and the staffing crisis

We have all seen and read the predictions - 2023 is likely to be the worst winter on record for the NHS.

We already knew there was a staffing crisis in health and social care before the latest wave of industrial action and increased staff absence

NHS vacancy statistics reveal over 130,000 vacancies in September last year which is a vacancy rate of 9.7% in comparison to a vacancy rate the year before of 103,809. Significant vacancies in medical and nursing but almost every healthcare profession is facing shortages.

Adult social care facing a worse position – number of existing vacant posts increased by 52% to 165,000

House of Commons Health and Social Care Committee reported that an extra 475,000 jobs would be needed in health and 490,000 jobs needed in social care by the early 2030s

Further, a recent survey showed that 50% of workers in health and social care have said that the government approach on pay has made them more likely to leave their job in the next one to three years.

What is causing it?

Many commentators say that there has been a lack of long-term workforce planning by the government

- Brexit
- Concerns over pay – leaving for higher paid jobs such as hospitality or retail.
- Job pressures due to increasing staff shortages – vicious cycle of leaving because it is too hard to do the job with the limited staff available, thereby creating more vacancies and wider staff shortages

We now also have the industrial action to add into the mix. We have had nurses and ambulance workers strike already, with further strikes to come. It was announced yesterday that physiotherapists had also voted for strike action.

Government has announced intention to introduce legislation which would allow SoS to specify the minimum service levels. Current draft is very broad and no requirement that minimum service levels are linked to safety (as opposed to operational convenience or to minimise disruption in society). In theory, the minimum required could be at near full-service provision at particular times. Unions suggest that the current draft undermines the right to strike.

All this has a very significant impact on people's experience of care. CQC's annual assessment of health and social care in England reported the "huge negative impact" on care reporting that:

- People in need of urgent care at increased risk of harm due to long delays in ambulance response times
- People stuck in hospitals longer than they needed to be due to lack of available social care
- Inability to access primary care was exacerbating the high pressure on urgent and emergency care services

Industrial action – what can organisations do to protect themselves

Helen Badger, Partner
Damian Whitlam, Partner and
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Industrial action

There are lots of legal technicalities about strike action but key for NHS employers at this time are the hearts and minds

Trade dispute is with the government not the employer

Be sympathetic to the reasons behind the decision to strike

Take control of communications with workforce. Continue to send out sensitively worded communications to staff that may help them make up their minds about whether they wish to take action

Law has now changed so that you can use agency staff to replace those who strike. But need to act with caution so as to avoid greater ER issues and turn national dispute into a local one

There has been some speculation about the potential liability for individual striking employees and whether it could be a criminal offence for a person to strike or take action if to do so is likely to endanger human life or cause serious bodily harm. This might apply to doctors in areas such as A&E, maternity, pharmacy and radiology. Leading KC, instructed by the BMA, throws significant doubt on that suggestion.

It is difficult to imagine circumstances in which an employee would be prosecuted for going on strike

Potential impact of staffing levels in civil claims and inquests – what can organisations do to protect themselves

Damian and Nicola explained that claims are often brought many years down the line so document keeping and document retention are key.

Organisations should keep minutes and documents which record and explain :

- staffing levels on those days
- how decisions were made about deploying available staff
- how decisions were made about prioritising patients – for example, if some surgery or appointments are cancelled what criteria are used to decide which patients will be cancelled and how long for?

The decision making on these points may be relevant in an inquest/claim down the line and the coroner may ask for relevant documents and evidence to help them understand the decision making process and criteria that were applied. Keep these documents centrally if possible, so that they can be located and disclosed in any later claims and inquests where decision making may come under scrutiny.

If procedures or appointments are cancelled, it is also important to ensure these patients are not lost to follow up. We have seen cases where this happened during the pandemic: patients were cancelled but then lost to follow up and came to harm as a result. Make sure you have robust processes in place to ensure any cancelled patients are re-listed or brought back to clinic once normal service is resumed.

It is not yet clear how Coroners will approach staff saying they won't give evidence at an inquest if it is listed on one of the days when strike action is planned.

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Making the most of the workforce you have, retention and the role of compassionate leadership and a Speak Up Culture

Helen Badger
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How can the workforce you do have be used across the system to address shortages?

Helen explained that one positive outcome of the pandemic was the collaboration between health and social care bodies. Arrangements were made to move staff around the system. Now is the time to review, build on and make more permanent the workforce sharing arrangements that were put in place during the pandemic.

We are working with a number of clients to develop the legal documentation to support arrangements. This extends from broad workforce sharing agreement involving parties in the ICS to less complex data sharing arrangements, licenses to allow employees of other organisations to attend Trust premises, use equipment etc.

Employers should look at their standard contracts to ensure they are flexible enough to move employees around the system. While the ideal is only to move those who volunteer, you can recruit new staff with different expectations about their working practices with flexibility and mobility clauses in contracts.

There are still some barriers in place which hamper workforce sharing arrangements. While some NHS organisations want to be able to place staff in care homes or primary care to reduce the numbers attending and needing to stay in hospital, current NHS insurance arrangements do not offer sufficient protection and private insurers are reluctant to give cover to outside employees.

Of course retention becomes one of the most significant areas of focus and leads us on to next key issue

Retention

A House of Commons Health and Social Care committee report published in June 2021 found that burnout was a widespread reality in the NHS and "chronic excessive workload" was a "key driver".

It found burnout not only negatively impacted the mental health of the individual staff member but also impacted their colleagues and patients they cared for.

The same report highlighted evidence from NHS Providers that 92% of NHS trusts had concerns about staff wellbeing, stress and burnout following the pandemic

The King's Fund also examined the impact of staff shortages on the health of its workforce and found that, in addition to it already being a stressful profession, staff shortages harms staff wellbeing, increases sickness absences (5.2% in 2022) and "exacerbates" the challenges of staff retention.

This of course is not just limited to clinical staff but support staff too.

It is clear many staff feeling exhausted and demoralised, exacerbated by current cost of living crisis and row over pay.

What can Trusts do to keep staff motivated in face of these challenges:

- Role of compassionate leadership in creating a supportive culture in which staff feel valued and respected. Does the board understand the culture of your organisation? How this is perceived internally and externally?
- Has the Board received training on leading compassionately, particularly in such challenging circumstances as exist at the moment.
- Has the Board received training on its role in creating the organisation's culture and encouraging Speak Up.
    - Does your board understand the legal issues
    - Are they clear on what a disclosure is and what it means to the organisation?
    - Do they know how to respond effectively and do they properly understand the Trust's processes?

(continued overleaf)

Discussion & How we can help

- Promoting an effective Speak Up culture that empowers staff to speak up in the knowledge that their concerns will be listened to and without the fear of reprisals. It is important to have an effective policy in place, but that policy needs to be lived and breathed in the organisation while at the same time not becoming a barrier to identification of concerns. We still so frequently see managers claiming that individuals are not "whistleblowers" because they have not raised their concerns through the policy, haven't put in writing etc. Managers need to be alive to the potential that issues raised orally will amount to protected disclosures
- Disciplinary and grievance panels – are they looking for signs that employees are suffering detriment because they have spoken up?
- Signpost staff to resources to support their wellbeing such as OH support, accessing the NHS England Staff Mental Health and Wellbeing Hubs, confidential text support service (FRONTLINE), access to wellbeing apps (all details are on NHS England website – supporting our NHS people).
- We are seeing cases where claimants are alleging that organisations are paying lip service to the idea of a compassionate and open culture but it is not obvious in practice. For example, including wording in template letters about staff support services is not enough when employees are going through a process.
- Look after managers who have to deal with this on daily basis. While it is part of the job, it is an area that will require significant support. Are your managers trained to identify and respond to mental health issues?

Discussion

During the discussion that followed we covered a number of issues including

- Working from home and its impact on
  - Productivity
  - Performance
  - Communication
  - Isolation
  - Office space reduction
  - Effect on relationships i.e. with families at inquests / other team members
- Staff sickness, including
  - Ongoing culture of fear of being penalised for taking time off sick resulting in people working at home when unwell.
  - HR role in establishing genuine illnesses.
  - Removal of pressure to be working from home when unwell.
  - The need for a change in culture around this.

How we can help

- We are happy to review the results of any audit of your atypical workforce and give further advice on holiday pay issues and risks;
- We can deliver training to boards on its role in creating a compassionate culture

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