Temporary employment in the NHS

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Short-term vacancies in the National Health Service have by custom tended to be filled by a locum who may not be suitably qualified to hold the substantive post. The conditions of service are supposed to be identical with those of the substantive holder. But the locum has no right of tenure and no right of appeal to the Secretary of State if and when his appointment is terminated. The selection procedures that holders of substantive posts have to go through are important; in the case of consultants they are of statutory force. The procedure for appointing consultants is laid down in regulations.¹ Great care is taken in appointing permanent medical staff; once appointed a NHS consultant cannot be removed except on grounds of misconduct, illness, or incapacity.

In contrast, until the early 1970s the person appointed as a locum enjoyed no such protection, though it was not unknown for locums to be appointed to the substantive post in due course. When the selection committee decided to select a candidate other than the locum, or when the necessity for a locum ceased for some other reason, there was no question but that the employment of the locum had to end.

The phrase "long-term locum consultant" contains an apparent contradiction, for is it logical for a "locum tenens"—by definition a person who holds the place of the absent doctor—to be employed long term? Logical or not, the NHS is well aware of the contribution of doctors who have done locum consultant jobs for long periods—periods that in some cases are measured in years rather than months. A handful of cases have ended up in industrial tribunals because the incumbents thought they had been unfairly treated when their employment was ended. A tribunal decision has recently been given in which a surgeon, Mr Biswapti Banerjee, was judged to have been dismissed unfairly from a locum consultant post and the employer concerned—the City and East London Area Health Authority(T)—ordered to pay compensation. In this article John Davies, head of the BMA's legal services, discusses the question of long-term locums.

Modern employment legislation

All that was before the introduction of the employment protection legislation in the early 1970s and, in particular, the special remedies in the hands of the industrial tribunals for the statutory complaint of "unfair dismissal." This concept of unfair dismissal is not unlike the concept of wrongful dismissal existing under the previous common law, except that compensation is calculated by reference to a code laid down in legislation and subject to a maximum limit for practical purposes equivalent to the amount that could be earned in 12 months.²

In the light of this new statutory security it was inevitable that certain long-serving locums began to question the position when their hopes of a permanent appointment were not fulfilled. Three cases of this type have been before the Employment Appeal Tribunal. The EAT was specially constituted by the employment legislation, and it has the status of a division of the High Court for hearing appeals from industrial tribunals. Decisions of the EAT "create law" in the sense that they form precedents binding on industrial tribunals.

The first of the three cases³ concerned a locum consultant radiologist who had held a series of fixed-term contracts with the West Midlands Regional Health Authority for seven years. He had thus fulfilled the duties of a consultant at various hospitals in the Birmingham area. In the appeal it was argued on behalf of the authority that failure to renew a fixed-term contract could never be "unfair" within the meaning of the Act. The authority argued that in the particular circumstances of the case—namely, that the authority had decided to discontinue the services of the locum practitioner and replace them with substantive consultants—the dismissal was fair. The EAT, however, held that, "for whatever reason, and probably for the reason that they misunderstood the legal position, the regional health authority seemed to have acknowledged no duty at all in the circumstances to [the doctor] and in that respect they were woefully mistaken."

Two years later the EAT applied similar reasoning in the case of a locum surgeon, Mr Banerjee, employed by the City and East London Area Health Authority(T).⁴ This doctor, who had given many years' service to the authority, was employed, at the time of his dismissal, as a locum consultant surgeon for three sessions a week. A district surgeon sharing the duty roster did six sessions a week. When that surgeon retired the authority decided to appoint a single full-time consultant surgeon for nine sessions instead of having two part timers. It was claimed to be in accordance with the authority's policy of rationalisation and the custom and practice of amalgamating part-time posts. On appeal from the industrial tribunal the EAT held that, since the employer had been unable to show how this policy had been evolved or that it had discernible advantages to the organisation, there was no evidence on which the tribunal could properly find that the dismissal was fair. When the authority failed to reinstate Mr Banerjee under the conditions ordered by the tribunal the case went to a second tribunal, which—by consent of both parties—awarded compensation close to the maximum figure permissible under the legislation. The application to the tribunal was made on a friendly basis and it is understood that the authority will continue to employ Mr Banerjee, though not on the same basis as before.

With this must be contrasted another case.⁵ This doctor's application failed to establish unfair dismissal in the industrial tribunal and the EAT. The case concerned a lady doctor working in oncology at St Mary's Hospital, Paddington, as a medical assistant and later as a locum consultant. There were plans to reorganise the radiotherapy department and amalgamate this with the one at the Middlesex Hospital and to have one consultant over the two departments. The EAT held that, since the applicant knew all along that her post was intended to last only until the new post had been filled following the normal procedure, there was, in effect, no evidence on which the industrial tribunal could have held that the dismissal was unfair.

Taking the broad effect of these three decisions it seems reasonably clear that the locum cannot claim to have been unfairly dismissed if the event that resulted in the termination of the locum contract was foreseen by the parties at the time

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NHS reorganisation

Hospital staff contracts

Last month the Secretary of State for Social Services agreed that the contracts of consultants, except those in teaching districts, should be held at regional level in the reorganised NHS (24 October, p 1141). The BMA's Secretary, Dr John Havard, has since written to the Secretary of State asking that the contracts of other senior hospital staff—associate specialists and senior hospital medical officers—should also be held by regions. In the letter the BMA Secretary pointed out that the BMA's Hospital Junior Staff Committee wants and the Short Report on medical education recommended that the contracts of registrars and senior registrars should also be held by regions or teaching districts.

Future of community physicians

Community physicians fear that after reorganisation there may be an attempt to limit the appointment of community physicians to only the district medical officer, with a subsequent high number of redundancies. The BMA has warned the Secretary of State of this possible development. Community physicians are also concerned about a possible reduction in income because of loss of fees from other public bodies—for example, crematoria fees, fees for advice to water authorities, fees for regular lectures, etc. The Association has asked the Secretary of State to consider granting ex-gratia payments to compensate for this financial loss.

Buying "added years"

The BMA is worried about several points arising from the implementation circulars on

General Whitley Council agreements on reorganisation. In a letter to the Secretary of State the Association has suggested that the regulations for purchasing added years should be amended to allow those concerned to receive a refund in respect of added years purchased over and above those required to maximise their entitlement. For those doctors purchasing added years under the current scheme and who are made redundant the BMA would like to see the period in which they have to resume paying instalments to pay off the outstanding balance extended from six to 12 months.

Redundancies

The level of redundancy payments for those under 41 who are made redundant in the NHS's reorganisation is another matter of concern for doctors, and the BMA Secretary has told the Secretary of State that, "It is becoming increasingly difficult for members of the profession to find suitable employment and this very often takes some months." Dr Havard has pointed out that "the one week's pay for each year of service in the circumstances is totally inadequate especially as they do not start employment until their mid-20s and their reckonable service is consequently usually less than other classes of employees of a similar age in the Health Service. We therefore feel that the redundancy payments should at least be doubled to two weeks' pay for each year of reckonable service."

Transfer of staff

The DHSS has set out, in HC(81)12, the arrangements for the transfer of staff to the new district health authorities which will be established on 1 April 1982 and for other and

subsequent transfers resulting from NHS reorganisation. It has asked employing authorities to draft transfer schemes and make other necessary transfer arrangements in consultation with staff interests. The circular is concerned with the mechanisms for ensuring that all staff have and know the identity of their new paying authority on 1 April 1982, and that these technical transfers and any other transfers necessitated by reorganisation before or after that date are carried out in such a way as to safeguard those statutory rights of transferred staff that derive from continuity of employment. For most staff in operational services transfer will mean only a formal change of employing authority on 1 April; existing posts, duties, and place of work will continue unchanged. These transfers will be distinct from the separate arrangements for filling posts, which will be spread over a period following 1 April 1982. The eligibility of any officer to compete for or be slotted into a post to be filled under the procedures set out in the General Whitley Council agreement on staffing arrangements will not be affected by this formal change of employing authority.

Separate guidance will be issued on transfer arrangements for medical staff employed by AHAs.

Correction

Civil Service medical officers' pay

In the last paragraph of the report on Civil Service medical officers' pay (7 November, p 1276) we reported on the steering committee headed by Dr A B Roberts of the Social Services Division. This should have read "Dr A B Roberts of the Medical Division (Social Security)." We apologise for this error.

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of the engagement. If, however, the termination of the post results from some change of plan on the part of the authority, or from some unforeseen subsequent event, it is at least possible that the resulting dismissal may be held to be unfair.

Training posts

Another important aspect of the new employment legislation in relation to temporary employment in the NHS is its effect, if any, on time-expired senior registrars and other training grades. Hitherto the widespread practice of the NHS in issuing fixed-term contracts to those in training posts has tended to complicate the issue. Essentially, the question of principle that arises in this type of case is "provided that the trainee has made adequate progress in the training post, can it ever be fair in the case of the senior registrar for the post to be terminated against the wishes of the occupant, or should the authority invariably continue his employment until further career opportunities are open for him?"

Only one case of this nature has come before the EAT.⁶ This

case concerned the then senior registrar in general medicine at the Liverpool Royal Infirmary. The EAT upheld the decision of the industrial tribunal at Liverpool to the effect that the dismissal in all the circumstances was fair. Though the case is unsatisfactory in that it leaves a lot of questions unanswered, it seems that the necessity to keep the training machinery in motion may be a substantial reason for terminating a training appointment. The question as to how much latitude should be given is obviously one that will depend on the circumstances of each case.

References

- 1 Statutory Instrument 1974 No 361. *The National Health Service (appointment of consultants) regulations 1974*. London: HMSO, 1974.
- 2 *Employment Protection (Consolidation) Act 1978*. London: HMSO, 1978.
- 3 *Guirguis v West Midlands RHA*. EAT 567/1977.
- 4 *Banerjee v City and East London AHA(T)*. (1979.) IRLR 147.
- 5 *Mukherjee v Kensington and Chelsea and Westminster AHA(T)*. EAT 284/1980.
- 6 *Baksi v Liverpool AHA(T)*. EAT 486/1977.