KING EDWARD'S HOSPITAL FUND FOR LONDON

KING'S FUND CENTRE

One-Day Seminar in Industrial Relations

for: Senior NHS Staff with responsibility for determining Industrial Relations policies (eg Members of Management Teams/Regional Personnel Officers, Area Personnel Officers, District Personnel Officers).

Tuesday 11th April 1978

Developments in Employment Protection Legislation and Implications of Recent Tribunal Decisions.

Chairman - Mr N Bosanquet, Lecturer in Economics, City University
Tutor and Economic Adviser on Industrial Relations to the King's Fund

10.00 am	Arrival and Coffee
10.15 am	Speaker - Mr M Whincup, Senior Lecturer in Law, Keele University
	Review of Employment Protection law, including the Sex Discrimination Act and Race Relations Act. The Employment Protection Act and unfair dismissals, with particular reference to the National Health Service. Recent decisions in the Employment Appeal Tribunal.
	Discussion
12.45 pm	Lunch
1.30 pm - 2.00 pm	Summing Up and Discussion - Mr Whincup
2.00 pm - 2.30 pm	Speaker - Mr J D Thomson, District Personnel Officer, Guy's Health District (Teaching)
	Implications for National Health Service Management: (a) Application of procedures and agreements (b) Handling of appeals and tribunal cases
2.30 pm - 3.30 pm	Syndicate discussions : Priorities for the next twelve months: (a) Procedures and agreements (b) Handling of appeals and tribunal cases
3.30 pm - 4.00 pm	Report Back
4.00 pm	Tea

JPR/NJD

KING EDWARD'S HOSPITAL FUND FOR LONDON

"DEVELOPMENTS IN EMPLOYMENT PROTECTION LEGISLATION AND IMPLICATIONS OF TRIBUNAL DECISIONS"

Report of a one-day seminar on industrial relations, held at the King's Fund centre, on Tuesday 11th April, 1978.

The Chairman, Mr. N. Bosanquet, lecturer in Economics, City University and Tutor and Adviser on Industrial Relations to the Kings Fund introduced the day's proceedings, and outlined the aims of the siminar.

As a result of increasing Union activity and involvement at local level and the growing quantity of legislation relating to industrial relations the NHS along with all other employers would find if necessary to establish clearly the nature and locus of their responsibility. Mr. M. Whincup, senior Lecturer in Law at Keale University would review the relevant legislation during the morning and in the afternoon there would be discussion of the implications of the various Acts for the Health Service.

Mr. Whincup introduced his talk as a discussion of new legislation in Industrial Relations which had increased the protection afforded the employee and resulted in an extension of the activity of both personnel and union sides.

Contract of Employment The rights of the individual as set out by the contract arise from beingan employee. Mr. Whincup focused on four main points concerning contracts:

Parties - who is an employee
Form - the form of the agreement
Terms - content of the contract
When - the limit of the contract

Parties By legal definition an employee entitled to full statutory rights under the Employment Protection Act is one who works full-time (minimum 16 hours per week, or 8 or more hours per week for more than 5 years). Exceptions to this rule are independent contractors whose employment status has to be defined as each case arises. The NHS faces this problem with the employment of agency labour.

Form Legally, the contract of employment need not be in writing but it is always advisable to draw up a written contract, particularly if it is complicated. Certain things should be included such as; the names of the parties, the date of commencement, the job title, pay hours, holidays and holiday pay, sickness and sickness pay, pension, notice and the grievance and disciplinary procedure.

A written contract reduces the possibility of demarcation disputes and is invaluable in a case of dismissal. A contract could, evidently, be extremely long but it is not necessary to detail every task. An outline of main duties is sufficient for the job description. The employer can ensure a certain amount of flexibility by using the "etcetera clause", a useful, all-embracing statement covering all the duties which the employee may reasonably be asked to perform.

It is vital to ensure that each employee should know how to appeal and whom to appeal to. The employer must make this clear to the employee by use of a

grievance and disciplinary procedure which clearly states what is not acceptable behaviour and what the result of such behaviour would be. ACAS provides guidance on disciplinary rules but rules of good behaviour are usually arrived at after discussions with the Unions. No set formula of such rules exists.

The GNC has issued guidance for the drafting of those rules as they apply to the nursing profession. Four contexts are identified in which nursing behaviour might be relevant to the employer.

1. Patient care at work
2. At work but not directly related to patient-care
3. Off-duty on the premises
4. Off-duty off the premises

In the eyes of the law a contract of employment is not restricted to what is written. Some of the contract may be written, some of it merely spoken and some of it will be neither written not spoken.

Collective Agreements In Britain collective agreements (e.g. Disciplinary and Grievance procedures) are not legally binding unless they are incorporated into the individual's contract. The individual contract of employment over-rides collective agreements.

Conclusion Pay and Holiday entitlement are not covered by the law and are drawn up according to the employer's discretion. Whatever is agreed in the contract is considered as negotiable but any agreement must meet the minimum standards. The agreed conditions are legally binding.

The Sex Discrmination Act and The Race Relations Act
Existing legislation has increased the obligation on the employer, e.g. to ensure that employees are protected from discrimination due to sex, race or union membership. The question of the right to time off for union activities is one for which the employer can find guidance issued by ACAS. Union members should be given any information they request, other than an individual's rate of pay.

Termination of Employment Since 1971 new legislation has caused a revolution in the termination of employment (Contract of Employment Act). The emphasis has moved from the question of giving notice (Industrial Relations Act), to the question of establishing the fairness of the dismissal (Trades Union Labour Relations Act 1974).

In the event of any dismissal the employer must have good reason and act fairly or he must reinstate, re-engage, if practical, (or maximum penalty £5,200 or give compensation of up to £8,200). In practice the outcome is usually a financial settlement. It is possible for an employer to pay up to £14,000 in some cases.

There are three forms of dismissal:
- termination by employer with or without notice
- constructive dismissal
- non-renewal within the same terms of a fixed term contract

Examples of unfair dismissal:
on the grounds of: sex, race, union membership or prison record

Examples of fair dismissal:
- refusal to join a union where there is a union membership agreement
- end of training contract, e.g. junior doctors

It would be impossible to cover all the possible forms of behaviour that would incur dismissal but the employer should name some examples.

- misconduct
- incapacity (e.g. unsuitable form the start, promoted beyond capabiltiy)
- breach of stated duty (failing exams)
- redundacy
- other substantial reason

Definitions or examples of unacceptable behaviour should be specific enough but general enough to allow each case to be appraised on its own merits. The best approach to dismissal cases is one of common sense.

The Tasks of the Personnel Officer

Dismissal Mr. Whincup said that in his view a Personnel Officer, rather than a lawyer should prepare and present a case at the Tribunal. Legal advice should be sought when necessary.

After lunch Mr. J.D. Thompson, District Personnel Officer, Guys Health District, spoke of his own experience at District level of the management approach to the disciplinary procedure and what made the procedure work.

The Attitude of management was to regard the disciplinary procedure as providing a correction. A procedure had been arrived at by discussion and negotiation with staff representatives.

The basic principles of the disciplinary procedure in Guys Health District are as follows:

1) Management is responsible for discipline, discipline is not negotiable and management is outside any sanction.
2) All individuals have a right to appeal to a) the DMT - formal appeal to an individual functional head, and b) to the AHA. Only the District Functional head can dismiss. The Personnel Officer is there only to give advice.
3) The right of the individual to be represented.
4) The right to the examination of personal files and documents related to the case.

Mr. Thompson stressed several points which were open to misinterpretation. Cases were regularly lost by the NHS (see study by R. Parkhurst on Tribunal cases) because procedure had not been properly commenced and followed through.

Terms should be clearly defined, a formal warning is part of a disciplinary procedure whereas an informal warning is not in procedure. Once commenced the procedure should be followed to the letter. A general principle to work by is that consistency of sanction breeds injustice, what should be adhered to is consistency of attitude.

In Guys District it was felt that management training would not be given for the procedure unless deemed necessary in the individual case. According to District policy District heads are used rather than solicitors to present management's case at the Tribunal. It is regarded as essential that a multi-District Area should have an Area policy on disciplinary matters.

Conclusion When introducing a Disciplinary Procedure it should be made absolutely clear what the limits of the authority of the manager are, and what the time limits of each stage of the procedure are. The aim should be to deal with the problem at its source.

Attending the Tribunal The procedure in tribunals seems to vary with each case. Emphasis is less on legal niceties, more on intangibles such as personalities, rapport. The main guiding principle to verdicts seems to be that which is reasonable, practical and equitable.

The burden of proof lies completely with management except in the case of constructive dismissal where the employee must prove his case.

The Tribunal rarely refuses an application from an employee. Management is contacted and then should examine any information made available very carfully to ascertain what the appeal will involve. As much related written information as possible should be studied and collated for the case. The management has a right to ask for more information. In practice it is possible to put forward the wrong case in defence, if there has been inadequate preparation.

Witnesses Witnesses can be sub-poenaed through the Tribunal when necessary. Staff for both sides should be allowed time off to attend. Management side witnesses should be carefully briefed, reassured and given details of venu, dress and form of address. Punctuality should be stressed.

Clerk to the Tribunal A useful and important figure. The Clerk will inform you of procedure, explain the composition of the Tribunal and look up legal precedents.

In Tribunal Note-taking is vital for the purposes of cross-examining.

The seminar then broke up into syndicates to discuss various aspects of the subject. The questions posed to syndicates and the answers given are as follows:

Discussion Groups Report Back

Q. In the light of developments in Employment Protection Law what improvements need to be considered in the next 12 months regarding disciplinary procedures?

A. The skill and expertise of managers in disciplinary rules and procedures should be developed.

Q. In the light of developments in Employment Protection Law what improvements need to be considered in the next 12 months regarding grievance procedures?

A. A code of practice should be formalised and widely publicised which identifies, in particular, levels of authority and time-scales. Forthcoming issues such as time off for Health and Safety work will have to be worked out. Procedures should be streamlined to deal with the envisaged increase in work-load. A clear distinction will have to be made in the time-scales for personal grievance and collective disputes.

Q. In the light of developments in Employment Protection Law what improvements need to be considered in the next 12 months to give support to line managers to carry out their managerial functions?

A. Line managers would benefit from some instruction and support to achieve a better understanding of contemporary attitudes and legislation, an appreciation of the importance of the preliminary stages in the disciplinary procedure and their effect on the ultimate decision, a knowledge of Whitley Council agreements for procedure, and understanding of the implications of related legislation.

Q. What major improvements should be considered in relation to the involvement and preparation of NHS managers of appeals and tirbunal hearings?

A. There was definitely a need for training and a better understanding of the conciliation role of ACAS. It was generally agreed that training was still needed for managers in;disciplinary procedure, relevant legislation, preparing a case and tribunal procedure.
Effective record-keeping was regarded as vital to the success of the manager handling the disciplinary cases. Information on recent cases should also be made available to the manager for up-to-date guidance and practical first-hand expereince of tribunals should be included in the training.
Most of the members of the group seemed to agree that expertise and legal knowledge should be built up in the personnel department and some thought that only a Personnel Officer should take the cases to the tribunal and not the manager involved.
Not all managers were equally in need of training. Priority should be given to managers of those staff groups which give rise to the most cases. (e.g. ancillary and nursing staff).

Q. What major improvements should be considered in relation to the role of personnel specialists in relation both to appeals and tribuanls?

A. Cases could be handled by a manager at Area appeal level and by the Personnel Department at Tribunals. Personnel should be involved from the beginning of a case. The specialist personnel function should be devolved more to unit level. Procedures should be clear.

Q. What are your priorities for positive employment policies (in the spirit of current legislation)?

A. With the aid of recent documents issued by ACAS the existing procedures should be refined. Procedures for collective disputes would be needed and work on Health and Safety should be intensified. National guidelines on Health and Safety activity would be very welcome.

Mr Bosanquet brought the days proceedings to a close. In the case for Health and Safety it would seem that national policy rather than local agreement was wanted in practice. This was in direct contradiction to Macarthy's wish for greater decentralisation. In the coming year personnel officers would no doubt be looking closely at the implications for legislation on inequality and discrimination.

Katherine Spary
April 1978