

Miles Scott
Chief Executive
Bradford Royal Infirmary
Chestnut House
Duckworth Lane
Bradford
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26 June 2009

Dear Ms Abou-Rizk,

Bradford Teaching Hospitals NHS Foundation Trust has great concerns about the potential recommendations of the CCP non-contracted hours study. In our view none of these options is acceptable. The contract of employment is a matter for the consultant and their employer and no-one else. If there is a dispute then there are established legal avenues for redress. Moreover, there is a private practice handbook which already clarifies the consultant contract. The options are totally one-sided in favour of ISTCs and IS providers. There is no account made for the employment, regulatory and CPD costs that we bear which amount to a public subsidy to private healthcare organisations.

In our view the least worst option is 1c. Even here, though, we have to be able to constrain consultants' practice in extreme examples where there is a clear conflict of time which means that the consultant cannot fulfill their NHS commitments properly.

Some of the arguments for NHS Trusts retaining control over consultants non-contracted hours are:

- Implications of the EWTG and patient safety are paramount. An effective way to safeguard against problems here is to have all employment co-ordinated by one employer
- There is potential to de-stabilise the provision of NHS care through competition for consultants' non-contracted hours. In particular when the private sector are offering rates significantly above consultant contract rates. There are already significant volumes of NHS Trust activity recurrently provided by consultants in their non-contracted hours.
- There is potential for conflict of interest where consultants have waiting lists where the same activity could be undertaken by that consultant at different providers, at different rates of remuneration.
- There are numerous issues relating to the fair playing field that are relevant here. There are many factors that might potentially allow the independent/private sector to pay premium rates to consultants for activity:
 - Picking and choosing which activity to deliver dependent on the national tariff rates. There is widespread evidence for this, and something we have experience locally. NHS Trusts & FTs have a statutory duty to deliver care and not choose between which the relative profitability between procedures
 - Some ISTCs have been allowed to negotiate contracts on a minimum take basis, and with a premium on top of national tariff (how does this fit with Principles 7 & 8). These contracts/rates are shrouded in secrecy where is the transparency here?
 - The Independent sector does not have many of the costs related to the employment of consultants, eg. training, supervision, CPD, supporting professional activities, pension costs, HR etc. This is effectively a free-good to the independent sector. (It is important to make a distinction that these costs that are not covered through the NMET levies, and have to be found from with tariff rates.)

- Obtaining Clinical Governance assurance through reliance on NHS Trusts processes and procedures

Employers have to be able to manage conflicts of interest. We need to act reasonably and proportionately, but this is a matter for contractual law/relations rather than regulation. At BTHFT we manage these issues on a case by case basis proportionate to the potential for conflicts of interest to arise. I attach a copy of our guidance to consultants on this issue.

Yours sincerely

MILES SCOTT
Chief Executive

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18 July 2007

All consultants

Dear colleague,

Providing services to NHS patients outside BTHFT

In recent months a number of consultants and managers have raised questions about the rules in relation to providing clinical services to NHS patients outside of job plans and outside the Foundation Trust itself. These questions have arisen from the increasing plurality of providers of NHS care locally including the Eccleshill Treatment Centre, Yorkshire Clinic, Yorkshire Eye Hospital and GP led providers such as Westwood Park.

I believe it is in everyone's interest for there to be greater clarity about how individuals can legitimately engage in such work, how potential conflicts of interest can be managed and when such activity would be inconsistent with an individual's commitments to BTHFT.

Principles

A number of principles underpin people's contracts and how they are implemented. These will govern the Foundation Trust's approach going forward.

- BTHFT is your principal employer. Access to additional activity and income is dependent upon this. The Foundation Trust therefore has a legitimate interest in this additional activity, (including work undertaken in a consultant's own time).
- The consultant contract has been implemented very flexibly in Bradford, particularly in relation to SPA time. In return consultants are expected to work flexibly, often outside their normal timetable, in order to meet the needs of the service.
- Clinical governance, (and in time revalidation), applies to the entirety of your practice irrespective of location or source of remuneration.
- Information gleaned in the course of working within BTHFT, both clinical and managerial, is confidential and should not be shared outside the organisation. The development of alternative providers locally makes more information commercially sensitive than was the case previously.

Policies and guidance

The most important policies and guidance governing activities outside individuals' job plans are:

- Contract of Employment and associated Terms and Condition- Consultants (England) – 1 June 2005, (including implied duties of fidelity and confidentiality)

- Code of Conduct for Private Practice; Recommended Standards of Practice for NHS Consultants; BTHFT policy on fee paying services; appraisal, (NB each of these applies equally to consultants holding the 'old' or 'new' contracts)
- BTHFT policy on Standards of Business conduct, (available on the intranet)
- Corporate registers of interest and hospitality. These are held by Jo Bray, Head of Corporate Affairs and apply to all members of staff.

The BMA have also produced a useful document 'Consultants working in competition with NHS employers'. This emphasises the need for consultants to declare outside business interests and also identifies a legal duty of fidelity which requires consultants to discuss in advance with their employer any managerial or advisory activity for third parties, (including their own businesses).

Way forward

The policies and guidance set out above should be adequate to manage practice outside of job plans. I do not believe that we need new regulations at this stage. Instead I propose that we apply the existing policies consistently and fairly across all consultants in all specialties. To do this the following specific actions were agreed by the Clinical Management Group on 5 July:

1. All consultants should make a declaration of professional activities and business interests outside their job plans by 30 September 2007. Declarations should be made to Jo Bray, Head of Corporate Affairs for entry into the Foundation Trust's Register of Interests. It is important that you update your declaration at least once a year. If you are unsure what you should declare please do not hesitate to contact Jo, Clive Kay or myself.
2. In the same timescale you should also declare to the Head of Corporate Affairs any hospitality (to a value of £25 or more) received over the last twelve months in connection with your work. Examples would include sponsorship to attend meetings, meals or accommodation paid for by a third party and gifts such as books.
3. Any new or potential activities should be discussed in confidence at the earliest possible stage with your Clinical Director, (who will inform the Medical Director and the Director of Finance). This will allow us to explore whether any potential conflicts of interest arise and if so whether these can be resolved.
4. I will review existing LLPs or other formal partnerships of consultants with each Clinical Director in order to provide assurance that they are supported by appropriate governance arrangements and that any conflicts of interest can be managed.
5. The Executive Directors will hold discussions with the Yorkshire Clinic, Yorkshire Eye Hospital, Eccleshill Treatment Centre, Eccleshill Community Hospital and Westwood Park Treatment Centre to clarify the basis upon which BTHFT consultants undertake NHS activity on their premises.

This is clearly a developing area for us all. I hope that the proportionate approach outlined above will enable us to work through each circumstance on its merits, protecting the interests of patients, consultants and the Foundation Trust.

With best wishes

Yours sincerely,

Miles Scott
Chief Executive

cc General Managers

Providing services to NHS patients outside BTHFT

QUESTIONS & ANSWERS

If I declare an outside business interest will I have to choose between that interest and continuing employment with the Foundation Trust?

All NHS Consultants are entitled to undertake private activities provided there is no adverse effect on their NHS work. The Consultant contract and accompanying Terms and Conditions make it clear that private work is acceptable under certain parameters. In particular;

Schedule 9 of the Terms and Conditions confirms that the Consultant is responsible for ensuring private work does not:

- result in detriment to NHS patients or services
- diminish the public resources available to the NHS.

Plus where there is a conflict of interest, NHS commitments must take precedence over any private work (paragraph 5 of Schedule 9).

Schedule 12 confirms:

- any financial interest or relationship with an external organisation with conflicting business interests must be declared.
- any pecuniary advantage must be declared
- the Consultant has an obligation not to disclose confidential information

The Code of Conduct for Private Practice – Recommended Standards of Practice for NHS Consultants also confirms private practice may be undertaken by Consultants but there should be no prejudice to the interests of NHS patients or disruption to NHS services. A copy of this code is available from my office

The new Human Resource Framework for ISTC's also allows the employment of NHS staff during non-contracted hours via a structured secondment provided that they are not in a shortage speciality and with the consent of the Trust.

The above guidance and contractual provisions mean that you do not, in most cases, have to choose between working for the Trust and the private sector provider. All Consultants should discuss the nature and extent of the private work they wish to undertake with their Clinical Director to ensure that there is no conflict with or detriment to their NHS work.

What kind of activity might represent an irreconcilable conflict of interest?

Where a Consultant is working for a private provider in direct competition to the Trust, this may amount to an unacceptable conflict of interest.

Similarly where a Consultant has set up in business or has a direct interest in a business (such as a directorship or shareholding) which is providing directly competitive health care services for NHS patients, this is likely to be regarded as incompatible with their employment with BTHFT.

It would be expected that such interests are declared at an early stage to allow any conflict to be resolved.

If an activity is classified as private practice are there any limits to how much of it I can undertake?

There is provision in the old Consultant contract to limit private practice under the maximum part-time rules.

The new consultant contract also confirms that, where clinical work is to be undertaken which is not specified in the Job Plan, an additional Programmed Activity should be offered to the Trust before private practice can be undertaken (Schedule 6 of the Terms and Conditions). This Schedule also contains the requirements for part-time Consultants.

What does the duty of fidelity entail?

In every contract of employment, there is an implied term that the employee will work for his or her employer with good faith and fidelity. This duty applies both during and outside normal working hours. It ceases, in most employees cases, when the employment relationship terminates.

During working hours, an employee is not free to undertake work for anyone else without the employer's express permission. There would also be a breach of the implied duty of fidelity if the employee used the employer's time or assets to compete with the employer outside his normal working hours.

The duty of fidelity will also extend outside normal working hours, for example, when working for a private provider where the employee's activities may cause harm to the employer's activities. This could be caused, for example, where an employee uses the employer's confidential business information in furtherance of their private business or to solicit the employer's clients/patients or employees to work at that business.

What are the flexibilities in the consultant contract which the Foundation Trust offers to consultants?

As indicated in answer to question 3 above, the Consultant contract does allow Consultants to use spare professional capacity to undertake private work. This extends to working for an ISTC.

The Foundation Trust normally allows consultants to work their SPA time flexibly. This is not the case at all Trusts. However, if there were concerns that a consultant was not fulfilling all of their NHS responsibilities, clinical and non-clinical, this flexibility could be withdrawn and the SPAs timetabled as a fixed commitment.

Does this guidance apply to all staff or consultants only?

This guidance applies to all staff, not just consultants.

Given the public right to freedom of information what non-clinical information is confidential to the Foundation Trust?

Schedule 12 of the Terms and Conditions confirms:-

"Confidentiality

A Consultant has an obligation not to disclose any information of a confidential nature concerning patients, employees, contractors or the confidential business of the organisation".

The above therefore would prevent Consultants from disclosing information to a third party, directly or indirectly, about, (for example); the fees and charges of the Foundation Trust, procedure costs, activity levels and performance data, development plans of the Foundation Trust, financial investment and staffing information.

If you are in any doubt as to whether such disclosure should be made then you must discuss this in advance with your Clinical Director, the Medical Director, the Director of Finance or Chief Executive as any breach of this duty may result in disciplinary action against you.

Note: If you have any additional questions that you wish to raise either openly in this Q&A format or directly with me, the Medical Director or Director of Finance then please do so. The information in this document is to provide outline and generic responses to commonly raised queries. Individual queries about a Consultant's own position should be raised as detailed in the covering letter.

Bradford Teaching Hospitals NHS Foundation Trust
18 July, 2007