

Relevant Contract Documents

More than 90% of consultants are on the new contract of employment introduced in 2003. A minority remain on the previous pay terms and conditions.

Consultant Contract 2003

The 2003 contract (and its predecessor) makes provision for consultants both undertaking private professional practice and or undertaking work for other organisations.

- Clause 10 of the contract makes provision for Private Professional Services (PPS) and refers to Schedule 9 of the Terms and Conditions of Service (T&Cs)
- Schedule 9.2 places a duty on employees to ensure the provision of PPS does not
 - Result in detriment of NHS patients or services or
 - Diminish the public resources that are available for the NHS
- The definitions to the T&Cs refer to PPS viz -
"Private Professional Services (also referred to as "private practice"): such services as include[s]:
 - *the diagnosis or treatment of patients by private arrangement (including such diagnosis or treatment under section 65(2) of the National Health Service Act 1977), excluding fee paying services as described in Schedule 10 of the terms and conditions*
 - *work in the general medical, dental or ophthalmic services under Part II of the National Health Service Act 1977 (except in respect of patients for whom a hospital medical officer is allowed a limited "list", e.g. Members of the hospital staff)".*

The prospect of working for another employer is anticipated and provided for (as specified) i.e. an express term exists.

- In addition, Schedule 12.1 of the T&Cs states -
"Outside Employment and Financial Interests
A consultant must declare:
 - *Any financial interest or relationship with an external organisation he or she may have which may conflict with the policies, business activity and decisions of the employing organisation; and/or*
 - *Any financial or pecuniary advantage he or she may gain whether directly or indirectly as a result of a privileged position within the employing organisation".*

A duty is placed on the consultant is to declare the activity. The employer's right is presumably to consider what to do about it and particularly judge if a breach has occurred and if so what action if any, to take.

In addition to the presence of these express terms it may be helpful to seek advice on the extent to which the commonly implied term of fidelity¹ applies, particularly with regard to consultants non clinical activities. Such activities are perhaps more likely to lead to the use of knowledge or information that is confidential in nature or could be classified as a trade secret.

- Schedule 12.8 of the T&Cs refers to confidentiality

"Confidentiality

8. 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 contract documentation can be viewed at:

[http://www.nhsemployers.org/SiteCollectionDocuments/Consultant terms-conditions_version7_280308_aw.pdf](http://www.nhsemployers.org/SiteCollectionDocuments/Consultant_terms-conditions_version7_280308_aw.pdf) and

[http://www.nhsemployers.org/SiteCollectionDocuments/Model contract 010408_aw.doc](http://www.nhsemployers.org/SiteCollectionDocuments/Model_contract_010408_aw.doc)

(ii) The Pre 2003 Contract – introduced circa 1979

Hospital Medical and Dental terms and conditions have for the previous 25 years stated

PRIVATE PRACTICE

Definition

40. The expression "private practice" in these Terms and Conditions of Service includes:

- a. the diagnosis or treatment of patients by private arrangement (including such diagnosis or treatment under section 65(2) of the National Health Service Act 1977), excluding however work of the kind referred to in paragraph 33: and
- b. work in the general medical, dental or ophthalmic services under Part II of the National Health Service Act 1977 (except in respect of patients for whom a hospital medical officer is allowed a limited "list", eg. members of the hospital staff).

Entitlement to undertake private practice

41. Subject to the limits set out in paragraph 42 below, all practitioners (including locums) may undertake private practice or other work, provided that practitioners in grades other than consultant may undertake it only outside the times for which they are contracted to an employing authority.

Whatever the precise intention, the focus is clearly upon clinical practice.

This contract can be viewed at:

<http://www.nhsemployers.org/SiteCollectionDocuments/Hospital Medical and Dental Staff TCS March 08 cd 160209.pdf>

(iii) The ISTC HR Framework

The Human Resources Framework, (revised August 2007) applies to the phase 2 of the Independent Sector Treatment Centre Programme. This anticipates consultants

¹ Fidelity is normally taken to mean employees have a duty to serve an employer faithfully and to refrain from acting in any way that could be detrimental to that employers business. So this could catch activities not already expressly provided for e.g. those that are managerial or strategic or related to policy formation.

working non contracted hours or working extra hours above contracted hours for independent sector (IS) providers and states in para 8.2 –

“Consultant medical staff will be able to work for IS providers after they have offered their first four hours of additional time to the NHS, and the NHS employer and the IS provider have satisfied themselves that this additional work will not compromise patient or employee safety”.

Annex B to the Framework sets out a protocol to be applied to NHS staff in such circumstances, which enables the deployment of non contracted hours in the IS irrespective of whether the member of staff is in a shortage specialty. In addition, the contractual restriction of IS providers substantively engaging health care staff is refocused and applied only to those in defined shortage specialisms. The detail of the protocol requires agreement before engagement, ensuring NHS organisations control the use of non contracted hours.

The full document can be viewed at
http://www.nhsemployers.org/Aboutus/Publications/Documents/HR_framework_I_STC_phase2_2007.pdf

Explanatory Notes

Pre and Post 2003 consultant's contract

Broadly the definition of private practice in both contracts is the same. It includes the diagnosis or treatment of patients by private arrangement. In day to day terms this has often been interpreted as:

- Waiting list initiatives;
- A private hospital bidding for a block of activity to treat NHS patients which is then carried out by NHS consultants who have visiting rights at that private hospital.

There is an interpretation that the BMA are therefore correct to say that even where the consultant's activities compete with those of their NHS employer they can still carry out that work as long as it does not:

- Result in detriment to NHS patients or services;
- Diminish the public resources that are available for the NHS.

However opposite arguments have been put to the BMA's view.

We are unaware of any case-law on the meaning of the above two bullet points.

The job planning process under the new consultant's contract requires the consultant to agree with his/her employer the totality of the activities that he/she carries out, including in respect of his/her private practice. In addition, he/she has

a specific duty to declare any financial interest or relationship with another organisation which may conflict with the policies, activities and decisions of his/her employer or where he/she gains any financial advantage as a result of his/her knowledge and position within the trust.

The 2003 contract further requires that consultants have an obligation not to disclose any information of a confidential nature concerning patients, colleagues or the confidential business of their employer.

The duty of fidelity

Every employment contract has an implied term that the employee will faithfully serve his/her employer and act in his/her employer's best interests. There is a clear tension between this implied duty and the express duties set out above. Generally the law is that express duties "trump" implied duties or that it is perfectly permissible for express duties to limit implied duties. There is debate around the scope of the unacceptable activity set out above and the other responsibilities set out below.

The duty of confidentiality

Consultants will be in breach of their employment contract if, for example, they use confidential information about the way their employer carries out or prices a service to then try and take that work away from the employer. Such action would be misconduct. In fact, in some cases, it would be gross misconduct.

Managing or preparing to manage competitive activities

The definitions of private practice do not apply to the management of an activity which competes with an employer's interests or seeking to set up such an activity. So a person who sets up a limited company to bid to carry out a particular procedure on NHS patients and who organised this function would not be protected by the private practice clause. This would also apply to "consultant's chambers" where those consultants take an active part in the running of that business and seek work which could otherwise be carried out by their NHS employer. Such activity could involve a breach of a consultant's duty of confidentiality. Such management activities would again be misconduct. Indeed, in some cases, it could be gross misconduct.

The Working Time Regulations

It is each employer's responsibility to ensure that consultants do not work more than 48 hours per week. These Regulations are about health and safety and the law recognises a risk to employees and patients from long hours. Each employer is therefore entitled to forbid consultants from working more than 48 hours when combining NHS and private practice. However, consultants can then seek an opt out agreement.

Activities in Independent Sector Treatment Centres (ISTCs)

Competitive activities carried out in a Phase two ISTC are covered by the Human Resources Framework for ISTCs. This requires that the independent sector provider has to let it know that any competitive work is going to be done. The consultants must then speak to their employers about a request to work with the independent sector provider and seek the employer's consent to carry out this activity.