

Dear all,

Thank you to all the workplace representatives and Regional Officers (RO) who attended the NHS PFI (Private Finance Initiative) and Agenda for Change (AfC) meeting at Esher on May 26. It was certainly a very informative session and many valuable contributions were made.

Special thanks go to the solicitors, Caroline Bates and Hannah Bright from Rowley Ashworth, who outlined the legal situation regarding the implementation of AfC and PFI. What is clear is that the situation is an extremely complex one, which is not going to be easy to tackle.

Amicus would like to see private companies, who are now responsible for providing hard and soft facilities management to the NHS, implement AfC where members would see an overall benefit in their terms and conditions of employment. Problems are arising because some companies appear to be more willing than others to consider implementing AfC.

Generally, there is now an assumption that where there is a PFI project the protections of Transfer of Undertakings (Protection of Employment) (TUPE) will apply – although this has been further complicated by the Retention of Employment Model which was negotiated by trade unions with the Department of Health (DOH). Under TUPE, new employers cannot change the terms and conditions of workers if the changes are for a reason connected to the transfer, but there is no hard and fast rule about how long this protection lasts.

Following a TUPE transfer, collective agreements are not normally legally enforceable unless the terms of the collective agreement are incorporated into an employee's contract of employment. This incorporation must be an express or implied agreement between the employer and employee, and will only cover those terms which are suitable for incorporation.

Without extensive analysis of the facts surrounding each individual case, the legal experts cannot state whether particular terms of AfC would qualify as suitable for incorporation in particular cases. Furthermore, even if an individual employee's contract meets these criteria, the terms and conditions of future collective agreements such as AfC may only be incorporated if there is a specific reference, either express or implied, to future collective agreements in the contract.

The DOH have acknowledged that this is a difficult legal area in their letter to the Business Services Association (BSA) who represent many of the companies involved in PFI schemes. A number of companies have falsely used this letter to justify not implementing AfC. However, the exact wording of the letter makes it clear that implementation of AfC is "*subject to any specific provisions of the contract which might apply.*"

Given the legal uncertainties of whether, and in what circumstances, AfC may be enforceable, the Amicus legal department is seeking to identify test cases. It may be possible to pursue action against contractors on a number of grounds including breach of contract, unlawful deductions of wages and equal pay. Amicus has already

approached 14 contractors on the issue of applying AfC and talks have started with three of these regarding implementation.

In order to help identify suitable test cases, ROs should provide Legal Services and the National Officer for Health with the following details:

1. Full details of employees affected
2. The employees' current contractual terms (including details of which Whitley Council agreement applies)
3. Copies of the relevant collective agreements
4. Copies of the relevant PFI/transfer agreements
5. Copies of any relevant local agreements
6. All relevant correspondence between the Union, members and the employer

With respect to negotiations with contractors and the application of AfC, Amicus officials should point out that the letter from the DOH to the BSA does not constitute a general rule for not implementing AfC. Furthermore, attention should be drawn to any clauses in contracts that provide for the incorporation of future collective agreements. Officials should also make sure that terms and conditions for new starters include express references to the incorporation of all collective agreements.

Finally, we also talked about the need for workplace representatives and ROs to prepare membership records in readiness for consultation on industrial action should this prove necessary.

Kind regards,

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