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BY FAX: 020 7505 3200

23 April 2003

Dear Colenzo

THE ABOLITION OF COMMUNITY HEALTH COUNCILS: TUPE

Gordon Isl has asked me to provide advice as to whether or not I consider that TUPE will apply to the abolition of Community Health Councils and the subsequent establishment of the Commission of Public and Patient Involvement in Health, the Independent Complaints and Advocacy Service and Patient Forums in Primary Care Trust Areas.

In order to answer the question as to whether or not TUPE applies, it is essential to examine the functions, first, of Community Health Councils and then, the successor organisations, in particular, the Commission of Public and Patient Involvement in Health ("CPPIH").

Functions of Community Health Councils

The functions of Community Health Councils are defined in the Community Health Councils Regulations 1996:

"17 It should be the duty of each Council to keep under review the operation of the health service in its district, to make recommendations for the improvement of that service and to advise any relevant health authority upon such matters relating to the operation of the health service within its district as the Council thinks fit."

Functions of the CPPIH

The functions of the CPPIH are listed in section 20 of the National Health Service Reform and Health Care Professions Act 2002. These functions include:

"(1) Advising the Secretary of State and other bodies about arrangements for public involvement in consultation on matters relating to the health service;

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- (2) Advising the Secretary of State about arrangements for the provision of independent advocacy services;
- (3) Representing to the Secretary of State the views of patients' forums and other voluntary organisations concerning consultation and independent advocacy;
- (4) Providing staff to patients' forums;
- (5) Advising and assisting providers of independent advocacy services;
- (6) Setting quality standards for patients' forums and independent advocacy services; and
- (7) Such other functions as may be prescribed."

Those functions are supplemented in the CPPIH (Functions) Regulations 2002 where there is provision for an obligation on the part of the CPPIH to establish work programs at the beginning of each financial year.

The Transfer of an Undertaking

I have no doubt that a Community Health Council will in itself constitute an 'undertaking' for the purposes of TUPE. The issue is as to whether or not those separate undertakings 'retain their identity' after reorganisation. Typically, a Court or Tribunal will consider a number of factors to determine whether or not the undertaking does retain its identity and these will include:

- (1) Whether or not there is any significant transfer of assets;
- (2) Whether or not a majority of the staff transfer and, if not, the reason for them not transferring; and
- (3) The similarity of the function exercised before and after the reorganisation.

At the outset, I note that there are a multitude of Community Health Care Councils up and down the country, which are about to be abolished. The new regime will involve a single commission for patient and public involvement, which will apparently operate on a national basis. It is not clear to me what the Secretary of State's intentions are in relation to the transfer of assets previously held by Community Health Councils. It is also not clear to me whether or not it is intended that a majority of the employees of Community Health Councils are to be taken on by the CPPIH.

However, the factor that I believe will be decisive in determining whether or not there has been a series of TUPE transfers is the distinct functions which the CPPIH will perform, as opposed to the previous duties of Community Health Councils. Community Health Councils essentially operate at a local level and their statutory duties are restricted to reviewing the operation of Local Health Services and making recommendations and providing advice to health authorities as they see fit.

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I believe that there is a very significant difference between those functions of Community Health Councils and the functions of the CCPIH. The CCPIH will be advising and making recommendations to the Secretary of State. It will also be providing staff to patients' forums and facilitating the coordination of their activities. The CCPIH will also be setting quality standard for those forums and independent advocacy services and will be monitoring those quality standards. From the provisions of the 1996 Regulations and the 2002 Act, it does seem clear to me that the function of the Community Health Councils was very much 'self driven', although obviously involving the participation of health service related organisations. In contrast, the CCPIH is to have specific regulatory functions, involving in particular advocacy services and patients' forums.

In those circumstances, my opinion is that TUPE would not apply because a Court or Tribunal would conclude that the activity being carried out after the reorganisation is not sufficiently similar to the pre-reorganisation activity.

Cabinet Office Guidance on Staff Transfers in the Public Sector

In the papers which Gordon IAI kindly provided to me, I saw a number of references to the Cabinet Office guidance on staff transfers in the public sector. That guidance is not legally binding, but does set standards which the government expects public bodies and contractors to comply with. That guidance is specifically applied to transfers and reorganisations within the public sector.

Paragraph 17 of the guidance specifically provides that:

"17 TUPE can apply to the transfers of the function from one part of the public sector to another where there is a change of employer. This, for example, can include:

..... transfers between the NHS and non departmental public bodies."

I am not sure of the status of Community Health Councils, but believe that there is a respectable argument that those are included in the ambit of the NHS. It does seem to me that the CCPIH will constitute a non departmental public body, meaning that the Cabinet Office guidance should apply and the reorganisation be conducted as if TUPE did apply.

Unfortunately, the application of the Cabinet Office guidance will provide no legal means of redress. It may, however, be a resource to use in negotiations.

The Department of Health's Advice

In its human resources framework document of 31 January 2003, the Department of Health simply stated that, after legal advice and careful consideration of the Cabinet Office guidance, the government has concluded that TUPE did not apply. The reason for this, given at question 10, was that "the Commission is a new, independent body

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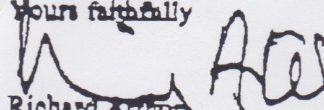
which is structured differently and performs a different set of functions from those of CHC's."

Although I believe that the Department of Health's analysis is cursory, I am afraid that on balance I do agree with the conclusion - that is, that TUPE will probably not apply. As I have said, the main reason for this is the clear distinctions which can be drawn between the functions of Community Health Councils and the CCPIH.

I appreciate that this advice will not be what your members wish to hear, and I am of course available to answer any further questions which may arise.

With very best wishes.

Yours faithfully


Richard Arthur
for THOMPSONS

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