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➔ Dealing with,
and overcoming
problems in
contracts of
employment.



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A special publication by the PDA



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THE PHARMACISTS' DEFENCE ASSOCIATION

The Pharmacists' Defence Association (PDA) is a not for profit organisation whose aim is to act upon and support the needs of individual pharmacists and, when necessary, to defend their reputation. At the time of printing of this publication (June 2005) PDA had more than 10,000 members.

The primary aims of the PDA are to:

- Support pharmacists in their legal, practice and employment needs.
- Provide insurance cover to safeguard and defend the reputation of the individual pharmacist.
- Proactively seek to influence the professional, practice and employment agenda to support members.
- Lead and support initiatives designed to improve the knowledge and skills of pharmacists in managing risk and safe practices, so improving patient care.
- Work with like-minded organisations to further improve the membership benefits to individual pharmacists.

More information on the PDA is available on the website www.the-pda.org or telephone 0121 694 7000.

The purpose of this publication

This publication is intended as a guide to all pharmacists who are employed under a written contract of employment, or as self-employed locums working under a contract for services. This may include community, hospital or PCT employed pharmacists, Pre-reg's, locums and Primary Care Pharmacists. Based on 'real life' situations in which the PDA has been involved, it contains sample employment clauses which have caused problems or have resulted in disputes between employees or locums and employers which the Pharmacists' Defence Association has had to deal with in the past. In highlighting problem clauses and also in suggesting approaches that may be taken by employees or locums, it is hoped that this guide, will assist pharmacists by helping them avoid or at least minimise problem employment clauses in the future.

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Introduction.

Contracts and the law

During the course of 2004, the Pharmacists' Defence Association dealt with more than 700 episodes where pharmacists required help or support as a result of incidents occurring in the workplace. Considerably more than half of these were episodes where a dispute had arisen between an employer and an employee or locum. In the majority of these cases, the involvement of the PDA secured a satisfactory outcome for the employee (or locum). In some of these cases, it was possible for the PDA to secure financial compensation in the form of a compromise agreement from employers who had treated their employees unfairly or illegally and for Locums where their contract had been breached. The amount secured for PDA members during this period was in excess of £150,000.

There is relatively unrestricted freedom to agree contract terms between employees and employers under UK law, with little statutory interference by government and other regulatory bodies. Successive UK governments have long sought to preserve this position in order to maintain Britain's perceived lead as an 'employer-friendly' area within the European Union and attract industry and investment to the UK from within the EU and elsewhere. One consequence of this however has been that in areas where employees have historically had little or no representation, or where the workforce tends not to challenge the content of their employment contract, the employers have largely been able to dictate terms to those seeking employment within their businesses; this has resulted in a trend towards ever more 'flexible' contract terms (from the employer's point of view), which are frequently to the detriment of employees who (by contrast) generally prefer well-defined working agreements which give them as much security from unwanted change as possible.

Risk Management.

Risk Management happens when, after problems occur, their causes are examined and changes to the system(s) are put into place to prevent their recurrence. The contract incidents that occurred during 2004 have been examined and many of their causes have been identified. A synopsis of issues and recommendations is contained in this booklet. Changing the 'balance of negotiating power' will not happen overnight, but it will certainly help the process if pharmacists read their contracts and consider the implications of the terms before they agree to take-on jobs and thereby become bound by them. By studying this booklet, it is hoped that pharmacists can be forewarned of situations which have led to problems elsewhere. In particular, this booklet contains contract clauses or styles of agreement that some employers have tried to persuade their employees to sign up to and in the majority of cases have succeeded. We believe that subsequently, these clauses have led to serious employment disputes. Before any new contracts are signed in the future, pharmacists are urged to ensure that they do not contain the types of clauses that are highlighted in this booklet.

Problem employment contract clauses

1. “The employer may make reasonable changes to this contract upon giving reasonable notice to the employee, such notice to be given either orally or in writing.”

This term has been appearing in pharmacist contracts of employment with increasing frequency. The practical effect of this clause is that it gives an employer carte blanche to make changes to the basis of the employment agreement at any time it wishes and this can be done to the detriment of the employee. The reason this can occur is that the employer only then has to show that the change is 'reasonable' and that the notice to the employee was also 'reasonable' and it has secured whatever change it desires to impose at whatever notice it considers to be reasonable. By way of example, an employer which has contracted to give two months notice of termination of contract could (by notice the day beforehand) change the notice period to the statutory minimum, or change the rate of pay with almost immediate effect.

In worst-case scenarios, it would be for the employee to prove it was not reasonable after the employer had imposed such a change. Such terms should therefore be resisted at all costs and serious consideration should be given to simply refusing to contract on such 'loose' and insecure terms.

2. “The employee's usual place of work will be (insert name of Pharmacy) but he / she may be required to work at other locations within the employers business, as required by the employer and the needs of the business.”

The effect of this clause is that whilst an employee may consider that their job is fixed at a particular location, the employer may for whatever reason decide that the employee should from now on work elsewhere, even though this may be to the detriment of the employee. Indeed, this clause has even been used by some employers to unsettle an employee so as to bring about a resignation. This clause could require an employee to permanently relocate their work location even though this may be many miles away or in a location that is considered to be undesirable.

Suggested approach;

Pharmacists who feel that they don't want to accept this term should simply delete it from the contract. If this clause is agreeable however, then before agreeing to such a term, pharmacists might want to add a 'reasonable' travel distance (or a maximum distance in miles) or they may want to provide that such a transfer may only be temporary and limit the duration. If the scope of the clause is not restricted as suggested, then in theory the employer, if it was so inclined or motivated could ask a pharmacist to work in Exeter instead of Carlisle. The simple rule for pharmacists is that they should seek to secure clarification in writing - define the limits of the transfer that they are prepared to accept, before it happens, rather than seeking to argue about it afterwards.

3. “The employee’s usual hours of work will be (insert details and number of hours) but he / she may be required to work more / less hours / Sundays / Bank holidays as required by the employer.”

This term gives employers the flexibility to demand that employees work extra hours when necessary and also to reduce the hours worked by the employee. In some situations, even if the employee has good reason why they cannot work the hours that are being requested of them, the effect of this clause renders the employee in a potential breach of contract.

Suggested approach;

If there is concern about this, then pharmacists are, once again urged to negotiate some limits to the clause, such as maximum extra hours, frequency, removing Bank Holidays, Sundays, etc.



4. “The employee will be entitled to receive a minimum of one week’s notice (or the Statutory minimum, whichever is the less) from the employer in the event that it wishes to terminate this contract. The employer will be entitled to receive from the employee a minimum of two calendar months notice in the event that the employee wishes to terminate this contract.”

This gives the employer a clear advantage over the employee, especially in the first year before the full protection of the Employment Rights Act (ERA) comes into effect to protect employees from unfair dismissal. If employees accept this clause then they will be bound by it.

Suggested approach;

Many employees will feel that it is unfair to give the employer such an advantage, they should demand the same notice from the employer as it demands from them.

5. “The employee shall be exclusively the servant of the employer and shall at all times devote him / herself diligently to all assigned tasks; in particular the employee shall not without the express permission of the employer be engaged, employed or otherwise involved in the business of any other commercial undertaking either alone or jointly with others. For the avoidance of doubt this restriction shall extend to the holding of offices within other firms or companies, either as director or partner and whether paid or unpaid and shall include a prohibition on the holding of shares in any company, provided that it shall be permissible to have a shareholding which does not exceed 5% of the total issued share capital.”

Increasingly employers want to ensure undivided loyalty, total control and ultimately the benefit of the employees full effort on their behalf. Such clauses are appearing in pharmacist employment contracts with increasing regularity. The effect of such a clause is that the pharmacist must exclusively be the employee of their employer and cannot be involved in any other employed activities (whether paid or unpaid) without their employers express (usually written) permission. This could prevent pharmacist employees performing any occasional locums elsewhere, or having a part-time evening job in any occupation. In some instances where a pharmacist requires to earn more income through locum work, employers will try to persuade their employee to work as a locum for them, as this is likely to save the employer significant costs of employing a genuine self-employed locum. Often the disincentive for the pharmacist is that they may be forced to work for lower hourly rates than would be available elsewhere, they may not be able to operate their locum work on a self-employed basis and hence lose their tax advantages. PDA has seen examples where employees have been summarily dismissed for breach of

contract because they have been discovered by their employers to be working as locums in their spare time. Subsequently, their experience has been publicised by the employer to the rest of the workforce to act as a deterrent.

The restrictions on share ownership are designed to allow investment in public companies by way of a portfolio, but to restrict competition with the employer or the involvement in another business venture vicariously, e.g. by owning another company and letting the running be done by another person.

Suggested approach;

There are three ways in which this issue can be handled:

- a) Negotiate the whole clause out of the employment contract at the time of taking on the job. Alternatively at the time, when the employer is trying to amend the contract so as to implement the clause.
- b) Amend the clause, so as to extract any specific wording which could affect your proposed activity e.g. locum work.
- c) Secure the employers permission in writing to allow for work as a locum or for the owning of more shares.

6. “During the period of 12 months following the termination of this employment, whether by notice from the employee, employer or otherwise, the employee shall not without the express permission of the employer be engaged, employed or otherwise involved in the business of any other pharmacy or competitive commercial undertaking within a radius of 50 miles from the employee’s main place of work. The same restrictions as in paragraph 5 hereof shall apply to the holding of offices in such businesses as detailed herein before.”

Employers will be fearful of their employees being attracted by other nearby employers and taking with them their knowledge of customer databases, professional contacts (with surgeries for instance), to the detriment of their business. The result is that many are now seeking to include terms of this type and some are even going to the lengths of seeking to add them to existing contracts, without offering to pay a proper or worthwhile fee for the amendment.

Suggested approach;

Pharmacists are urged to think carefully before they agree to restrictions of this type; especially about the duration and distance which is involved. It would not be unreasonable to reduce the restriction to say; 3 months and/or 1 mile.

It is important to note that enforcement of a contract, especially after an employee has left is a civil matter and has nothing to do with the criminal law. In practice, even if an employee has signed such a clause and has subsequently broken it, the ex-employer may not contemplate going to Court to obtain an injunction to enforce the clause or sue for breach of contract, especially if it can show no damage arising from the non-adherence to it.

There is some degree of legal speculation as to whether this type of restrictive clause is actually enforceable in the event that an ex-employee leaves and chooses to work in the proximity. The view of the PDA is that the more onerous the restriction, the more likely it is that it will be unenforceable if it was challenged in court. The important thing here is how reasonable is the restriction. For example, it would be very difficult for an employer to enforce a five year, fifty mile restriction on a newly qualified pharmacist who works for an employer for six months in a large city. However, an employer may stand a much greater chance of enforcing a one year, three mile restriction on a pharmacist who has worked for the employer for ten years.

It is probably for this reason that at the current time, there are no known attempts by the RPSGB to regard such clauses as a 'matter of professional conduct', making breach a professional matter. However, as the Society seeks to become ever more involved in regulatory activity, it is conceivable that employers may consider a referral to the Society as an active deterrent and a cheaper alternative than taking the matter to court.

7. Locums and their contractual rights.

The PDA has dealt with many scenarios whereby Locums feel that they have been treated unfairly by an 'employer' to whom they have been loyal, and yet have (in the Locum's view) been 'dropped' unceremoniously when it so suits.

Locums, except under certain circumstances, have no employment rights. They are however protected under the Law of Contract.

A Contract is in place whether made verbally or in writing. The difficulty is that verbal contracts are always open to denial and/or ambiguity.

Contractual terms can therefore be either implied or express.

Terms of a Contract are express when they are actually agreed by the two parties. They can either be put in writing or verbally agreed.

Terms of a Contract can be implied if:

1. They are dictated by statute.

2. They are determined by the previous behaviours of the two parties (e.g. if the locum has worked for an employer before, or on a long term basis, and has been given short notice to cancel a booking and accepted it, this could now be interpreted as an implied term of the contract).

3. There is a custom and practice or 'norm' in the Industry. (e.g. If there is an industry-wide acceptance that three days notice either side to cancel a booking is normal).

The difficulty that the PDA faces when protecting Locums from breaches in contract is that a very high proportion do not have a written 'Contract for Services', this allows very little space for manoeuvre when dealing with the implicit terms rather than the explicit terms which would be stated in the written contract.

Previous to the inauguration of the PDA there was only one example of a 'generic' contract for services in circulation and its main purpose was specifically to ensure that the terms agreed between a locum and an engager were those that constituted a self-employed 'contract for services' and not an employed 'contract of service'. This distinction is important as it can mean that the engager is held responsible by the Inland Revenue for paying the locums Tax and National Insurance and the locums self-employed tax status is refused.

The NPA 'Locum Contract for Services' document

Periodically, the Inland Revenue (IR) will decide to investigate whether a pharmacist who claims to be self-employed is truly self-employed or whether he is in fact an employee. The ensuing IR investigation will look carefully at the exact nature of the relationship and will perform certain tests to establish whether the relationship is that of employment or self-employment. To protect pharmacist locums and those that retain their services from disadvantageous assessments (i.e. to ensure that the IR did not state that the individuals were actually employees and that the employers need to pay back tax and back employers NI contributions), the National Pharmaceutical Association (NPA) produced what has become known as a 'Contract for Services' document which is now in widespread use in pharmacy when an engager books the services of a locum. The problem with this document is that it has been produced by the NPA whose primary aim is to look after the interests of the employers and not of locums or employees. Consequently, whilst it satisfies the requirements of the Inland Revenue, it unfortunately places a burden on the shoulders of the locums, but in the view of the PDA, it does not place a commensurate or balanced burden on the shoulders of the engagers. As a result, locums who are engaged under the terms of the NPA Contract for Services are exposed to a number of obligations to the engager, but the engager is not placed under what PDA consider to be reasonable obligations to the locum.

For example the NPA Contract for Services does not require an engager to;

- a) Provide a safe working environment for the locum.
- b) Provide sufficient properly trained staff to enable the safe provision of pharmaceutical services at the pharmacy.

Neither does the NPA Contract for Services give the locum reasonable protection in the event that an engager cancels a booking at short notice.

The PDA 'Locum Contract for Services' document

The PDA has produced a 'Contract for Services' document which the PDA believes balances the responsibilities of each party to the other. In the view of the PDA, this makes it a much more equitable document.

For example, the PDA places a requirement on the engager to;

- a) Ensure that a safe working environment exists.
- b) Ensure that sufficient properly trained staff are available to enable the safe provision of pharmaceutical services at the pharmacy.
- c) Ensure that locum bookings cannot be cancelled at short notice without some form of compensation paid to the locum.

The PDA Contract for Services has been approved for use by the Inland Revenue (page 13) and locums are urged to use the PDA Contract for Services in all of their dealings with engagers.

The PDA Contract for Services can be found on pages 14 to 17 of this booklet and is designed to be photocopied and used by locum pharmacists. Ideally, locums should serve a signed copy to their engager prior to undertaking work with that engager. In the event that a locum undertakes a lot of work for one particular engager, then one such signed 'Contract for Services' will suffice as long as it is served on the relevant Head Office. Ideally, a fresh contract should be served annually.

Locums working as Limited Companies

These days, many locums have established themselves as Limited Companies as this assists with limiting their personal and taxation liabilities. A 'Contract for Services' designed for locums who work as Limited Companies is also enclosed (pages 18 to 21).



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Date 24 March 2005
Our ref 450/7C/Status/068/SZ758437/WJB
Your ref mxj/694742-1DOC/7316.20/plm

Dear Sir

Pharmacists' Defence Association (PDA) - Status Determination

I refer to your letter of 5 November 2004 and our subsequent telephone conversations.

You will recall that generally it is not the practice of this department to comment on draft contracts of this nature, however I am able to advise under Code of Practice 10 that locum pharmacists who work to the express terms and conditions of the proposed contract will be likely to be self employed.

You should note however, that this opinion should be regarded as provisional as no firm conclusion can be reached until each contract operates in practice.

If the contract is not operated in practice, nor there are oral or implied conditions, which have not been presented, this view may alter in individual cases.

You will appreciate that the line being taken with regard to the Pharmacists' Defence Association is very much in line with that followed with the standardised form of agreement devised by the National Pharmaceutical Association (NPA) which is commonly utilised for the engagement of Locum Pharmacists- that is to say where NPA agreement is followed, it is likely that the locum will be self employed- bearing in mind that a written document by itself cannot determine Employment Status- the oral and implied terms of the engagement and the extent to which the written terms are followed also need to be taken into account.

It would be helpful if you would indicate when the PDA contract is intended to be utilised so that I can draw my colleague's attention to this so as to minimise any enquiries.

Area Director: Roger Atkinson

Yours faithfully


John Brown
Status Inspector



amount equal to 50% of the Fee which would have normally been due had the cancellation not been made; and
 6.2.2 less than three days' notice, 100% of the Fee, which would have normally been due had the cancellation not been made.

7. Force Majeure

7.1 If an event beyond the Locum's reasonable control (including but not limited to a natural disaster, act of God, civil disorder, strikes, travel disruption, serious illness or hospitalisation of a Locum or death of a close relative) occurs 14 days or less before a booking is due to be performed, the Locum or his/her representative may cancel any bookings without him/her being liable to the Proprietor under clause 6 or otherwise.

8. Limitation of Liability

8.1 For the purposes of this clause 8 "Liability" means liability for any and all damages, claims, proceedings, actions, awards, expenses, costs and any other losses and/or liabilities.
 8.2 The Locum shall have no Liability for defective Services where the defect has been caused or contributed to directly or indirectly by the Proprietor to the extent so contributed.
 8.3 The Locum shall have no Liability for any matters which are outside his/her reasonable control.
 8.4 The Locum shall have no Liability to the Proprietor for any:
 8.41 consequential losses;
 8.4.2 loss of profits and/or damage to goodwill;
 8.4.3 economic and/or other similar losses; and/or
 8.4.4 special damages and indirect losses.
 8.5 The Proprietor shall be under a duty to mitigate any loss, damage, costs or expenses that he/she may suffer.

8.6 The Locum's total Liability to the Proprietor shall not exceed the Fee.
 8.7 Nothing in this Contract shall exclude or limit the Liability of the Locum for death or personal injury due to his/her negligence or any Liability which is due to the Locum's fraud or any other liability which it is not permitted to exclude or limit as a matter of law.

9. General

9.1 Nothing in this agreement shall restrict the right of the Locum to provide Services of the same kind to others, outside the periods of time during which the Locum has agreed to provide Services at the Pharmacy.
 9.2 The Locum is engaged to perform the Services as a self-employed person.
 9.3 The Locum shall be responsible for and will account to the relevant authority for income tax liabilities and national insurance or similar contributions in respect of the Fee and any other payments made to the Locum under this agreement.
 9.4 Upon the death of the Locum, the Proprietor shall remain liable to the Locum's estate for all sums due in respect of such duties or

services which have already been performed.

9.5 This agreement is governed by and interpreted in accordance with English law and the parties agree to submit to the exclusive jurisdiction of the English Court.

SIGNED on behalf of the Proprietor

SIGNED on behalf of the Locum

..... day of 20.....

..... day of 20.....

CONTRACT FOR THE PROVISION OF LOCUM SERVICES BY A COMPANY PROVIDING LOCUM SERVICES (CPLS)

Proprietor will be liable to pay the CPLS a proportionate amount of the Fee as follows:
6.2.1 less than 14 days' notice and more than three days' notice, an amount equal to 50% of the Fee which would have normally been due had the cancellation not been made.
6.2.2 less than three days' notice, 100% of the Fee which would have normally been due had the cancellation not been made.

7. **Force Majeure**

7.1 In the event of an event beyond the CPLS's reasonable control (including but not limited to a natural disaster, act of God, civil disorder, strikes, travel disruption, serious illness or hospitalisation of the CPLS's employee(s) or death of a close relative of the employee(s)) within a period of 14 days or less before a booking is due to be performed, the CPLS or its representative may cancel any bookings without being liable to the Proprietor under clause 6 or otherwise.

8. **Limitation of Liability**

8.1 For the purposes of this clause 8 "Liability" means liability for any and all damages, claims, proceedings, actions, awards, expenses, costs and any other losses and/or liabilities.
8.2 The CPLS and/or its employee(s) shall have no Liability for defective Services where the defect has been caused or contributed to directly or indirectly by the Proprietor to the extent so contributed.
8.3 The CPLS and/or its employee(s) shall have no Liability for any matters which are outside their reasonable control.
8.4 The CPLS and/or its employee(s) shall have no Liability to the Proprietor for any:

- 8.4.1 consequential losses;
- 8.4.2 loss of profits and/or damage to goodwill;
- 8.4.3 economic and/or other similar losses; and/or
- 8.4.4 special damages and indirect losses.
- 8.5 The Proprietor shall be under a duty to mitigate any loss, damage, costs or expenses that he/she may suffer.
- 8.6 Nothing in this Contract shall exclude or limit the Liability of the CPLS for death or personal injury due to negligence, or any Liability which is due to the CPLS's fraud, or any other liability which it is not permitted to exclude or limit as a matter of law.

9. **General**

9.1 Nothing in this agreement shall restrict the right of the CPLS to provide Services of the same kind to others, outside the periods of time during which the CPLS has agreed that its employee(s) will provide Services at the Pharmacy.
9.2 The CPLS is a body corporate and contracts to perform the Services in this capacity.
9.3 The CPLS shall be responsible for and will account to the relevant authorities for income tax liabilities and national insurance or similar contributions in respect of its employees.

9.4 Upon the death of (the) CPLS employee(s) who was/were to provide the Services, the CPLS shall forthwith cease to be responsible for the discharge of any / all duties or services agreed herein, but the Proprietor shall remain liable to the CPLS for all sums due in respect of such duties or services which have already been performed.

9.5 This agreement is governed by and interpreted in accordance with English law and the parties agree to submit to the exclusive jurisdiction of the English Courts.

SIGNED on behalf of the Proprietor

SIGNED on behalf of the CPLS

..... day of 20.....

..... day of 20.....

8. “The employee shall keep confidential all such information as shall come into his / her knowledge whilst employed by the company and shall not divulge this to any unauthorised person, firm or body without the express permission of the employer. On the cessation of this employment the restrictions imposed by this paragraph shall endure indefinitely and the employee shall not seek to use such information to solicit or otherwise obtain for another, the business of the employers customers.”

A clause such as this is in most contracts and it is reasonable for it to be there. However, if the terms are unusually restrictive after the employment has ceased, employees may wish to object in advance of signing a contract. Once again, as in clause 6, enforcement is the problem for the ex-employer seeking to rely on the clause.

9. “The employee will be responsible for ensuring that the company and all employees working within his/her control comply with all professional, statutory and other legal requirements.”

Pharmacists should be concerned and suspicious of these types of clauses; they are often an attempt by the Superintendent Pharmacist and/or the employing company to avoid or shift some of the liability for various matters, which are more properly their responsibility. Senior management pharmacists who genuinely have the ability to control the overall environment of the pharmacy with little or no restriction from the employer (e.g. staffing levels, training programmes, workload, etc.) may think that this clause is reasonable. Indeed they may have the knowledge and ability to deal with the responsibilities which this type of clause places upon them. However, as has been seen by the PDA, there is often no real prospect that a pharmacist will ever have the requisite level of control over the pharmacy environment because that factor is essentially in the hands of others. In such cases this type of clause has no place in their employment contract.

Suggested approach;

Such clauses should be avoided completely. However, if the pharmacist is given a genuine authority to act and control the working environment, then the pharmacist should seek a written statement of exactly which legal and professional regulations they are required to be responsible for, rather than just agree to an ‘unwritten, open-ended’ list. It is crucial that a pharmacist is fully aware of the exact extent of the legal and professional requirements being placed upon them and for which they are accepting responsibility.

10. “The employee shall provide an emergency dispensing service out-of-hours for NHS prescriptions marked ‘urgent’ and shall also attend at all alarm call-outs.”

Terms such as the one above can, unless subject to defined restrictions, effectively be a prohibition on a pharmacist's social life. Many pharmacists agree to these clauses, without realising that they may be unable to go away at a weekend or even to go out any distance in the evening. Moreover, many pharmacists agree to such clauses without thinking through the practical implications of being required to attend their pharmacy at night because there has been a break-in and where there is no guarantee that the police will be present.

Suggested approach;

If agreeing to such terms, then at the very least pharmacists are urged to make sure that they;

- a) Negotiate extra pay to compensate for the restrictions on their social life.
- b) Seek amendments which ensure that a deputy pharmacist for the urgent prescriptions can be found.
- c) Seek to include permission to appoint an alternative key-holding member of staff for alarm call-outs.

11. “Training of staff; the employee shall ensure that all staff are trained to the required standard for their particular job and shall be responsible for any failures in such training.”

This clause is similar to clause 8 and similar comments apply. The effect of these types of clauses is that if a catastrophic failure occurs then it could result in the pharmacist taking the brunt of the responsibility and not the company or its superintendent. This can only be justifiable if the pharmacist has been given relatively unhindered scope for action and the physical/financial support necessary to ensure that the pharmacist can truly deliver. Experienced senior managers will probably feel quite comfortable however, they are urged to seek specific definitions on limits. Less experienced pharmacists are urged to secure a detailed job-description which specifies exactly the training to be given to each staff member and which provides for management support from the employer.

12. “The employee shall be responsible for the endorsement and submission of all prescriptions to the pricing authority on time and shall ensure that all prescriptions are endorsed according to the employer’s instructions; the employee shall be responsible for all claims submitted and any errors and shall indemnify the employer in respect thereof.”

Pharmacists should be very wary indeed of ever signing a contract which contains this clause. The effect of this clause is that it may mean that the employer can claim any losses from the employee. More importantly, if the employers instructions on script endorsement are dubious, but are nevertheless followed, then this could lead to the employed pharmacist having to take professional and criminal liability for 'endorsing fraud'.

Suggested approach;

Terms which make the pharmacist responsible for all claims and any errors and which require the pharmacist to indemnify the employer in respect thereof should never be agreed to.

13. Terms aimed at avoiding the liabilities of employment altogether

Some employers will offer 'employment', but then deliberately use wording and terminology in their contracts which set out to avoid the responsibilities that an employer is required to have. Consequently, when an employment issue arises, they can argue that the pharmacist was never an employee in the first place. The tell – tale sign to look out for is when the document that is deemed to be an employment contract is not given a heading which includes the word 'employment'. Instead different headings are used, e.g. "Manager's Contract", "Pharmacist's Contract", "Terms of the Pharmacist's Service".

Numerous pharmacists have signed such agreements, not suspecting them to be in any way problematic. The simple rule is that if the pharmacist is to be employed, then the heading should state "employment contract" and the words "employer" and "employee" should be used in the contract.

14. "The employee will be required to be responsible for the payment of his/her own National Insurance and Income Tax contributions, during the time of his/her employment."

One recent situation dealt with by the PDA saw a contract which was headed "contract for self-employed employment" and then went-on to include the above clause. The ensuing dispute has now ended up in court, but the fact that the 'employee' pharmacist agreed to it has made the case much more difficult to prosecute on behalf of the employee pharmacist.

15. "The Pharmacist / Manager will at all times maintain his/her own contract of insurance, covering professional and other liabilities arising out of all of his / her actions under this contract. The Pharmacist / Manager will indemnify the Company against all and any losses, howsoever arising, whilst the business is under his/her control, including failure to have such insurance in force."

Employers bear what the law calls 'vicarious liability' for all the actions of their employees. This means that if (for example) someone is harmed by the actions, errors or omissions of an employee pharmacist, then it is always the employer that takes primary responsibility. What may happen next, and this is already happening in pharmacy, is that the employer may seek redress from the employee through disciplinary procedures, or the employers insurer may seek to pursue the employee for a return of the monies it used to settle a claim for compensation from a patient. Contract terms such as this one (written in this way) will have the effect of allowing the employer to attempt to side-step claims made against his pharmacy by simply telling the patient (or other third party) that the responsibility for the error is that of the pharmacist and it is the pharmacist that should therefore be pursued – not the employer. This is especially the case if the contract does not include the word employee.

The effect of a clause that requires the pharmacist to indemnify the employer for all / any losses occurring whilst the pharmacist is in control could be catastrophic for the pharmacist. It could mean that an injury to a patient that had nothing whatsoever to do with the pharmacist (e.g defective flooring leading to a fall) could still make the pharmacist personally liable. Such a clause has also been seen in some contracts issued to Primary Care Pharmacists where they are (probably inadvertently) being asked to take responsibility for any errors that occur in the GP surgery where they provide their services – to include those made by surgery staff and GP's.

Suggested approach;

If the employer seeks to include a requirement as to the employee carrying their own insurance, then the pharmacist should seek to ensure that the word "employee" appears in the relevant clause (unless of course the relationship is truly that of self-employment).

The requirement to indemnify the employer (the company, the surgery or the PCT) against all losses, etc. should never be agreed to under any circumstances.

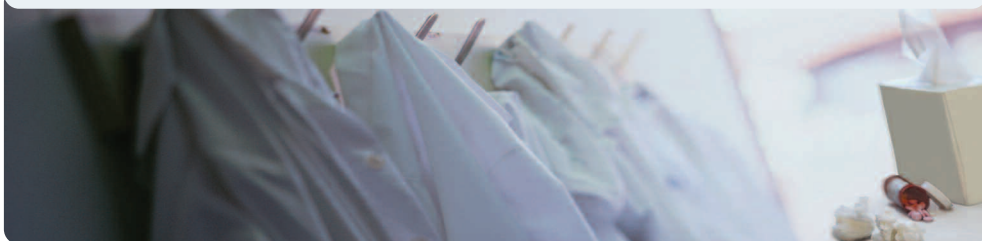
16. 'TUPE'. Transfer of Undertakings (Protection of Employment) Regulations 1981.

If employed by an existing employer on agreed contract terms, then those terms (unless the contract provides otherwise) cannot be changed or amended without the agreement of the employee. However, a very common situation in pharmacy is the company 'takeover' where a small pharmacy or small chain is acquired by a larger multiple. Typically, a few weeks after the takeover, the training coordinator / area manager / 'HR person' arrives to announce that they have issued new contracts to bring everyone into line and, so as to keep all the paperwork straight, they will want it signed so that they can take it away with them when they leave later on that afternoon. The discussion generally leads the pharmacist to believe that this is merely a routine formality paperwork exercise and nothing to be concerned about.

However, by virtue of what is known as 'TUPE' [the Transfer of Undertakings (Protection of Employment) Regulations 1981], employees' original contract terms and rights are maintained, despite business transfers to new owners. In short, employees of a business which is taken over by another, transfer to the new employer on the same terms and conditions as they enjoyed with the old employer. In addition, the employment is deemed to have commenced at the time that the employment with the old employer originally started. This means that the length of service for employees is protected and preserved as are the original terms and conditions. However, the new owners may wish to include different, possibly less advantageous terms and conditions, such as a right to require different hours to be worked, a right to transfer the employee to another branch, dictate alternative holiday dates, change working practices and existing agreements, restrict the employee's right to work for other employers outside of employment times, etc., etc. A simple way of achieving these changes is for the employer to put the new or varied terms and conditions in the 'new contracts', add some small 'benefit' for the employee (to provide for what lawyer's call 'fresh consideration' and thus to make the contract legally binding) then to present them to the existing staff. Often this is done in such a way as to ensure that the employee does not suspect that anything significant has occurred, usually during the first visit to the newly acquired pharmacy. Very often the staff are nervous of the new employer and the last thing they want to do is to 'upset' relations at the first encounter. The effect of being co-operative and complying with this requirement can prove to be (and often is) disastrous for the employee, when the new area manager turns up later and starts to make requests/ demands that would have been impossible under the old contract.

The lesson to employees in take-over situations is that if they sign their new contract without careful consideration then they may get into disputes with their new employer about whether they are bound by the new terms. This can be unpleasant and costly.

Another issue for employees to bear in mind is that employers are under an obligation to notify employees about a proposed transfer or sale of the business before the transfer takes place. There is also an obligation on employers to consult with employees about any measures the new owner is proposing to take in relation to their employment. If the employer doesn't notify employees about a transfer/sale or doesn't consult with them, employees could be entitled to damages in an Employment Tribunal of up to 90 days pay as compensation for the employers failure to comply with his obligations.



Suggested approach;

Never sign something as important as a contract of employment in a hurry because somebody wants you to sign it so that they can take it with them when they leave.

Pharmacist employees are urged to take time to read any new contract, consult the old one and establish the differences clause by clause. Using this booklet will go a long way in helping pharmacists establish whether there are any problems. If issues do arise, then pharmacists are urged to take legal advice or contact the PDA and simply inform the new employer that whilst they have read the proposed contract terms, they would rather not sign them, because they prefer to rely on those which transferred automatically from their previous employer, under 'TUPE'. It is natural for pharmacists to want to avoid confrontation, but PDA has dealt with cases where tackling the problem straight away, would have avoided many months of tortuous court and tribunal arguments which ultimately ended up in the complete breakdown of the relationship between the employer and employee.

17. Working times, Days off and Holidays

"The employee will be required to work a total of forty hours per week, not including rest breaks. The business hours of the Pharmacy are 09:00 - 18:00 Monday to Saturday and the employee shall be entitled to one whole day per week on which day he (she) will not work. On that day, he (she) will be responsible for the engagement of a locum pharmacist to deputise for him (her). In the event that the employee is not able to arrange for a locum pharmacist to attend on any particular day, then he (she) shall be responsible for attending at the Pharmacy and providing his (her) services as a pharmacist to ensure the continuity of provision of pharmaceutical services."

AND/OR

"The employee shall be entitled to five weeks annual leave in any one year. The employee shall be responsible for obtaining a locum pharmacist to deputise for him (her) during all periods of annual leave and the employer will pay the costs (at no more than 'standard' rates of pay). In the event of a failure of any such deputy to attend at the pharmacy, the employee will be personally responsible for ensuring that the continuity of provision of pharmaceutical services is maintained."

The effects of these clauses can have a dramatic effect on the employee pharmacist. Effectively they make the employee responsible for arranging pharmacist cover if they want a day off or a holiday. In the event that they cannot find a pharmacist, they would not be able to take time off. This can become a big issue particularly in areas of the country where locums are difficult to locate and also during holiday times when locums are scarce. The problem is further exacerbated if there are con-

straints on the hourly rates that an employee is authorised to agree with a locum and also if the employer refuses to allow the employee to use the services of a locum agency to assist with finding cover. Additionally, some employers have a company policy on locum hourly rates and travelling expenses which places them below national norms and this places the employee in a particularly difficult situation. In the experience of PDA, some pharmacists who find themselves in this situation end up paying agency fees, travelling expenses and top ups on hourly rates themselves, just so that they can secure their holiday cover.

In other situations, pharmacists have been disciplined by their employers, when they have refused to return to work in the event that the locum has failed to arrive.

It is the view of the PDA, that it is entirely unreasonable for an employer to attach such onerous conditions on an employee. In the worst instances, the effect of these clauses mean that the employer is breaching the Working Time Regulations 1998 by failing to allow employees the opportunity to take their statutory entitlement to paid holidays. Additionally there is also the possibility that the pharmacist will be breaching the Pharmacy Code of Ethics by working in a way that causes fatigue and therefore constituting a risk to the public.

There are further problems for employees with these clauses; in the event that a pharmacy ends up with no pharmacist cover due to the failure of a deputy, then the local Primary Care Organisation (PCT or Health Board) may decide to penalise the contractor. This could result in a written warning or even a financial penalty, moreover, the pharmacy could also be reported to the RPSGB, which could then result in an RPSGB investigation. In such circumstances, it is likely that the employee would be drawn directly into such investigations. Ultimately, there is also the possibility of the employee being called to employment disciplinary meetings by the employer.

Suggested approach;

Ideally these types of clauses should be avoided altogether by employees, as they really can have a serious impact on them. This is particularly the case if the employee works in an area of the country where locums are scarce. It is much more appropriate for the employer to take the responsibility for pharmacy cover in his pharmacy business. In the event that an employee cannot succeed in deleting sections that require the employee to take responsibility for finding the locum, then ways to reduce the full extent of the liability could be found. For example, the employee may insert a sentence which ensures that if a week before the proposed day (week) off, the employee has still not managed to secure the services of a locum, then it becomes the responsibility of the employer to make further arrangements. Alternatively, the employee may delete the sentence which restricts the employee to the employer's preferred hourly rate of pay and the employer's preferred travelling expense arrangement.

18. Retention of Services after Registration as a Pharmacist (found in contracts given to Pre-reg's)

"This employment is subject to the express condition that upon successfully completing the pre-registration training year and registering as a Pharmaceutical Chemist, the employee will be required to continue to accept employment by the Company in that capacity, if offered to him (her) by the Company for a period of at least one year after qualifying. Under the terms of this clause, the Company may require the employee to accept employment in any one or a number of its branches, either as a relief manager or manager and at any location within reasonable travelling distance of the employee's present home. Furthermore, in the event that the company is unable to offer employment in such capacity within a reasonable travelling distance of the employee's home, then the company will (at its discretion) either pay the reasonable travelling and accommodation expenses of working away from home, or require the employee to re-locate to another area within the United Kingdom, providing that it shall meet the reasonable relocation expenses involved."

"In the event that the employee shall refuse any employment and / or travelling and/ or relocation offered under this clause, or shall seek to take-up or take-up any offer of employment elsewhere, then the employee shall be deemed in breach of this contract and the Company shall be entitled to recover from the employee the full costs of the pre-registration training year or the sum of £10,000.00 (whichever is the higher figure) from the employee and the employee hereby expressly authorises the Company to make deduction of such sum from remuneration due to him (her)."

This clause significantly restricts the options for a Pre-reg at the end of their Pre-reg year and gives the employer complete flexibility and control. It means that the newly qualified can be required by the employer to work anywhere in the UK upon qualifying, even though they may not wish to relocate or they may not wish to work in the particular pharmacy being offered by the employer. The clause uses phrases like 'reasonable', which are ambiguous and are a recipe for conflict and disagreement as what is deemed reasonable by the employer, may not be deemed reasonable by the employee. Additionally, there is no future salary guarantee and this means that the employer would be able to offer the newly qualified pharmacist a salary that is lower than the usual newly qualifying rate.

Worst of all, in the event that a newly qualified decides not to accept a particular position, or decides to leave within 12 months of qualifying, then the employer would be able to recover costs of training. In such instances, it is not difficult to imagine that the employee would consider that it would simply be prohibitively expensive for them to contemplate leaving.

Suggested approach;

Ideally, such clauses should be avoided altogether and any pharmacy graduate contemplating working for an employer who has such clauses contained in their proposed contract of employment should consider striking out such a clause from the proposed contract prior to signing or lessening the burden of such a clause by amending it accordingly. For example, the prospective employee may consider amending the section that entitles the employer to require the employee to work away from their immediate area after qualifying. This entitlement could be limited to within a radius of say 10 miles. Alternatively, the prospective employee may amend the section that describes a twelve month post qualifying commitment, and reduce it to say three months only. Should the employer resist such entirely reasonable changes, then the prospective employee should think seriously about considering looking at other employment options.

19. Taking a break but being required to stay on the premises.

"The Pharmacist will be entitled to and shall be obliged to take an unpaid rest break of one hour between the hours of 12:00 and 14:00 during each 9-hour working day. During this time the pharmacist will be required to remain on the company's premises and in charge of the pharmacy, but shall not be required to work."

It is important to recognise that a 'break' is a total mental and physical break with no 'ties'. The employee must be free from constraints during the hour in question, including freedom to leave the premises, meet with friends, go shopping etc. If the employer tries to place the pharmacist in a position where their services, either mental or physical, may be called upon, then the pharmacist is NOT having a break and is therefore entitled to be paid. Under such circumstances, it does not



qualify as a break, within the meaning of the Working Time Directive / Regulations and not a break for the purposes of satisfying any professional requirement that the RPSGB may have (now or in the future) for a pharmacist to have a break. This could lead to legal or professional consequences for both the pharmacist and the employer in question.

The employer requires the pharmacist to remain on the premises so that he can legally operate the business. But for this to occur, the pharmacist needs to be not just on the premises, but in control of the Pharmacy and in a position to intervene; in such circumstances, he/she is not having a break. In a 1971 Statutory Committee test case, the Chairman (then Sir Gordon Wilmer) said that **"one foot in the door"** was insufficient to be in control of a Pharmacy.

Road haulage operators have long had to live with 'tachographs' and regulations which require their drivers to have a break. Breaks for pharmacists are at least as essential as breaks for lorry drivers.

Suggested approach;

Over-tiredness constitutes a danger to the public and a danger to the Pharmacist's health, it is for this reason that the PDA would urge pharmacists to avoid such clauses altogether.

It is recommended that pharmacists should resist attempts by employers to over-work them and should insist on their statutory right to spend their rest breaks "away from the workstation" and this means the whole of the pharmacy. Should a pharmacist be keen to work through their lunch, then they should arrange to be paid an appropriate salary for this added responsibility. However, it is worthy of note, that if in the case of a dispensing error it transpires that the error may have occurred due to long working hours leading to the fatigue of the pharmacist, then any RPSGB investigation may result in additional disciplinary consequences for both the employer and the pharmacist.