

Formal Consultation on proposals to amend the 'Management of Organisational Change Policy and Protection of Terms and Conditions Policy'

Follow on paper from the JNCC 30th March 2011

1. Introduction

1.1 This paper follows on from the previous discussions and proposals from 30 March 2011 JNCC. This is relation to pay protection and travel/subsistence allowances following organisational change.

1.2 The current Trust policy within the Trust states that:

“Where an employee is redeployed into alternative work they will be entitled to protection of earnings, excluding unsocial hours payment and on call. Where an individual earns less in their new role, the employee’s substantive salary will be protected for 2 years. Thereafter protection will occur on a marked time basis which will not extend beyond three additional years. Marked time will be taken to mean that no changes will be made to an employee’s level of remuneration until such time as the salary of the new job exceeds the amount protected or the employee moves to a post whose basic salary is lower than their previous substantive position.

2. Reason for Review

2.1 The Trust is seeking to review the pay protection arrangements for the Trust for a number of significant reasons:

- i) the impact that lengthy pay protection arrangements have on equal pay considerations and general morale between colleagues;
- ii) the unreasonably long length of time provided to cushion employees to either readjust their personal financial situation or secure an alternative post that is equivalent to their skills and experience;
- iii) the inability for the Trust to effectively manage change in a timely and cost effective way therefore placing wider employment and cost improvement targets at risk.
- iv) A intent to bring pay protection in line with many similar health trusts and a number of ambulance services (North East, Great Western, South East Coast and London all have 2 year pay protection agreements. Isle of Wight just moved from 2 years to 18 months) to ensure fit for purpose flexible employment policies.

3. The General Principles

- 3.1 Pay protection is the practice of protecting the pay of employees whose jobs are downgraded or are redeployed, this is generally following an internal reorganisation or as a result of a pay and grading review.
- 3.2 Where it is necessary to reduce pay, employers in both private and public sectors commonly adopt measures to assist employees to adapt to reduced pay. The practice is intended to cushion existing employees from the adverse consequences which a sudden drop in pay would otherwise cause.
- 3.3 The legal position is that it is legitimate to cushion employees where it is necessary to reduce pay, provided you have no reason to think that their old pay arrangements were directly or indirectly discriminatory. The law does not prescribe a maximum time period that should be applied in all cases. However, whether the duration is lawful will depend on whether the protection arrangements themselves result in sex discrimination.
- 3.4 The risk is that a female employee who does not benefit from pay protection will identify a male employee who has the benefit of lengthy or indefinite pay protection, with whom she is undertaking equal work. The risk of challenge will be particularly high if the group that benefits from pay protection is predominantly male and the group without pay protection is predominantly female, as is commonly the case where pay protection is linked to job evaluation.
- 3.5 However it must also be considered, that what may appear low risk at the outset of an arrangement may become high risk if the gender composition of the two groups changes over the course of the protected period.
- 3.6 Pay protection cases – for example, “Redcar and Cleveland Borough Council v Bainbridge” - the employer argued for a defence to equal pay litigation that protection was a genuine material factor argument that the reason for the difference in pay was the need to provide pay protection. Further it argued that if the pay protection scheme was found to indirectly discriminate against women, its use was to be further justified on objective grounds, for the same reasons as a genuine material factor.
- 3.7 Whilst the main issue with this case was the continuation of discriminatory pay through pay protection arrangements, the Court of Appeal also asked the employer what steps they had taken to minimise the effect of the pay protection scheme, such as limiting its length.

4. Proposals

- 4.1 The Trust has a responsibility as a fair and equitable employer to ensure that our legitimate aim (i.e.: to offer a cushion against sudden reduction in pay) is achievable through proportionate means (i.e.: a reasonable protection period) and that otherwise it may be susceptible to challenge and unable to offer legitimate legal justification for pay differences.
- 4.2 The Trust has consulted with its recognised Trade Union (Unison) through the formal JNCC forum on 30 March 2011; following this discussion further information was requested.
- 4.3 This information is now provided and the following recommendation is tabled for PPPGF (Personnel, Procedures and Policies Group) in order for further consultation.
- 4.4 The Trust proposes that with effect 1st September 2011 it will amend the “Protection of Terms and Conditions Policy” which is not a contractual element to provide for 2 years pay protection.
- 4.5 The Trust also proposes that from 1st September 2011 to amend the protection for travel and subsistence to 1 year protection from the current 4 year agreement.

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