

MBM
Civil Service



DEPARTMENT OF HEALTH & SOCIAL SECURITY
Alexander Fleming House, Elephant & Castle, London SE1 6BY

Telephone 01-407 5522

From the Secretary of State for Social Services

12/26/79

The Rt Hon The Lord Soames GCMG GCVO CBE
The Lord President of the Council
Civil Service Department
Whitehall
London SW1

22 November 1979

Dear Archbishop,

HANDLING OF INDUSTRIAL DISPUTES IN THE NHS

At the meeting of E(CS) on Tuesday 6 November - E(CS)(79) 2nd Meeting - I promised to circulate our draft guidance to NHS authorities on handling industrial disputes. This guidance is attached. I am anxious to issue this circular as soon as possible and would be grateful therefore if comments could reach me by mid-day Monday 26 November.

I am copying this letter to the Prime Minister, members of E(CS) Committee, the Secretaries of State for Wales and Northern Ireland, the Attorney General, and to Sir Robert Armstrong.

Your
Patel

ENC

CONFIDENTIAL

DRAFT CIRCULAR

HC(79)

November 1979

For Action:

Regional Health Authorities
Area Health Authorities
Boards of Governors

For Information:

Community Health Councils

HEALTH SERVICES MANAGEMENT
IF INDUSTRIAL RELATIONS BREAK DOWN

SUMMARY AND INTRODUCTION

The care and cure of sick people is the whole purpose of the NHS. All the staff work together for this aim. It cannot be achieved with real consideration and comfort for the ill unless there are good relations between all the staff, whatever their jobs.

2. People need to be clear as to their jobs and their rights, and what happens if they strike. Both the management and the staff need to be absolutely clear where they stand. A draft agreement on procedures for the handling of local disputes is being discussed by the General Whitley Council.
3. This is a guidance note on handling any dispute that may arise.

HOW SHOULD THE MANAGEMENT RESPOND TO INDUSTRIAL ACTION?

4. Industrial action varies from full-scale strikes to restrictive working, overtime bans and the like. These are set out more fully in the Annex. Not every member of the staff realizes that most forms of industrial action are a breach of contract.
5. Staff who are on strike are not entitled to be paid, or to have bonus payments or overtime or shift allowances that are not earned. Beyond that, it is for Authorities themselves to decide in the light of local circumstances the timing and precise nature of their response. In reaching decisions they will wish to bear in mind --

CONFIDENTIAL

- i. the need to maintain services to patients;
- ii. the possibility that in some cases the suspension of staff or withholding of pay would lead to an earlier return to normal working (even though there might be an escalation of industrial action in the first place);
- iii. that when the strike is over the health service will continue, and staff will need to work together again;
- iv. the undesirability of paying for work which has not been carried out; and
- v. the exact contractual position of groups of staff taking industrial action; Authorities should take early legal advice if there is doubt about contractual matters.

6. None of these factors is overriding, although some will have more weight than others according to circumstances. In particular, there may well be occasions when the proper response to industrial action will be to accept that services to patients cannot be fully maintained, for instance, where staff in dispute make unacceptable demands or a condition for remaining at work. In such circumstances, the responsibility for the assessment of priorities between, and the clinical management of, patients must lie with doctors concerned. Authorities will however be aware that their prime function is to provide treatment for patients and that consequently their response to industrial action must take account of the need to maintain those services in the long as well as in the short term. Authorities should strike a balance between the various factors according to their own particular circumstances. Ministers want NHS management to know that, having issued this guidance, they would hope not to intervene in their decisions.

7. It is also important that Authorities make known in advance to staff and their trade union representatives the general policy which the Authority will follow in the event of industrial action. Such a policy is unlikely to cater for every contingency and it should be reiterated or supplemented in the light of prevailing circumstances when industrial action takes place. It is important, too, that Authorities should have regular contacts with trades union officials and staff representatives both before and during a dispute; to be fair and to be seen to be fair, the policy of management must be fully explained.

CONFIDENTIAL

VOLUNTARY HELP

8. Authorities should, if they feel it necessary during a dispute, make such use of volunteers as they think fit - whether recruited from existing members of staff or from the general public. Decisions on whether, when and how to use volunteers can only be taken at local level in the light of local circumstances, but it is clear that, properly organised, volunteers can make a valuable contribution to the maintenance of services to patients. Authorities should consider now how they can tap the help the general public are usually and spontaneously prepared to offer in response to the needs of sick people. Ministers will support any authority which makes use of volunteers during industrial action. The position of "regular" volunteers (those whose volunteering will continue after the dispute is over) may need special consideration and Authorities are urged early in a dispute to consult voluntary organisations about the role of their members.

9. Authorities are similarly free to make use of agency staff or contractors during a dispute. They should, however, seek to ensure that their own staff do not work as agency staff during a dispute.

CONTINGENCY PLANNING

10. It is essential that Authorities should give high priority to contingency planning against the event of industrial action. Although Authorities will be aware that plans for assistance from the Services are in existence (and were implemented in the case of the Ambulance Service earlier this year) such assistance must not be regarded as a substitute for adequate planning by the Authorities themselves.

11. The precise nature of an Authority's contingency planning will be dictated by local considerations such as the past history of industrial disputes, the geographical location of NHS premises and the pattern of services. But in general terms a review of contingency planning should:

- a. identify those services which are susceptible to disruption by industrial action;
- b. assess in consultation with clinicians and nursing staff the extent to which such services need to be maintained in order to provide basic essential clinical and support services; and

CONFIDENTIAL

CONFIDENTIAL

- c. make plans for the maintenance of such services to the extent required.

In some cases it will be found that action can be taken in advance of industrial action - for example, the provision of outside telephone lines, independent of an exchange, for key personnel, and the nomination of an officer with responsibility for co-ordinating and directing the activities of volunteers.

ACTION

12. Authorities are asked to let all staff know the policy which they intend to follow in the event of industrial action.

CONFIDENTIAL

CONFIDENTIAL

From:

Regional Liaison Division 5B
Euston Tower
286 Euston Road
London NW1 3DN

Enquiries: Circular: Mr M G McCurry, Room 1722 Euston Tower
Tel: 01-388 1188 Ext 938

Annex: Mr G R F Balderson, Room 70, Hannibal House
Tel: 01-703 6380 Ext 3606

Further copies of this Circular may be obtained (by written request wherever possible, please) from

DHSS Store
Scholefield Mill
Brunswick Street
Nelson
Lancs BB9 OHU Tel: Nelson (0282) 62411/2 Ext 17

CONFIDENTIAL

FORMS OF MANAGEMENT RESPONSE TO INDUSTRIAL ACTION

This Annex spells out the various forms of management response to certain forms of industrial action (see para 4 of the covering Circular). This annex, and the covering Circular, have been prepared in the light of legal opinion available to the Government, but do not purport to be a full statement of the law. Authorities should look at the terms of individual contracts before deciding what action to take and should if necessary seek specific legal advice. This should be done quickly, lest by delay or inaction Authorities are seen as acquiescing in a breach of contract by their staff. In general the advice given in paras 2-7 is based on the premise that the conduct of the employee to whom the advice applies amounts to a substantial breach of his contractual obligations.

2. COMPLETE WITHDRAWAL OF LABOUR

Those on strike should not be paid for the appropriate period of time and there should be no subsequent payment for the period of the strike.

3. LIGHTNING STRIKES

Pay should be stopped for the period of the lightning strike. Where constant short-duration stoppages are so disruptive as to affect the whole work pattern, management should consider sending staff home without pay, providing it is clear that this is not being applied as a disciplinary measure under which employees could claim that the prescribed procedure ought to have been followed. See also paragraph 6 below.

4. BONUS SCHEMES

There are no specific rules in NHS productivity schemes referring to industrial action. Nevertheless the codes explicitly relate the payment of bonus to performance. Where performance is affected by industrial action, local management

CONFIDENTIAL

should assess the reduction in bonus that is appropriate under the terms of the scheme and give staff notice that, failing resumption of normal working, bonus will be adjusted from the next pay period. There will usually be provision for similar action in respect of bonus schemes for ambulancemen which form part of their transferred terms and conditions of service devised by former local authorities. It will, however, be necessary to examine the details of such schemes. The "lead-in" pay agreement for ancillary staff (applicable equally to lead-in for works maintenance staff) provided for the payment to cease "in the event of staff co-operation being withdrawn or undertakings broken". This should present grounds for withdrawal of "lead-in" payments in the event of industrial action. Conditions attaching to "lead-in" payments for ambulancemen are not laid down and these should be treated on the same basis as pay.

5. OVER-TIME, SHIFT ALLOWANCES, UNITS OF MEDICAL TIME AND OTHER ALLOWANCES

In the event of an over-time ban, over-time payment should not, of course, be made. In the case of guaranteed or regular over-time, shift allowances, units of medical time and other allowances, where employees do not carry out the duties to which the allowances relate, pay should be stopped for the appropriate period and no subsequent payment made. In general, it is only in cases where the contract of employment requires over-time or shift working that refusal to work over-time or shifts is a breach of contract, but this point can be resolved only by examination of the contracts concerned.

6. RESTRICTED PERFORMANCE OF DUTIES

Where staff report for duty normally but refuse to carry out their normal duties by means of working to rule, "blacking" certain areas of work, by selecting those duties they will carry out, or by deliberately restricting production, they are usually in breach of contract. An employee is not entitled to his full remuneration unless he can prove substantial performance of his contractual obligations. Appropriate forms of management response where there has been a breach of contract will depend on local circumstances but will usually consist of one of the following courses of action:

CONFIDENTIAL

CONFIDENTIAL

i. if less than the full range of duties is acceptable to management the staff concerned should at the outset of the action be given notice (say 24 or 48 hours) that unless they resume normal working they are in breach of contract and are not entitled to pay although management is willing to accept limited services on terms that would be specified. These would be one of the following. Terms (a) would be for staff to be offered ex-gratia such proportion of normal payments as the authority considers reasonable for the proportion of normal duties performed. Management should be careful to ensure that there has been a clear and valid direction to the employee to perform his full duties and that any payments made should not be taken as an acceptance of or acquiescence in the employee's action. It is not necessary for authorities to devise complicated formulae for assessment purposes and a standard proportion of normal wages for groups of staff would usually be appropriate. It is sufficient that the authority should offer a payment which they consider reasonable. The offer is ex-gratia and should not be the subject of negotiation. In very exceptional circumstances, authorities may consider that it is justifiable to continue full pay for partial working, but this should not be the normal course of action. Terms (b) would be to make clear that pay will be stopped but that management are prepared to pay (on a full-time basis) that number of staff required to maintain the level of service offered. The remainder of the staff would be sent home without pay, provided it is made clear that this is not a disciplinary procedure (see paragraph 3);

ii. if less than full service is NOT acceptable to management, staff should be given notice (say 24 or 48 hours) that unless they resume normal working they will not be entitled to any pay, which should be stopped. Again, it should be made clear that such action is not being applied as a disciplinary measure (see paragraph 3).

7. WORKING RESTRICTED HOURS

On any day when an employee works less than his contractual hours he is in breach of contract and loses his right to be paid for that day. Management may exercise their right to withhold pay for such time as the employee was in breach of his contract or may offer an ex-gratia payment, based upon the proportion of the day which was worked.

CONFIDENTIAL

CONFIDENTIAL

8. PICKETING AND ACCESS

Picketing must be kept within the law, and management should not allow pickets to operate on NHS premises or to use normal staff facilities such as canteens or toilets. Staff who refuse to cross picket lines and as a consequence are in breach of contract should not be paid.

9. SICKNESS PAYMENT DURING INDUSTRIAL ACTION

Staff who are taking strike action (or action short of strike action which has resulted in a breach of contract) are not entitled to sickness payments. Staff who have reported sick prior to the announcement or commencement of industrial action should receive sickness payments in accordance with the regulations on production of medical certificates as required. Staff taking industrial action who become sick and who continue sick after its end should be paid from the date they would otherwise have resumed normal work.

10. ANNUAL LEAVE DURING INDUSTRIAL ACTION

Where annual leave, lieu days or Bank Holidays have been granted in advance of the notification of industrial action, staff should be paid for such days in the normal way. Staff who request leave, lieu days or payment for Bank Holidays after industrial action has been notified should not have such requests granted as normally their services will be required.

11. RELATIONS WITH AGENCY STAFF, CONTRACTORS OR VOLUNTEERS

Staff who refuse to co-operate with agency staff, contractors or internal or external volunteers should be considered to be working restrictively as in paragraph 6 above.

12. TIME OFF FOR UNION ACTIVITIES DURING INDUSTRIAL ACTION

Where staff are in breach of contract through taking industrial action, facilities for trade union activity should normally be withdrawn, except where management consider, for example, that reasonable time off to attend a trade union meeting might lead to an improvement in the situation.

CONFIDENTIAL

CONFIDENTIAL

13. SAFETY

Staff who take any form of industrial action still have an overriding legal responsibility for the health and safety of themselves and people at work. Any member of staff who through his actions during a dispute endangers either himself, his colleagues, patients or other people at the work place will be subject to the normal Safety Rules and Regulations which operate within an Authority and should be subject to disciplinary action for any breach of those Rules.

14. USE OF NHS EQUIPMENT

Staff taking industrial action, particularly strike action, should not have the use of NHS equipment. Any use of NHS equipment during action, eg a hospital vehicle, will not be covered by Crown immunity and staff will not be able to claim indemnity from the employer as a result of any occurrence arising during the action.

15. ENTITLEMENT TO ACCRUED BENEFITS DURING INDUSTRIAL ACTION

Annual leave entitlement will not accrue during periods of industrial action for which no payment is made. Superannuation contributions will not be made and superannuation entitlement will not accrue for that period.

16. CONTINUITY OF EMPLOYMENT

Continuity of employment is not broken by strike action. Continuity in this context means that employment prior to the strike counts as continuous with the service following the strike; but any week during which the employee is on strike for all or part of that week does not count as a period of employment for those statutory purposes which require periods of employment to be calculated by adding up weeks of employment (eg the service to be completed before entitlement to a redundancy payment, statutory maternity pay etc is established).

CONFIDENTIAL

22 NOV 1979

