

Our Ref: JHS001-0332614
 Your Ref: MS
 23 January 2003



Mrs M Scott
 Chair
 East Hampshire Primary Care Trust
 Raebarn House
 Hulbert Road
 Waterlooville
 PO7 7GP

PRIVATE AND CONFIDENTIAL

Dear Margaret

Chief Executive

I am writing as requested following the meeting which took place at the offices of the Health Authority on 17 January 2003, to confirm my advice concerning the current employment position of the Chief Executive and the options available to your organisation at this point.

I am aware that this is an issue which will need to be considered by the Remuneration Committee of the Trust and I confirm that I have prepared this letter on the understanding that you will want to share its contents with the other members of the Committee.

Background

Tony Horne, who is employed by the PCT as its Chief Executive was redeployed to other work as from [] September 2002. The decision to redeploy Mr Horne was taken after papers came to light on 16 September 2002 which indicated that nursing staff working at Gosport War Memorial Hospital ("GWMH") had expressed concerns about prescribing practices at GWMH to those responsible for management of GWMH in 1991.

The fact that such concerns had previously been expressed had not been known within the PCT prior to the papers coming to light, despite previous police investigations into the death of Gladys Richards at GWMH in 1998 and a subsequent review of GWMH by the Commission for Health Improvement. Mr Horne had been an employee of the unit which was responsible for the management of GWMH in 1991, and was subsequently appointed as an executive director of Portsmouth Healthcare NHS Trust, which became responsible for running GWMH on its establishment in 1994, and which was responsible for GWMH at the time of the previous police investigation. Mr Horne was also referred to in the papers as being an individual to whom the concerns had been made known by representatives of the nursing staff.

The Strategic Health Authority issued a press release on 20 September 2002, which indicated that additional information concerning the care and treatment of patients at GWMH had come to light and that the Health Authority was committed to ensuring that all appropriate action was taken in relation to this new information, which was likely to include looking at the management decisions taken at GWMH. The announcement confirmed that both Mr Horne and Ian Piper, Chief Executive of Fareham and Gosport PCT, had been temporarily redeployed to other duties, given their involvement in the (past) management of GWMH, to ensure that the ongoing investigation was seen to be independent and able to command the trust of local people.

7 Park Square East Leeds LS1 2LW

Tel: Direct Tel: Fax: Direct Fax:
 DX: 14099 LEEDS e-mail:

Birmingham | Bristol | Brussels | Leeds | London | Manchester | Winchester



INVESTOR IN PEOPLE

Since that time, Mr Horne has not been working as the Chief Executive of the PCT, although he remains employed by the Trust and continues to be paid by the Trust. He has been undertaking project work agreed between himself and the Chief Executive of the Strategic Health Authority, and arrangements have been made for his role to be covered in the interim by Paula Turvey on an acting up basis. Arrangements have also been agreed between the Trust and Mr Horne to enable him to be kept up to date with the work of the Trust so that he would be in a position to return to his post as Chief Executive when his redeployment comes to an end.

Following receipt of the papers referred to above, your Trust, together with Fareham and Gosport PCT and the Strategic Health Authority commissioned an independent management investigation into GWMH, the terms of reference for which were to be as set out in the attached document. The Health Authority asked Mr Mike Taylor, former Chief Executive of Oxfordshire Health Authority to conduct the investigation with the assistance of Mr Ed Marsden, from the Inquiry Consultancy. It was always intended that such investigation would be undertaken alongside the other investigations into events at GWMH which were to be as follows:

- (a) a police investigation into alleged unlawful deaths at GWMH, and whether there had been any attempt to pervert the course of justice (by for example not making relevant information known to the police);
- (b) an audit by Professor Baker of deaths at GWMH from 1988 until 1998;
- (c) a second investigation by the Commission for Health Improvement into GWMH in respect of the period prior to the period covered by their first review.

The Management investigation began (in terms of gathering background information) in early November 2002, and at the same time the Health Authority were liaising with the police to ensure there was a co-ordinated approach to the various investigations. As part of that process and in line with my advice, the Health Authority provided the police with a copy of the terms of reference for the management investigation and asked the police to confirm that they had no objection to the management investigation proceeding on that basis. Although the police indicated initially that they were content that the management investigation could proceed, in mid December 2002 the police began to object to the management investigation on the basis that it could prejudice the ongoing criminal investigation. The police have also confirmed that they are now looking at complaints from 64 different families relating to treatment of patients at GWMH and that the matters they are investigating include Corporate Manslaughter.

Further discussion ensued between the Health Authority, the Chief Medical Officer and the police which culminated in a meeting between all three on Monday 13 January 2003, at which the police confirmed that they felt that **both** the management investigation **and** the second CHI investigation should be suspended, until they had concluded the criminal investigation. The police indicated at that meeting that their investigation could take up to two years to complete.

The outcome of the discussions with the police and the CMO were discussed at length at the meeting with the Health Authority on 17 January 2003, when it was confirmed that the CMO had indicated that his view was that the CHI investigation should be suspended. You also understand that the GMC and the LMC, to whom various professionals who had worked at GWMH had been referred previously for investigation, had also put their investigations on hold at the request of the police, pending the outcome of the police investigation.

Although written confirmation of the police position has yet to be received, a decision has now been taken that the management investigation cannot proceed, following discussion between the Health Authority, yourself and Lucy Docherty, Chair of Fareham and Gosport PCT, at the meeting on 17 January 2003.

The issue which the Remuneration Committee (on behalf of the Trust) must now consider is what action (if any) should be taken by the Trust in relation to Mr Horne in the light of that decision – should he continue to be redeployed, or should he be allowed to return to work.

Legal position

As you know, in my view, although it has always been described publicly as a "temporary redeployment", in reality Mr Horne has been suspended from his post as Chief Executive since those arrangements took effect. An employer may suspend an employee from duty where he has either an express right to do so, or for example to facilitate an investigation into specific allegations against an individual employee. In this case, there was no express right to suspend Mr Horne in his contract of employment; and the only power of suspension exercisable by the Trust is contained in its disciplinary procedure. That power is intended to be used in relation to a disciplinary investigation, and at the time of Mr Horne's suspension, there was no allegation against him. As a result, in my view the Trust may have placed itself in breach of its contract with Mr Horne by "redeploying" him.

To date, however, and following your discussions with him, Mr Horne has agreed to remain redeployed, but only on the basis that the management investigation will be concluded swiftly, and that the PCT will then make a decision as to whether or not he is to face any disciplinary action, and if not, to allow him to return. It has also been confirmed to Ian that the PCT will keep the issue of his continued "redeployment" under review, and reconsider it as the situation develops.

The fact that the management investigation will now be placed on hold at the request of the police is a development which demands that the PCT, as employer, should review its decision to "redeploy" Tony, and decide whether or not Tony should remain redeployed.

If it is correct that the original decision to redeploy Tony was a breach of contract by the Trust, then it follows that a decision by the Trust to maintain that redeployment will also be a breach of contract. As a result, if Tony wished to do so, he could pursue either of the following avenues against the Trust:-

- a claim for constructive unfair dismissal – this would involve Tony resigning from his employment, on the basis that by its actions (i.e the breach of contract of redeploying him) the Trust had left him with no option but to resign. In this case he would claim damages for breach of contract, equivalent to the pay he would have received from the Trust had he remained your employee, until he gets work elsewhere at a similar rate of pay (or for such period as the Court believes is reasonable). Such a claim could be pursued either in an Employment Tribunal (where the maximum amount of compensation the Trust could be ordered to pay would be limited to £60,000) or in the High Court (where there would be no limit on the amount which could be awarded).
- a claim in the High Court for an order for specific performance of the employment contract – that is, a court order requiring the Trust to allow Tony to return to work in his post as Chief Executive without further delay.

Tony has already taken legal advice on his position, and has indicated in correspondence that he may pursue a claim in the event that his redeployment continues for a lengthy period. The Trust has every reason to believe, therefore, that if it decides now not to allow Tony to return to work, he will pursue legal action against the Trust. What remains unclear is what form that claim would take – but I suspect that he would initially seek an order for specific performance, as by doing so he could remain in employment (and therefore in receipt of salary) until the outcome of the claim was known. Such an action would be likely to proceed relatively quickly, I would guess within a matter of weeks, and if the claim was successful, the Trust would be ordered to pay any legal costs incurred by Tony, in addition to its own costs in defending the claim.

In the event of any claim by Tony, the Trust would seek to defend any such claim on the basis that there had been no breach of contract by the Trust. In setting out any defence, the Trust would have to provide full details of the reasons for both the initial decision to redeploy Tony, and the decision not to allow him to return to work. That in itself could be the source of adverse publicity. In addition, I am concerned that to do so might prejudice the on going criminal investigation, and the police may want to exercise some influence on the information that the Trust would make available in its defence, since that will become a matter of public record. If that is correct, then the Trust's ability to properly defend any claim may be compromised to some extent. One possibility may be that we make an application for any such proceedings to be heard in private, but even if that application were successful (and often they are not), there is a risk that doing so might also result in adverse publicity for the Trust.

If Tony is allowed to return to work, then obviously neither of the claims specified above could be pursued. By allowing Tony back to work, the Trust would have remedied any prior breach of contract, and although in theory he could still pursue a claim for any damage he had suffered whilst he had remained redeployed (for example, damage to his health), the prospects of any such claim would be far more remote.

Factors to be taken into account in reaching the decision

In considering what action to take it will be necessary for the Remuneration Committee to consider and weigh the pros and cons of both options. I have summarised below what I perceive to be the relative advantages and disadvantages of each option, although obviously there may be other considerations of which I am not aware.

Option A – continuing the redeployment

Pros

Maintaining the perceived impartiality of the ongoing investigation

Consistency with original decision (to redeploy whilst “investigations” ongoing)

Prevents TH from having any opportunity to influence potential witnesses

Cons

Acting up arrangements would need to continue for a lengthy period

Would continue and possibly exacerbate existing breach of contract

Likely to result in legal challenge by Tony (and if successful, liability for damages and possibly also costs)

Possible adverse effect on morale within the organisation

Option B – allowing him to return to work

Pros

Remedies existing breach of contract

Removes need for acting up arrangements (and consequently improves resource within management team)

Reduces likelihood of any claim against the Trust from TH

Treatment of TH would be consistent with that afforded to other individuals who may be liable to investigation (eg doctors) who are not suspended from work

Improved morale within the organisation

Cons

TH could at some point in the future face charges relating to his past involvement with GWMH which might cause third parties to question the decision to allow him to return to work when it remained unclear whether or not this would be the case

Provides an opportunity for TH to seek to influence other staff who may be potential witnesses

General Comments

It should be noted by the Committee that:-

- (1) The police have apparently indicated to the Health Authority in discussion with them that they would have **no** objection to Tony being allowed to return to work, and although we have not had written confirmation of that view from the police as yet, if that is their view then it seems that there would be little justification for your Trust to be concerned about any impact his return to work might have on the investigation process. I would advise however that if Tony is allowed to return to work, the Trust should continue any measures it has already put in place which are intended to ensure that Tony has no role in any discussions about the ongoing investigation at GWMH.
- (2) If the Committee is minded to recommend allowing Tony to return to work, the Trust will also need

- to consider the text of any announcement to be made about his return, and how it will respond to any questions about the subject. In this regard, please note that at present, it remains the case that there is an extensive police investigation underway, the Baker Audit is continuing and both the management investigation and the second CHI investigation have only been suspended, not abandoned. There remains the possibility, therefore, that Tony could be implicated in some degree of wrongdoing at some point in the future. With that possibility in mind, the Trust must be careful **not** to give the impression (either in what it says in any announcement or in response to any questions) that it has already formed a view about his past involvement with GWMH (i.e. before he was appointed to his post with the PCT).
- (3) If Tony is to remain redeployed, then the next question must be how long that arrangement is to continue. Since the only investigations which will continue are the Baker audit and the police investigation, logically the position must be that he must remain redeployed until at least those investigations are completed. The police have already said that their investigation may take up to two years to complete, and there is no firm indication of how long the Baker audit might take (although previous estimates have suggested it might be completed within 18 months). A decision to keep Tony redeployed now therefore means that he is likely to remain redeployed for a lengthy period. Whilst redeployed, he remains an employee of the Trust, entitled to return to his post as Chief Executive at some point in the future. With that in mind, and in order not to prejudice the position of the Trust as employer any further, my view would be that the Trust could **not** appoint anyone else to fulfil the Chief Executive role on a substantive basis, even if it was only for a fixed period, unless any such appointment was made with the prior consent of Tony Horne (which would prevent him from being able to argue that such an appointment was a further breach of contract). The Trust should therefore consider whether it can sustain an acting up arrangement if the redeployment were to continue for a period of two years.
- (4) To date, Tony's position has always been that he wants to return to work as soon as possible, and the Trust has no reason to believe at present that his position on that has changed. If he returns whilst the police investigation is still on going, however, then he is **not** returning at a time when it could be said that he is entirely free from any suspicion. It is possible that he might feel that it would be preferable for him to return once all investigations have been done and it is clear that there is no possibility of any action against him. If that is his position, then it would be open to the Trust to agree with him that he can remain redeployed, but only on the basis that in that situation, he agrees to some other individual being appointed by the Trust to carry out the Chief Executive role on a more substantive basis for the length of his redeployment.

I hope you find this letter helpful but if you have any queries or wish to discuss any aspect of it in more detail then do please give me a ring.

Yours sincerely

Jane Hayden-Smith

wwh\H:\01350\656\L\2003-01-22-DOCHERTY.LET.DOC