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21 November 2023

FILE REF: **SHA/26065**

DECISION MAKING BODY: **LINCOLNSHIRE INTEGRATED CARE BOARD ("THE COMMISSIONER")**

GDS CONTRACTOR: **LIEZE DU PLESSIS, HOLBEACH DENTAL SURGERY, 12 ALBERT STREET, HOLBEACH, LINCOLNSHIRE PE14 7EX**

DISPUTE RESOLUTION: **NATIONAL HEALTH SERVICE (GENERAL DENTAL SERVICES CONTRACTS) REGULATIONS 2005**

RE: **APPLICATION FOR DISPUTE RESOLUTION WITH REGARD TO CLAIM FOR DENTAL RELIEF IN RESPECT OF A REJECTED FORCE MAJEURE APPLICATION**

Outcome

1.1 On the basis of the Commissioner's reconsideration of its position, I am of the view that the Contractor has met the criteria for its force majeure application to succeed.

1.2 Based on dental relief of 1,120.9 UDAs, the Commissioner will carry forward the value of UDAs to the financial year 2023/24 and adjust the value of overpayment in respect of the remaining balance of UDAs not provided in the financial year 2022/23.

1.3 I note that neither party has submitted a claim for interest to this dispute and I make no determination in this regard.

Advise / Resolve / Learn

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RE: **APPLICATION FOR DISPUTE RESOLUTION WITH REGARD TO CLAIM FOR DENTAL RELIEF IN RESPECT OF A REJECTED FORCE MAJEURE APPLICATION**

1 INTRODUCTION

1.1 The Contractor has referred the dispute in relation to its General Dental Services ("GDS") contract for dispute resolution under the provisions of Paragraph 55 of Schedule 3 of the National Health Service (General Dental Services Contracts) Regulations 2005 (the "Regulations").

1.2 The Secretary of State for Health and Social Care has directed that NHS Resolution exercise the functions of dispute resolution on their behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2 APPLICATION FOR DISPUTE RESOLUTION

2.1 By email dated 28 July 2023 the Contractor applied to NHS Resolution for dispute resolution.

2.2 I have had regard to the following documents made available to me in consideration of this matter to ensure the just, expeditious, economical and final determination of this dispute: -

2.2.1 Contractor's emailed application to NHS Resolution for dispute resolution dated 28 July 2023 with enclosures;

2.2.2 Contractor's email to NHS Resolution dated 11 August 2023 with further information;

2.2.3 Contractor's further email to NHS Resolution dated 11 August 2023 with further information;

2.2.4 Contractor's email to NHS Resolution dated 30 August 2023 with further information; and

2.2.5 Commissioner's email to NHS Resolution dated 6 September 2023 with enclosures.

3 PARTIES SUBMISSIONS

The Contractor's application

3.1 "I am writing, as advised by the NHSBSA Provider Assurance team, to dispute the decision not to grant dental relief following a rejected Force Majeure request (reference YE2223/QJM/143448/0001).

3.2 I will attach a copy of the letter I received detailing the final decision at the end of the Stage 1 Local Dispute Resolution process in order to structure my appeal of this decision.

3.3 Furthermore, I will attach the original supporting documents of my correspondence and documentation that was requested by the NHS when I first applied for the dental relief in January 2023 and then the Force Majeure in February 2023.

3.4 I will outline the synopsis of the email correspondence between myself and the NHS BSA Dental Cases department. All of these emails can be forwarded upon request.

3.5 Firstly, I would like to take this opportunity to briefly describe my case and the details pertaining to my request for granting dental relief.

3.6 In October 2022 I was diagnosed with a xxxx. This pain had been present for approximately 18 months. Conservative management with physiotherapy and directed exercise, the pain did not resolve. I was advised by xxxx, to have a xxxx injection in this area to alleviate symptoms and hopefully have minimal impact on my personal and work life.

3.7 Th [sic] injection was scheduled at the London clinic on 0911/22. On this very day, my COVID-19 test at the hospital returned a positive result and as per the hospital's policy, I was sent home immediately and had to post-pone the procedure by a minimum of 7 weeks before I could be admitted again. At first this had minimal impact, I was in pain, albeit manageable.

3.8 Unfortunately, that very evening I suffered an xxxx. I was suddenly in unbearable pain. I was unable to xxxx unassisted and needed constant daily care to just manage the most menial of daily tasks. I couldn't sleep or move without excruciating pain.

3.9 I was finally able to have my injection moved forward to 29/11/23 after much deliberation by the hospital, as this technically still within my period of COVID-recovery. My consultant was shocked to see how much pain I was in; he was keen to get the injection carried out as soon as possible to minimize the xxxx in the area and potential xxxx damage.

3.10 I had the injection on 29/11/22 and despite it alleviating the constant excruciating pain, the xxxx was unfortunately of such a severe nature that the diminished xxxx was no [sic] sufficient to allow me to xxxx. A rapidly arranged follow-up with my consultant unfortunately confirmed my worst fear; I have suffered xxxx damage to xxxx. Upon examination, my consultant was shocked to discover I couldn't xxxx at all. I was devastated. Only weeks previously, despite being in pain, I was an incredibly fit, healthy, and active young woman. Now I was xxxx due to the exceptional pain that caused in my xxxx.

3.11 Surgery was immediately scheduled at my consultant's earliest availability, on 04/01/23. Unfortunately, the Christmas and New Year bank holidays inadvertently postponed my surgery by a few of days. I had to isolate leading up to my surgery and even though this doesn't pertain to my case, I wish to mention my xxxx by my condition being the cause of cancelling plans for a family Christmas. I was absolutely devastated.

3.12 But, then on 04/01/23, I feel nothing short of a miracle happened. I came out of my surgery and for the first time in 8 weeks I could xxxx.

3.13 I was discharged from the hospital and the slow recovery process began I got my life back!

3.14 In short, I had two follow-up appointments with my consultant who advised I do not return to dentistry until 8 weeks post-surgery and then at a very reduced capacity. We discussed my options, and it was decided that I would return to work on 03/03/23, working 2 hours maximum

per day for a start and building that up. Over the course of the month, I worked a total of 35 hours and by the end of April I was able to build this up significantly, and by May I was almost back to my pre-surgery hours.

3.15 I am currently still working an hour less than I used to every day to accommodate my xxxx regimen in the mornings and to avoid xxxx, the deep healing is apparently only completing now, and I feel ready and able to live my life normally again.

3.16 I now have persistent xxxx, but the pain is completely gone! I am incredibly grateful to have had such a successful outcome.

3.17 In January 2023, after my first follow-up appointment with my consultant, I finally had an idea of when I could return to work, and in what capacity.

3.18 My father and I own a mixed practice in rural Lincolnshire with a 9000-UDA NHS contract. We have another dentist who works with us one day per week to alleviate the high treatment need in our area. In January, my father and I realized we would be struggling to meet our UDA target for the Year End 22/23.

3.19 I sent emails and made phone calls to try and find out who to contact to address this issue. I initially contacted the NHS Lincolnshire Integrated Care Board on 23/01/23 to enquire about a possible concession to be made to our UDA target for YE22/23. On 24/01/23 I was advised to forward my email on to the primary care trust [sic] at England.em-pcdental@nhs.net. I forwarded my original request email on to this address within a few minutes on 24/01/23 but never had a reply.

3.20 In the following weeks I continued to recover and as I started planning a strategy for return to work, I looked again for a resolution to our UDA delivery issues, and upon not hearing back from the primary care email I sent on 24/01/23, I forwarded my email to the NHS BSA dental cases team on 23/02/23 at nhsbsa.dentalcases@nhs.net.

3.21 On 24/02/23 I received an email back from nhsbsa.dentalcases@nhs.net advising me to apply for a Force Majeure as we were nearing the end of the year YE 22/23. They advised which supporting documents I needed and attached the necessary application form.

3.22 On 25/02/23 I sent back the completed Force Majeure application form and supporting documents to nhsbsa.dentalcases@nhs.net

3.23 On 27/02/23 I received a reply from nhsbsa.dentalcases@nhs.net stating “the Force Majeure notification will be forwarded to you [sic] regional commissioning team for review closer to the YE2223 [sic] for reconciliation”.

3.24 On 01/06/23 I received and [sic] email from nhsbsa.dentalcases@nhs.net acknowledging receipt of notification of a Force Majeure event. The email included a second request to complete the Force Majeure application again, and to forward the supporting documents again, by 16/06/23.

3.25 Om 08/06/23 I re-sent my Force Majeure application and supporting documents again to nhsbsa.dentalcases@nhs.net as I had done on 25/02/23.

3.26 On 09/06/23 I received an email from nhsbsa.dentalcases@nhs.net that the Force Majeure application and documents have been received.

3.27 Finally, I received an email from nhsbsa.dentalcases@nhs.net on 24/07/23 stating that the Force Majeure application and grant for dental relief have been rejected.

3.28 I have subsequently proceeded to complete the Stage 1 Local Dispute Resolution process and have been advised to sent [sic] this email I am composing now.

3.29 As per the attached email detailing why the Force Majeure application has been rejected I would like to reply:

3.29.1 I acted promptly and quickly every time I corresponded with the NHS BSA cases department once I was advised a Force Majeure application was the best way to proceed.

3.29.2 I was uncertain of my ability to work at a normal capacity once back at work when I made the application, hence why I mentioned the inability to carry forward the under-delivered UDAs. I had to simply wait and see how my xxxx responded to increase work demand and currently, I seem to be recovering and coping well.

3.30 I would finally like to make a personal appeal. I appreciate the policies and protocols the NHS have in place for these events and matters. In hindsight, I could have acted sooner to raise the issue of my under performance and consequences to the NHS commissioner. But during the months of November and December 2022, I was in the most unimaginable and terrible pain. I was taking the maximum amounts of analgesics my GP could prescribe, and yet the terrible pain wouldn't abate. I appreciate it is not of much concern, but I want to kindly request to bear in mind; I was trying to get through one day at a time with an exceptional amount of pain, whilst trying to arrange trips to and from London to see my consultant. All the while surgery was not a guaranteed success, and the prospect of my future as a dentist really looked uncertain. I was xxxx. During this time, I still had contact with the practice, running the payroll for my staff and trying to help advise where and how to manage ongoing patients' needs. Luckily my father and Mr. Hawthorn were able to see many of my urgent cases.

3.31 I know these are personal matters, but I really wish to impress upon the dispute resolution team the circumstances of my appeal.

3.32 Furthermore, I was effectively unable to work for 4 full months of the year, and once I did return to work, it was at a significantly reduced capacity, as detailed above.

3.33 I kindly request that my appeal for dental relief be considered. Any further documents, details, copies of emails or further correspondence will be supplied."

Representations

Commissioner's representations

3.34 "Thank you for sharing the details of the application for dispute resolution and a copy of the applicant's statement.

3.35 We have considered carefully the additional information provided in this application and it would appear from our original review that there may have been communications that the panel reviewing the force majeure application may not have been sighted on previously.

3.36 There are elements of the force majeure decision letter which are relevant, such as the force majeure was not submitted in a timely manner. The NHS England Policy Book for Primary Dental Services, Chapter 14, 14.1 Introduction states that Contractors are responsible for informing the Commissioner of any force majeure event promptly and no later than five working days of the occurrence of such circumstances or events and for lodging a claim for relief. We understand the applicant was not able to inform us in a timely manner due to the unforeseen circumstances, however the other partner to the contract (Mr D J Du Plessis) could have informed the Commissioner on behalf of the applicant.

3.37 The NHS England Policy Book for Primary Dental Services, Chapter 14, 14.10 Contract Compliance states that "Failure to notify the Commissioner will mean that the Contractor is not absolved from its obligations under the contract and will render any claim for dental relief invalid. This may mean that the Contractor is in breach of its contract because of under delivery of its contracted activity which will not be mitigated against as a result of the force majeure event occurring".

3.38 It appears from the applicant's correspondence that there was a plan to mitigate the impact on the fulfilment of the contract however this was unable to be enacted due to a change of circumstances and the availability of a performer to deliver the additional capacity, which may in part be the reason we were not notified at the start of the event leading to the force majeure claim.

3.39 There have been changes within the local team and full delegation of dental services to the local Integrated Care Board from 1st April 2023, this may have led to some of the communications not being received by the appropriate colleague and not acted upon promptly, if this occurred, we do apologise to the applicant.

3.40 On further review of the information submitted in this application we are satisfied that a force majeure event occurred and initially plans were in place to mitigate the consequences, but the circumstances changed in January 2023. Therefore under the NHS England Policy Book for Primary Dental Services this claim for relief would be considered under Chapter 14, 14.6 Possible Events or Circumstances for Dental Relief Claims and section 14.6.3 Significant period of absence due to accident or sudden serious ill health of a significant performer, this would apply as the applicant is one of the two performers who deliver the NHS contracted activity at the Practice.

3.41 We believe the correct notification was completed and supporting evidence has been provided for the claim to NHS BSA Dental Cases when requested. However, we wish to challenge the calculation of the dental relief being claimed by the applicant.

3.42 In the NHS England Policy Book for Primary Dental Services, Chapter 14, 14.13 Calculating Dental Relief, the calculation of the appropriate level of relief that a Contractor is awarded should be based on the activity that the relevant performer(s) would normally deliver in a day.

3.43 Calculation of dental relief should take account of the number of working days the performer(s) has been engaged in delivering NHS dental care under the contract during the financial period, which will exclude the days that the performer could not work due to the force majeure event. If employed for a full financial year this equates to 240 days. So, for example, in the case of a performer who has worked full time from 1 April to 31 March and delivered 3000 UDAs/UOAs, the estimated daily average will be 12.5. (3,000 / 240 =12.5)

3.44 If they did not work for a period of five days because of the force majeure event, the lost activity is calculated to be 62.5 UDAs/UOAs. (5 *12.5 = 62.5). This would be calculated pro rata for a part time performer.

3.45 Based on our calculation for the value of the dental relief in 2022/23 and the number of days lost being accepted as 88, this would equate to 1,075.6 UDAs rather than the 2,500 UDAs completed in the Force Majeure event documentation dated 6th August 2023. Please see attached Appendix 1 to this letter with the calculation of the dental relief for the applicant.

3.46 We have also reviewed previous years activity delivery by the applicant to consider whether 2022/23 was a typical year up to the point of the force majeure event and the results are below for the preceding three years: -

	2019/20	Percentage of total contract delivery by performer	Average daily (based on 240 days)	Number of days lost in FM	UDA lost based on average 19-20 delivery
Diederick 220582	5,590.8	64.7%	23.3		0.0
Lieze du Plessis	3,056.0	35.3.%	12.7	88	1,120.5

710334					
Grand Total Delivered	8,646.8				

	2020/21	Percentage of total contract delivery days by performer	Average daily (based on 240 days)	Number of days lost in FM	UDA lost based on 20-21 delivery
Diederick 220582	1,591.8	47.2%	6.6		0.0
Lieze du Plessis 710334	1,783.6	52.8%	7.4	88	654.0
Grand Total Delivered	3,375.4				

	2021-22	Percentage of total contract delivery by performer	Average daily (based on 240 days	Number of days lost in FM	UDA lost based on average 21-22 delivery
Diederick 220582	3,101.8	50.4%	12.9		0.0
Lieze du Plessis 710334	3,057.0	49.6%	12.7	88	1,120.9
Grand Total Delivered	6,158.8				

3.47 The Commissioner is happy to consider the higher of the preceding three years if this is acceptable to the applicant therefore the dental relief calculated would be 1,120.9 UDAs.

3.48 We hope that the decision to accept the claim for dental relief will be received positively by the applicant and we are able to reach agreement on the value of the total units of activity that they were prevented from providing during the force majeure period during 2022/23.

3.49 If this is acceptable to the applicant, we would carry forward the value of UDAs to this financial year 2023/24 and adjust the value of overpayment in respect of the remaining balance of UDAs not provided in the financial year 2022/23.

3.50 Please do not hesitate to contact myself if any further information is required."

<u>The Contractor's representations</u>

3.51 No representations were received.

Observations

3.52 No observations were received from either party to the dispute.

4 CONSIDERATION

GDS contract:

4.1 As part of this consideration of the application for NHS dispute resolution, I required an up-to-date version of the contract in dispute containing all variations agreed since the contract was signed. This was not provided, although the following provides some clarity regarding the contract between the parties:

4.1.1 By email dated 11 August 2023, the Contractor informed NHS Resolution: *"I have contacted Lincolnshire integrated healthcare board (our local ICB) to request a copy of our contract and I am still awaiting their response. I will forward as soon as I receive it."*

4.1.2 By email dated 11 August 2023, the Contractor informed NHS Resolution: *"I have received the contract copy and have attached it below."* I note a copy 'General Dental Services Contract Variation Notice – July 2018' for Contract number 143448/0001. The variation notice is signed and dated 25 February 2019 by NHS England, and 6 March 2019 by D J du Plessis.

4.1.3 By email dated 30 August 2023, the Contractor informed NHS Resolution: *"I have finally received the copies of the requested GDS contract and have attached these below."* I note one of the two enclosures provided was the variation notice already referred to above. The other is entitled 'Schedule to Contract – page 2' and refers to the annual contract value from 1 April 2019. It was signed and dated by both dentists on 18 July 2019, and by NHS England on 22 July 2019.

4.2 The Commissioner has not disputed the validity of the above nor that the Contractor's contract number is 143448/0001. I have therefore proceeded on the basis that the Contractor is party to a General Dental Services Contract with the Commissioner.

4.3 I have assumed that the contract between the parties reflects the provisions of the relevant Regulations in force at the relevant time and have proceeded to determine a dispute on that basis.

The Commissioner's decision letter:

4.4 I note NHSBSA's letter to the Contractor dated 26 July 2023 states:

4.4.1 "*I refer to your recent claim for dental relief in respect of the force majeure event that you incurred on 9th November 2022, which you believe affected your ability to deliver your contractual activity in full*.

4.4.2 *As detailed in the letter sent on 21st July 2023, as part of the informal local resolution process your NHS England commissioning team reviewed your claim and the supporting evidence submitted and the decision was made not to grant dental relief.*

4.4.3 *Following the provision of additional supporting evidence, your case was referred to your NHS England commissioning team to form part of the Stage 1 – Local Dispute Resolution Process for local resolution. The decision has been upheld to not to grant dental relief in this instance, this is for the following reasons:*

4.4.3.1 The Commissioner does not feel that it meets the criteria of a substantial impact as there was no notification to the commissioner from the provider alerting of the potential Force Majeure.

4.4.3.2 Force Majeure was not submitted in a timely manner.

4.4.4 *Contractors are required under the terms of their contracts to promptly notify the Commissioner (which for the purposes of this policy is within 5 working days) of a force majeure event. We understand the performer Lieze du Plessis was not able to inform us in a timely manner due to the unforeseen circumstances, but the contractor should have informed the commissioner on behalf of the performer.*

4.4.5 *The Commissioner does believe carrying forward the under delivered 2,500 UDAs, will add more pressure on the contractor as mentioned in the "specific details" provided ("We are aiming to increase capacity by working more hours including Saturdays and attempting to secure a locum. My physical health is limiting the number of hours I can work unfortunately."). If the contractor already had this in place, we might have considered on exceptional cases.*

4.4.6 *The Commissioner does believe there is also a risk of setting a precedent with future similar Force Majeure requests if there are no exceptional grounds.*

4.4.7 *We will commence with the proposed action that will be outlined in your Year End reconciliation letter.*

4.4.8 *This concludes Stage 1 of the Local Dispute Resolution process. If you still do not agree with the decision, you may wish to refer the matter to the NHS resolution procedure, as we have now exhausted all avenues of local resolution. This can be done by sending a written request to:*

NHS Resolution Primary Care Appeals
10 South Colonnade Canary Wharf
London
E14 4PU
nhsr.appeals@nhs.net"

Time limits:

4.5 I note that the Contractor first made enquiries to the Commissioner in January 2023 after she had realised there was likely to be a difficulty in meeting the 2022/2023 contractual obligations. The Contractor finally became aware of the matters in dispute following the NHSBSA's letter of 26 July 2023 refusing her claim for dental relief in respect of the force majeure event. I am satisfied that the application for dispute resolution to NHS Resolution has been made in time.

Local dispute resolution:

4.6 NHSBSA's decision letter to the Contractor dated 26 July 2023 (see above) includes: *"This concludes Stage 1 of the Local Dispute Resolution process. If you still do not agree with the decision, you may wish to refer the matter to the NHS resolution procedure, as we have now exhausted all avenues of local resolution."* The Contractor having taken the opportunity to make an application for dispute resolution to NHS Resolution, has also in my view, accepted that local dispute resolution is exhausted. In the circumstances, I am content that I may proceed to determine the current application.

Matters relevant to the dispute according to the Contractor:

4.7 The Contractor disputes NHSBSA's decision not to grant dental relief following a rejected force majeure request on the basis that:

4.7.1 The Contractor claims to have acted promptly and quickly every time it corresponded with the NHSBSA once the Contractor was advised a force majeure application was the best way to proceed.

4.7.2 The Contractor claims to have been uncertain of her ability to work at a normal capacity once back at work when she made the application.

4.7.3 The Contractor states that she could have acted sooner to raise the issue of under-performance and consequences to the Commissioner but during the months of November and December 2022, she was in the most unimaginable and terrible pain.

4.7.4 The Contractor was also xxxx. The Contractor though, still had contact with the practice, running the payroll for her staff and trying to help advise where and how to manage ongoing patients' needs.

4.8 The Contractor has with her application for dispute resolution, provided a copy of a document entitled 'Annex 84 Contractors Preliminary Notice for Force Majeure Event'. I note the following under the heading 'Introduction':

4.8.1 *"This template must be submitted to the Commissioner should an unplanned event occur due to circumstances or events beyond the reasonable control of the contractor that could have a detrimental impact on service provision and may result in underperformance as at year end.*

4.8.2 *Notification must be provided to the Commissioner within five working days of its occurrence.*

4.8.3 *The template should be typed to ensure legibility and emailed to the Commissioner as well as served in accordance with the notice provisions of the contract to avoid the possibility of it being lost in the post.*

4.8.4 *The Commissioner will record that the event has happened and provide the contractor with an acknowledgment letter.*

4.8.5 *No evidence is required at the preliminary advice stage but will be required should a claim formally be submitted for consideration at year end."*

4.9 Under the heading 'Force Majeure – Notification of an unplanned event' the Contractor stated that its notification was in respect of contract number QJM 1434480001, Holbeach Dental Surgery, 12 Albert Street, Holbeach, Lincolnshire PE14 7EX. The notification date is given as 25 February 2023.

4.10 I note the Contractor's comment in the notification that due to the following unplanned event, it may not be possible to deliver the contracted activity to 96%, the minimum level of attainment required by the contract. The event is summarised as follows:

4.10.1 *10 November 2022 – The Contractor suffered xxxx meaning she was unable to work. The Contractor subsequently had xxxx injection on 29/11/22 but it did not relieve her symptoms enough to allow her to return to work. The Contractor has now had had surgery xxxx on 4 January 2023 and will be able to return to work on a part-time basis on 6 March 2023.*

4.11 The Contractor claimed that the potential number of UDA's that could be lost was approximately 2000. No UOA's were expected to be lost.

4.12 The Contractor described as follows, the action being taken to mitigate the loss of service:

4.12.1 *"Unfortunately, we have been unable to source a locum to work in my absence. Our part-time provider (Mr Hawthorn) is also on leave xxxx. As such we currently have only one performer able to work (Mr Du Plessis), and he himself xxxx problems and*

struggling to cope with the demands of the practice. Mr Hawthorn is currently only able to assist and work with us 1-2 days per week."

4.13 The Contractor has also provided a copy of her completed application form entitled 'Year End Reconciliation 2022-2023 Force Majeure/Exceptional Event'. This was made in respect of contract number 143448000, Holbeach Dental Surgery, 12 Albert Street, Holbeach, Lincolnshire PE12 7DN. The date of the event to which the application related was given as 4 January 2023. The form does not bear in the relevant 'tick box' an input date of when it was notified to the Commissioner. However, I note the form bares '6/8/23 9:00am' in the top left-hand corner.

4.14 Under the heading 'Description of Event' the Contractor has stated: *"I, Lieze du Plessis, suffered xxxx on 09/11/2022 rendering me unable to xxxx, meaning I was unable to work. I subsequently had a xxxx injection on 29/11/22 but it did not relieve my symptoms and I was unable to return to work. I had xxxx surgery xxxx on 04/01/23 and was able to return to work on a part-time basis on 06/03/23 as per my consultant's recommendation. I…"* [further explanation not visible].

4.15 Under the heading 'Mitigating actions taken as a result' the Contractor stated: *"Unfortunately we have been unable to source a locum to work in my absence. Our part-time provider (Mr Hawthorn) is also on leave to xxxx. Currently there is one performer able to work (Mr Du Plessis), and he himself is having xxxx problems and struggling to cope with the demands of the practice. I am currently almost working at my full capacity but still cannot physically manage my usual hours. Mr Hawthorn is currently working with us 1 day per week."*

4.16 I note the Contractor's comment under the heading 'Number of days lost' was '88'.

4.17 I note the Contractor's comment under the heading 'Number of estimated UDA's/UOA's lost' was '2500'. Also, under the heading '2023/24 Delivery' the Contractor stated that the number of undelivered UDA's it was requesting to carry forward from 2022/23 to be delivered as a priority in 2023/24 was '2500'. No underdelivered UOA's were requested.

4.18 Under the heading "Please provide specific details about how these additional units will be delivered in 2023/24" the Contractor stated:

4.18.1 *"We are aiming to increase capacity by working more hours including Saturdays and attempting to secure a locum. My physical health is limiting the number of hours I can work unfortunately."*

4.19 The Contractor has provided copy letters detailing her medical condition from the Consultant xxxx treating her.

4.20 I note the Commissioner's comment that it stands by the conclusion in NHSBSA's decision letter that the Contractor could have submitted its force majeure application in a more timely manner. The Commissioner refers to the NHS England Policy Book for Primary Dental Services ("the Policy Book"), Chapter 14, 14.1 Introduction [I was not provided with a copy] which states that Contractors are responsible for informing the Commissioner of any force majeure event promptly and no later than five working days of the occurrence of such circumstances or events and for lodging a claim for relief. The Commissioner understands the force majeure applicant was not able to inform it in a timely manner due to the unforeseen circumstances, however the other partner to the contract (Mr D J Du Plessis) could have informed the Commissioner on behalf of the force majeure applicant. I note that the Contractor has not disputed the wording of the above mentioned, Policy Book. The Contractor has also acknowledged that the force majeure application could have been lodged sooner.

4.21 I note the Commissioner's comment that the Policy Book, Chapter 14, 14.10 Contract Compliance states that "Failure to notify the Commissioner will mean that the Contractor is not absolved from its obligations under the contract and will render any claim for dental relief invalid. This may mean that the Contractor is in breach of its contract because of under delivery of its contracted activity which will not be mitigated against as a result of the force

majeure event occurring". I note that the NHSBSA's decision letter of 26 July 2023 does not include any finding that the Contractor had breached its terms of service. Any such consideration would require a separate decision by the Commissioner. I therefore take no view on the Commissioner's suggestion that the Contractor had breached her contract because of under delivery of contracted activity.

4.22 I note the Commissioner's comment that after a review of the information in respect of this case, it is now satisfied that a force majeure event occurred and that initially plans were in place to mitigate the consequences, but the circumstances changed in January 2023. Therefore, under the Policy Book this claim for relief would be considered under Chapter 14, 14.6 Possible Events or Circumstances for Dental Relief Claims and section 14.6.3 Significant period of absence due to accident or sudden serious ill health of a significant performer, as this would apply as the force majeure applicant is one of the two performers who deliver the NHS contracted activity at the Practice.

4.23 I further note the Commissioner's comment that it believes the correct notification was completed and supporting evidence has been provided for the claim to NHSBSA when requested. I consider that the Commissioner now accepts the force majeure application and the reasons given.

4.24 However, the Commissioner wishes to challenge the calculation of the dental relief being claimed by the Contractor. According to the Commissioner, the Policy Book, Chapter 14, 14.13 Calculating Dental Relief, states the calculation of the appropriate level of relief that a Contractor is awarded should be based on the activity that the relevant performer(s) would normally deliver in a day. I have not been provided with a copy of the above mentioned, section from the Policy Book so am unable to verify the wording for myself. I note however, that the Contractor has not challenged the guidance as referred to by the Commissioner.

4.25 The Contractor has not challenged the Commissioner's assertion that calculation of dental relief should take account of the number of working days the Contractor has been engaged in delivering NHS dental care under the contract during the financial period, which will exclude the days that the performer could not work due to the force majeure event. I note the Commissioner's comment that based on its calculation for the value of the dental relief in 2022/23 and the number of days lost being accepted as 88, this would equate to 1,075.6 UDAs rather than the 2,500 UDAs completed in the force majeure event application dated 6 August 2023. The Contractor has not contested this calculation.

4.26 I note the Commissioner's comment that it has also reviewed previous years activity delivery by the force majeure applicant to consider whether 2022/23 was a typical year up to the point of the force majeure event and the results are detailed at 3.46.

4.27 The Commissioner is happy to consider the higher of the preceding three years if this is acceptable to the force majeure applicant and therefore the dental relief calculated would be 1,120.9 UDAs. The Commissioner comments that if this is acceptable to the Contractor, it will carry forward the value of UDAs to this financial year 2023/24 and adjust the value of overpayment in respect of the remaining balance of UDAs not provided in the financial year 2022/23. The Contractor has not contested this calculation, or the action proposed by the Commissioner.

4.28 On this basis, I conclude that the parties have reached a mutually acceptable outcome for this application for dispute resolution which does not require any further input from me.

5 DECISION

5.1 On the basis of the Commissioner's reconsideration of its position, I am of the view that the Contractor has met the criteria for its force majeure application to succeed.

5.2 Based on dental relief of 1,120.9 UDAs, the Commissioner will carry forward the value of UDAs to the financial year 2023/24 and adjust the value of overpayment in respect of the remaining balance of UDAs not provided in the financial year 2022/23.

5.3 I note that neither party has submitted a claim for interest to this dispute and I make no determination in this regard.

Head of Appeals
NHS Resolution