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DATE	**31 January 2024**
FILE REF:	**SHA/26104**
COMMISSIONER:	**NHS ENGLAND - SOUTH EAST**
PERFORMER	**DR ANDREW POWELL ("the Appellant")**
DISPUTE RESOLUTION:	**NATIONAL HEALTH SERVICE (PERFORMERS LISTS) (ENGLAND) REGULATIONS 2013**

1. **Outcome**

1.1 Pursuant to paragraph 4(1)(b) of the 2015 Determination I determine that the Appellant is not entitled to suspension payments for the period from 16 August 2023 onwards.

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NHS Resolution

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1. INTRODUCTION

1.1 The above named Appellant has referred the matter for consideration under the National Health Service (Performers Lists) (England) Regulations 2013 ("**the Regulations**")

1.2 The Secretary of State for Health and Social Care has directed that NHS Resolution, the operating name of NHS Litigation Authority, exercise the functions under Regulation 13(5) to (9) on their behalf. Primary Care Appeals discharges that function for NHS Resolution and I, as an authorised officer have made this determination.

2. THE APPEAL

2.1 By a letter dated 22 October 2023 the Appellant applied to Primary Care Appeals for consideration of a decision by NHS England to refuse to make a payment to the Appellant during the period of suspension ("**Notice of Appeal**").

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

2.2.1 the Appellant's Notice of Appeal;

2.2.2 NHS England's representations dated 15 November 2023 ("**NHS England's Representations**"); and

2.2.3 the Appellant's observations dated 4 December 2023 ("**Appellant's Observations**").

2.3 The matter relates to the entitlement of a medical practitioner to suspension payments under Regulation 13 of the Regulations and in turn the Secretary of State's Determination: Payments to Medical Practitioners Suspended from the Medical Performers List 2015 ("**the 2015 Determination**").

3. BACKGROUND AND SUBMISSIONS

3.1 The background below is taken from the Appellant's Appeal Notice and NHS England's Representations.

3.2 The Appellant became the subject of a criminal investigation and on 17 July 2023 NHS England wrote to the Appellant to inform him that he was suspended from the Medical Performers List with immediate effect under Regulation 12(1)(b)(i) and 12(6) of the Regulations whilst the outcome of the investigation was awaited.

3.3 On 16 August 2023 the Appellant informed NHS England that he had been expelled from his GP partnership that day.

3.4 On 30 August 2023 the Appellant made an application to NHS England for suspension payments.

3.5 On 7 September 2023 NHS England issued its decision that the Appellant was not entitled to suspension payments between 17 July 2023 and 16 August 2023 because he was in receipt of at least 90% of his normal monthly drawings during that period. NHS England further determined that the Appellant was not entitled to suspension payments from 16 August 2023 because he was no longer practising in a partnership from that date.

3.6 On 8 September 2023 the Appellant requested a review of the decision to refuse payment for the period after 16 August 2023.

3.7 On 16 October 2023 NHS England issued its reconsidered decision ("**Reconsideration**") determining that the Appellant is not entitled suspension payments from 16 August 2023.

3.8 Following the Reconsideration, the Appellant has submitted the Notice of Appeal.

<u>The Appeal</u>

3.9 "1) In this appeal I make reference to:

a. The 2015 Secretary of State's Determination
b. Sandles v NHS Litigation Authority [2022] EWHC 1582 (Admin)
c. The Standard General Medical Services Contract
d. The letter informing me I have been expelled from the partnership
e. The BMA Salaried GP Model Contract
f. Your letter of determination
g. https://www.wessexlmcs.com/partnershipspm
h. The performers lists and suspension consultation response document (dated 11/2/15)
i. North West Anglia NHS Foundation Trust v Gregg (2019) CA
j. Petrie v McFisheries Limited [1940] 1 KB 258
k. Uber BV v Aslam [2021] UKSC 5

2) I make my appeal in two parts; firstly considering the determination and relevant case law, and secondly referring to the principle of neutrality and a purposive approach to the relevant legislation.

3) Firstly, I will review my case and relevant case law.

The act of suspension

4) In order to qualify for suspension payments, it appears that you need to qualify, as determined by paragraph 3 and be entitled, as determined by paragraph 4, of the 2015 Determination.

5) My qualification under paragraph 3 does not appear to be in doubt. I have been suspended (as per sub-paragraph (2)(a)) and immediately prior to the suspension I was a contractor (as per (2)(b)(i)).

6) It would also appear that a person could meet more than one of the criteria in sub-paragraph (2). For example, a part time partner could also undertake regular locum work (either at their own practice or elsewhere, if the partnership agreement allowed it) – therefore they would

qualify under both (2)(b)(i) AND (2)(b)(iv) or (2)(b)(v). Therefore, it cannot be suggested that the numbered sub-paragraphs (i) to (v) of (2)(b) are mutually exclusive.

7) It would also seem that the wording of (2)(b)(ii) could include partners. We have established the non-exclusivity of the sub-paragraphs above. I would note that a GMS Contract is between the Board and the partnership collectively (referred to as 'the Contractor' in the Contract). It would therefore be true to say all partners are 'engaged' by the Contractor to perform primary medical services (as per (2)(b)(ii)).

8) Looking at sub-paragraph 3(3) – this also not in doubt, the only impediment to me performing primary medical services is my suspension from the NHS performers list.

9) You state in your letter:

'*From the 16th of August 2023 when your partnership agreement was terminated, you were no longer entitled to suspension payments. This is because you are no longer eligible to receive partnership drawings and that would be the case whether you were suspended or not.*'

10) You do not clearly cite which part of the 2015 Determination you are referring to. Under paragraph 4, you could be suggesting that paragraph 4(1)(b) requires me to still be practicing in a partnership and that my expulsion means I am no longer eligible under this clause.

11) I argue however, that paragraph 4(1)(c), using the same logic as above, still applies… 'is or was…. engaged…' and thus I should be entitled to suspension payments.

12) I am aware that similar arguments were tested in *Sandles v NHS Litigation Authority [2022] EWHC 1582 (Admin)* and it was found in your favour.

Differences in this case

13) I would draw the following distinctions in my case:

14) In the Sandles case, Dr Sandles signed a document voluntarily retiring from the partnership. This is highlighted in paragraph 29 of the Judgment:

'*I see no unfairness here. The employed doctor has no choice if he is dismissed in those circumstances, subject to any claim for unfair dismissal which will not yet have been determined. He or she is not going to be able to get another employed position during the suspension and it is fair that he or she gets an interim payment. Likewise a locum will simply be unable to work during suspension. A partner by contrast retires by his own choice, either because the terms of the partnership to which he signed up require it or at the request of his partners to which he accedes.*'

15) I would like to make several points:

16) Firstly, I was expelled. I had no choice. From the letter I received from the partnership:

'*Pursuant to clause 18.1 of the Deed, following a meeting of the partnership held on 15th August 2023 of which all partners had been given notice, we, the "other Partners" of the Partnership, hereby give you, Dr Powell, notice of expulsion as from Wednesday, 16th August 2023, the date of service of this notice, on the grounds of clause 18.1.9 of the Deed following a decision taken by us at the said meeting.*'

17) With the relevant clauses of the partnership agreement stating:

'*18.1 If an Equity Partner:*
…
18.1.9 has his name erased or suspended from the NHS Medical Performers List notwithstanding the status of any appeal
…

THEN, and in any such case, the Partner in default may be expelled from the Partnership by the service on such Partner of a notice in writing from all of the other Partners'

18) Secondly, it is suggested in paragraph 29 that the circumstances are different for an employed doctor. The suggestion is a partner has made a choice (due to potential wording in the partnership agreement they may have signed). However, the BMA Salaried GP model contract has similar wording:

'*Termination of employment*
36. This Agreement shall be subject to termination forthwith by the Practice (in line with Practice employment procedures) if the practitioner:
…
ii. conducts [him/herself] in a manner which results in [his/her] name being [insert as set out below] …
England and Scotland
Insert:
'suspended from the Medical Register (except under section 30(5) of the Medical Act 1983'

19) It is clear therefore that both employed doctors and partners can be subject to sanctions against their will, in this sort of circumstance, and both are aware of this at the time they commence the role. I therefore argue that the distinction drawn in paragraph 29 is not valid.

20) Similarly the statement in paragraph 38, '…it makes sense for partners to be treated differently because they have choice and control that is not available to employed doctors and locums.', is patently not true in this case.

21) I do also note that it is a requirement of the GMS contract to offer all salaried doctors a contract with terms '… which are no less favourable than those contained in the document entitled "Model terms and conditions of service for a salaried general practitioner employed by a GMS practice" published by the British Medical Association …'), therefore ALL employed doctors will be subject to the clauses above.

22) In paragraph 35 it is stated:

'*Partners are in a very different position from employed doctors and locums. The latter are likely to be deprived by their suspension of their ability to work. By contrast, partners are unlikely to be forced to retire on the basis of allegations that are neither admitted nor proved; it would be very surprising if the partnership deed required that.*'

23) It is surprising that the Cooke J feels confident to make this conclusion, having not even seen the partnership deed in the case in question. Quite the contrary – as explained on the Wessex LMC webpage, 'many partnership deeds … states that any partner can be <u>expelled for any reason</u> if all of the other partners vote to expel them.' – often referred to as a 'Green Socks' clause.'

24) In paragraph 40 of the Judgement, there is a quote from your submission in the case:

'"*From the date that the Appellant ceased to be a partner in the Practice, he ceased being entitled to his normal partnership income. Not as a result of his suspension but as a result of him not being a partner ….*"'

And:

'" *… the purpose of the 2015 Determination, which in my view is to compensate practitioners who are unable to practice as a result of their suspension and not if they lose income for some other reason.*"

25) In my case, as outlined above, my not being a partner is a DIRECT consequence of being suspended and for NO other reason.

26) *North West Anglia NHS Foundation Trust v Gregg (2019) CA* also looked at pay during suspension. Gregg was a consultant anaesthetist suspended, this time by an IOT of the MPTS. It was found at appeal that whilst suspended, his pay should not have been withheld, saying in summary:

'*… the default position should be that, in the ordinary case, an interim, non-terminatory suspension should not attract the deduction of pay.*'

27) It would be absurd, therefore, to suggest that a General Practitioner (however engaged) should be different.

28) In the Sandles judgement Cooke J seems to be concerned, in paragraphs 31 and 38, there could be unintended consequences with a broader inclusion criteria. In paragraph 31 it is argued that a partner who retires due to reaching retirement age during their suspension could be eligible for suspension payments is a reason for the restrictive wording in (4)(1)(b). However the already established principle of being otherwise 'ready, willing and able' to work (*Petrie v McFisheries Limited [1940] 1 KB 258* [sic]) should suffice to prevent claimants, for example, claiming after retiring on age grounds.

Human Rights

29) In *Malik v United Kingdom 23780/08 [2012] ECHR 438* the European Court of Human Rights considered if suspension from the performers list violates Article 1 Protocol 1 of the European Convention on Human Rights. The court declined to decide if there was a possession that could be interfered with, but ruled that the, in Dr Malik's case that the suspension did not affect Dr Malik as '(1) Dr Malik continued to be paid during his suspension (this is required by the terms of the NHS contract);' and '(3) … Dr Malik did not show that this had affected his income'

30) Therefore, in the absence of suspension payments, it could be considered that my rights under Article 1 Protocol 1 may be violated.

Neutrality of Suspension

31) My second broad reason for appeal is one of principle (of neutrality).

32) In the consultation document Performers Lists and Suspension it states:

'*The Department of Health has reviewed the 2013 Regulations and considers their impact is disproportionate. Because the imposition of an interim suspension order is intended to be a neutral act, this should not result in removal from the performers lists.*'

33) This is how my immediate and rapid suspension was explained to me – a neutral act. This is especially relevant as, in my case, there is no evidence whatsoever available to NHSE or indeed innocence or guilt at any level, let alone at the civil standard 'on the balance of probabilities' that would be required to take punitive regulatory action.

34) However, declining suspension payments is indeed a punitive action, especially during this cost of living crisis.

35) The importance of a suspended practitioner continuing to receive payment weighs heavily in the responses in the consultation document from which the idea of suspension being a neutral act is derived:

'*… They felt this placed the practitioner in a vulnerable position, because if they were removed from the performers list they would be unable to receive any payment.*'

'*… Some were concerned over the phrase 'could' continue to be paid, and believed practitioners should receive payment of salaries. This was because suspension is a neutral act …*'

'*it ensures practitioners have access to payments.*'

36) And the BMA's response:

'"*the imposition of an interim suspension order on a general practitioner is a neutral act and not intended to punish – this is a position that we strongly support.*"'

37) Paragraph 3.23 in summary shows it was the clear intent that the 2015 Determinations were supposed to remove the punitive aspect and allow payment:

'*While suspended from the performers list due to an interim suspension order from their regulator (ie awaiting a judgement from the regulator), practitioners would still have access to payments thus removing the punitive aspect. We will amend the Determinations to enable this.*'

38) I note also, that the is nothing in the 2015 Determination to suggest a process of 'means testing' nor a suggestion that there is a limited 'pot' of funding for which suspended practitioners apply. Thus, this furthers the argument above that there is a clear intention that ALL suspended practitioners receive suspension payments, commensurate with their usual income, for the duration of their suspension pending formal regulatory outcomes.

Purposive approach to legislation

39) It would appear that, for the want of two words '… or was …' in sub-paragraph (4)(1)(b) of the 2015 Determination, there is an inherent unintended unfairness in the Determination. In the Judgement the Judge refers to *AA (Nigeria v SSHD [2010] EWCA 773* – a case which hinged on the intended meaning of the word 'false' and more importantly the intent behind a false declaration (ie deceit v. mistake).

40) I feel it would be fair to argue discretion should be applied here because of the ambiguity between the clear intent of the Determinations and their actual wording.

41) In the case of *Uber BV v Aslam [2021] UKSC 5* the Supreme court stated:

'*The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose. … Lord Reed cited the pithy statement of Ribeiro PJ in Collector of Stamp Revenue v Arrowtown Assets Ltd (2003) 6 ITLR 454, para 35:*

"The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."'

42) It is clear that the purpose of the 2015 Determination and the Legislation is that suspension is a neutral act and suspension payments should be paid for this reason.

Summary

43) In summary, I base my appeal on the fact that:

a. In declining my application for suspension payments, I am being punished financially by what is supposed to be a neutral act.
b. It is the clear the intent is that suspension is a neutral act, and it was intended that suspension payments were to encompass all suspended practitioners.
c. I am unable to practice because of the suspension and my not being a partner is a DIRECT consequence of being suspended and for NO other reason, and this position would not differ materially if I was employed.
d. There is ambiguity between the intent and the wording of the Determinations and there are not likely to be unintended consequences considering partners in the same way as employed doctors, and this would be in keeping with the principle

of purposive approach to legislation.

e. There may be a breach of Article 1 Protocol 1 of the European Convention on Human Rights.
f. Paragraph (4)(1)(c) could be applied in this case."

NHS England's Representations

3.10 "1. These are the representations made by NHS England ("the Respondent") in response to the appeal brought by Dr Andrew Powell ("the Appellant") to the PCA on 22 October 2023.

Legal framework

Legal framework for immediate suspension

2. Registered medical practitioners are required to be named on a performers list maintained by NHS England in order to perform primary medical services as part of the NHS in England (the "Medical Performers List").

3. The National Health Service (Performers Lists) (England) Regulations 2013 (the "Regulations") provide NHS England with powers over admission, suspension and removal from the Medical Performers List. The powers are used to ensure that practitioners are fit for the purpose of providing primary medical services and to protect patients and the service from any practitioners who are not.

4. The Respondent can suspend a performer from the Medical Performers List where (amongst other things) it is satisfied that it is necessary to do so for the protection of patients or members of the public or that it is otherwise in the public interest, while it awaits the outcome of any criminal or regulatory investigation affecting the practitioner (Regulation 12(1)(b)(i) of the Regulations).

5. The Respondent has the power to determine that a suspension is to have immediate effect where it considers it necessary to do so for the protection of patients or members of the public or that it is otherwise in the public interest (Regulation 12(6) of the Regulations).

Payments to Medical Practitioners Suspended from the Medical Performers List 2015 ("the 2015 Determination")

6. Paragraphs 3, 4 and 5 of the 2015 Determination set out the conditions for entitlement to a suspension payment from the Respondent during the period of suspension and prescribe the amount payable. The relevant provisions in respect of this appeal are as follows:

> "3 (1) A medical practitioner may be entitled to receive payments from the Board by virtue of this determination if sub-paragraphs (2) and (3) apply to that medical practitioner.
> (2) This sub-paragraph applies to a medical practitioner who-
> (a) is suspended; and
> (b) immediately prior to the suspension (or the circumstances giving rise to the suspension) is or was
> (i) a contractor (including a partner in a partnership which is a contractor),
> (ii) a person employed or engaged by a contractor to perform primary medical services,
> (iii) a locum who has, or has had, a contract for services with a contractor to perform primary medical services,

(iv) a locum employed or engaged by a body that provides or provided locum or deputising services to contractors who, in the period of six months beginning immediately prior to the suspension, performed primary medical services which were provided at a contractor's practice,

(v) a locum who does not, or did not, have a contract of service or a contract for services with a contractor or a body referred to in paragraph (iv) but who, in the period of six months beginning immediately prior to the suspension, performed primary medical services which were provided at a contractor's practice.

(3) This sub-paragraph applies to a medical practitioner to whom sub-paragraph (2) applies who, apart from the suspension, and any suspension from the register of medical practitioners which does not provide grounds for removal from the medical performers list under regulation 28 of the 2013 Regulations (grounds for removal from the medical performers list), is able and permitted to perform primary medical services.

4 (1) A medical practitioner to whom paragraph 3(2) and (3) applies ("a suspended medical practitioner") is, subject to the following provisions of this Determination, entitled to payments from the Board in respect of any complete calendar month, or part of a calendar month, for which-

(a) …;

(b) where the suspended medical practitioner is one of two or more individuals practising in a partnership, that medical practitioner is not entitled to receive at least 90% of the normal monthly drawings (or a pro rata amount in the case of a part month) from the partnership account, whether or not that medical practitioner is actually in receipt of those drawings;

(c) where the suspended medical practitioner is or was employed or engaged by a contractor, other than as a locum, that medical practitioner is not entitled to receive at least 90% of that medical practitioner's normal monthly NHS earnings from work as a performer of primary medical services (or a pro rata amount of such earnings from such work in the case of a part month,) whether or not that medical practitioner is actually in receipt of at least that amount from the contractor, or

(d) …

(2) …

5 (1) Subject to the following provisions of this Determination, if a suspended medical practitioner is entitled to payments from the Board in accordance with paragraph 4, the amount of those payments, in respect of each complete calendar month or part month during the period of the suspension, is –

(a) …;

(b) where a contractor consists of two or more individuals practising in partnership and the suspended medical practitioner is or was a partner in the partnership immediately before the circumstances giving rise to the suspension, an amount which represents 90% of the medical practitioners normal monthly drawings (or a pro rata amount in the case of part months) from the partnership account;

(c) where the suspended medical practitioner is or was employed or engaged by a contractor, other than as a locum, and amount which, immediately before the suspension, amounted to at least 90% of that medical practitioner's normal monthly NHS earnings from work as a performer of primary medical services (or a pro-rata amount of such earnings from such work in the case of a part month);

(d) …".

Background and basis for Appellant's Appeal

7. The Appellant is a General Practitioner ("GP").

8. The Appellant was the subject of a criminal investigation following a number of allegations having been made against him, and consequently, NHS England ("the Respondent") notified the Appellant on 17 July 2023 that he was immediately suspended from the Medical Performers List under Regulation 12(1)(b)(i) and 12(6) of the Regulations whilst the outcome of the investigation was awaited.

9. On 16 August 2023, the Appellant contacted the Respondent to confirm that he had been expelled from his GP partnership on that day and that he therefore needed to apply for suspension payments.

10. On 30 August 2023 the Appellant provided a completed suspension payments application form.

Decision of 7 September 2023

11. On 7 September 2023, the Respondent wrote to the Appellant to confirm that he was not entitled to suspension payments between 17th July 2023 and 16 August 2023 because he was in receipt of at least 90% of his normal monthly drawings during that period, as confirmed by documentation supplied by the Appellant. This was further to paragraph 4(1)(b) of the 2015 Determination.

12. The letter went on to state that from 16 August 2023, from the Appellant's expulsion from the partnership, he was not entitled to suspension payments. This is because the Appellant was no longer practising in a partnership from that date, as per paragraph 4(1)(b) of the 2015 Determination.

Review of the suspension payment decision

13. The Appellant requested a review of the suspension payment decision on 8 September 2023.

14. The suspension payment decision was reviewed and upheld by the Respondent on 16 October 2023 for the following reasons:

> *a. "Dr Powell is not eligible for suspension payments whilst he was a partner as his income did not drop by 10%.*
>
> *b. Dr Powell is not eligible for suspension payments after he left the partnership. The eligibility for the payment has been ruled on by CO/2579/2021 High Court of Justice Queen's Bench Division Administrative Court [2022] EWHC 1582 (Admin). There is no reason to deviate from this ruling".*

Appeal against the decision re suspension payments

15. The Appellant appealed the decision to the PCA on 22 October 2023.

16. To summarise the key arguments in the appeal, the Appellant contends that:

> a. It would appear that a person could meet more than one of the criteria in sub-paragraph 3(2) of the 2015 Determination. The Appellant gives the example that a part time partner could also undertake regular locum work;
>
> b. The wording of (2)(b)(ii) of the 2015 Determination could include partners. "We have established the non-exclusivity of the sub-paragraphs above. I would note that a GMS Contract is between the Board and the partnership collectively (referred to as 'the Contractor' in the Contract). It would therefore be true to say all partners are 'engaged' by the Contractor to perform primary medical services (as per (2)(b)(ii))";
>
> c. Accordingly, if (2)(b)(ii) of the 2015 Determination should apply to the Appellant, so too should paragraph 4(1)(c) of the 2015 Determination allowing the "is or

was…engaged" to be applied meaning that suspension payments should be paid even after the termination of the partnership contract; and

d. Sub-paragraph 3(3) of the 2015 Determination is also not in doubt, "the only impediment to me performing primary medical services is my suspension from the NHS performers list".

17. The Appellant acknowledged the recent decision made in Sandles v National Health Services Litigation Authority (Primary Care Appeals) [2022] EWHC 1582 (Admin) ("*Sandles*") and made the following distinctions:

a. Dr Sandles voluntarily retired from the partnership whereas the Appellant was expelled from the partnership and had no choice but to leave pursuant to a clause in the partnership deed allowing this to take place;

b. Circumstances are not different for partners or salaried GPs in that both can be subject to sanctions against their will (such as termination of a contract for being suspended from the Medical Register) as this can be drafted into a partnership agreement or can be eg. on the BMA salaried GP model contract; and

c. The Appellant's not being a partner is a direct consequence of being suspended (termination as a partner as a result of being suspended) and for no other reason (eg. Dr Sandles retired).

18. Further arguments are made by the Appellant and summarised as follows:

a. In the absence of suspension payments, it could be considered that the Appellant's rights under Article 1 Protocol 1 of the European Convention of Human Rights may be violated;

b. Principle (of neutrality) – the Appellant argues that an interim suspension is intended to be neutral as there has been no judgement made, and that therefore declining suspension payments amounts to a punitive action; and

c. Purposive approach to legislation - discretion should be applied to sub-paragraph 4(1)(b) of the 2015 Regulations because of the ambiguity between the clear intent of the Determination and its actual wording. This is in reference to potentially adding the words "or was" after the words "medical practitioner is" to allow someone who "was" a partner to receive suspension payments.

The Respondent's representations in response to the Appellant's Appeal

Qualification for payments

19. The Appellant was suspended by the Respondent with immediate effect on 17 July 2023. The Appellant was a partner in a partnership and in receipt of his normal monthly drawings throughout July and up until his expulsion from the partnership on 16 August 2023. Therefore, the Appellant met the qualifying criteria under paragraph 3 of the 2015 Determination.

Entitlement to payments

20. Under Paragraph 4(1)(b) of the 2015 Determination, the Appellant is entitled to suspension payments if he is currently practising in a partnership and is not entitled to receive at least 90% of his normal monthly drawings (or a pro rata amount in the case of a part month) from the partnership account. The decision was therefore made by the Respondent that no suspension payments were payable from the date of his suspension from the Medical Performers List on 17 July 2023, as the Appellant was either still in receipt of at least 90% of his normal monthly drawings or (from 16 August) no longer met the entitlement criteria as he was no longer practising in a partnership. These criteria have been previously considered by the PCA in other cases (including SHA/23275) and by the High Court in *Sandles* and the above interpretation has been upheld by both the PCA and High Court. The Respondent does not rehearse all the arguments put forward in those cases as the PCA will be aware of the

basis for its decision in the *Sandles* case and for the High Court decision. The Respondent submits that this current appeal presents no information or evidence which should alter the conclusion reached in the *Sandles* case.

Response to Appellant's submissions

21. The Appellant contends that a person could meet more than one of the criteria in paragraph 3(2) of the 2015 Determination. The example given by the Appellant is where "a part time partner could also undertake regular locum work". This is in theory possible. However, the Respondent contends that the wording of the Determination is not intended to lead to this scenario. The Determination is drafted in terms that enable a performer to 'qualify' under paragraph 3 on the basis that they meet one of the criteria – they are either a contractor (including a partner in a partnership which is a contractor), a person employed or engaged by a contractor, or a locum. Paragraphs 4 and 5 of the 2015 Determination adopt the same titles, basing the entitlement to payments and the amount of any payments on the status of the performer. If a performer is entitled to payments under more than one of the limbs of paragraphs 3, 4 and 5 of the 2015 Determination, this could lead to the performer receiving a significant amount by way of suspension payments, which would seem to go against the spirit and purpose of the 2015 Determination. However, and in any event, this point does not appear to be relevant in respect of the Appellant as he has claimed suspension payments only in respect of his status as a partner in a partnership and has not claimed payments on the basis of lost income from a locum role or otherwise.

22. The Appellant also suggests the wording of paragraph 3(2)(b)(ii) of the 2015 Determination could be relevant to partners with the suggestion being that he could be considered as both:

a. a contractor (including a partner in a partnership which is a contractor) (under paragraph 3(2)(b)(i)); and

b. a person employed or engaged by a contractor to perform primary medical services (under paragraph 3(2)(b)(ii)).

23. The Appellant has raised that a partnership, as in this instance, is collectively known as "the contractor" in a GMS contract and that they "contract" with "the Board". This accords with the definition of contractor in the Regulations and is accepted. However, the Appellant submits that all partners are therefore also 'engaged' by the contractor to perform primary medical services. As set out in paragraph 21 above, the Respondent contends that the wording of the Determination is not intended to lead to this scenario. The Respondent submits that reference in paragraph 3(2)(b)(i) of the 2015 Determination to a contractor also including a partner in a partnership which is a contractor leads to the conclusion that the intention was for this paragraph 3(2)(b)(i) to be the paragraph applicable to partners in a partnership and not paragraph 3(2)(b)(ii) which refers to a person employed or engaged by a contractor. Also, taking into account the ordinary meaning of the words 'employ' and 'engage' and the dictionary definition of "engage" (to arrange to employ someone; hire), it is not accepted that a partner in a partnership is employed or engaged by that partnership.

24. The Respondent therefore submits that a partner practising in a partnership can be considered only as a "contractor" within paragraph 3(2)(b)(i) and cannot be considered to fall within the qualification of paragraph 3(2)(b)(ii) of the 2015 Determination.

25. The Appellant submits that paragraph 4(1)(c) of the 2015 Determination allowing the "is or was…engaged" to be applied should mean that suspension payments should be paid to a performer who was a partner practising in a partnership following that person's expulsion from the partnership.

26. The Respondent submits that without any basis of qualification under paragraph 3(2)(b)(ii) of the 2015 Determination, as set out in paragraph 23 above, the entitlement provided by paragraph 4(1)(c) of the 2015 Determination equally has no basis. Furthermore, the wording in paragraph 4(1)(c) cannot be transposed to paragraph 4(1)(b), which contains different wording.

27. As set out in paragraph 20 above, the wording and criteria of paragraph 4(1)(b) of the 2015 Determination has been the subject of previous PCA appeals and the High Court case of *Sandles*. The Appellant makes an argument to distinguish the case from the current appeal, in stating that Dr Sandles voluntarily retired from the partnership whereas the Appellant was expelled from the partnership and had no choice but to leave pursuant to a clause in the partnership deed allowing this to take place. The Respondent submits that the wording of paragraph 4(1)(b) of the 2015 Determination does not distinguish between these two scenarios ie. the reason and basis for the performer leaving the partnership is not relevant to the interpretation of paragraph 4(1)(b).

28. The Respondent also notes that a distinction was not made in *Sandles* between the two examples given by the Appellant such as to lead to a different interpretation of paragraph 4(1)(b). The Court in Sandles simply sought to distinguish between the wording in paragraph 4(1)(b) and paragraph 4(1)(c) so as to provide a possible rationale for the difference in treatment of an employed doctor and locum in contrast with a partner. Paragraph 29 of the Sandles judgment provides that: "*The employed doctor has no choice if he is dismissed in those circumstances, subject to any claim for unfair dismissal which will not yet have been determined. He or she is not going to be able to get another employed position during the suspension and it is fair that he or she gets an interim payment. Likewise a locum will simply be unable to work during suspension. A partner by contrast retires by his own choice, either because the terms of the partnership to which he signed up require it or at the request of his partners to which he accedes"*. It is accepted that in this case the Appellant may have had no choice but to leave the partnership, but he did presumably have a choice as to whether to enter into the partnership deed containing the ability to expel him.

29. The Appellant submits that circumstances are not so different for partners or salaried GPs in that both can be subject to sanctions against their will (such as termination of a contract for being suspended from the Medical Register) as this can be drafted into a partnership agreement or on an employee GP's contract of employment with the partnership. The Appellant also argues that them not being a partner is a direct consequence of being suspended (termination as a partner as a result of being suspended) and for no other reason.

30. The Respondent accepts that clauses may be contained in partnership deeds enabling a partner to be expelled from the partnership if and when the partner is suspended. In the case of a partnership deed, the relevant partner/performer does have a choice as to whether to enter into a partnership on this basis. The fact that a partnership may operate on this basis is not a matter for the Respondent to consider and determine, or take into account, when applying the criteria in the 2015 Determination. The Respondent submits that the wording of paragraph 4(1)(b) of the 2015 Determination is clear and does not carve out different scenarios depending on why a performer may no longer be practising in a partnership.

31. The Appellant argues that in the absence of suspension payments, it could be considered that the Appellant's rights under Article 1 Protocol 1 of the ECHR may be violated. The Appellant also puts forward the arguments that declining suspension payments amounts to a punitive action and that discretion should be applied to the interpretation/application of paragraph 4(1)(b) of the 2015 Determination. The Respondent submits that it has determined eligibility for suspension payments in this case based on the 2015 Determination. The 2015 Determination is a Secretary of State Determination and determines in which circumstances an individual is entitled to suspension payments. The Respondent must apply the Determination as it is worded and has no discretion in this regard.

32. In any event, the Respondent submits that the Appellant has not provided any basis upon which to make a human rights claim nor would the PCA be the correct forum to consider such an argument. The Respondent notes that the Appellant's sole consideration in this matter is whether he should have been given payments during his suspension. The Appellant has referenced *Malik v United Kingdom 23780/08 [2012] ECHR 438,* where the issue of "possession" did not relate to future earnings and those presiding over the case went to some lengths to establish this point (see paragraphs 81, 84, 88 of the judgement dated 13 March 2012).

33. Finally, the Respondent would like to bring to the attention of the PCA the following excerpt from the *Sandles* judgment, which the Respondent submits is also relevant to this current appeal:

> *"As the Defendant put it at paragraph 5.14:*
>
> > *"From the date that the Appellant ceased to be a partner in the Practice, he ceased being entitled to his normal partnership income. Not as a result of his suspension but as a result of him not being a partner. If the Appellant is not a partner, he cannot be entitled to partnership income. Therefore, NHS England cannot compensate [h]im for income lost as a result of him no longer being a partner and I consider that to do otherwise would go against the purpose of the 2015 Determination, which in my view is to compensate practitioners who are unable to practice as a result of their suspension and not if they lose income for some other reason."*
>
> *That is undoubtedly correct".*

34. In summary, the Respondent submits that the decision not to award suspension payments to the Appellant was taken in accordance with the relevant legal framework and taking into account the judgment of the High Court in the *Sandles* case.

35. The Respondent invites the PCA to reach the same conclusion on redetermination as the Respondent, in line with the judgment of the High Court in the *Sandles* case and confirm that the Appellant is not entitled to suspension payments for the reasons set out above and in the Decision Letter of 7 September 2023."

Appellant's Observations

3.11 "1. In paragraph 11 - the period between 17th July 2023 and 16th August 2023 is not in dispute.

2. In paragraph 21 the Respondent contends that:

> *'If a performer is entitled to payments under more than one of the limbs of paragraphs 3, 4 and 5 of the 2015 Determination, this could lead to the performer receiving a significant amount by way of suspension payments, which would seem to go against the spirit and purpose of the 2015 Determination.'*

3. The Respondent seems to suggest that using more than one limb of paragraphs 3-5 could lead to the performer benefitting financially. This is argument has no merit, each paragraph of the 2015 Determination makes it clear that payment is capped at 90% of the relevant earnings. There is no way a performer could profit from this.

4. It is interesting that the Respondent wishes to consider the 'spirit and purpose of the 2015 Determination' – as it is very clear that the spirit and purpose is that suspension is a neutral act, and that GPs, irrespective of their method of 'employment', should benefit from suspension payments, as highlighted in my submission, paragraphs 31-38.

5. In paragraph 28 the Respondent states:

> *'It is accepted that in this case the Appellant may have had no choice but to leave the partnership, but he did presumably have a choice as to whether to enter into the partnership deed containing the ability to expel him.'*

6. I reiterate the matter I raised in paragraphs 18-19 of my submission – there is a clause in the BMA Salaried model contract – which by regulation must be used by both GMS and PMS practices for the employment of salaried doctors – allowing termination of employment in the case of suspension. Therefore, there is no difference between a salaried doctor and a partner in this respect.

7. As this is the case then the suggestion that a partner deserves different treatment upon suspension as they choose to enter an agreement which can be terminated upon suspension has no merit."

4. CONSIDERATION

4.1 Regulation 13(5) of the Regulations enables a medical practitioner to appeal NHS England's reconsideration of a decision relating to the medical practitioner's eligibility for suspension payments.

4.2 The Notice of Appeal is in respect of the Appellant's eligibility for suspension payments for a period after 16 August 2023. The Appellant submits that his entitlement to suspension payments in respect of the period after 16 August 2023 should not cease by virtue of him no longer being a partner in a partnership after that date.

4.3 The Appellant was suspended on 17 July 2023 and was subsequently expelled from his GP partnership on 16 August 2023. There is no dispute that the Appellant was not eligible for suspension payments from the period of 17 July 2023 to 16 August 2023. I shall therefore consider whether the Appellant is entitled to suspension payments in respect of the period after 16 August 2023.

4.4 The Appellant has made multiple references to Sandles v National Health Services Litigation Authority (Primary Care Appeals) [2022] EWHC 1582 (Admin) (the "**Sandles Case**"). In the Sandles Case, Cooke J sets out a clear methodology for applying the conditions for entitlement to a suspension payment as detailed in paragraphs 3, 4 and 5 of the 2015 Determination. I consider each of these paragraphs in turn, alongside the representations from both parties.

4.5 I consider paragraph 3 as set out at paragraph 6 of NHS England's Representations above. As described in the Sandles Case, this defines a class of persons who "*may be entitled*" to suspension payments. There are two elements to the test for entitlement under paragraph 3(1). The first is paragraph 3(2) which lists classes of persons.

4.6 The Appellant states that the language of paragraph 3(2) suggests that the classes of persons are not mutually exclusive as a person could fulfil criteria under two different classes. NHS England states that this should not be the case, as this could lead to a situation where a suspended individual could receive a significant amount of money. Having due regard to the Sandles Case, it is clear that each paragraph of the 2015 Determination should be taken separately and that inclusion under one paragraph does not immediately result in payments under the other paragraphs.

4.7 Paragraph 3 sets out classes of eligibility and does not, on its own, grant rights to payments. It is the first hurdle over which a practitioner who wishes to receive suspension payments must overcome. Provided that one class is met, and the requirements of paragraph 3(3) are also met, then consideration moves to paragraph 4.

4.8 I have considered the Appellant's statement, that a partner is also, simultaneously, a person employed or engaged by a contractor, under paragraph 3(2)(b)(ii). I concur with NHS England and consider that the wording "*including a partner in a partnership which is a contractor*" is clearly and unambiguously intended to indicate that a partner falls under paragraph 3(2)(b)(i).

4.9 The statutory regulations that underpin the GMS contract state that the contract is to be treated as made with the partnership but this does not extend to the partnership being deemed a legal entity in English law for the purposes of engaging or employing the partners. I agree with NHS England's statement that a partner in a partnership is not employed or engaged by that partnership. Consequently, I do not consider that paragraph 3(2)(b)(ii) applies to the Appellant.

4.10 The Appellant meets the criteria of paragraphs 3(2)(a) and 3(2)(b)(i). There is no dispute that the Appellant meets paragraph 3(3). I therefore go on to consider paragraph 4.

4.11 I will start by considering paragraph 4(1)(b). This was the paragraph in dispute in the Sandles Case. The wording in paragraph 4, as set out above in NHS England's Representations, is clear. Paragraph 4(1)(b) applies to a medical practitioner who "***is*** *one of two or more individuals practising in a partnership* [my emphasis]". In the Sandles Case, Cooke J ruled that upon exiting the partnership a medical practitioner was no longer entitled to suspension payments.

4.12 I note that the Appellant has provided several distinguishing features which he states require the judgment in the Sandles Case to not be applied in this appeal. The first is that there is a difference between voluntarily retiring and a situation with "*no choice*".

4.13 I consider that, having regard to the evidence provided by the Appellant, in terms of quotes from the partnership agreement and the letter from the partnership, the Appellant was expelled from the partnership by virtue of an existing provision of the partnership agreement. There is some difference here to the facts of the Sandles Case in which the partner was asked to leave by the other partners, with some alleged degree of pressure, and did so, seemingly by his own agreement (although there is a suggestion that he did not choose to retire), rather than being expelled.

4.14 The first piece of evidence adduced by the Appellant is a quote from the Sandles Case. It includes the following "*A partner by contrast retires by his own choice, either because the terms of the partnership to which he signed up require it or at the request of his partners to which he accedes.".* I consider that this is indicating that the concept of having a choice is not just a choice to leave the partnership but is also choice in relation to events prior to the suspension.

4.15 I agree with NHS England that the Appellant had a choice as to whether to enter into the partnership deed. By agreeing to the partnership agreement the Appellant's choice took place then. The Appellant could have sought to have this clause amended if he did not wish to be expelled upon suspension. But it remained in the partnership agreement and the Appellant exercised choice in agreeing to be bound by it.

4.16 I note the Appellant's argument that the partner in such a position should be considered no different from a salaried GP by virtue of the BMA Salaried GP model contract containing a similar clause to the partnership agreement, i.e. that they shall be terminated in the event of suspension from the Medical Register. The Appellant argues that, since both partners and employed medical practitioners can be terminated on the same grounds, the distinction drawn by Cooke J is incorrect.

4.17 I do not agree with the Appellant's conclusion. The Appellant indicates that it is a requirement of the GMS contract that all salaried doctor's contract terms are no less favourable than those in the model contract. It is therefore the case that all salaried GPs will be terminated upon suspension and have very little say in the matter. There is no choice exercised by the salaried GP if they wish to be a salaried GP in any GP practice.

4.18 I consider this different to a partnership agreement. There is no imposition of terms by external factors. There is no requirement that a partnership agreement has particular clauses relating to expulsion due to suspension. An individual forming or joining a partnership can determine, or seek to amend, the terms of the partnership. The success of doing so may of course depend on that individual's strength of bargaining position but the Appellant has not satisfied me that an individual seeking partnership is forced to accept that clause in the way he has indicated that employed doctors must.

4.19 I consider that the rationale for the difference between paragraphs 4(1)(b) and 4(1)(c) in the 2015 Determination, as stated in the Sandles Case, has not been disproven and the fact that the Appellant was expelled by virtue of a clause of a partnership agreement that the Appellant accepted should not result in a different decision being taken.

4.20 The Appellant also argues that, in the Sandles Case, Cooke J states that the reason for the Appellant in that case not being entitled to partnership income was not due to his suspension

but due to not being a partner. The Appellant therefore states that this is different in his case, as the expulsion was a direct result of the suspension, and consequently the loss of payment.

4.21 The Appellant provides an extract from the partnership agreement which provides that the partner who is suspended "*may*" be expelled should all other partners provide notice in writing. In my view, the use of the word "*may*" is key because it means that a suspension does not automatically trigger expulsion. The other partners must actively make a decision to expel the partner at a meeting to which all partners were provided notice of. The other partners must agree the expulsion and provide notice in writing to the partner being expelled. There was therefore potential for the other partners not to expel the Appellant in which case the Appellant would have remained a partner, even while suspended, and this would have been acceptable under the partnership agreement.

4.22 I do not therefore accept that the expulsion was a direct consequence of suspension. There was an intervening event - the decision of the other partners to exercise their contractual right to expel the Appellant from the partnership. In other words, the reason for the Appellant no longer being a partner was a conscious choice taken by the other partners in the partnership, taken in accordance with the terms of the partnership agreement, which the Appellant had chosen to accept when he joined the partnership.

4.23 I consider that this also supports the decision taken in the Sandles Case, and the reason for the different wording between paragraphs 4(1)(b) and 4(1)(c).

4.24 It is worth noting that the wording provided by the Appellant from the BMA Salaried GP model contract uses the word "*shall*". The termination is automatic, there is no discretion available.

4.25 I consider that the Appellant did have the "*choice and control*" referred to by Cooke J as the Appellant could have negotiated the partnership agreement so that the suspension would not result in a right to expulsion or the Appellant could have reached an agreement with the partnership such that they would not have exercised the right to expel.

4.26 NHS England has stated that the operation of a partnership agreement is not something to which it should have concern. The 2015 Determination does not provide any wording indicating that, where a suspension payments matter relates to a partner, the commissioner should have to request the partnership agreement to consider its exact wording.

4.27 The Appellant states that the decision in *North West Anglia NHS Foundation Trust v Gregg (2019) CA* (the "**Gregg Case**") demonstrates an absurdity in the decision in the Sandles Case. In the Gregg Case, the General Medical Council suspended the doctor's registration to practice due to an ongoing criminal investigation. The Trust had taken the decision to suspend his pay as a consequence of this suspension and bail conditions. The contract under which the doctor was employed did not provide for a right to deduct from the doctors pay for any reasons. The Appellant has correctly stated that "*It was found at appeal that whilst suspended, his pay should not have been withheld*".

4.28 I consider there are significant differences in the facts of the Gregg Case and the Appellant's situation. The Appellant received remuneration from the partnership. There was no contract of employment. If the Appellant was eligible under all relevant parts of the 2015 Determination to receive suspension payments then NHS England would be responsible for making those payments but NHS England did not employ the Appellant under a contract of employment. The Appellant's remuneration did not cease due to his suspension but due to his removal from the partnership. Payment was not "*withheld*" from the Appellant by NHS England - he was not entitled to it in the first place. I therefore consider that the Gregg Case does not demonstrate an absurdity in the decision in the Sandles Case.

4.29 The Appellant states that in the Sandles Case, Cooke J seems to be concerned that there could be unintended consequences with a broader inclusion criteria. The Appellant makes reference to the example given by Cooke J as a reason for not including "or was" in paragraph 4(1)(b) - that a partner who retires due to reaching retirement age during their suspension could be eligible for suspension payments. The Appellant refers to the established principle of being otherwise ‘ready, willing and able’ to work (Petrie v McFisheries Limited [1940] 1 KB

258) as sufficient to prevent individuals claiming after retiring on age grounds. I assume the Appellant is indicating that the example cited by Cooke J does not support the reason why there is no "or was" in paragraph 4(1)(b) compared to the other provisions of paragraph 4(1). But Cooke J makes the point that the 2015 Determination seeks to make provision for those who cannot be paid because of their suspension rather than for any other reason. I have set out above that I consider the Appellant cannot be paid because he was expelled from the partnership by the exercise of a clause of the partnership agreement to which the Appellant willingly signed.

4.30 Consequently, I see no reason to depart from the conclusions in the Sandles Case, as regards to the understanding, interpretation and application of paragraph 4 of the 2015 Determination.

4.31 The Appellant has provided further arguments as to why he should be entitled to suspension payments. I shall consider each of these in turn.

4.32 Firstly, the Appellant has referred to the general notion of the "*principal (of neutrality)*". The Appellant has provided extracts relating to the consultation document Performers Lists and Suspension (the "**Consultation Document**"). He states that the declining of the suspension payments represents a punishment, which does not accord with the neutral nature of suspension. He also states that the intention was that "*ALL suspended practitioners receive suspension payments"* [Appellant's emphasis].

4.33 I agree that suspension is intended to be a neutral act. I make two comments here. Firstly, I have determined that the lack of entitlement to payments is due to the expulsion from the partnership. Secondly, the Appellant's suggestion that NHS England has "*declined*" suspension payments as a punitive act implies that there was an entitlement to payments which was subsequently refused. In contrast, the Appellant had no entitlement to payments, due to his expulsion. As such, no "*punitive*" action was taken by NHS England.

4.34 I do not consider that the 2015 Determination and subsequent decision of NHS England has contradicted the intention that suspension is to be a neutral act as indicated by the Consultation Document.

4.35 Secondly, the Appellant raises the question of statutory interpretation, citing *Uber BV v Aslam [2021] UKSC 5* (the "**Uber Case**"). The Appellant appears to cite this case to support its view that discretion should be applied (I assume to read paragraph 4(1)(b) as including "*or was*") because of the ambiguity between the clear intent of the 2015 Determination and its actual wording. As was set out in the Sandles Case and as I set out above, there appears to be clear reasoning as to why "*or was*" has been omitted. I consider that the approach in the Sandles Case should be followed and there is no good reason to re-interpret the wording of paragraph 4(1)(b) following the approach to statutory interpretation as set out in the Uber Case.

4.36 Finally, the Appellant has raised the issue of Article 1 of Protocol 1 of the European Convention on Human Rights, which involves the legal right to private enjoyment of ones possessions. NHS England has stated it is not clear under what basis such a claim is being set out. I agree with NHS England. NHS England correctly states that the case cited by the Appellant, Malik v United Kingdom 23780/08 [2012] ECHR 438 (the "**Malik Case**") points out that future earnings is not a "*possession*". It is unclear if the Appellant is claiming that the suspension payments he considers he should receive is a possession. There was no response to NHS England's comments on this point in the Appellant's Observations.

4.37 I note that the Appellant states that in the Malik Case the Court ruled that suspension from the Performers List did not affect Dr Malik as he continued to be paid during his suspension and Dr Malik did not show that this had affected his income. The Appellant states that in the absence of suspension payments, it could be considered that the Appellant's rights under Article 1 Protocol 1 may be violated.

4.38 I consider, however, that the Malik Case does not make any ruling that lack of suspension payments constitutes a violation of Article 1 Protocol 1 rights. The Court expressly declined to decide on whether there was a possession. There were also other reasons for non-

infringements including a fall in patient numbers and goodwill in the practice being affected. The Court also clearly stated that it did not consider inclusion on the Performers List to be a possession. I am not satisfied that the Appellant has set out an explanation of what the Appellant considers to be a possession for the purpose of Article 1 Protocol 1 and has not provided satisfactory supporting evidence to indicate an infringement of any Article 1 Protocol 1 rights.

5. DETERMINATION

5.1 Pursuant to paragraph 4(1)(b) of the 2015 Determination I determine that the Appellant is not entitled to suspension payments for the period from 16 August 2023 onwards.

Head of Appeals
NHS Resolution