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29 February 2024

FILE REF: **SHA/26112**

DECISION MAKING BODY: **LEICESTER, LEICESTERSHIRE & RUTLAND INTEGRATED CARE BOARD ("THE COMMISSIONER")**

GDS CONTRACTOR: ***[REDACTED BY NHS RESOLUTION]***

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

RE: **FORCE MAJEURE DECISION**

1 Outcome

1.1 I am of the view that the Contractor has failed to meet the criteria for its Force Majeure application to succeed.

1.2 The Commissioner can make the financial recovery as specified in 2022/23 Year-end reconciliation – 8128110001.

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

NHS Resolution

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

RE: **FORCE MAJEURE DECISION**

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 5 November 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 Email with application for dispute resolution from the Contractor dated 5 November 2023 with enclosures;

2.2.2 Copy letter titled "Voluntary Dental Contract Variation" from the Contractor, received on 19 November 2023; and

2.2.3 Letter with representations from East Midlands Primary Care Team, on behalf of the Commissioner.

3 PARTIES SUBMISSIONS

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

3.1 "I would like to appeal against the decision regarding my force majeure (attached) as the doctor's letter was submitted as soon as it was provided by the doctor which was not in my control. Additionally, my long-standing health condition was diagnosed after the due date for

the evidence and so would not have been possible to submit within the specified time frame. I have reattached the evidence submitted on this email.

3.2 As this force majeure relates to a medical condition and being unsuccessful at recruiting a new associate despite my best efforts I hope you will reconsider this decision."

3.3 [Enclosures:

3.4 Email trail between the Contractor and the Commissioner:

3.4.1 Commissioner to Contractor dated 21 July 2023;

3.4.2 Contractor to Commissioner dated 26 July 2023;

3.4.3 Commissioner to Contractor dated 27 July 2023;

3.4.4 Contractor to Commissioner dated 14 September 2023;

3.4.5 Commissioner to Contractor dated 18 September 2023 and

3.4.6 Commissioner to Contractor dated 25 October 2023.

3.5 Letter from NHS Business Services Authority to Contractor dated 25 October 2023.

3.6 Letter from [*Anonymised by NHS Resolution*] Hospital to Contractor dated 19 July 2023.

3.7 Letter from [*Anonymised by NHS Resolution*] Health Centre to Whom it May Concern dated 20 July 2023.

3.8 Letter from NHS England re Voluntary Dental Contract Variation to Contractor dated 4 January 2019.]

Representations

The Commissioner's representations

3.9 "Thank you for sharing the details of the application for dispute resolution and a copy of the applicant's statement; we have considered carefully the information provided.

3.10 Providers who hold an NHS dental contract are subject to the Year End reconciliation process (Chapter 8 of the NHS England Policy Book for Primary Dental Services). The reconciliation process is to ensure that activity is being delivered against contracted requirements. The activity data is sent by providers to NHS Dental Services (NHS DS) by way of FP17 submissions on completed courses of treatment.

3.11 Where, following Year End reconciliation, a Contractor has delivered less than 96% of their contracted activity, the Commissioner will recover the full amount of money (the overpayment to the Contractor in respect of the activity delivered under the contract) up to the full contract value. In addition to recovery of the overpayment, the Commissioner may also serve a Breach Notice to the Contractor for failure to deliver the contracted activity.

3.12 As outlined in "2022/23 Year-end reconciliation – 8128110001" letter dated 31 July 2023; the Contractor in this case delivered 74.41% of their contracted activity.

3.13 As per Chapter 14 of NHS England Policy Book for Primary Dental Services, Contractors can apply for Dental Relief if they consider that a force majeure event has occurred. A force majeure event is defined as "one which is caused by circumstances beyond the reasonable control of either the Commissioner or the Contractor that could not have been avoided or

mitigated with reasonable care and where the event has had a material effect on the fulfilment of the contract."

3.14 The Contractor is required to notify the Commissioner of any force majeure event promptly and no later than five working days of the occurrence of such circumstances or events. Contractors must then provide evidence of the force majeure event and the impact that is has had on delivery when they submit their claim at year end.

3.15 In this case the Contractor submitted a "Force Majeure Claim Form" as part of the Year End Reconciliation process, which was administered by NHS BSA, however the Contractor did not supply the requested evidence to support the claim in a timely manner.

3.16 NHS BSA did request this evidence from the Contractor (emails 15 June 2023 and 19 June 2023) and gave a deadline of 23 June 2023. The Contractor advised on 21 June 2023 that the evidence may be late and was advised by NHS BSA that it would be Commissioner discretion as to whether this would be acceptable.

3.17 The Commissioner panel met on 10 July 2023 to review the claim and there was no evidence supplied to support the claim; the claim was rejected on the basis that no supporting evidence was provided.

3.18 NHS BSA received the evidence from the Contractor on 26 July 2023. The Commissioning team considered the request to re-review the claim following this correspondence, however in line with a fair and consistent process, it was decided that we should stand by the original decision and reject this claim, as the evidence was not supplied in a timely manner.

3.19 In consideration of this appeal we have conducted a further review of the information and evidence submitted and we are not satisfied that a force majeure event occurred (as defined in Chapter 14 of NHS England Policy Book for Primary Dental Services.

3.20 A list of "Unacceptable Events or Circumstances for Dental Relief Claims" is outlined at Chapter 14, 14.7 and we consider that the event the Contractor has detailed relating to ongoing health concerns does fall under the example at 14.7.4 (extracted below):

3.21 ***"14.7 Unacceptable Events or Circumstances for Dental Relief Claims:***

3.22 ***14.7.4 Long term sickness causing some incapacity disability, maternity, paternity, or adoption leave of a performer***

3.23 *Long term sickness causing some incapacity disability, maternity, paternity, or adoption leave of a performer.*

3.24 *The term long term sickness is often applied when the course of the disease lasts for more than four weeks. An example of long-term sickness includes but is not limited to, cancer, inflammatory arthritis, and severe and enduring mental illness.*

3.25 *It is expected that the Contractor will make necessary provision for the continuation of the service in the performer's absence. Contractors are advised to refer to the relevant SFE for information about payments in respect of long-term sickness, maternity, paternity, and adoption leave."*

3.26 To grant a claim for dental relief we must be satisfied that a force majeure event has occurred and that all reasonable efforts have been exercised by the Contractor to mitigate the consequences of the force majeure event.

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

3.28 [Enclosures:

3.28.1 2022/23 Year-end reconciliation – [*redacted by NHS Resolution*]

3.28.2 Policy Book available in public domain: NHS England » Dental commissioning policies and procedures]

The Contractor's representations

3.29 No representations received from the Contractor.

Observations

The Commissioner's observations

3.30 No observations received from the Commissioner.

The Contractor's observations

3.31 No observations received from the Contractor.

Additional information

NHS Resolution requested that the Contractor provide a copy of its application for force majeure which it submitted to the Commissioner.

3.32 The Contractor did not respond to this request.

4 CONSIDERATION

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. The Contractor has provided a copy letter dated 4 January 2019 from NHS England, Midlands and East (Central Midlands) to the Contractor entitled "Voluntary Dental Contract Variation – Contract Number – 812811/0001". This letter states:

> "*Thank you for providing information relating to a change in the contractor status of your GDS contract dated 1st April 2006 (the "Contract") from an individual to a partnership.*
>
> *I can confirm that we are satisfied that the information meets the conditions to enable us to agree that the Contract will continue with the partnership with effect from 1st February 2019. ….*"

4.2 The Commissioner has not disputed the validity of this Contract and I am satisfied that I may proceed on the basis that the Contractor is party to a General Dental Services Contract with the Commissioner and that the Contract between the parties reflects the provisions of the relevant Regulations in force at the relevant time and proceed to determine a dispute on that basis.

4.3 I have considered whether local dispute resolution has taken place. I note from the Commissioner's representations that it requested evidence regarding its claim from the Contractor by 23 June 2023. The Commissioner panel met on 10 July 2023 to review the claim concluding that no supporting evidence was provided. The evidence was then provided on 26 July 2023. A decision was sent to the Contractor dated 31 July 2023. I further note a final letter has been sent to the Contractor dated 25 October 2023 which states:

> "*As we have now exhausted all avenues of local resolution, if you do not agree with the decision, you may wish to refer the matter to the NHS resolution procedure*."

4.4 I conclude that there has been some form of dispute resolution at local level. 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.

4.5 As the application is with regard to the year ending 2022/23, I am satisfied that the application for dispute resolution has been made in time.

4.6 I note the Commissioner, in its representations, states:

> "*In this case the Contractor submitted a "Force Majeure Claim Form" as part of the Year End Reconciliation process, which was administered by NHS BSA, however the Contractor did not supply the requested evidence to support the claim in a timely manner*."

4.7 I am mindful that I have not been provided with a copy of the Force Majeure application to the Commissioner.

4.8 I note in its application for dispute resolution, the Contractor states:

> "*I would like to appeal against the decision regarding my force majeure (attached) as the doctor's letter was submitted as soon as it was provided by the doctor which was not in my control. Additionally, my long-standing health condition was diagnosed after the due date for the evidence and so would not have been possible to submit within the specified time frame. I have reattached the evidence submitted on this email.*
>
> *As this force majeure relates to a medical condition and being unsuccessful at recruiting a new associate despite my best efforts I hope you will reconsider this decision*."

4.9 The Commissioner states it "*did request this evidence from the Contractor (emails 15 June 2023 and 19 June 2023) and gave a deadline of 23 June 2023. The Contractor advised on 21 June 2023 that the evidence may be late and was advised by NHS BSA that it would be Commissioner discretion as to whether this would be acceptable*."

4.10 The Contractor states it submitted the doctors' letters as soon as they were provided. I note the dates of the doctors' letters are 19 July 2023 from the hospital consultant and 20 July 2023 for the GP letter. The Commissioner states it "*received the evidence from the Contractor on 26 July 2023*." I further note that the Commissioner wrote to the Contractor by letter dated 31 July 2023 stating:

> "*We have finalised your year-end delivery position based on FP17/FP17(o) submissions in respect of the 2022/23 financial year, any activity awarded due to force majeure applications and meeting the contractual stipulations for this financial year.*
>
> *Your outcome summary is set out in the table below: …….*
>
> *Your contract has not met contractual requirements in Q1 and over the year. Your contract will therefore be subject to full financial recovery for undelivered activity*. ……
>
> *Your Direct Commissioning Office (Local Team) has separately considered the force majeure and/or exceptional circumstances application you made prior to you contract's year*-end reconciliation.
>
> *Following a review of your claim and the supporting evidence, the decision has been made by your NHS England (NHSE) Commissioning Team and this request has not been upheld*."

4.11 The Contractor contacted the Commissioner by email on 14 September 2023, acknowledged on 18 September 2023, followed by an email on 25 October 2023 in which a copy of the Commissioner's decision letter dated 25 October 2023 was enclosed. It states that its decision was following a review by the Commissioning team. The 25 October 2023 letter includes the following reasoning for refusing the application:

> "*The outcome following your NHSE commissioning team review is that the decision has been upheld and your request for the Force Majeure to be considered has been declined due to the reasons detailed below:*
>
> *Delay in receiving the supporting documentation/evidence*."

4.12 In its representations on the application, the Commissioner refers to the NHS England Policy Book for Primary Dental Services and states:

4.12.1 "*The Commissioning team considered the request to re-review the claim following this correspondence, however in line with a fair and consistent process, it was decided that we should stand by the original decision and reject this claim, as the evidence was not supplied in a timely manner*."

4.13 The Commissioner goes on to state:

4.13.1 "*In consideration of this appeal we have conducted a further review of the information and evidence submitted and we are not satisfied that a force majeure event occurred*."

4.14 The Commissioner quoted paragraph 14.7 of Chapter 14 of the NHS England Policy Book for Primary Dental Services which states:

> ***"14.7 Unacceptable Events or Circumstances for Dental Relief Claims:***
>
> ***14.7.4 Long term sickness causing some incapacity disability, maternity, paternity, or adoption leave of a performer***
>
> *Long term sickness causing some incapacity disability, maternity, paternity, or adoption leave of a performer.*
>
> *The term long term "sickness is often applied when the course of the disease lasts for more than four weeks. An example of long-term sickness includes but is not limited to, cancer, inflammatory arthritis, and severe and enduring mental illness.*
>
> *It is expected that the Contractor will make necessary provision for the continuation of the service in the performer's absence. Contractors are advised to refer to the relevant SFE for information about payments in respect of long-term sickness, maternity, paternity, and adoption leave."*

4.15 The Commissioner, in its representations then concludes:

4.15.1 "*To grant a claim for dental relief we must be satisfied that a force majeure event has occurred and that all reasonable efforts have been exercised by the Contractor to mitigate the consequences of the force majeure event*."

4.16 I have reviewed the information provided. I note the Contractor did respond to the Commissioner on 21 June 2023 which was within the deadline (of 23 June 2023) to say there was a delay in obtaining the evidence regarding the illness. I note the evidence was provided on 26 July 2023, which was 16 days after the Commissioner considered the case but six days before the Commissioner issued its final decision. I am troubled that the decision of 31 July 2023 then gives its reason for refusing the application as "*Delay in receiving the supporting*

documentation/evidence." particularly when the Commissioner was in possession of this evidence, albeit late, for six days.

4.17 However, I have reviewed a number of paragraphs within the NHS England Policy Book for Primary Dental Services which state:

> "***14.3 Force Majeure Event***
>
> *A force majeure event is one which is caused by circumstances beyond the reasonable control of either the Commissioner or the Contractor that could not have been avoided or mitigated with reasonable care and where the event has had a material effect on the fulfilment of the contract.*
>
> *Examples of events that may invoke the force majeure provisions are as follows:*
>
> *• fire;*
>
> *• flood;*
>
> *• severe weather conditions and for which precautions are not ordinarily taken to avoid or mitigate the impact (for example a severe hurricane);*
>
> *• industrial action which significantly affects the provision of public services or services upon which the party is reliant;*
>
> *• death of a significant performer or close relative (for the purposes of this policy. a close relative is defined as, mother, father, sister, brother, wife, husband, civil partner, daughter, son, grandparent, grandchild, parent-in-law, son-in-law, daughter-in-law, sister-in- law, brother-in-law, step-parent, step-child, step-sister, step-brother, foster child, legal guardian, domestic partner or fiancé/fiancée);*
>
> *• pandemic disease or circumstances that might otherwise be considered "an act of God";*
>
> *• war;*
>
> *• civil war (whether declared or undeclared);*
>
> *• riot or armed conflict;*
>
> *• radioactive, chemical, or biological contamination;*
>
> *• pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speed;*
>
> *• acts of terrorism; and/or*
>
> *• explosion. …….*
>
> ***14.4 Dental Relief***
>
> *Throughout this policy the term dental relief is used. This is used as an outcome measure that will effectively determine the total units of activity that the Contractor was delayed or prevented from providing during the force majeure period and which may be 'carried forward' to the following financial year, instead of the Commissioner recovering the overpayment in respect of the UDAs/UOAs not provided.*

The Commissioner's decision whether to grant dental relief will be based on the assessment of a Contractor's claim for relief, where there has been an inability to deliver the contractual activity required. This policy provides the template documents that are relevant to the process of assessing eligibility for and granting dental relief, and also sets out the criteria, processes, and examples of what would constitute a force majeure event. There is also a calculator and methodology provided for calculating the amount of dental activity that can be carried forward.

If the Commissioner is satisfied that a force majeure event occurred and all reasonable efforts have been made to mitigate the consequences of the force majeure event, it may allow the Contractor to carry forward to the following financial year a number of unfulfilled UDAs or UOAs which, it is estimated, were not delivered as a direct result of the force majeure event. It is expected that any activity carried forward will be delivered within the next financial year. ……

14.6 Possible Events or Circumstances for Dental Relief Claims

The following is a list of examples of events or circumstances where the claim for relief may be considered, but it is not exhaustive. ……

14.6.3 Significant period of absence due to accident or sudden serious ill health of a significant performer

If a performer responsible for a significant proportion of the contracted activity is suddenly taken ill and is unable to deliver the services for a significant period of time, the Commissioner may consider that this is a circumstance for which relief may be considered.

14.7 Unacceptable Events or Circumstances for Dental Relief Claims*:*

The following is a list of examples of events or circumstances where the claim for relief should not be considered. It is not exhaustive: ……..

14.7.4 Long term sickness causing some incapacity disability, maternity, paternity, or adoption leave of a performer

Long term sickness causing some incapacity disability, maternity, paternity, or adoption leave of a performer. The term long term "sickness is often applied when the course of the disease lasts for more than four weeks. An example of long-term sickness includes but is not limited to, cancer, inflammatory arthritis, and severe and enduring mental illness.

It is expected that the Contractor will make necessary provision for the continuation of the service in the performer's absence. Contractors are advised to refer to the relevant SFE for information about payments in respect of long-term sickness, maternity, paternity, and adoption leave. …….

14.9 Evidence

Contractors must provide evidence of the force majeure event and the impact that it has had on service provision when they submit their claim at year end. Examples are as follows:

• copy of a death certificate;

• letter from the treating medical professional, hospital, or treatment centre, confirming the diagnosis or condition of the performer in question and the period for which it considers the individual should be absent from work; ……"

"8.4.3 Under delivery of UDAs or UOAs – below 96%

Where a Contractor has delivered less than 96% of their contracted activity, the Commissioner will recover the full amount of money (the overpayment to the Contractor in respect of the activity delivered under the contract) up to the full contract value.

Financial recovery will be administered by NHSBSA and will routinely be via three instalments of deductions from September to November's scheduled payments (inclusive).

Any requests to extend instalments beyond this will be forwarded to the Commissioner for consideration. NHSBSA will retain responsibility for administering the agreed instalment plan in Compass once agreed by the Commissioner. ……"

4.18 I have noted, as far as I can ascertain, the Contractor's reasons for its Force Majeure application with regard to their health condition. I have firstly considered paragraph 14.6.3 "Significant period of absence due to accident or sudden serious ill health of a significant performer" as quoted above and have taken into account the doctors' letters referred to at 4.10. Based on the information provided, the Contractor's absence was not caused by an 'accident', nor is there any indication about the condition being 'sudden' and that it resulted in a 'significant period of absence'. I have not been provided with information to specifically indicate how much time was taken off, making it difficult to consider if relief should have been considered. With regard to paragraph 14.7.4 – "Long term sickness causing some incapacity disability.....", as quoted above, I note that the Contractor's GP states that "[the illness] led him to take time off work on various days throughout the past year" although it is unclear if the absence met the period of 4 weeks and would therefore fall under this category of relief.

4.19 Dental relief is predicated on the basis that "*…the Contractor will make necessary provision for the continuation of the service in the performer's absence".* I have considered paragraph 8.4.3 of the Policy Book regarding "Under delivery of UDAs or UOAs – below 96%" and note that this Contract only delivered 74.41% of activity which is a significant under delivery. In this regard I have no information as to how the Contractor tried to mitigate for the sickness absence, apart from a mention of the Contractor "*being unsuccessful at recruiting a new associate despite my best efforts*." There is no information to demonstrate what efforts were undertaken by the Contractor for the continuation of the service whilst the Contractor was suffering with the health condition.

4.20 I am sympathetic to the struggles that the Contractor appears to have encountered. However, in view of the limited information provided regarding their health condition and lack of information regarding recruitment, the Commissioner was correct to refuse the application.

5 DECISION

5.1 I am of the view that the Contractor has failed to meet the criteria for its Force Majeure application to succeed.

5.2 The Commissioner can make the financial recovery as specified in 2022/23 Year-end reconciliation – [*Redacted by NHS Resolution*].

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

Head of Appeals
NHS Resolution