

19 September 2023

8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

FILE REF: SHA/26029

Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

COMMISSIONER: NHS ENGLAND

PERFORMER DR CHAUDHRY ALI ("the Appellant")

DISPUTE RESOLUTION: NATIONAL HEALTH SERVICE (PERFORMERS LISTS)
(ENGLAND) REGULATIONS 2013

1. **Outcome**

- 1.1 I determine that the Appellant is not entitled, pursuant to paragraph 3(1)(b) of the 2015 Determination, to suspension payments for the period 13 May to 4 August 2020.

A copy of this decision is being sent to:

Dr Chaudry Ali

NHS England

Advise / Resolve / Learn

NHS Resolution is the operating name of NHS Litigation Authority – we were established in 1995 as a Special Health Authority and are a not-for-profit part of the NHS. Our purpose is to provide expertise to the NHS on resolving concerns fairly, share learning for improvement and preserve resources for patient care. To find out how we use personal information, please read our privacy statement at <https://resolution.nhs.uk/privacy-cookies/primary-care-appeals/>



INVESTORS IN PEOPLE®
We invest in people Gold



8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

FILE REF: **SHA/26029**

COMMISSIONER: **NHS ENGLAND**

PERFORMER **DR CHAUDHRY ALI ("the Appellant")**

DISPUTE RESOLUTION: **NATIONAL HEALTH SERVICE (PERFORMERS LISTS)
(ENGLAND) REGULATIONS 2013**

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 (undated) received 19 May 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 (via its representative Hill Dickinson LLP) dated 21 June 2023 ("**NHS England's Representations**") together with enclosures;
 - 2.2.3 the Appellant's representations (undated) received 21 June 2023 ("**Appellant's Representations**") together with enclosure; and
 - 2.2.4 the Appellant's observations (undated) received 11 July 2023 ("**Appellant's Observations**") together with enclosures.
- 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 Performers Lists (Suspended Dentists' NHS Earnings) Determination 2015 ("**the 2015 Determination**").

3. BACKGROUND AND SUBMISSIONS

- 3.1 The background below is taken from the Appellant's Appeal Notice, NHS England's Representations, and the Appellant's Representations.
- 3.2 In April 2018 the General Dental Council (GDC) Interim Orders Committee (IOC) ordered that the Appellant be suspended for 18 months.

- 3.3 As a result of the Appellant's interim suspension from the GDC register, on 17 April 2018 NHS England suspended the Appellant in accordance with Regulation 12(1A)(b) of the Regulations.
- 3.4 On 13 May 2020 the IOC revoked the suspension and imposed conditions.
- 3.5 On 25 April 2023 the Appellant contacted NHS England to ask for a written reply that NHS England would not issue suspension payments for the above period.
- 3.6 On 26 April 2023 NHS England wrote to the Appellant to inform them that no payment was due.
- 3.7 On 26 April 2023, the Appellant requested NHS England to reconsider its decision.
- 3.8 On 5 May 2023 NHS England issued its reconsidered decision ("**Reconsideration**") determining that the Appellant is not entitled to suspension payments for the period 13 May 2020 – 4 August 2020.
- 3.9 Following the Reconsideration, the Appellant has submitted the notice of Appeal.

The Appeal

- 3.10 "Relevant NHS England contact details: NHS England, South East, Medical Directorate, York House, 18-20 Massetts Road, Horley, Surrey RH6 7DE
- 3.11 Copy of reconsidered decision: Please see enclosure.
- 3.12 Brief statement of the grounds for appeal:
- 3.13 NHSE kept the suspension from NHSE performer list until August 2020 but NHSE has refused to pay the suspension payments for the May 2020 to August 2020 period.
- 3.14 Moreover NHSE has calculated the suspension payment based on **pensioned** income whereas rules say it is **pensionable** income that should be used to calculate suspension payment.
- 3.15 In addition, NHSE has failed to make payment for the period when I was sick.
- 3.16 It's disappointing that NHSE has displayed contemptuous attitude throughout their interaction and that affected my health and wellbeing and caused me and my family immense sufferings.
- 3.17 Pleadings.
 - 3.17.1 To please issue suspension payment for May 2020 to August 2020 period.
 - 3.17.2 To please calculate the suspension payment according to **pensionable** income and not the **pensioned** income.
 - 3.17.3 To please pay the interest payment for the arrears at the rate 8% plus BOE base rate.
 - 3.17.4 NHSE to pay damages for their errors and contemptuous attitude.
 - 3.17.5 To pay sickness payment for the period of 2022 to April 2023."

NHS England's Representations

"Background

- 3.18 The Applicant, Dr Chaudhry Ali, appeals against the decision of the Respondent, NHS England, to refuse to pay suspension payments for the period of 13 May 2020 until 4 August 2020.

- 3.19 NHS England's original decision was set out within an email of 26 April 2023 [R/1/2] and upon reconsideration by NHS England was confirmed in an email of 5 May 2023 [R/2/4].
- 3.20 In summary, Dr Ali is not entitled to suspension payments for this period because he was not suspended from the performers list. NHS England's decision is the only lawful decision it could have reached in the circumstances.
- 3.21 Dr Ali also raises other issues which, for the reasons set out below, are not issues to be determined within this appeal.
- 3.22 Accordingly, NHS England invites the PCA to dismiss this appeal, confirm that Dr Ali is not entitled to suspension payments for the period in question, and confirm that the other issues are not issues to be determined within this appeal.
- 3.23 NHS England encloses a bundle of documents with these representations. Reference to documents within the bundle use the format [R/Document Number/Page Number].

Relevant law

- 3.24 7. Regulation 12 of the National Health Service (Performers Lists) (England) Regulations 2013 states:
 - 3.24.1 (1A) The Board [i.e. NHS England] must suspend a Practitioner from a performers list if the Practitioner's registration ... in the dentists register is subject to an interim suspension order made under section 32 of the Dentists Act 1984 ...
 - 3.24.2 (1B) *A suspension under paragraph (1A) will cease to have effect on the date that the interim suspension order referred to in that paragraph ends.*
 - 3.24.3 (1C) *Where the Board suspends a Practitioner under paragraph (1A) it must notify the Practitioner of the suspension and the reason for it.*
- 3.25 8. Regulation 13 states:
 - 3.25.1 (1) *During a period of suspension under regulation 12, payments may be made by the Board to, or in respect of, a Practitioner in accordance with a determination by the Secretary of State*
- 3.26 At all relevant times, the relevant determination by the Secretary of State is the Performers Lists (Suspended Dentists' NHS Earnings) Determination 2015.
- 3.27 Paragraph 3(1) of the Determination states:
 - 3.27.1 **Entitlement to payments by virtue of this determination**
 - 3.27.2 3. (1) *A person may be entitled to payments from the Board if*
 - (a) *that person is a suspended dentist; or*
 - (b) *that person is a contractor by whom that suspended dentist is employed or engaged, and*
 - 3.27.3 *immediately prior to the dentist's suspension or the circumstances that precipitated that dentist's suspension the dentist was employed or engaged by a contractor, and apart from the suspension under regulation 12 of the Performers Lists Regulations (suspension), or any suspension from the dentists register which does not provide grounds for immediate removal from the dental performers list under regulation 35 of the Performers Lists Regulations (grounds for removal from the dental performers list), that dentist would be able and would be permitted to perform primary dental services.*

3.28 Paragraph 2 of the Determination provides the following definition:

3.28.1 *"suspended dentist" means a dentist who is suspended by the Board in accordance with regulation 12 of the Performers Lists Regulations (suspension);*

3.29 Paragraph 6 of the Determination states:

3.29.1 *6. No payment must be made pursuant to this Determination unless ... the Board is satisfied that the suspended dentist, or contractor that is otherwise entitled to a payment, is entitled to that specific sum;*

Relevant Facts

3.30 On 12 April 2018, in accordance with interim suspension orders made by the Interim Orders Committee (IOC) under section 32 of the Dentists Act 1984, Dr Ali's registration in the dentists register kept by the General Dental Council (GDC) was suspended for a period of 18 months [R/3/6].

3.31 On 17 April 2018:

3.31.1 In accordance with Regulation 12(1A), NHS England suspended Dr Ali from the dental performers list.

3.31.2 In accordance with Regulation 12(1C), NHS England wrote to Dr Ali to notify him of the suspension from the dental performers list and the reason for it [R/4/7].

3.32 On 13 May 2020:

3.32.1 The IOC revoked the suspension and imposed conditions [R/5/9]. As recorded on page 3 of the determination [R/5/11], in the meantime the interim suspension orders had been reviewed and confirmed by the IOC and extended by the High Court, as appropriate, such that the period of the interim suspension orders ran uninterrupted from 12 April 2018 until 13 May 2020

3.32.2 In accordance with Regulation 12(1B), Dr Ali's suspension from the dental performers list ceased to have effect by operation of law.

Response to Dr Ali's pleadings

3.33 1. "To please issue suspension payment for May 2020 to August 2020 period"

3.34 While Dr Ali only approximately describes the period for which he alleges he should receive suspension payments, NHS England understands that the relevant period commenced on 13 May 2020 and ended on 4 August 2020. This is because

3.34.1 NHS England paid Dr Ali suspension payments up to and including 12 May 2020, but ceased doing so on 13 May 2020, for the reasons set out below; and

3.34.2 Dr Ali appears to consider August 2020 to be relevant because the Primary Care Support England (PCSE) website (<https://secure.pcse.england.nhs.uk/PerformersLists>) did not show that he was no longer suspended until 4 August 2020.

3.35 Dr Ali is not entitled for suspension payments during this period because:

3.35.1 Dr Ali's suspension from the dental performers list ended on 13 May 2020 by operation of law, specifically by operation of Regulation 12(1B). Paragraph (1B) states that the suspension "*will cease to have effect on the date that the interim suspension order ... ends*". The wording and effect of paragraph (1B) is clear, unequivocal and unconditional. It is neither contingent upon nor subject to any acts or omissions by any person, including NHS England. This can be contrasted

to the wording of paragraph (1A) which places a duty on NHS England to suspend the practitioner rather than it occurring automatically.

- 3.35.2 Regulation 13, under which suspension payments are made, only applies “[d]uring a period of suspension under regulation 12” (paragraph (1)).
- 3.35.3 Entitlement to suspension payments under the Determination only arises in respect of a “*suspended dentist*” i.e. a dentist suspended from the dental performers list (paragraphs 2 and 3(1)) and NHS England may not make a payment under the Determination unless such entitlement criteria are established (paragraph 6).
- 3.36 There is therefore no legal basis for NHS England to pay Dr Ali suspension payments for this period. NHS England’s decision to refuse to pay suspension payments is the only lawful decision it could have reached in the circumstances.
- 3.37 While not mentioned in his appeal application, Dr Ali has previously asserted that:
- 3.37.1 *We all know that in principle my name should have been restored on the performer list in May 2020 but it did not happen.*
- 3.37.2 *In reality my name remained suspended from the list till August 2020.*
- 3.37.3 **[R/1/3]**
- 3.38 NHS England has explained in relation to this:
- 3.38.1 *As you are aware there was an administrative issue regarding your listing on PCSE, which was rectified on 04.08.2020 to reflect the fact that your suspension had ended on 13.05.2020.*
- 3.38.2 **[R/1/2]**
- 3.39 Dr Ali’s argument is obviously and fundamentally misconceived because “*in reality*” his suspension from the dental performers list ended automatically, by operation of law, when his interim suspension from the dentists register ended, irrespective of any “administrative issue” concerning the PCSE website.
- 3.40 Dr Ali’s state of mind is not relevant to the question of whether or not he was suspended as a matter of law and fact. However, for the avoidance of doubt, NHS England strongly refutes any suggestion that Dr Ali believed he was suspended from the performers list between May 2020 and August 2020 that he or any other person placed any reliance upon the PCSE website as to such matters, or suffered any detriment as a result. NHS England did not do or say anything to suggest that Dr Ali was suspended during this time.
- 3.41 As one would reasonably expect, the PCSE website prominently states:
- 3.41.1 **Customer Notice**
- 3.41.2 *PCSE makes every effort to provide accurate and up to date information on our website. As performers regularly update their information the data is constantly changing which might occasionally lead to occurrences of information being out of sync. So, please take this into account when using any information copied or downloaded from this website.*
- 3.41.3 (<https://secure.pcse.england.nhs.uk/PerformersLists>)
- 3.42 As noted in the IOC determination **[R/5/11]**, Dr Ali was legally represented in relation his fitness to practise proceedings. It is inconceivable that he was not notified by either his solicitor, the IOC or the GDC of his suspension from the dentists register coming to an end. It also seems unlikely that he was not advised that his suspension from the dental performers list also ended

as an automatic consequence. But if Dr Ali found himself in any genuine doubt or curiosity as to this point at the time, it is reasonable to suppose that he might have taken some basic steps clarify the position. He could and should have sought clarification from a number of sources: his solicitor, NHS England or even a perusal of the clear wording of the Regulations themselves. Any one of these steps would have swiftly provided the clarification needed but it appears that Dr Ali did not take any of them at the time.

- 3.43 2. "To please calculate the suspension payment according to pensionable income and not the pensioned income"
- 3.44 This is not an issue to be determined within this appeal because:
 - 3.44.1 The decision and reconsideration leading to this appeal solely concern Dr Ali's first ground of appeal, namely the refusal to pay suspension payments between May 2020 and August 2020 [R/1/2 & R/2/4].
 - 3.44.2 By virtue of Dr Ali having no entitlement to suspension payments during this period, the question of the amount of the suspension payment does not arise. Indeed, NHS England has not taken any decision in respect of this.
 - 3.44.3 Should Dr Ali be seeking to challenge the amount of any suspension payments that were paid by NHS England in respect of any other period, he must first request that NHS England reconsider its decision (Regulation 13(3)). Within 28 days of being notified of the outcome of the reconsideration by NHS England, he may then (and only then) give notice of appeal to the PCA (Regulation 13(5)). Dr Ali has not requested reconsideration of such matters, nor has NHS England reconsidered such matters, therefore his right to appeal to the PCA regarding such matters has not arisen.
- 3.45 Notwithstanding the above, NHS England takes this opportunity to confirm that it considers all suspension payments have been calculated and paid in accordance with paragraph 3 of the Determination and based upon the evidence that Dr Ali provided of his monthly pensionable earnings. Dr Ali is obliged to ensure such evidence is accurate and reliable in accordance with paragraph 6(b) of the Determination. If Dr Ali now wishes to challenge NHS England's calculation of his suspension payments, he must first request reconsideration by NHS England and await the outcome prior to appealing to the PCA. In doing so he will need to properly particularise why he considers the calculation is wrong with reference to the evidence he himself provided.
- 3.46 3. "To please pay the interest payment for the arrears at the rate 8% plus BOE base rate"
- 3.47 By virtue of the above, there are no arrears on which to claim interest.
- 3.48 Should the PCA determine otherwise, NHS England respectfully requests the opportunity to make further submissions on interest.
- 3.49 4. "NHSE to pay damages for their errors and contemptuous attitude"
- 3.50 By virtue of the above, NHS England has not made any errors regarding Dr Ali's entitlement to suspension payments between May 2020 and August 2020, nor has it or its officers done or said anything that can reasonably be described as contemptuous.
- 3.51 NHS England has acted expeditiously. NHS England communicated its decision to refuse suspension payments within 1 working day of the issues being raised by Dr Ali [R/1/x]. NHS England undertook and communicated the outcome of its reconsideration of the issue within 6 working days of Dr Ali requesting this [R/2/x]. On each occasion NHS England provided clear reasons.
- 3.52 5. "To pay sickness payment for the period of 2022 to April 2023"

- 3.53 On 30 May 2023, the PCA confirmed that Dr Ali's appeal against the non-payment of sickness payments has been closed and that no further action will be taken.

Conclusion

- 3.54 For the reasons set out above, NHS England invites the PCA to dismiss this appeal, confirm that Dr Ali is not entitled to suspension payments for the period in question, and confirm that the other issues are not issues to be determined within this appeal."

Appellant's Representations

"Suspension payment for May 2020 to August 2020 period

- 3.55 NHS kept me suspended from the performer list register from 13th May 2020 till 4th August 2020 due to the negligence.
- 3.56 This resulted in losses, and sufferings. I felt humiliated at the hands of potential employers and others.
- 3.57 We seek suspension payments for this period and for the damages due to NHS negligence.

Interest payment for the arrears at the rate 8% plus BOE base rate

- 3.58 NHS made previous suspension payments for period April 2018 till May 2020 without paying interest at 8% plus BOE base rate.
- 3.59 We seek interest payment of 8% plus BOE base rate for April 2018 till May 2020 and for the May 2020 to August 2020 period.

Suspension payment Calculation according to pensionable income and not the pensioned income.

- 3.60 NHS used the pensioned income to calculate the suspension payments for the period of April 2018 till May 2020.
- 3.61 The NHS rules clearly state that calculation should be based on pensionable income. My pensionable income was different than my pensioned income and as evident from the attached appendix, for no fault of my own; my pensions were not correctly deducted.
- 3.62 We seek NHS to use pensionable income to calculate the suspension payments instead of pensioned income.

Damages for NHS errors and contemptuous attitude

- 3.63 We are extremely disappointed by NHS contemptuous attitude throughout the our dealing [sic] with them from 2017 till now. NHS repeatedly committed data and confidentiality breaches.
- 3.64 We seek damages for distress and emotional hurt caused by NHS direct and indirect actions."

NHS England's Observations

- 3.65 "We write to confirm that we have no observations to make on the appellant's representations, as all issues raised by the appellant have already been fully addressed in our own representations."

Appellant's Observations

- 3.66 "On 13 May 2020, GDC removed its interim suspension order and, the Applicant's (CA) name was restored on the GDC register.
- 3.67 Respondent (NHSE) was obliged to follow GDC and restore Applicant's name on NHS Performer List without any delay. Respondent has a duty of care towards Applicant and onus

was on Respondent to act swiftly and in the best interest of Applicant to remove suspension from the NHS Performer List as soon as GDC had removed the interim suspension order.

- 3.68 However from 13 May 2020 until 4 August 2020 the Respondent kept Applicant's name suspended from NHS Performer List intentionally or unintentionally.
- 3.69 During this time Applicant applied for the jobs. But potential employers contacted the NHS and were informed that Applicant's status on NHS Performer List is of suspended and he could not and should not be employed.
- 3.70 It must be noted that Respondent has previously not denied the fact that Applicant's *name* was suspended from NHS Performer List Register from 13 May 2020 until 4 August 2020 (Appendix A & B).
- 3.71 The Respondent is naively or maliciously defending its decision to not grant suspension payment for this period claiming its own actions as error and mistakes. Even a layman on the street using the Duck test "*If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck.*" will conclude that the Respondent arguments are not plausible and Applicant name was suspended from NHS Performer List from 13 May 2020 until 4 August 2020
- 3.72 It was the threat of legal action that forced Respondent to act and remove the suspension from NHS Performer List register in August 2020. Respondent is a gigantic organization with vast resources and legal eagles available at its disposal. Its claim that period from 13 May 2020 until 4 August 2020 was not a suspension but an error on its part is malicious. It defended its actions by a retrospective letter from August 2020 to restore Applicant's name on NHS Performer List (*Appendix A*).
- 3.73 Respondent has also failed to justify that why Applicant should pay financially, physically and mentally for the Respondent's intentional or unintentional mistakes and errors whatsoever and why an apology is not sufficient (*Appendix B*).
- 3.74 The Respondent claims are even ludicrous as for all the practical purposes it kept Applicant's name suspended from NHS Performer List and the potential employer learned that the Applicant name was suspended from NHS Performer List. It had double whammy as potential employer and others saw Applicant as deceptive seeking job while his name was being suspended on NHS Performer List.
- 3.75 The mental trauma caused by this episode is difficult to describe in words and no amount of apology and/or financial compensation can heal it.
- 3.76 Regarding the calculation of suspension payments, Applicant don't object in principal for Respondent to review its own decision but the previous record shows that Respondent will use review to only waste useful resources and time for the egoistic satisfaction of its officer.
- 3.77 Thus, if Respondent sincerely wants to review its own decision, then please send this request back to Respondent. However if Respondent is of the view that even the review will lead to the same conclusion then it's requested that PCA deliberate this matter.
- 3.78 Thus it is please requested that PCA:
- 3.78.1 Grant Applicant the suspension payment for 13 May 2020 until 4 August 2020 period.
 - 3.78.2 Grant Applicant damages, for the humiliation, anguish and mental trauma caused by Respondent's actions.
 - 3.78.3 Grant interest @ 8% plus BOE base rate for the payments.
 - 3.78.4 Correctly calculate the suspension payments for pensionable earnings.

3.78.5 Reprimand Respondent for its actions.”

3.27 [Appendix A – letter from NHS England dated 3 August 2020 and Appendix B – email from NHS England dated 4 August 2020].

4. CONSIDERATION

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

4.2 I note in its Notice of Appeal and later correspondence, the Appellant raises several questions, namely that:

4.2.1 it is entitled to suspension payments for the period May – August 2020;

4.2.2 the suspension payment be calculated according to pensionable income and not pensioned income;

4.2.3 interest should be paid on payments from April 2018 to May 2020 and for the arrears at a rate of 8% plus BOE base rate;

4.2.4 the Appellant should be awarded damages; and

4.2.5 NHS England should be reprimanded for its actions.

4.3 I will address each question in turn below.

4.4 Separately, the Appellant contends that sickness payment is due for the period 2022 – April 2023. However this Appeal was dismissed because it clearly does not relate to the non-payment of suspension payments, which is the reconsidered decision the Appellant is seeking to appeal. Therefore, no further mention of this payment will be made.

Suspension payments

4.5 The Appellant contends that it was eligible for suspension payments for the period 13 May 2020 - 4 August 2020.

4.6 I note there is no dispute that the Appellant’s suspension was revoked by the Interim Orders Committee (“the **IOC**”) on 13 May 2020 and further that its name was restored on the GDC register on the same date.

4.7 Further I note there is no dispute that it was not until 4 August 2020 that the Appellant’s name was restored on the NHS Performers List. I have been provided with a copy of an email from NHS England addressed to the Appellant dated 4 August 2020, which states:

“Further to my email of 31st July, as below, I have just received confirmation that the National Performers List has been updated to show your correct status.

Again, please do accept my apologies for any inconvenience caused.”

4.8 Attached to that email is a letter from NHS England dated 3 August 2020 to notifiable bodies which states:

“As you are aware, the NHS Commissioning Board (herein known as NHS England) is obliged by Regulation 18 of the NHS (Performers Lists) (England) Regulation 2013, to advise certain organisations of any action taken under those regulations.

I notified you on 17.04.18 that the above practitioner was mandatory suspended from the Dental Performers List. Following the GDC revoking their suspension of the practitioner on 13.05.20, NHS England’ mandatory suspension is lifted.

Please note that the mandatory suspension was lifted with effect from 13.05.20."

- 4.9 The Appellant contends that NHS England was obliged to follow the GDC and restore its name on the NHS Performers List without any delay.
- 4.10 The Appellant states that it applied for jobs during this time, but that *"potential employers contacted the NHS and were informed that Applicant's status on NHS Performer List is of suspended and he could not and should not be employed."*
- 4.11 It is the Appellant's view that it should not be penalised for an error on the Commissioner's part.
- 4.12 I note that Hill Dickinson has provided a link to the PCSE website and highlighted the following wording:

"Customer Notice

PCSE makes every effort to provide accurate and up to date information on our website. As performers regularly update their information the data is constantly changing which might occasionally lead to occurrences of information being out of sync. So, please take this into account when using any information copied or downloaded from this website."

- 4.13 Having considered the wording of this paragraph, I note that use of the phrase *"update their information"* implies that this notice applies to information that is provided by the performer, rather than information that NHS England should have provided to it. I note that the PCSE website not only provides information in relation to a performers status, but things like the performer role and personal information, which are within the control of the performer and are more likely to be frequently updated. I also note that the issue is not about the information on the website being *"out of sync"* but not updated at all. Consequently, I do not consider that the production of this quote by Hill Dickinson contributes to its arguments and shall have no further regard to it.

- 4.14 Continuing, I note in its representations, Hill Dickinson contends that there is no legal basis for NHS England to pay Dr Ali suspension payments for this period. Hill Dickinson states:

"Dr Ali's suspension from the dental performers list ended on 13 May 2020 by operation of law, specifically by operation of Regulation 12(1B). Paragraph (1B) states that the suspension "will cease to have effect on the date that the interim suspension order ... ends". The wording and effect of paragraph (1B) is clear, unequivocal and unconditional. It is neither contingent upon nor subject to any acts or omissions by any person, including NHS England. This can be contrasted to the wording of paragraph (1A) which places a duty on NHS England to suspend the practitioner rather than it occurring automatically.

Regulation 13, under which suspension payments are made, only applies "[d]uring a period of suspension under regulation 12" (paragraph (1)).

Entitlement to suspension payments under the Determination only arises in respect of a "suspended dentist" i.e. a dentist suspended from the dental performers list (paragraphs 2 and 3(1)) and NHS England may not make a payment under the Determination unless such entitlement criteria are established (paragraph 6)."

- 4.15 Hill Dickinson contends that NHS England's decision to refuse to pay suspension payments is the only lawful decision it could have reached in the circumstances:

"Dr Ali's argument is obviously and fundamentally misconceived because "in reality" his suspension from the dental performers list ended automatically, by operation of law, when his interim suspension from the dentists register ended, irrespective of any "administrative issue" concerning the PCSE website."

- 4.16 I note that Paragraph 3 of the 2015 Determination sets out the circumstances in which a dentist may be entitled to payments:

Entitlement to payments by virtue of this determination

3. (1) *A person may be entitled to payments from the Board if*

(a) that person is a suspended dentist; or

(b) that person is a contractor by whom that suspended dentist is employed or engaged, and

immediately prior to the dentist's suspension or the circumstances that precipitated that dentist's suspension the dentist was employed or engaged by a contractor, and apart from the suspension under regulation 12 of the Performers Lists Regulations (suspension), or any suspension from the dentists register which does not provide grounds for immediate removal from the dental performers list under regulation 35 of the Performers Lists Regulations (grounds for removal from the dental performers list), that dentist would be able and would be permitted to perform primary dental services.

- 4.17 Paragraph 2 of the 2015 Determination provides the following definition:

"suspended dentist" means a dentist who is suspended by the Board in accordance with regulation 12 of the Performers Lists Regulations (suspension);

- 4.18 I note that Paragraph 6 of the 2015 Determination states:

6.-(1) No payment must be made pursuant to this Determination unless ... the Board is satisfied that the suspended dentist, or contractor that is otherwise entitled to a payment, is entitled to that specific sum;

- 4.19 I note the dispute before me is whether the Appellant is entitled to suspension payments for the period 13 May 2020 to 4 August 2020, despite the IOC order having been revoked.

- 4.20 Having considered the Regulations, and the wording provided by Hill Dickinson above, Regulation 12 is very clear regarding when suspensions come to an end. That is when the suspension order ends, and, as I have recognised, the order was revoked on 13 May 2020. Consequently, it is unequivocally true that the suspension also ended on 13 May 2020.

- 4.21 The question before me is thus whether the status of a performer on the Performers List has any impact on their status for the purposes of suspension payments. I have had regard to both parties' representations, and the Regulations themselves. I can see no wording that would suggest that the appearance of the Performers List has any impact on the actual status of an individual with regards to the status of suspension.

- 4.22 I note the Appellant's allusions to the "duck test" in that the alleged consequence of being suspended from the Performers List was the same as if he was indeed suspended. However, he was not, in fact, suspended at that time, even if it would have outwardly appeared to have been the case. It also appears that the Appellant was aware of the fact that he was not suspended. It is unclear if any action was taken by the Appellant to attempt to provide clarification to any prospective employers regarding the fact that his suspension had been revoked, and what the impact of this was.

- 4.23 The Performers List, in this regard, is a reflection of the status of an individual, not the factual status of the individual. The list should of course reflect the actual situation, but the record of status as it appears on the Performers List cannot dictate the actual status. If it was intended that the Performers List should be the test for whether a performer is suspended or not then Regulation 12 (1B) would not be worded as it is. Instead, the date of the end of the suspension would be worded as the date upon which the Performers List is updated to reflect this. I therefore determine that the only applicable test for suspension is the one under Regulation

12 (1B), not the "duck test" as put forward by the Appellant. As a result, from the period of 13 May 2020 onwards the Appellant was no longer suspended, as per Regulation 12.

- 4.24 I note that the wording associated with suspension payments in the 2015 Determination states that a person may be entitled to suspension payments if they are a suspended dentist. The 2015 Determination defines this by reference to Regulation 12. I also note that I have determined there is no other definition of suspension applicable. Therefore, to be entitled to suspension payments a performer must be suspended under that Regulation. As I have determined that the Appellant was not in fact suspended then he cannot be entitled to suspension payments under the 2015 Direction.
- 4.25 In light of the above I consider that the Appellant is not entitled to suspension payments for the period of 13 May 2020 onwards.

Suspension payments to be calculated according to pensionable income

- 4.26 I note that the Notice of Appeal stated:
- "NHSE has calculated the suspension payment based on pensioned income whereas rules say it is pensionable income that should be used to calculate suspension payment."*
- 4.27 The Appellant then clarified in his Representations that the period of suspension payments in question was from April 2018 till May 2020. Therefore, it does not relate to my determination above that no payments should be due from May 2020 onwards.
- 4.28 I consider that, having regard to the underlying Regulations, the Appellant is correct in the assertion that the wording of the 2015 Determination, which I presume is what is being referred to by "rules", is "pensionable", not "pensioned". I note that Hill Dickinson contended that, as set out at paragraph 3.44:
- 4.28.1 this appeal only relates to the suspension payments from May 2020 to August 2020, and since there are no suspension payments for this period, there is no calculation; and
- 4.28.2 if it is for a different period it would need to go through reconsideration by NHS England before it could be appealed.
- 4.29 On consideration of the first point I agree that this Appeal has been brought in relation to the reconsideration of the decision by NHS England not to make suspension payments from the period of May 2020 to August 2020, as per paragraph 3.8. Therefore, I can only consider matters relevant to that decision, and hence any other period of suspension would be outside of my jurisdiction.
- 4.30 Secondly, Hill Dickinson is correct that Regulation 13(5) indicates that only following the notification of a reconsidered decision can the Appellant issue a notification of Appeal. Since NHS England has not had the opportunity to reconsider the decision, as per Regulation 13(3), then it would not be in accordance with the Regulations for me to make any determination on the paid amounts for any other period of suspension at this time.
- 4.31 I also note that there is no evidence of the amounts of payments made during the period of suspension, no evidence of what the pensionable verses pensioned amount was, and no details of the actual error. The evidence that has been provided by the Appellant is heavily redacted and it is unclear how this email relates to the evidence of pensionable earnings. I also have not been provided with the original decision of NHS England to consider if there had been a mistake. Given these lack of details, even if I were able to consider this point, I consider that it would have been impossible to make any useful determination with the information provided.
- 4.32 For all of these reasons I make no determination as to whether pensionable or pensioned income was, is or should be used to calculate any suspension payments. The Appellant will need to consider requesting a reconsideration of the decision by NHS England as to the

amount of the original suspension payments and if it so does, provide all necessary information to support its position.

Interest should be paid on payments from April 2018 to May 2020 and for the arrears at a rate of 8% plus BOE base rate.

- 4.33 I will firstly consider the payments from April 2018 to May 2020. I note that there are no comments from NHS England on this as the period for which interest was being claimed was unclear in the original Appeal. Therefore NHS England's comments only apply to any interest being claimed on payments from May to August 2020. I note that it also did not provide any observations.
- 4.34 I consider it unclear what exactly is being claimed by the Appellant in relation to this period; it is uncertain how the Appellant envisions interest being applied, if it is that he should be paid his monthly pensionable earnings plus interest or if he is stating that interest should be applied to the total payments made. I also note that, as set out above, the Appellant is seeking to appeal the amount paid during this period, so it is possible that the Appellant is wanting interest paid on this outstanding amount rather than the amounts already paid. In order to give the Appellant the benefit of the doubt I will consider each of these constructions.
- 4.35 I note that the 2015 Determination details the amount of payment to which a suspended dentist is entitled, as at paragraph 4(1) states:
- "The amount to which the dentist is entitled, in respect of each complete calendar month or part month for which the dentist is suspended, is the suspended dentist's monthly pensionable earnings..."*
- 4.36 There is no mention of any interest applicable to said pensionable earnings, and there is no other element in the Regulations that implies interest would be applicable to suspension payments. Therefore, if the Appellant is seeking interest on the payments already made, I cannot see there is any legal basis for this to be granted. If interest should have been paid, then this would amount to a decision on the amount of payment due to the Appellant. Consequently, it would require NHS England to have made a reconsideration on this point prior to it being appealed, as per Regulation 13. Therefore, I cannot make any determination on whether interest should have been paid on this payment, however I consider it unlikely that it should have.
- 4.37 In regard to the possibility that interest is being sought on the amount alleged to be outstanding from the original suspension payments, I have determined that I cannot make any determination on that line of appeal, as at paragraph 4.32. Since I cannot determine whether any payment amount is incorrect, I also cannot make any determination as to whether interest on said alleged arrears should be made. Therefore, I make no determination in this regard.
- 4.38 In regard to the period from May 2020 to August 2020, I note that I have determined that suspension payments were not due to the Appellant during this period. Therefore, there is nothing to which to apply interest. I therefore determine that no interest is due to the Appellant for the period from 13 May to 4 August 2020.

The Appellant should be awarded damages

- 4.39 It is unfortunate that the Appellant's name was not reinstated on the NHS Performers List, and I am sympathetic to the Appellant in terms of the potential negative consequences that may have occurred due to the Performers List not reflecting the cessation of his suspension. NHS England does have a responsibility for its lists and to ensure that they are up to date so as not to penalise any contractors applying for and securing work.
- 4.40 However, I note that this Appeal was brought under Regulation 13(5), which states:
- "Following notification of the reconsidered decision, the Practitioner may, within a period of 28 days beginning on the day on which the Practitioner is notified of that reconsidered decision, give the Secretary of State a notice of appeal."*

- 4.41 Therefore, this Appeal relates only to the Reconsideration referenced at paragraph 3.8. which relates to the decision not to make suspension payments under Regulation 13. In determining such appeals there is only two options available to me, as per Regulation 13(9):

"(a)decide the appeal, and notify the parties of its decision and the reasons for it; and

(b)give the Board such directions in writing, if any, on the matter as the Secretary of State thinks fit."

- 4.42 As such, any question of damages sits outside of the powers conferred on me in determining this Appeal.

- 4.43 To the extent that such a claim does relate to suspension payments I also note that I have determined that NHS England has not made any errors with regard to these. It is unclear to me what the Appellant is alleging by "*contemptuous attitude*".

- 4.44 It may be open to the Appellant to bring some form of legal remedy against NHS England which is available to him, however for the purposes of this Appeal I determine that damages is not something I can consider. I am unable to provide legal advice to the Appellant on whether any other form of legal remedy such as a complaint or an action for negligence can be brought. The Appellant must decide if it wishes to procure such advice.

NHS England should be reprimanded for its actions

- 4.45 I reiterate my sympathies for the Appellant's situation. It is clear, and has been acknowledged by NHS England, that NHS England erred in not ensuring the Performers List reflected the actual status of the Appellant for the relevant period. NHS England should not have enabled this to happen. I would make the point that, aside from indicating my view, there is no further or more formal types of reprimand that I can make.

5. DETERMINATION

- 5.1 I determine that the Appellant is not entitled, pursuant to paragraph 3(1)(b) of the 2015 Determination, to suspension payments for the period 13 May to 4 August 2020.

**Head of Appeals
NHS Resolution**