12 June 2024

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FILE REF: **SHA/26155**

DECISION MAKING BODY: **NHS ENGLAND & BEDFORDSHIRE, LUTON AND MILTON KEYNES INTEGRATED CARE BOARD ("THE COMMISSIONER")**

GDS CONTRACTOR: **GREAT NORTHERN ROAD DENTAL PRACTICE 84 GREAT NORTHERN ROAD DUNSTABLE BEDFORDSHIRE**

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

RE: **APPLICATION FOR DISPUTE RESOLITION WITH REGARD TO YEAR END RECONCILIATION 2022/2023**

1 Outcome

1.1 I determine that if the Contractor is able to provide the reasons for the cancelled appointments, and these were directly applicable to the pandemic, for the relevant patients, to the Commissioner within 28 calendar days then the Commissioner must exercise its discretion and consider these circumstances. If the Contractor does not provide the information within the prescribed time limit, the Commissioner can proceed to recover the full amount of £174,816.42.

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

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RE: **APPLICATION FOR DISPUTE RESOLITION WITH REGARD TO YEAR END RECONCILIATION 2022/2023**

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 54 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 31 January 2024 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 from the Contractor of 31 January 2024;

2.2.2 Second email from the Contractor of 31 January 2024 with enclosures;

2.2.3 Email from the Contractor of 3 February 2024;

2.2.4 Undated letter from the Contractor, received 19 March 2024 with enclosures;

2.2.5 Email from the Commissioner of 10 April 2024 with enclosures;

2.2.6 Email from the Contractor of 16 April 2024; and

2.2.7 Email from the Commissioner of 30 April 2024.

3 PARTIES SUBMISSIONS

The Contractor's application

In an email of 31 January 2024, the Contractor stated:

3.1 "Contract number: 9171250001

3.2 Contractor: [AL], Facial Aesthetics UK Ltd

3.3 ICB: Beds, Luton Milton Keynes

3.4 I hereby appeal the revised clawback amount of £174816.42

3.5 I attach letter from my legal representative sent to the ICB.

3.6 I also attach meeting notes compiled by the ICB during an attempt to resolve the issue. These notes provide a comprehensive account of the issues.

3.7 Further evidence in mitigation will be submitted if required."

In a further email of 3 February 2024, the Contractor stated:

3.8 "In response to your email, I forward the information requested.

3.8.1 The signed contract and the Year End Reconciliation statement will be posted to the address contained in your email.

3.8.2 The dispute relates to the extreme level of late cancellation of appointments by patients, which had a direct impact on the ability of the clinic to achieve its UDA targets.

3.8.3 More details of this and the causes is contained in the correspondence previously submitted. Lists of patients are available for submission if required. There are nearly 100 pages of patient names and dates.

3.8.4 The commissioning body is the Bedfordshire, Luton and Milton Keynes ICB/ the commissioners are [DC], [DW]

3.8.5 Email: blmkicb@nhs.net [sic]

3.8.6 There is no telephone number available.

3.8.7 My contact numbers is [x]"

Representations

The Commissioner's representations

In an email of 10 April 2024 the Commissioner responded to the application and stated:

3.9 "Please see attached the documented representations from NHS BLMK ICB regarding the Great Northern Road (GNR) Dental Practice case.

3.10 As requested, we have provided the contract documentation for GNR with some supporting documents:

3.10.1 Doc01 - General Dental Services contract for GNR

3.10.2 Doc02 – Variation Change document to reduce the number of UDAs

3.10.3 Doc03 – Signed Variation to contract by all parties

3.10.4 Doc04 – Application (includes meeting minutes) to reduce further the clawback value (amount)

3.10.5 Doc05 – Email Re [Mr L] YE 22/23 Clawback

3.11 NHS BLMK ICB's position is that the original decision to work through the clawback process was set by NHS England (East of England), as the Commissioner for the period 22/23 for GNR's dental contract. (See Doc05).

3.12 BLMK ICB along with all other ICBs inherited and took over the management of Dental Service Contracts as of 1 April 2023 and were asked to support (broadly) the decisions made in the previous financial year 2022/2023.

3.13 We believe that Doc04, Page 3 sets a reasonable summary of the position in that:

3.13.1 The Year End recovery total was originally £243,170.18.

3.13.2 [Mr L] appealed and an adjustment was made bringing the new total to be recovered to £174,816.42 thereby reducing the amount by £68,353.76.

3.13.3 [Mr L] is seeking a further reduction by another £54,816.42 which would bring the total proposed reduction by GNR to £123,170.18, a 50.65% reduction on the original recovery total.

3.14 As a public organisation, it is not agreeable that a provider of NHS services in receipt of monthly agreed public monies and who did not meet the delivery expectations of those agreed services, be allowed to retain over 50% of public funding based primarily on short notice cancellations as described in Doc04, Page 2, paragraph 6.

3.15 During 2022/2023 there appears to be no record or GNR notifying the Commissioner of the challenges and providing a pro-active notification of the difficulties due to short notice cancellations. It must be noted that other Providers/Contractors who may have encountered similar short notice cancellations, enacted contingency arrangements to attempt to fulfil their NHS dental responsibilities.

3.16 NHS BLMK ICB's recommendation is that GNR should be held accountable for the £174,816.42 but a more suitable recovery arrangement(s) should be put in place to provide a 'safer' financial clawback which does not put at risk patient care and dental access and supports the continuation of GNR."

The Contractor's representations

3.17 "Please find attached bundle containing the list of patients that supports the evidence of the number of late cancellations and the total hours lost in clinical time.

3.18 Previously supplied are the emails and communications with the ICB. Also previously supplied are the minutes of the meeting in which a resolution was not agreed by the ICB."

Observations

The Commissioner's observations

3.19 “Please see below a final response (representations) from NHS BLMK ICB regarding Great Northern Road Dental Practice (GNR)

3.20 Thank you for sharing the information supplied by [Dr L].

3.21 We would like to clarify and confirm that NHS Bedfordshire Luton and Milton Keynes Integrated Care Board (BLMK ICB) and NHS England (East) Region, the Commissioner of NHS dental contracts in 2022/23 has complied with the terms of the General Dental Services Contract (previously sent Doc01) and NHS England annual process for Year-End financial reconciliation (previously sent Doc04). Dental contractors who did not meet a nationally agreed percentage of dental activity would be and are subject to financial reconciliation/clawback of monies paid to them during the financial year.

3.22 Dental contracts returned to business as usual in April 2022 following the Covid-19 pandemic, in the East of England region, dental contractors who previously provided urgent dental services during the pandemic were allowed to continue to deliver the service for a final period in quarter 1 of 2022/23. Those contractors like [Dr L] had their activity considered for quarter 1 of 2022/23 and adjustments made to their year-end position to reflect the additional investment by East of England region and dental contractors’ activity. This resulted in [Dr L] having the level of financial reconciliation he was due to repay NHS England reduced from £243,170.18 to £174,816.42.

3.23 It is the view of BLMK ICB and NHS England (East) Regional Director as set out in the notes of the meeting with [Dr L] (Doc04, Page 5, paragraph 6) on 19/01/2024 that taking into account late cancellations would be setting a national contractual precedent that would have significant implications on NHS dental funding in England. The funding due to be repaid by [Dr L] and dental contractors in England that did not meet their contracted activity which once returned to NHS England is reinvested in NHS services. [Dr L] was offered additional time to repay the monies due to be returned to the NHS that offer remains in place.

3.24 It therefore remains the case that BLMK ICB recommend in its strongest terms that GNR should be held accountable for the £174,816.42 but a more suitable recovery arrangement(s) should be put in place to provide a ‘safer’ financial clawback which does not put at risk patient care, dental access and supports the continuation of GNR. GNR to date still have not provided any compelling evidence as to why they did not pro-actively notify their commissioner of the difficulties due to short notice cancellations during the 2022/23 financial year. It must be noted that other Providers/Contractors who may have encountered similar short notice cancellations, enacted contingency arrangements to attempt to fulfil their NHS dental responsibilities.

3.25 As a public organisation, it is not agreeable that a provider of NHS services in receipt of monthly agreed public monies and who did not meet the delivery expectations of those agreed services, be allowed to retain over 50% of public funding based primarily on short notice cancellations. GNR received public funding in good faith but unfortunately they did not meet their contracted activity and the monies owed should be repaid to the NHS.”

<u>The Contractor’s observations</u>

3.26 “Following on from your letter and documented representation from the NHS BLMK ICB herewith my rebuttal of its contents .

3.27 The BLMK ICB have failed in their documentation and their representations to address and rebut any of the arguments I presented within my mitigation.

3.28 Namely

3.28.1 No rebuttal or detailed mention of the main argument of the high number of late cancellations within the designated year.

3.28.2 No mention or rebuttal of the shortage of manpower, a situation created by the government's chronic well documented underfunding of dentistry and the woeful value of my contracted UDAs (units of dental activity).

3.28.3 No mention or rebuttal of the situation created by the government in which the public were encouraged to cancel any engagement if they had any sign or symptom of illness.

3.29 The BLMK ICBs argument has been to echo government policy and not provide a specific counter to the mitigation presented.

3.30 The BLMK ICB has autonomy to make decisions regarding individual contractors, but has chosen not to do so.

3.31 [Mr E] has stated "[Dr L] appealed and an adjustment was made bringing the new total to be recovered to £174 816.42 thereby reducing the amount by £68 353.18"

3.32 Were these legal proceedings [Mr E] would be sanctioned and admonished by any presiding authority for gross misrepresentation of the facts.

3.33 All dental practices that provided services to the public during the Covid Pandemic as URGENT DENTAL CARE CENTRES were given this as an acknowledgement for services during a national crisis, by NHS England.

3.34 By bringing this statement into these proceedings is a discredited attempt to conflate the issues presented . It is an attempt to paint the BLMK ICB in an entirely different light and change the narrative to their own ends.

3.35 The reduced amount given to all UDCs was negotiated centrally and has no bearing on these proceedings.

3.36 The amount in dispute is not £243 170.18 nor is it £174 816.42. An offer was made by me to the BLMK ICB of an immediate payment of £80 000.00 followed by 6 monthly payments of £5000.00 from the schedules totalling £110 000.00.

3.37 Thus the amount in dispute is £64 816.42.

3.38 Thus a reduction in the recovery total of 37.07%

3.39 [Mr E] has stated "As a public organisation, it is not agreeable that a provider of NHS services in receipt of monthly agreed public monies and who did not meet the delivery expectations of those agreed services, be allowed to retain over 50% of public funding based primarily on short notice cancellations as described in Doc04 Page2 Paragraph 6,"

3.40 This statement by [Mr E] is again factually incorrect. The disputed amount is 37.07%. He has provided no comment on the short notice cancellations, save to dismiss them.

3.41 [Mr E] has stated "During 2022/23 there appears to be no record or GNR notifying the commissioner of the challenges and providing a pro-active notification of the difficulties due to short notice cancellations.

3.42 As a clinic we were always hopeful of fulfilling our obligations. Most of our work is done in the last quarter of the financial year. To what end would a notification in the last quarter go to enable us to fulfill [sic] our contract?

3.43 What expertise would the BLMK ICB provide in assisting us?

3.44 [Mr E] has made a statement without qualification of said statement.

3.45 [Mr E] has stated " It must be noted that other Provider/Contractors who may have encountered similar short notice cancellations, enacted contingency arrangements to attempt to fulfill [sic] their NHS dental responsibilities"

3.46 [Mr E] has again made a statement and failed to qualify it ,or provide any evidence to back it up.

3.47 He is implying that as a clinic we made no attempt to fulfill [sic] our obligations which suits the narrative the BLMK ICB are trying to create.

3.48 I trust that this response serves to correct the numerous inaccuracies and lack of any evidence in the submission by the BLMK ICB

3.49 As a clinic we will continue providing invaluable services to our community."

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 GDS Contract in dispute containing all variations agreed since the Contract was signed. This was provided by the Commissioner and has not been disputed by the Contractor.

4.2 The Commissioner has also provided me with a copy of a contract variation which has the effect of reducing the total number of UDAs that the Contractor needs to provide. I note however that this is with effect from 1 April 2023 and the dispute before me is with reference to the 2022/2023 financial year. I therefore take no view on the reduction of UDAs with effect from 1 April 2023 as this is not a relevant matter in respect of the dispute before me.

4.3 This application for dispute resolution relates to the 2022/2023 Year End Reconciliation statement. The Contractor seeks to dispute the Commissioner's decision not to accept partial payment of the monies that are due following the reconciliation and the underperformance during the financial year 2022/2023.

4.4 There is reference in the minutes of the meeting of 19 January 2024, to the Urgent Dental Centres. From the meeting minutes, an appeal was upheld regarding the Urgent Dental Centres and adjustments were made by NHS BSA which resulted in new end of year reconciliation letters being issued which took into account revised figures for quarter 1 of 2022/2023. I note that there is no dispute between the parties with regard to the appeal in respect of the Urgent Dental Centres or the fact that this has reduced the sum owed to the Commissioner. I further note that there is no dispute between the parties that this had had the effect of reducing the monies owed from £243,170.18 to £174,816.42.

4.5 I note that local dispute resolution has been entered into and that a meeting was held between the Contractor and the Commissioner. In the meeting minutes of 19 January 2024, following the actions/agreed outcome it is stated "*Following regional discussions JG confirmed that AL will need to submit an appeal to: https://resolution.nhs.uk/services/primary-care-appeals/ or contact the Primary Care Appeals Team at nhsr.appeals@nhs.net or 0203 928 2000."*

4.6 From the information before me, I am of the view that local dispute resolution has been exhausted following which the Contractor has referred the matter in dispute to NHS Resolution. There is no dispute that local dispute resolution has not been entered into and therefore I will proceed to consider the matters before me.

4.7 I have not been provided, by either party, with either a copy of the original Year End Reconciliation statement for 2022/2023 or a copy of the revised Year End statement following the adjustment by NHS BSA with regard to the appeal in respect of the Urgent Dental Centres. However, I note that there is no dispute between the parties with regard to the actual calculation of the total financial recovery that the Commissioner is seeking to claim.

4.8 The Contractor does not wish to repay the full amount that is due as there was an *"extreme level of late cancellation of appointments by patients which had a direct impact on the ability of the clinic to achieve its UDA targets*."

4.9 The Contractor, whilst acknowledging that there is a debt to repay has offered a lump sum of £80,000 followed by 6 monthly installments of £5,000 meaning a total repayment to the Commissioner of £110,000 with the remaining £64,816.42 being written off by the Commissioner. The Commissioner has not accepted this and remains of the view that the full amount of the overpayment should be repaid by the Contractor as they did not fulfil their agreement and the total number of UDAs for the 2022/2023 financial year were not completed.

4.10 The Commissioner set out, and confirmed in the meeting minutes of 19 January 2024, that there should be 1 monthly repayment of £58,272.42 followed by two repayments of £58,272 meaning a total repayment of £174,816.42 due to the Commissioner. The Commissioner has subsequently stated that, whilst the full amount remains due and should be repaid "*a more suitable recovery arrangement(s) should be put in place to provide a 'safer' financial clawback which does not put at risk patient care, dental access and supports the continuation of GNR."*

4.11 I note that there is no dispute that the Contractor has underdelivered its contracted activity for the financial year 2022/2023. Further, the Contractor has not disputed the calculation of its year end reconciliation for the practice, rather that it should not have to repay the full amount, but a reduced figure due to the circumstances it has faced.

4.12 The Contractor did not submit a Force Majeure notice to the Commissioner and did not provide any indication to the Commissioner of the challenges or suggest that it wished the significant amount of cancellation of appointments to be considered as either a Force Majeure or a request for other assistance. The Commissioner has confirmed this and states "*During 2022/2023 there appears to be no record or GNR notifying the Commissioner of the challenges and provide a pro-active notification of the difficulties due to short notice cancelations."* I note that this is not disputed by the Contractor.

4.13 I note the Contractor's statement that "*the government was giving advice for people to not attend with a cold*". However, I have not been provided with any information to support this assertion that this was still the advice during the 2022/2023 financial year. I further note the comment from the Commissioner that with effect from April 2022 dental services resumed as normal.

4.14 The Contractor also makes reference to *"…the shortage of manpower, a situation created by the government's chronic well documented underfunding of dentistry and the woeful value of my contracted UDAs (units of dental activity)".* However, the Contractor has not explained how any shortages specifically impacted on the practice and its ability to deliver the required activity although I do note the minutes of the meeting with the Commissioner make reference to the low UDA rate.

4.15 The Contractor further states "*most of our work is done in the last quarter of the financial year. To what end would a notification in the last quarter go to enable us to fulfill [sic] our contract."* The Contractor is of the view that a Force Majeure would not have assisted them as the Commissioner would not have been able to do anything to alleviate the situation in the last quarter of the financial year. Without the Force Majeure being made there is no way of knowing what the Commissioner might or might not have been able to do in this situation. I therefore take no view on the possibility of the potential outcome if a Force Majeure had been submitted at any point during the year.

4.16 The Commissioner suggests that accepting a lower figure would set precedent and be unfair to other contractors in the same position. In my view, each case should be considered on its own merits taking into account the specific circumstances.

4.17 The Contractor has provided a list of patients, for the entire contract year of 2022/23 which shows, for the nine performers at the practice, where a patient appointment was either moved or cancelled. I note that the total of these, for all performers, equates to 1,396 appointments

over the year, with approximately 780 of these “missed” appointments being as a result of cancellations. In its meeting with the Commissioner, the Contractor claims to have lost 785 hours of appointments including 339 hours in one day. The supporting information provided at 3.17, shows 509 lost hours.

4.18 I note the comment from the Contractor that, given how the Contract works, most of their work is completed in the last quarter. I have considered the information before me and note that there were more cancellations in February (approx. 85) and March (approx. 80) than in other months however, there is a consistency throughout the year of approximately 60 cancellations a month. I also note the volume of appointment ‘movements’ of which there were 112 in February which may have exacerbated the position but it is unclear what any of the ‘movements’ during the year actually entailed.

4.19 I have had regard to information provided by the Contractor, but it does not indicate the reasons for cancellation or movement of appointments.

4.20 I accept that there will be cancellations and movement of appointments and if these occur later in the year, there is greater potential to underperform. In this dispute, these cancellations occurred throughout the year, which is demonstrated in the information provided. However, without any further or comparative data, it is unclear if the rate of cancellation or movement of appointments, compared to other providers, was exceptional. In this regard, in my view, there was a missed opportunity to undertake this exercise which may have resolved this dispute at an earlier stage.

4.21 Separately, I do note the parties have since agreed to vary the contract to reduce the total number of UDAs that the Contractor must provide, which will help to mitigate delivery in the future.

4.22 Whilst I am of the view that the Contractor has not fulfilled their contractual UDAs for the 2022/2023 year and as a result there is money owing to the Commissioner, I am unable to determine what this amount should be. I am satisfied that, should the Contractor be able to provide the reasons for the cancelled appointments, and these are directly applicable to the pandemic, for the relevant patients to the Commissioner within 28 calendar days then the Commissioner must exercise its discretion and consider these circumstances. If the Contractor does not provide the information within the prescribed time limit, the Commissioner can proceed to recover the full amount of £174,816.42.

4.23 I note that the dispute is in relation to the 2022/2023 Year End Reconciliation statement and the comments from the Commissioner that NHS England (East) was the relevant commissioner during this period and not Bedfordshire, Luton and Milton Keynes ICB and that any financial recovery would be returned to NHS England and not the ICB.

4.24 Since 1 April 2023, ICBs have taken on delegated responsibility for the commissioning of primary dental services and have had regard to the NHS England Delegation Agreement which sets out the way in which NHS England has delegated its functions in relation to primary dental services to ICBs. The Delegation Agreement is clear that ICBs have taken on dental service contract management and they must comply with mandated guidance. I note that there are no express provisions regarding how ICBs should manage historic disputes.

4.25 The ICB has responded to this dispute and has also been involved with hosting a meeting between the Contractor and the Commissioner to try to establish a way to resolve this dispute. I am of the view that the ICB is able to continue to liaise with NHS England, as it has done here, in order to review the information set out at 4.22 and, if necessary, to establish a reasonable revised payment schedule to ensure that the monies are repaid in a timely manner which results in a ‘safer’ financial recovery which does not put at risk patient care or dental access.

5 DECISION

5.1 I determine that if the Contractor is able to provide the reasons for the cancelled appointments, and these were directly applicable to the pandemic, for the relevant patients, to the Commissioner within 28 calendar days then the Commissioner must exercise its discretion and consider these circumstances. If the Contractor does not provide the information within the prescribed time limit, the Commissioner can proceed to recover the full amount of £174,816.42.

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

Head of Appeals
NHS Resolution