

21 June 2024

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FILE REF: SHA/26167

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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 to any additional amount of suspension payments, or interest, for the period 26 April 2018 to 5 May 2020.

A copy of this decision is being sent to:

Dr Chaudhry Ali
NHS England

Advise / Resolve / Learn

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FILE REF: SHA/26167**COMMISSIONER:** NHS ENGLANDTel: 0203 928 2000
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1. INTRODUCTION

- 1.1 The above named Appellant has referred the matter for consideration under the National Health Service (Performers Lists) (England) Regulations 2013 ("the Regulations")
- 1.2 The Secretary of State for Health and Social Care has directed that NHS Resolution, the operating name of NHS Litigation Authority, exercise the functions under Regulation 13(5) to (9) on their behalf. Primary Care Appeals discharges that function for NHS Resolution and I, as an authorised officer have made this determination.

2. THE APPEAL

- 2.1 By an email received 27 February 2024 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 8 April 2024 ("**NHS England's Representations**");
 - 2.2.3 the Appellant's representations dated 8 April 2024 ("**Appellant's Representations**"); and
 - 2.2.4 the Appellant's observations dated 29 April 2024 ("**Appellant's Observations**")
 - 2.2.5 NHS England's observations (via its representative Hill Dickinson LLP) dated 29 April 2024 ("**NHS England's Observations**").
- 2.3 The matter relates to the entitlement of a dental practitioner to suspension payments under Regulation 13 of the Regulations and in turn the Secretary of State's Performers List (Suspended Dentists' NHS Earnings) Determination 2015 ("**the 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) Interims 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 determining that the Appellant is not entitled to suspension payments for the period 13 May 2020 – 4 August 2020.
- 3.9 Subsequently, the Appellant appealed to NHS Resolution on these grounds and NHS Resolution issued its decision on 19 September 2023.
- 3.10 On 13 November 2023, the Appellant requested NHS England to reconsider its decision in response to the decision issued by NHS Resolution.
- 3.11 On 30 January 2024 NHS England issued its reconsidered decision ("**Reconsideration**") determining that the Appellant is not entitled to the amount set out in its decision.
- 3.12 Following the Reconsideration, the Appellant has submitted the Notice of Appeal.

Notice of Appeal

- 3.13 "Hereby I appeal against NHS decision to refuse paying the interest on suspension payment made and also the way NHS has calculated suspension payments based on *pensioned* income whereas law clearly states that suspension payment should be calculated on *pensionable* earnings.

NHS has not offered to review its decision but advised to make an appeal to NHS Resolution. Please find attached my appeal against NHS suspension payment refusal by NHSE.

I will be thankful if you please acknowledge the receipt of this email at your earliest convenience."

NHS England's Representations

3.14 "**Background**

1. The Applicant, Dr Chaudhry Ali, appeals against the reconsidered decision of the Respondent, NHS England, as to the amount of his suspension payments, and whether interest should be payable in respect of those suspension payments.

2. NHS England's original decision on the amount of suspension payments as to which Dr Ali is entitled was set out within a letter of 5 September 2019 [R/1/2] and reconsideration of this decision was made by NHS England and confirmed in a letter of 30 January 2024 [R/2/4].

3. It is important to note that this is not Dr Ali's first application to Primary Care Appeals (PCA) in respect of his suspension payments. In summary, Dr Ali previously appealed against NHS England's decision to refuse to pay suspension payments for a specific period, between 13 May 2020 and 4 August 2020 (SHA/26029) (the Previous PCA Appeal). In the Previous Appeal, the PCA determined (the Previous PCA Determination) that Dr Ali was not entitled to suspension payments for the period of 13 May 2020 to 4 August 2020, upholding NHS England's decision and dismissing the appeal. Within that appeal, Dr Ali had also raised other

issues which the PCA declined to determine. This was because Dr Ali had not first requested NHS England to reconsider its decision in respect of such issues, a prerequisite to making an application to the PCA (see Regulation 13(3)-(5) and paragraphs 4.26 to 4.38 of the Previous PCA Determination). Those issues included those which are now the subject of this new appeal, NHS England having reconsidered its decision in respect of such matters in the meantime.

4. For the reasons set out below, NHS England invites the PCA to dismiss this further appeal, confirm that Dr Ali's suspension payments have been calculated correctly, and confirm that interest is not payable in respect of any suspension payments previously paid by NHS England.

Documents

5. 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

6. Regulation 13 (1) states:

During a period of suspension under regulation 12, payments may be made by NHS England to, or in respect of, a Practitioner in accordance with a determination by the Secretary of State.

7. Regulation 13 (3) states:

(3) Where requested by a Practitioner to do so, the Board is to reconsider any decision-

(a) to refuse to make a payment to, or in respect of, the Practitioner under paragraph (1);

(b) as to the amount of a payment to, or in respect of, the Practitioner under paragraph (1); or

(c) in respect of recovery of what the Board considers to be an overpayment under paragraph (2).

8. At all relevant times, the relevant determination by the Secretary of State is the Performers Lists (Suspended Dentists' NHS Earnings) Determination 2015 (the Determination).

9. Paragraph 4(1) of the Determination 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 (or a pro rata amount in the case of part months).

10. Paragraph 2 of the Determination provides the following definitions:

"monthly pensionable earnings" as regards any month, means one twelfth of the earnings that are the pensionable earnings of the dental practitioner from primary dental services for the financial year in which the month falls;

"pensionable earnings" has the same meaning as in paragraph 1 of Schedule 2 to the NHS Pensions Schemes Regulations 1995 (additional definitions used in this Schedule) or, as the case may be, regulation 3.A.1 of the NHS Pensions Schemes Regulations 2008 (interpretation of Part 3: general), and accordingly—

(a) as regards type 1 dental practitioners, means practitioner income, including earnings derived from monthly seniority payments, but taking into account any relevant pensionable earnings ceiling; or

(b) as regards type 2 dental practitioners, means fees or regular payments (including salary or wages) paid to the practitioner by a contractor in respect of

the performance of primary dental services, excluding bonuses and payments to cover expenses or for overtime;

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

11. Paragraph 6 of the Determination states:

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;

...

the Board may make payments on account to, or in respect of, a suspended dentist of amounts that are likely to be payable to, or in respect of, the dentist under this Determination, in appropriate circumstances.

Relevant facts

12. 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/3/7].

13. On 17 April 2018:

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

b. 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/4/8].

14. On 19 July 2019, a letter was sent to Dr Ali outlining his entitlement to suspension payments, in accordance with paragraph 3(1) of the Determination, in respect of each complete calendar month, or part month, for which he is suspended [R/5/10].

15. On 5 September 2019, a letter was sent to Dr Ali with the calculation of Dr Ali's monthly pensionable earnings based upon the information and evidence available, and the amount of suspension payments due [R/1/2].

16. On 13 November 2023, as per Regulation 13(3), Dr Ali requested a reconsidered decision on the calculation of the suspension payments and interest to be paid on all the payments made to Dr Ali [R/6/13]. Subsequently, in accordance with Regulation 13(4), NHS England's reconsideration of the amount of suspension payments was set out in a letter to Dr Ali on 30 January 2024 [R/2/4], upholding of the original calculation.

17. By way of an email by Dr Ali sent on 27 February 2024 to the PCA, Dr Ali now appeals against the "decision to refuse paying interest on suspension payment made and also the way NHS has calculated suspension payments based on pensioned income whereas law clearly states that suspension payment should be calculated based on pensionable earnings".

Response to Dr Ali's appeal

"NHS decision to refuse paying the interest on suspension payment made"

18. Within the Previous PCA Appeal, the PCA declined to determine whether interest was payable on the suspension payments made by NHS England, because this was outside the scope of the appeal (see paragraph 3 above and paragraphs 4.32 and 4.37 of the Previous PCA Determination).

19. However, the PCA stated the following within the Previous PCA Determination:

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...

20. NHS England adopts within this appeal the PCA’s clear and unequivocal finding that there is not any legal basis for interest to be paid on suspension payments.

21. It is noted that, despite the clear and unequivocal finding above, Dr Ali has not provided any argument or evidence as to why he considers why both NHS England and the PCA are wrong in this respect. He did not do so in his reconsideration request to NHS England and has not done so now in this appeal. NHS England considers this is because there is no argument or legal basis to support this.

22. Consequently, NHS England considers that its refusal to pay interest is the only lawful decision NHS England could have reached in the circumstances.

“the way NHS has calculated suspension payments based on pensioned income whereas law clearly states that suspension payment should be calculated based on pensionable earnings”

23. All suspension payments have been calculated and paid in accordance with the Determination and based upon the evidence that Dr Ali previously provided of his monthly pensionable earnings.

24. Under paragraph 4(1) of the Determination, the amount to which Dr Ali was entitled, in respect of each complete calendar month or part month for which he was suspended, was his monthly pensionable earnings (or a pro rata amount in the case of part months), subject to applicable deductions.

25. Under paragraph 1 of the Determination, “monthly pensionable earnings” are defined as, regards any month, one twelfth of the earnings that are pensionable earnings for the financial year in which the month falls.

26. Also under paragraph 1, “pensionable earnings” is defined as having the same meaning within NHS pensions legislation. It is a general principle is that only income from providing NHS services may amount to pensionable earnings for the purposes of the NHS pension scheme. It would be disproportionate to explore the NHS pensions legislation in full, but for example, the NHS Pension Scheme Guide for NHS general dental practitioners published by the BSA states that *“The ‘golden rule’ for a performer is that their NHS pensionable pay should be the same as their agreed net GDS/PDS income however it is arrived at.”*¹ GDS/PDS income relates to services provided under GDS/PDS contracts i.e. NHS services. Earnings from private services are therefore not pensionable earnings for the purposes of the NHS pensions legislation and, therefore, for the purposes of the Determination.

27. Dr Ali was suspended on 17 April 2018, very near the beginning of the 2018/19 financial year, in respect of which Dr Ali’s pensionable earnings for the financial year were unknown. NHS England considered these to be appropriate circumstances in which to make payments on account of what was likely to be payable, in accordance with paragraph 6 of the Determination. NHS England therefore sought to estimate Dr Ali’s typical pensionable earnings within the meaning of the Determination by considering his pensionable earnings during the periods he was working during the previous financial year, 2017/18.

28. For the original calculation of Dr Ali’s suspension payments, NHS England requested and received information from the BSA, who hold details of dental activity in the ‘Compass’ system for each NHS dentist and administer records of performance and payment under GDS/PDS

contracts and administer NHS pensions schemes. Pensionable earnings for the year for individual dentists are submitted by June of the following financial year by the provider and are based on this submission. Significantly, those figures are agreed between the dental performer and the provider.

29. The BSA provided details of Dr Ali's pensionable earnings for the financial year 2017/18. Dr Ali had pensionable earnings of £19,623.27, as detailed in the attachment [R/7/14]. It is crucial to note that this remains the only evidence available to NHS England, and before the PCA, as to Dr Ali's pensionable earnings.

30. Accounting for Dr Ali ceasing work from the end of September 2017, the monthly pensionable earnings were therefore based on dividing £19,632.27 by the six months of work during April to September (inclusive). It was considered that there were no applicable deductions, therefore Dr Ali's monthly suspension payment was calculated to be £3,270.55. NHS England maintains that this is the correct calculation, for the reasons set out in its reconsidered decision and these observations.

31. Dr Ali has submitted the following one item of evidence in view of NHS England's reconsideration of its decision as to the amount of Dr Ali's suspension payments: "Jan-Oct 2017 Oasis Statement" [R/8/15].

32. This document outlines the net amounts Dr Ali received between January to October 2017 from a company called Oasis Dental Care Limited, which is ultimately owned and controlled by BUPA, a well-known private healthcare insurer and provider. This document does not provide sufficient detail on what proportion of this income is for NHS services or what proportion is to be considered as pensionable earnings under the NHS pension scheme. Dr Ali has not provided a detailed payslip or accounts breaking down his earnings whilst working for Oasis Dental Care Limited, he has simply provided a copy of a bank statement that acts to evidence the net amount paid into his bank account by Oasis Dental Care Limited.

33. Furthermore, while Dr Ali makes a valid distinction between pensionable and pensioned earnings, he does not provide any explanation or evidence as to why the evidence relied upon by NHS England does not reflect his pensionable earnings, or what he says his pensionable earnings actually are. It is reiterated that the pensionable earnings figure provided to NHS England by the BSA Compass system should have been agreed between Dr Ali and the provider he was working for. It is submitted that if that amount is in dispute, then it is a matter for Mr Ali to pursue with the provider, not NHS England, and if so this line of enquiry ought to have been pursued several years ago.

34. In respect of Dr Ali's position on this point, the PCA's Previous Determination stated:

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.

35. NHS England submits that Dr Ali has done nothing to address the above. In view of this, and the reasons above, the inescapable conclusion is that Dr Ali has not provided any reasonable or satisfactory evidence to support his appeal, and his appeal must fail.

Conclusion

36. For the reasons set out above, NHS England invites the PCA to dismiss this appeal, confirm that Dr Ali's suspension payments have been calculated correctly, and confirm that interest would is not payable in respect of any suspension payments previously paid by NHS England to Dr Ali."

Appellant's Representations

3.15 **"Background**

1. The Applicant, Mr C Ali, (referred to as Applicant hereafter) was suspended from NHS England (referred to as Respondent hereafter) performer list from 26 April 2018 till [sic] 4 August 2018.
2. In Feb [sic] 2020 Respondent made backdated suspension payments.
3. Respondent calculated suspension payments based on Applicant's *Pensioned* earning instead of using *Pensionable* earning as per NHS England rules.
4. Applicant worked as locum, earning more than pensioned earning thus there seems to be discrepancy between pensioned and pensionable earning.
5. Respondent failed to pay interest on the backdated suspension payments.
6. Attachment 1 NHS England regulations describe suspension payment calculations.

(4) For the purposes of paragraph (3)(b) for calculating the suspended dentist's normal monthly NHS remuneration, the Board must-

(b) determine an amount which, in the Board's view, represents a reasonable amount having regard to the pensionable earnings of the suspended dentist in the most recently available six complete months of data relating to that suspended dentist's earning.

The wording of the regulation is of paramount importance as it appears that by mentioning Pensionable instead of Pensioned earning writer has deliberately tried to include people who may have less pension deducted and/or opted out of NHS pensions.

7. Attachment 2 NHS Resolution document, describe interest payment regulations.
8. Attachment 3 documents from practice shows that Applicant's pensions were not properly deducted.

Appeal:

1. The Applicant, appeals against the decision of the Respondent, NHS England, to calculate suspension payments on the bases [sic] of Pensioned earning instead of Pensionable earnings for the period of 26 April 2018 until 5 May 2020.
2. The Applicant, appeals against the decision of the Respondent, NHS England, to refuse to pay interest payments for the period of 26 April 2018 until Feb 2020.
3. Applicant also raises concerns about unreasonable behaviour of Respondent."

NHS England's Observations

- 3.16 "1. On 11 April 2024 the PCA provided Dr Ali's representations and invited NHS England to make observations on these.
2. NHS England has no observations to make on Dr Ali's representations. NHS England's representations of 8 April 2024 already address all of the points raised by Dr Ali in his appeal.
3. In respect of Dr Ali's request for interest on payments already made by NHS England, given:
 - a) NHS England's agreement with, and reliance on, the PCA's previous finding that "if the Appellant is seeking interest on the payments already made, I cannot see there is any legal basis for this to be granted" (SHA/26029, para. 4.36);

b) Dr Ali's failure to provide any argument or evidence as to why this finding is wrong, whether at the reconsideration stage, in his appeal application, or his representations; and

c) The need to deal with this appeal justly and proportionately;

NHS England makes no further submissions on this matter.

4. However, should the PCA, contrary to the indication given previously, determine that there is or may be a legal basis to direct NHS England to pay interest on the payments already made, NHS England respectfully requests a further opportunity to make submissions on the issue of interest once the remainder of the issues raised by Dr Ali have been determined. NHS England submits that this would be the most proportionate approach to the issues in the appeal, given the points raised above, and also that interest can only be fully and properly addressed once NHS England's full liability to Dr Ali for England's position that Dr Ali's suspension payments have been calculated and paid correctly and that he neither sets out, nor has, any legal basis to claim interest."

Appellant's Observations

3.17 "These observations are to address several inaccuracies and misleading statements made by the Respondent in their response to the above matter.

Firstly, it is important to clarify that contrary to the Respondent's assertion, all relevant paperwork was posted to Ms. Karen Crossland, and the last communication was sent to her in October 2023. However, the Applicant was later informed by the Respondent that Ms. Karen Crossland was no longer working for them.

At this stage, no further documents are allowed to be submitted. Thus, it is kindly requested that without delving into the specifics of x or y figures, NHS Resolution should decide in principle that:

1. Interest is payable by the Respondent on the backdated payments made for the period of April 2018 - February 2020.

2. Suspension payments should be calculated based on the Applicant's Pensionable earnings and not on the deducted Pensioned earnings.

3. The Respondent should be reprimanded for their unreasonable behavior [sic].

Interest Payments:

The Respondent stated in their response that...

"19. However, the PCA stated the following within the Previous PCA Determination:

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...

20. NHS England adopts within this appeal the PCA's clear and unequivocal finding that there is not any legal basis for interest to be paid on suspension payments"

It is the Applicant's position that this is an incorrect interpretation of the PCA comment. The Respondent made backdated payments in 2020, and even after the PCA determination in 2019, it took many months and made unfair delays to award the payment. As per previous PCA decisions involving similar cases, the Respondent is obliged to award interest on the backdated payments.

Suspension Payment Calculation:

The Respondent stated in their response that...

"28. For the original calculation of Dr Ali's suspension payments, NHS England requested and received information from the BSA, who hold details of dental activity in the 'Compass' system for each NHS dentist and administer records of performance and payment under GDS/PDS contracts and administered NHS pensions schemes. Pensionable earnings for the year for individual dentists are submitted by June of the following financial year by the provider and are based on this submission. Significantly, those figures are agreed between the dental performer and the provider.

29. The BSA provided details of Dr Ali's pensionable earnings for the financial year 2017/18. Dr Ali had pensionable earnings of £19,623.27, as detailed in the attachment [R/7/14]. It is crucial to note that this remains the only evidence available to NHS England, and before the PCA, as to Dr Ali's pensionable earnings.

32. This document outlines the net amounts Dr Ali received between January to October 2017 from a company called Oasis Dental Care Limited, which is ultimately owned and controlled by BUPA, a well-known private healthcare insurer and provider. This document does not provide sufficient detail on what proportion of this income is for NHS services or what proportion is to be considered as pensionable earnings under the NHS pension scheme. Dr Ali has not provided a detailed payslip or accounts breaking down his earnings whilst working for Oasis Dental Care Limited, he has simply provided a copy of a bank statement that acts to evidence the net amount paid into his bank account by Oasis Dental Care Limited.

33. Furthermore, while Dr Ali makes a valid distinction between pensionable and pensioned earnings, he does not provide any explanation or evidence as to why the evidence relied upon by NHS England does not reflect his pensionable earnings, or what he says his pensionable earnings actually are. It is reiterated that the pensionable earnings figure provided to NHS England by the BSA Compass system should have been agreed between Dr Ali and the provider he was working for. It is submitted that if that amount is in dispute, then it is a matter for Mr Ali to pursue with the provider, not NHS England, and if so this line of enquiry ought to have been pursued several years ago.

34. In respect of Dr Ali's position on this point, the PCA's Previous Determination stated:

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 versus 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.

35. NHS England submits that Dr Ali has done nothing to address the above. In view of this, and the reasons above, the inescapable conclusion is that Dr Ali has not provided any reasonable or satisfactory evidence to support his appeal, and his appeal must fail."

It is fiercely contested that the Applicant did not submit relevant documents and/or proof of remuneration received for providing NHS services, and/or evidence of the amounts of payments made during the period of suspension.

Evidence of what the pensionable versus pensioned amount should be, and details of the actual error were all posted to Ms. Karen Crossland.

Furthermore, the Respondent is assuming, contrary to fact, that the Applicant did not pursue the correct pension deductions with the Provider. It was actively pursued by the Applicant, but the Provider refused to help. Evidence of it was posted to Ms Karen Crossland. Unfortunately there is no viable mechanism available for Applicant to force Provider to come to mutually agreed pension sum.

Moreover, the Respondent's argument is absurd, stating that only a sum agreed upon between the Applicant and Provider should be relied on for the calculation of Pensionable earnings. This argument becomes redundant for someone opting out of NHS pensions and/or for the sake of contractors where little or no pensions were deducted on the BSA-COMPASS system.

This is also one of the bases for this appeal, that NHS resolution should decide whether deducted Pensioned earnings available through BSA-COMPASS or Pensionable earnings should be relied on for the suspension payment calculation.

Respondent's Unreasonable Behaviour:

It is regrettable that the Respondent has not only failed to acknowledge and present the evidence that was sent to it but is blatantly denying its existence.

Having endured relentless and flagrant acts of injustice perpetrated by the Respondent, the Applicant is profoundly dismayed by the colossal waste of energy and time expended in diligently providing services to an entity that has demonstrated a blatant disregard for fairness and decency. This egregious mistreatment has not only resulted in profound frustration and disillusionment but has also undermined the Applicant's trust in the integrity of the system and has inflicted immeasurable emotional distress.

It is worth noting that this is not an isolated incident. The Respondent has a history of denying the existence of crucial evidence, as exemplified by the loss of Ms. CW's original statement in 2017 by the Respondent which was pivotal in demonstrating Applicants innocence and preventing unjust persecution.

Additionally, the Respondent initially denied the receipt of original letter from bank with account details in 2019, only acknowledging them under persistent pressure. This pattern of behavior [sic] erodes trust and integrity.

Appeal:

It's kindly requested that this dispute be resolved promptly, considering the delays already experienced. Any unresolved issues needs to be included in a forthcoming high court case seeking compensation for damages incurred from 13th May 2020 to 4th August 2020, thus a prompt attention to this matter is highly appreciated."

4. CONSIDERATION

- 4.1 Regulation 13(5) of the Regulations enable a practitioner to appeal NHS England's reconsideration of a decision relating to the practitioner's eligibility for suspension payments.
- 4.2 The Notice of Appeal, as per the Appellant's Representations is in respect of three decisions made by NHS England:
 - 4.2.1 The first is in relation to the calculation of the amount of suspension payments made to the Appellant for the period of 26 April 2018 until 5 May 2020;
 - 4.2.2 The second is in relation to NHS England's refusal to pay interest on said payments; and
 - 4.2.3 The third concerns the Appellant's allegations of unreasonable behaviour by NHS England.
- 4.3 I will consider each of these in turn.

Calculation of suspension payments

- 4.4 There is no dispute that the Appellant was entitled to suspension payments for the period of 26 April 2018 until 5 May 2020.
- 4.5 The Appellant has made very limited Representations and Observations in relation to this point. The main contention, as stated, is that NHS England has not properly applied paragraph 4(3) of the Performers Lists (Suspended Dentists' NHS Earnings) Determination 2015 (the "**Determination**"), on the basis that it used "*Pensioned earning* [sic] *instead of Pensionable earnings*".
- 4.6 Paragraph 4 of the Determination states:
- (4) For the purposes of paragraph (3)(b) for calculating the suspended dentist's normal monthly NHS remuneration, the Board must-*
- (a) have regard only to remuneration relating to the performance by the suspended dentist of primary dental services provided under Part 5 of the 2006 Act (dental services); and*
- (b) determine an amount which, in the Board's view, represents a reasonable amount having regard to the pensionable earnings of the suspended dentist in the most recently available six complete months of data relating to that suspended dentist's earning.*
- 4.7 The Appellant has not expanded upon what it believes to be the definition of "*Pensioned*" income as opposed to "*Pensionable*". I note that "*pensionable earnings*" is a defined term in the Determination and that it is defined by reference to the NHS Pensions Schemes Regulations 2008 (or 1995 as the case may be).
- 4.8 Hill Dickinson, on behalf of NHS England, has stated that the payments were in fact calculated by reference to pensionable earnings, as defined in the Determination. This is set out at paragraph 23 of its Representations. I have also been provided with an extract from the NHS BSA systems which demonstrate that, as stated by NHS England, £19,623.27 was paid to the Appellant for the months April to September 2017 with no other record of pensionable income having been received by the NHS BSA.
- 4.9 I initially consider that, in the absence of any specific statements by the Appellant as to why this process is incorrect, that this meets the criteria set out in paragraph 4(b) of the Determination, as this represents the most recently available six complete months of data relating to the Appellant's earnings. The Appellant has not indicated why this figure would be considered "*pensioned*" earnings.
- 4.10 I note that the Appellant has provided an email dated 13 August 2020 from an unidentified individual, referred to as "Attachment 3", that states:
- "I have looked over your earnings [REDACTED]
- Rustington P0429.
- You completed 260.2 UDA's unfortunately the practice overdelivered on the contract and the NPE was capped for all Associates. As we have already declared the maximum NPE Available we are unable to submit a higher value.
- [REDACTED]."
- 4.11 The Appellant has stated that this shows that pensions were not properly deducted. No explanation has been provided as to how this brief statement demonstrates this. As alluded to in NHS England's Representations, I have considered this document before and indicated that, due to the heavy redactions and lack of context, it is virtually impossible for me to understand what this evidence is supposed to demonstrate.

- 4.12 I have considered this email at length and I have a number of reasons as to why it does not demonstrate any problems with NHS England's stated methodology for calculating suspension payments due to the Appellant.
- 4.13 Firstly, in isolation it appears that 260.2 UDA's were, at some point prior to 2020 completed by the Appellant and that this was not submitted as "*NPE was capped*". However, in absence of any explanation by the Appellant, I am unsure how this demonstrates that the UDA's were "*pensionable income*" as per the definition in the Determination. I note that there is reference to taking into account any relevant pensionable earnings ceilings in the Determination, however, whether any ceiling applies or whether the amount indicated represents a ceiling, is not explained.
- 4.14 Secondly, it is not clear if this relates to the period from April to September of 2017, used by NHS England to calculate pensionable income. NHS England has provided a bank account statement previously provided by the Appellant in relation to its claims which show multiple payments, for different amounts, made to the Appellant by Oasis Dental Care Ltd between January to October 2017. These hours could have been completed outside of the relevant time used by NHS England to calculate the suspension payments.
- 4.15 I also note that NHS England indicates that Oasis Dental Care Ltd is owned by Bupa and provides private services. In relation to amounts received by the Appellant from Oasis Dental Care, the Appellant would also have to demonstrate that this money was received in relation to the performance of primary dental services as per paragraph 4(a) of the Determination. I consider that the Appellant has not demonstrated this.
- 4.16 Finally, I note the lack of specificity in relation to the statements made by the Appellant. I shall, therefore, refer to my previous comment in relation to the determination made in SHA/26029:
- "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."*
- 4.17 Without this information, I cannot see how I can determine this point. In order to determine that NHS England was incorrect, it is necessary to understand what the correct figure would be and why that figure should be considered to be correct.
- 4.18 The Appellant alludes to further documentation which demonstrates the pensionable earnings and details of the error which had been provided to NHS England but that NHS England is now "*denying its existence*". In the absence of the Appellant providing the emails referred to by the Appellant, or any evidence provided by the Appellant to support this allegation, it is difficult for me to consider this. If the Appellant wanted such evidence to be considered as part of this Appeal, I would have expected it to be submitted to me by the Appellant alongside its Representations. I have not been provided with this evidence.
- 4.19 The Appellant has invited me, in principle, to determine that suspension payments should be calculated based on pensionable earnings. It is not in dispute that pensionable earnings are the basis for determining suspension payments. This is clearly stated in the Determination. NHS England has clearly set out why its calculations accord with the definition of pensionable earnings, as defined in the Determination. I do not consider that the Appellant has demonstrated any error in this calculation or why the figures provided by the NHS BSA do not reflect his pensionable income, or what the Appellant considers the correct pensionable income to be and why. I therefore determine, due to the lack of arguments or evidence to the contrary that, NHS England correctly calculated the Appellant's suspension payments in accordance with the Determination.
- 4.20 I also note that the Appellant has requested that I decide whether "*Pensioned earnings*" available via BSA-COMPASS or "*Personable earnings*" should be relied upon. I do not consider that this is an appropriate determination to make. In relation to the evidence and statements made in this appeal, I consider that it is appropriate for me to determine that the amount indicated by NHS England demonstrates pensionable earnings, as per the definition

contained in the Determination. As I have stated above, I am not clear on what amount the Appellant considers to be "*pensioned*" as the Appellant has not provided an explanation.

- 4.21 As indicated earlier in this determination, the Appellant's entitlement to suspension payments from 26 April 2018 to 5 May 2020 is not disputed by either party but the Appellant argues that interest payment should have been paid on the payments made by NHS England.
- 4.22 The Appellant has made very limited statements in regard to this point. I do note that the Appellant has provided NHS Resolution's "Interim approach to awarding Interest" document which relates to how interest should be considered during primary care appeals.
- 4.23 I start from the general principle which I set out in SHA/26029 that there is no entitlement to interest on suspension payments when they are made by NHS England as part of its regular process following application of the Regulations and the Determination. The suspension payments made to the Appellant were made following a PCA determination in 2019, SHA/19950. No finding of interest was made in that determination which predated the taking effect of NHS Resolution's "Interim approach to awarding Interest". I cannot now re-open that finding.
- 4.24 If, however, I determine in this appeal that NHS England should pay the Appellant more than was originally paid by NHS England, then, in accordance with NHS Resolution's "Interim approach to awarding Interest" document, it is open to me (but not required of me) to decide that awarding interest is appropriate. One of the guiding principles set out in that document states that NHS Resolution will recognise the opportunity cost of loss of access to funds. I therefore consider that interest would only be appropriate on the amount which the Appellant had a loss of access to – in other words interest would only be appropriate on the amount representing the difference between the original amount already paid to the Appellant and the new amount.
- 4.25 As I have determined that the amount already paid by NHS England is correct, there is no additional amount due to the Appellant on which I can determine interest should be paid.
- 4.26 I therefore determine that interest is not awarded on the suspension payments already made.
- 4.27 The Appellant has raised concerns about the unreasonable behaviour of NHS England in relation to this appeal. I note that a number of these issues relate to evidence which the Appellant alleges is being denied and withheld. The Appellant has not produced any evidence to support that it is being withheld.
- 4.28 I consider that the behaviour of NHS England is outside of the scope of Regulation 13(5) which relates purely to the determining of suspension payments. I therefore make no determination on this point.

5. DETERMINATION

- 5.1 I determine that the Appellant is not entitled to any additional amount of suspension payments, or interest, for the period 26 April 2018 to 5 May 2020.

Head of Appeals
NHS Resolution