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24 June 2024

FILE REF: **SHA/26194**

DECISION MAKING BODY: **NHS ENGLAND & # INTEGRATED CARE BOARD ("THE COMMISSIONER")**

GDS CONTRACTOR: **# ("THE CONTRACTOR")**

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

RE: **APPLICATION FOR DISPUTE RESOLUTION**

1 Outcome

1.1 If not already recovered, I determine that the Commissioner can proceed to recover the full amount of £11,319.75 owed to them in respect of the reduced variable costs incurred by the Contractor for the financial year 2021/2022.

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 RESOLUTION**

1 INTRODUCTION

1.1 The above Contractor referred the dispute in relation to its General Dental Services ("GDS") contract for dispute resolution under the provisions 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 BACKGROUND

2.1 I provided a final determination on a preliminary matter dated 3 April 2024, in which I concluded that local dispute resolution had been exhausted and would therefore proceed to consider the substantive application for dispute resolution. I indicated that parties should provide their representations on the substantive matter as set out in the Contractor's original application for dispute resolution of 5 December 2023.

2.2 Each party was provided with a copy of the other party's further submissions and provided with the opportunity to make any final observations. All submissions received have been shared with all parties.

2.3 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:

2.3.1 Email of 5 December 2023, with enclosures, from the Contractor;

2.3.2 Email of 8 January 2024 from the Contractor;

2.3.3 Email of 15 January 2024 from the Contractor;

2.3.4 Email of 1 May 2024, with enclosures, from the Contractor;

2.3.5 Email of 7 May 2024, with enclosures, from the Commissioner;

2.3.6 Email of 10 May 2024 from the Contractor; and

2.3.7 Email of 14 May 2024, with enclosures, from the Contractor.

3 PARTIES SUBMISSIONS

The Contractor's application

In an email of 5 December 2023, the Contractor stated:

3.1 "Thank you for talking to me on the telephone yesterday. There are a number of attachments to this email, and I will refer to them throughout the text. As we discussed I have tried to get a primary appeal heard but have been completely unable to even get a response, never mind a decision and [ENCLOSURE DB1 dated 12th October 2022] gives you an idea about what I have been up against.

3.2 [ENCLOSURE DB 2 dated 14th October 2022] simply confirms the ignorance of the senior executive [DB], and I am writing to the Chief Dental Officer to lodge a formal complaint about his behaviour towards me. I do believe this communication does support the fact that I had an NHS Contract, and therefore should have been able to go to Appeal.

3.3 [ENCLOSURE DB3 dated 9th November 2022] having spoken to the CDO who informed me about the appeals process in itself asks the question of [DB] about not bothering to inform me!

3.4 [ENCLOSURE DB4 dated 10th December 22] shows quite clearly I am still on the contract despite having retired and handed over the practice on 26th June, and I am now still liable for 50% of [MB's] £45K deficit. Had he died in an accident at this time I would have been wholly responsible for that debt despite being 6 months retired.

3.5 [ENCLOSURE DB5 dated 1st Feb 2023] I think sums it all up. I have asked for Stage 1, and I am asking for the relevant documents, but still nothing.

3.6 As you can gather I am extremely unhappy at the way I have been treated particularly by the local NHS dental team, headed by [DB].

3.7 I am disputing the withholding for the following reasons.

3.7.1 [ENCLOSURE BSA1-BSA4] The letter from NHSBSA indicating the withholding was written on the 28th of July 2022, which was 4 weeks after my retirement on June 28th, and was seen from the first time as an attachment to an email sent by [JG] on the 3rd of January 2023. As I am no longer in the practice I have seen no sight of this letter, and therefore was completely unprepared for the personal difficulties it would create for me. For this reason alone I dispute the withholding as I believe this was unfair as it was written after my retirement.

3.7.2 I believe the withholding to be unfair and unjust on a recently retired practitioner such as myself, who is now dependent on a pension. Quite different if I was still earning, and I do not believe the Provider Assurance Dental at NHSBSA intended this to apply to a 78 year old retired practitioner after 45 years as an NHS dentist. A different matter altogether had I handed back my NHS contract to become a private practitioner. For this reason alone I dispute the withholding.

3.7.3 Our requirement throughout the year 21-22 was to achieve a minimum level in each Quarter, and this was achieved but not easily. To have followed the Standard Operating Procedures as laid down by the CDO which we did to the letter made it virtually impossible to have achieved 100%. Until the 28th of July letter in 2022 [ENCLOSURE BSA1-BSA4] I had no idea there would be a withholding. For this reason I dispute the withholding.

3.7.4 As far as I am aware GP's have not had a withholding. Our local GP surgery did not return to normal working for well over a year. For this reason, I dispute the withholding.

3.7.5 As the attached photographs shows my severe arthritis in my hands and wrists, and the letter from the consultant indicates I was in severe pain and difficulty in working at all. I continued because NHS dentistry mattered a great deal to me, and as you are well aware at that time in West Norfolk I was almost alone in my support of NHS dentistry. I continued working in pain until I could get my contract taken on, which I did with [Mr MB]. For this reason I dispute the withholding as it falls within the label of exceptional circumstances due to COVID. The fact that I did not use my hands between March and June during the lockdown significantly increased the obvious incapacity in my hands. The consultant's letter and the photographs are sufficient evidence to support this, plus my age.

3.8 I am asking for your support in my case to the extent I want you allow the second appeal stage under the circumstances rather forced upon me. I hope you can find in my favour and have the sum of £11,319.75 refunded to me, without going through the primary appeal which as I have demonstrated has been made unavailable to me."

Representations

The Commissioner's representations

3.9 In an email of 7 May the Commissioner stated:

3.9.1 "We are happy as a Board to have [J] contribution and observations on the case.

3.9.2 [J] has provided sufficient evidence and clarity regarding [the Contractor]'s case.

3.9.3 Please see details of observations below. Relevant documents requested enclosed.

3.9.4 We have considered all the information from [the Contractor] in relation to his appeal for reimbursement of the Chief Dental officer cost adjustment.

3.9.5 [The Contractor] appears to believe the charge is against under-performance. This is not the case. The charge/debt is not related to underperformance rather it is an adjustment charge recovery. The practice received 100% funding whilst operation under reduced targets set nationally for all contract holders by the chief dental officer. (letter attached).

3.9.6 The financial recovery relates to the financial year 2021/2022 (1 April 21- 31 Mar 22) – The recovery was put on Compass by the BSA for the October, November and December 2022 schedules (11319.75 divided x 3 instalments) total £11319.75 as detailed in the attached letter dated 28 July 2022 sent to both [the Contractor] and [MB] who would have been in partnership at this time (since 25 May 2022).

3.9.7 Please see the 2nd attached CV which details the date [Mr B] became a partner with [the Contractor] signed 25 May 2022 effective from 1 May 2022.

3.9.8 This debt relates to the financial year 2021/2022 (1 April 2021- 31 Mar 2022) therefore is the sole responsibility of [the Contractor] as [the Contractor] was the named contract holder for the specific financial year and received 100% funding throughout the year

while on reduced targets. This charge was implemented by the Chief dental officer for the reduced costs within the 21/22 financial year.

"Your contract has recorded activity that exceeded the performance threshold in all time period but is below 100% of annual contracted activity:

- *therefore, your end of year position is subject to variable adjuments [sic] only which will be recovered in three instalments. The first of which will be from your scheduled Compass payment on 1 October 2022 (September schedule).*

3.9.9 The debt is with the contract therefore this is a dispute that the legal representatives should have dealt with at the time of the provider transfer. [The Contractor] held the contract in his sole name when the contractual 100% payments were made. This dispute requires resolution between [the Contractor] and [Mr B]. The year-end data becomes available in June each year and then the BSA produce the letters and published on 28/7/2022. Since [the Contractor] received the 100% funding, he is responsible for repaying it to [Mr B]. The debt recovery was applied according to the contractual schedules by the BSA, at the time when [Mr B] was the contract holder.

3.9.10 A dental contract can only be amended following CQC registration - (attached) this caused some delays in the process of [the Contractor]'s separation from the contract with [Mr B].

3.9.11 Although [the Contractor] complaint [sic] that he requested partnership changes (handing back his contract) and his intentions on retirement in (as mentioned 26th June 2022), the attached the contract variation wasn't signed by the providers until late January 2023 (CV attached) following the receipt of the new CQC registration, therefore he was in partnership with [Mr B] until 31 January 2023.

3.9.12 We are unable to comment on his compliant [sic] against NHSE behaviour."

The Contractor's representations

3.10 In an email of 8 January 2024, the Contractor stated:

3.10.1 "Thank you for your email, and attached letters.

3.10.2 It seems to me the DMB emails just about sum up the difficulties I have had dealing with the authorities.

3.10.3 I can do little more at this end, having now been retired from my practice some 18 months so the chances of finding my original contract are zero. NHSE do however acknowledge there was a contract.

3.10.4 To state that local dispute resolution has not taken place is an understatement when you read [JG's] letter. [JG] is only concerned about CQC and whether or not [M] could send in FP17's.

3.10.5 Whether we delayed in some way has nothing whatsoever to do with whether or not I had a contract.

3.10.6 As I have written to you before, these people have no interest in the appeal, all they seem capable of doing is to waffle about matters that are irrelevant to my appeal, and not the primary appeal itself."

3.11 In an email of 1 May 2024 the Contractor stated:

3.11.1 "May I respond to the letter attached to this letter. I am still incensed that [JG] has been granted more time to prepare. I could understand if this case had been brought

even three months ago. This case has been meandering on since 2022, almost two years ago. It is obvious from all the correspondence I sent previously that in all my dealings with them they have delayed, and delayed, and obviously never wanted any kind of appeal.

3.11.2 I think it is unfair, and you should be able to see that. Procrastination is what they are all about, and it has been like that since day 1, and it is all they are doing now.

3.11.3 I am not blaming you or your upline, but surely you can see my point. I am left feeling there is bias in favour of the NHS management, and I regret to say I will not let this rest until fairness is seen to be done.

3.11.4 PS Did I not send you a series of communications from NHSE and to NHSE as well.

3.11.5 Part of the contract I was still jointly liable

3.11.6 I'm going to send them again just in case. I also wish to re-empasise [sic] the fact that in late 22 [DB] told me as part of the contract I was still jointly liable for [M]'s debts. however on the 12th of October he said as I was no longer part to the contract I am unable to discuss further with you.

3.11.7 On 20th dec 22 I receive a communication stating my responsibility for the debt yet [DB] in October didn't know I was still on the contract, I suspect due to his departments incompetence.

3.11.8 He also apparently didn't know about the appeals process or he deliberately refused to tell me in the hope I would go away. total dereliction of his duty.

3.11.9 The letter informing me of my liability to make up the shortfall was written after I retired so I had no warning of this which is unfair.

3.11.10 I don't apologise for writing this in capitals and I am sure you have already had this, but I am just so angry!!"

Observations

The Commissioner did not make any observations on the Contractor's representations.

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

3.12 In an email of 14 May 2024, the Contractor stated:

3.12.1 "Thank you for all the information you have sent across. My goodness doesn't the Civil Service produce a huge amount of paper. I will endeavour to comment on the points that in my opinion are incorrect in the email from the # ICB.

3.12.2 I have had all of their information for some time, so I do NOT feel, and even more so than before that they needed the retrospective extension. They have not produced anything new.

3.12.3 I may have initially believed the charge is against underperformance but was slowly made to understand it was not. It was however not very well explained at the time, in fact not well at all because I didn't believe the NHS could be so callous. Fine if we had abandoned the NHS as so many have done, but to pursue a retired NHS dentist who had been loyal for over 40 years in his late 70's could almost be described as vindictive.

3.12.4 The 2021/22 Year End reconciliation letter – 2054000001, was as you can see dated 28/7/2022. This was one month after my retirement date and as you can see this letter

was addressed to [the Contractor] and [MB], at the dental surgery which has its own entrance and is totally separate from the house, so I had no sight of this letter, and indeed knew nothing about it until [M] contacted me when the first payment was taken in the October.

3.12.5 Firstly, how on earth being new to the NHS could [M] understand the importance of the contents of the letter!! I have enough trouble understanding the mathematics of NHSBSA schedules after 40+ years, what chance did he have after four weeks. I see now I was given the opportunity to respond and plead my case but as I was never in receipt of the letter which was addressed to the surgery. THIS IS MANIFESTLY UNFAIR.

3.12.6 I understand the reasons given for the necessity to charge me, but I would make the following comments.

3.12.6.1 The x-rays and photographs show the condition of my hands after lockdown, and the letter from the consultant orthopaedic consultant confirm the deterioration, due to the time away from the surgery when I wasn't using my hands. As an irrelevant point the condition of my hands two years down the road makes even handling cutlery difficult.

3.12.6.2 It made it impossible to keep up the work rate required to fulfil the contract. I continued to work whilst trying to ensure I sold the practice to an NHS dentist. After 47 years as an NHS dentist in Norfolk, even when my colleagues were deserting the sinking ship I continued to run my NHS practice. I worked 48 weeks a year 21-22 and you already have the explanation on file about my inability sent in the downloads after lockdown to work at the pace I did before. I trust these will be referred to.

3.12.6.3 There is nothing I can see anywhere where a financial credit has been given for what we did during lockdown to help our patients. Whilst I am fortunate to work within my home the records at NHSBSA will bear out the huge number of patients contacted, reassured, issued prescriptions amongst other things, but no financial credit given for the costs of heating, electricity, and telephone in the practice.

3.12.6.4 On return after lockdown practices were ordered by NHSE to purchase equipment to reduce the risks, and the procedures that we were required to follow for many months [SOP] They simply did not allow us to function at anything like full capacity. In my practice we have one corridor and one door in and out. The SOP's meant staggering the arrival of patients who had to wait outside in their cars so they could come in after the previous patient had left.

3.12.6.5 This went on for many months before the rules were relaxed. Obviously, that made keeping up our work rate without bending the rules impossible. To effectively then fine us for doing our best in difficult circumstances seems very hard.

3.12.7 If my problem had been Long Covid, would there have been special dispensation. I believe the deterioration of my hands should come under that same heading.

3.12.8 If as would appear I was still on the contract at the end of October 22 why was I not in a position to see the contract value on the schedules received by [Mr B]? Would you not feel that would have been fair?

3.12.9 I forgot of course [DB] would respond to one of my many emails [see document DB1] where on the 22nd of October 2022 he states '*as you are no longer on the contract I am unable to discuss further with you*'

3.12.10 Then his email of [DB2] dated 14th October says we are both still on the contract, confirmed by the email [DB4] dated 30th of December 22 telling me my contract will be in negative payment position. [DB] holds a very senior position in management, yet he doesn't know I was still on the contract. This email placed me under an enormous amount of pressure as you can imagine, not to mention my wife [J]. Had [M] been seriously injured, or tragically died I, despite being retired, would have been totally responsible for his debts as technically due to incompetence I believe at CQC I was still in the partnership with [M]. That is a terrifying prospect as due to [M]'s ignorance of sending in his FP 17's I believe the negative schedule was around £100,000. This position was wholly due to management incompetence at NHSE, headed by [DB].

3.12.11 [DB] has tried to place the blame on [M] and I for not completing the paperwork until 2023. My solicitor has been contacted and he also believes the blame lies with the buyer's solicitor but not with me. I find it unbelievable that [DB] made no attempt to move the process on, but he and his department have been dragging their heels over this now for over 18 months. To even ask for more time, when he has staff to do this for him. I must fight my case on my own!

3.12.12 . There is no mention of the appeal process in any of [DB] emails. I have to ask why not? Is it ignorance? I would hope not, but have to wonder. It seems almost unbelievable that the Chief Dental Officer had to ring me after I wrote to complain about how I was being treated to inform me of my rights. Now you may feel this is out with the rules to bring this point up, but it is not only very relevant, but crucial when taken alongside the dates of the letters, and the crucial email where [DB] tells me I am no longer on the contract when I was!!

3.12.13 10. I am concerned that [JG] feels I retired due to ill health. She needs to get her facts right. My doctor's surgery is the [x] Medical Practice, and they will keep her right. I retired for two reasons.

3.12.13.1 The condition of my hands as confirmed by my orthopaedic surgeon

3.12.13.2 The fact that I had just turned 78, which is time enough for any dental practitioner who has given 54 years of his life to a profession he loved. I did not retire on the grounds of ill health, that is frankly insulting. In fact my wife and I spent a lot of our time post lockdown interviewing dentists before choosing [M].

3.12.14 Paragraph 2 in [JG's] email to you contains some inaccuracies.

3.12.15 [M] and I did not fail to send the CQC registration. Indeed we asked several times for it. Quite interesting that [M]'s brother recently qualified waited for a ridiculously long time for his documentation, and that was not from want of trying. It is more than likely CQC were tardy and if it was missing why did they wait seven months before getting it done?

3.12.16 I did not take on a partner in [M]. I sold the practice and he came in and took over. If as they insist we were still in partnership why was I not in receipt of at least the paperwork about the NHSBSA schedules. I wasn't.

To Summarise:

3.12.17 the letter informing me of the NHSBSA decision was written in July 2022 after I had retired and was sent to the surgery and not to me. I had no income then being on a pension to pay this debt, and no time to plan for this eventuality [DB] chose to ignore the fact I was still on the contract and to find it necessary not to tell me about the appeals process. this is unfair and negligent.

3.12.18 I have been placed under great stress over this period. Not knowing about the debt and not knowing how it was to be covered. That is unacceptable when as a dentist I have devoted a huge part of my life to the NHS in #."

4 CONSIDERATION

4.1 I note the comments in the representations from the Contractor with regard to the "appeal" process, alleging that they were not aware of the initial local dispute resolution process and that they had not been informed of this by the Commissioner.

4.2 I am mindful that, as a preliminary matter, I first considered that it was necessary to seek representations on the question of local dispute resolution and that these were sought from both parties.

4.3 Based on the information that was provided at the time, I was of the view that local dispute resolution had been exhausted and that referring the matter back for local dispute resolution to be further carried out would be fruitless given the position that the Contractor has taken towards the Commissioner. I was of the view that accepting the substantive application for dispute resolution would not prejudice either party as the Primary Care Appeals service is an independent, appellate body.

4.4 Given that I have already made a final determination in respect of the preliminary matter of whether or not local dispute resolution had been carried out, I will make no further reference to any of the points raised by the Contractor regarding this.

4.5 I will therefore proceed to consider the substantive application for dispute resolution as set out in the Contractor's email of 5 December 2023 and restrict my consideration to the substantive matters only.

4.6 I have not been provided with a copy of the Contract, however there still remains no dispute between the parties that the Contractor held a Standard General Dental Services Contract dated 1 April 2006. Further, whilst the parties make reference to the Contract variation, there is no dispute between the parties that the variation, which has been signed by all parties, took effect from 13 January 2023.

4.7 I note that the dispute is with regard to a withholding which NHS BSA, on behalf of the Commissioner, applied to the year-end reconciliation for the 2021/2022 financial year.

4.8 I am of the view that the Contractor was a party to the Contract at the time for which the 2021/2022 year end reconciliation statement refers.

4.9 The Year-End reconciliation statement was sent to the Contractor in a letter of 28 July 2022 and was addressed to both of the partners of the practice, as at this time, [the Contractor] was still a party to the Contract and the variation to remove him had not yet been submitted or taken effect.

4.10 I note the comments from the Contractor with regard to not being aware of the Year-End reconciliation statement as it was sent to the surgery address and further that the new dentist would not have been aware of the importance of the letter. Whilst I accept that a new dentist in post may not be aware of the importance of a letter, this is not, in my view, a reason that the Contractor can rely on especially as at the time he was still a party to the Contract and further that the period in question relates to a period when he was the sole practitioner and contract holder.

4.11 I note that the Year-End reconciliation letter of 28 July 2022 states:

"Period 1 – 1 April to 30 September 2021

…

Where the performance threshold has been met, an adjustment of 16.75% will be applied to the activity not delivered to take into account the reduced variable costs incurred.

Period 2 – 1 October to 31 December 2021

…

Where the performance threshold has been met, an adjustment of 12.75% will be applied to the activity not delivered to take into account the reduced variable costs incurred.

Period 2 – 1 January to 31 March 2022

…

Where the performance threshold has been met, an adjustment of 12.75% will be applied to the activity not delivered to take into account the reduced variable costs incurred."

4.12 The letter went on to state:

"Your contract has recorded activity that exceeded the performance threshold in all time periods but is below 100% of annual contracted activity:

- *Therefore, your end of year position is subject to variable adjuments [sic] only which will be recovered in three instalments. The first of which will be from your scheduled Compass payment on 1 October 2022 (September schedule)."*

4.13 I further note that the 28 July 2022 letter states:

"The 2021/22 year-end reconciliation encompasses the full 2021/22 contractual year, in line with the time periods set out within the NHS England and NHS Improvement Preparedness letters for primary dental care and the supporting guidance. For the purposes of the year-end reconciliation, your annual activity will be prorated for each of the time periods against which contracts are measured."

4.14 Included within the letter was a table which set out how the amounts had been calculated. The letter concluded by saying "these details are available in your year-end statement in Compass".

Time Period	H1	Q3	Q4	Total
Months and year	Apr to Sept 21	Oct to Dec 21	Jan to Mar 22	
% Performance Threshold	60%	65%	85%	
% Minimum Threshold	36%	52%	75%	
Adjustment for undelivered UDAs	16.75%	12.75%	12.75%	
Contracted UDAs prorated per time period	4,8000.00	2,400.00	2,400.00	9,600.00
Scheduled UDA activity	2,893.20	1,652.80	2,010.40	6,556.40
UDA Carry forward from 20/21 (including distribution if applicable)	-192.00	-96.00	-96.00	-384.00
Adjusted UDA activity delivered	3,085.20	1,748.80	2,106.40	6,940.40
% UDA activity delivered	64.28%	72.87%	87.77%	
Year-end reconciliation				
Covid 19 credited UDA activity		00.00	348.00	348.00
Adjusted UDA scheduled activity including credited activity	3,085.20	1,748.80	2,106.40	6,940.40
Redistributed UDA scheduled activity following redistribution	0.00	0.00	0.00	

Adjusted UDA scheduled activity following redistribution	3,085.20	1,748.80	2,106.40	6,940.40
Final % UDA activity delivered	64.28%	72.87%	87.77%	72.30%
Actual No. of Undelivered UDAs	1,714.80	651.20	293.60	2,659.60
Indicative UDA value				£27.77
Recovered for underlived activity (£)	£7,975.06	£2305.31	£1039.37	£11,319.75
Total Adjustment Recovery (£)	00.00	00.00	00.00	00.00

4.15 I further note that the Year-End reconciliation statement states "*the above takes in consideration an addition of 348 UDAs for your COVID-19 exceptional circumstances claims as previously agreed by your NHS England and NHS Improvement Direct Commissioner Officer (Local Team).*"

4.16 I have no information regarding the exceptional circumstances claims, but note that this is not in dispute. Given that it is included in the calculations and there is agreement between the parties with regard to the additional 348 UDAs, I take no view on this.

4.17 I note the reference in the letter of 28 July 2022 to the "Managing the 2021/22 year-end reconciliation – Guidance to support dental contract management arrangements for the 2021/22 year-end reconciliation" (the "guidance") and further note that the application of this has not been disputed by either party.

4.18 Under "Conditions required for full income protection" in the guidance at paragraphs 10 and 11 it states:

"10. In the case of any contractor delivering 100% of their total actual annual contract activity across the year, irrespective of how that activity is distributed across the year, they will be deemed to have successfully delivered actual contract activity and no adjustment to contract payment will be made at year end.

11. Where 100% of the total actual annual contract activity has not been delivered, but contractors have met all the conditions of income protection requirements and achieved or exceeded the performance threshold in each time period, the contractor will be eligible for 100% of their actual contract value in that period adjusted for variable costs to reflect reduced patient care activity. This variable rate will be calculated as below:

- *16.75% April 2021 to September 2021 – H1.*
- *12.75% October 2021 to March 2022 – Quarter 3 and Quarter 4."*

4.19 The Commissioner states "*there is no charge for under-performance … but there is a national charge from the office of the chief dental officer where practices had reduced targets/patient access and therefore reduced associated costs.*"

4.20 I note that the Contractor, in their submission above, accepts that whilst initially they believed the repayment was with regard to underperformance, they now understand that the repayment is not with regard to underperformance.

4.21 From the table included within the Year-End reconciliation statement, the Contractor met the Performance Threshold for H1, Q3 and Q4. The "withholding" is therefore not directly related to performance and is not in respect of an "underperformance".

4.22 I note that the withholding is with regard to a charge which was applied nationally from the office of the chief dental officer in respect of the reduced variable costs which were not incurred due to the practitioner meeting the performance threshold, but not exceeding this or meeting their full UDA target.

4.23 The Contractor has provided information with regard to their health, including letters, photographs and reports from their consultant and that they were struggling to meet the UDAs, even at a lower performance threshold. I note the comments from the Contractor that if they had been suffering from Covid then it would have been treated differently by the Commissioner.

4.24 However, I note that the guidance as well as dealing with "Covid-19 dental staff absence exceptional circumstances" section 4 deals with "Exceptional Circumstances" which states "*38. There may be instances in which a contractor is unable to fulfil its requirements to deliver the annual contractual activity due to an adverse event*." The guidance directs contractors to the NHS England Policy Book for Primary Dental Services.

4.25 Whilst I have sympathy for the Contractor with regard to his health, I note that the Contractor did not submit a Force Majeure notice to the Commissioner and did not provide any indication to the Commissioner of the challenges they were experiencing as a result of their deteriorating health. Without a 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.

4.26 I have not been provided with any information from the Contractor to demonstrate why the national charge, as applied by the office of the chief dental officer, should not be applied for the year-end reconciliation for the financial year 2021/2022.

4.27 As a result, there is a sum of £11,319.75 owed to the Commissioner by the Contractor in respect of the year-end reconciliation for the financial year 2021/2022.

4.28 I note the Contractor's application for dispute resolution refers to being 'refunded' which indicates that the amount has already been paid. If it has, no further monies are due back to the Commissioner. If this is incorrect and monies are owed, it is a matter for the Contractor to establish how this is going to be repaid to the Commissioner. Whilst at the time of the reconciliation there were two partners to the Contract, I am mindful that for the financial year 2021/2022 and the period to which the reconciliation refers there was only one signatory to the contract.

4.29 The Contractor, either on their own or in discussions with the new signatory to the Contract, needs to come to some arrangement as to how the money will be repaid to the Commissioner.

4.30 If there is a dispute between the performers as to who is liable for the money due to the Commissioner then the performers should seek their own advice. This was a matter which should have been raised, and resolved, before they entered into partnership together, albeit that the partnership was only for a brief period of time. The performer that was leaving the Contract should have been aware that, at the time they were seeking a new partner, the year-end reconciliation statement had not been compiled and that there was always a possibility that monies could be due to the Commissioner. Further, the performer that was seeking to leave the Contract would have had access to the Compass schedule so should have been aware of the schedules as well as being provided with copies of communications which were sent out to all Contractors during 2022.

4.31 I am of the view that any dispute between the performers who were in practice together is not something which I can consider under the dispute resolution procedures as set out in the Regulations.

4.32 I note that the dispute is in relation to the 2021/2022 Year-End reconciliation statement and whilst I appreciate that NHS England (#) was the relevant commissioner during this period and not # ICB I am mindful that any financial recovery would be returned to NHS England and not the ICB.

4.33 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.

4.34 The ICB has responded to this dispute and the ICB is able to continue to liaise with NHS England, in order to, if necessary, establish a reasonable revised payment schedule to ensure that the monies are repaid in a timely manner.

5 DECISION

5.1 If not already recovered, I determine that the Commissioner can proceed to recover the full amount of £11,319.75 owed to them in respect of the reduced variable costs incurred by the Contractor for the financial year 2021/2022.

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