4 October 2024

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FILE REF: **SHA/26236**

COMMISSIONER: **NHS ENGLAND**

PERFORMER: **DR M ("the Appellant")**

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

1. Outcome

1.1 Pursuant to, paragraph 3(1) of the 2015 Determination, I determine that the Appellant is entitled to suspension payments for the period of 28 March 2024 until 2 April 2024 and from 25 May 2024 until eligibility ceased. Pursuant to paragraph 3(1) of the 2015 Determination, I also determine that the Appellant is not entitled to suspension payments for the period of 3 April 2024 until 24 May 2024.

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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 a letter dated 14 June 2024 the Appellant through its representative 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 dated 15 July 2024 ("**NHS England's Representations**");

2.2.3 the Appellant's observations dated 1 August 2024 ("**Appellant's Observations**"); and

2.2.4 NHS England's further submissions dated 21 August 2024 ("**NHS England's further Submissions**").

2.3 The matter relates to the entitlement of a medical practitioner to suspension payments under Regulation 13 of the Regulations and in turn the Secretary of State's Determination: Payments to Medical Practitioners Suspended from the Medical Performers List 2015 ("**the 2015 Determination**").

3. BACKGROUND AND SUBMISSIONS

3.1 The background below is taken from the Appellant's Appeal Notice, NHS England's Representations, and the Appellant's Representations.

3.2 The Appellant suffered a health concern on 12 March 2024.

3.3 On 28 March 2024 NHS England wrote to the Appellant to inform him that he was suspended from the Medical Performers List with immediate effect under Regulation 12(1)(a) and 12(6) of the Regulations.

3.4 On 2 April 2024, in accordance with Regulation 12(7)(c)(ii), NHS England reviewed this decision and upheld the Appellant's suspension from the Medical Performers List.

3.5 On 16 April 2024 the Appellant submitted a claim for suspension payments enclosing various documents.

3.6 On 9 May 2024 NHS England issued its decision ("**Decision**") that the Appellant was not entitled to suspension payments between 28 March 2024 and 9 May 2024 because he was not able to perform primary medical services.

3.7 On 20 May 2024 NHS England issued its reconsidered decision ("**Reconsideration**") determining that the Appellant was not entitled to suspension payments, as set out in its Decision.

3.8 On 30 May 2024 NHS England issued a second reconsideration due to a change in the Appellant's circumstances. This decision stated that the Appellant was not entitled to suspension payments, as per the Decision, but stated that this period ended on 24 May 2024. The Appellant was, however, entitled to payments from 25 May onwards, as per additional evidence provided by the Appellant.

3.9 Following the Reconsideration, the Appellant has submitted the Notice of Appeal.

Notice of Appeal

3.10 "I write on behalf of Dr [redacted by NHSR] who is a member of Medical Protection. Please accept this letter as his appeal of your decision to decline suspension payments for the period of 28 March 2024 to 24 May 2024.

3.11 I hope it is helpful to provide a brief background to the matter.

3.12 Dr M has been working as a locum GP since 1 October 2023. On 28 March 2024 he was suspended from the Performers List due to health concerns identified on 12 March 2024.

3.13 Dr M complied with the suspension and stopped working. As the concern raised was a health matter, he contacted his GP and Practitioner Health to seek professional support and guidance on managing his health problems.

3.14 On 3 April 2024 his GP provided him with a sick note which he back dated to the date of the index incident. Dr M was not working at this time due to his suspension. While there was no need for him to obtain a sick note, he did so as he wished to address the identified health issues in a responsible manner. This, I submit, demonstrates his recognition of the issues and insight into his health problems.

3.15 As part of the investigation into the concerns raised, Dr M had an investigation meeting with NHS England at which he agreed to health assessments and testing, for NHS England to contact his health providers, and he submitted a copy of the sick note. He was advised at this meeting that he could apply for suspension payments.

3.16 Dr M provided evidence of earnings for the purpose of this application and was subsequently informed on 9 May 2024 that his application had been denied on the grounds that his sick note indicated that he was not "able" to perform primary medical services, as per the *Secretary of State's Determination: Payments to Medical Practitioners Suspended from the Medical Performers List 2015* paragraph 3(3).

3.17 Dr M expressed that he would like the decision reviewed and on 20 May 2024 he was informed that the decision stood, but he had 28 days from the date of that letter to lodge an appeal.

3.18 I will now set out the grounds for this appeal.

3.19 (1) The suspension *preceded* the issuing of the sick note. The reference to a practitioner being "able" to perform applies to the moment of suspension, as per the same paragraph of the *Secretary of State's Determination: Payments to Medical Practitioners Suspended from the Medical Performers List 2015* referred to in the letter declining suspension payments, which states:

3(1) A medical Practitioner may be entitled to receive payments from the Board by virtue of this Determination if sub-paragraphs (2) and (3) apply to the medical practitioner.

(2) This sub paragraph applies to a medical practitioner who –

(a) is suspended; and

(b) immediately prior to the suspension (or the circumstances giving rise to the suspension) is or was –

(a) (v) a locum

(3) This sub-paragraph applies to a medical practitioner to whom sub-paragraph (2) applies who, apart from the suspension, and any suspension from the register of medical practitioners which does not provide grounds for removal from the medical performers list under regulation 28 of the 2013 Regulations (grounds for removal from the medical performers list), is able and permitted to perform primary medical services.

3.20 At the time of the suspension, Dr M was not "signed off" work and therefore was able to work and entitled to suspension payments from that date.

3.21 2) As can been seen from the chronology of events, once Dr M had been suspended, there was no need for Dr M to seek, or be provided with, a sick note. His reasons for doing so were to demonstrate compliance with the NHS England investigation. To refuse him suspension payments on the basis of the sick note is to penalise him for complying with the investigation and demonstrating insight into the concerns. Had he not, there would be no grounds to deny him the suspension payments. However, had he not, NHS England may then say that he did not show appropriate regard to his health or insight into the issues. This is not a fair or safe position to put a practitioner in.

3.22 3) The sick note was provided as part of the NHS Investigation into the concerns raised. It was not submitted for the purpose of the suspension payments, or with knowledge or consent that it would be used in this way.

3.23 4) To refuse to provide payments on the grounds that a doctor is unwell is an act of discrimination, as per the Equality Act 2010 which states:

6 Disability

(1)A person (P) has a disability if—

(a)P has a physical or mental impairment, and

(b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

15 Discrimination arising from disability

(1)A person (A) discriminates against a disabled person (B) if—

(a)A treats B unfavourably because of something arising in consequence of B's disability, and

(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

3.24 By denying him a benefit he would be entitled to, but for his illness, is to discriminate against him on health grounds.

3.25 As I am sure you appreciate, it would be entirely inappropriate of NHS England to suspend a practitioner, having identified concerns of a health nature, and then deny that practitioner suspension payments on the basis of their seeking medical assistance with those same health issues. To do so sets a dangerous precedent that practitioners suspended by NHS England should *not* seek medical assistance for fear of being penalised with the removal of the suspension payments they are entitled to. For the reasons set out above, this constitutes discrimination, and potentially puts practitioners suspended by NHS England at risk of harm.

3.26 According, I look forward to hearing from you without delay that the suspension payments for the period indicated, will be paid."

NHS England's Representations

3.27 "**Background**

3.28 1. The Applicant, Dr [redacted by NHSR], appeals against the decision of the Respondent, NHS England, to refuse his application for suspension payments for the period 28 March 2024 – 24 May 2024 as a result of non-eligibility.

3.29 2. NHS England's decision on the suspension payments as to which Dr M is entitled was set out within a letter of 30 May 2024 [**R/2/12-13**].

3.30 3. For the reasons set out below, NHS England invites the PCA to dismiss this appeal and confirm that Dr M was not eligible for suspension payments for the period 28 March 2024 – 24 May 2024.

3.31 **Documents**

3.32 4. NHS England encloses a bundle of documents with these representations. Reference to documents within the bundle use the format [**R/Document Number/Page Number**].

3.33 **Relevant law**

3.34 5. Regulation 12(1) of the National Health Service (Performers Lists) (England) Regulations 2013 ("**the Regulations**") states:

(1) If NHS England is satisfied that it is necessary to do so for the protection of patients or members of the public or that it is otherwise in the public interest, it may suspend a Practitioner from a performers list—

(a) while NHS England decides whether or not to exercise its powers to remove the Practitioner under regulation 11(1)(c), 14(3) or (5), 16 or 17(6)(b) or to impose conditions on the Practitioner's inclusion in a performers list under regulation 10.

3.35 6. Regulation 12(6) states:

(6) Where NHS England considers it necessary to do so for the protection of patients or members of the public or that it is otherwise in the public interest, it may determine that a suspension [under paragraph (1)] is to have immediate effect without undertaking the steps specified in paragraph (2).

3.36 7. Regulation 13 states:

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

3.37 8. At all relevant times, the relevant determination is the Secretary of State's Determination: Payments to Medical Practitioners Suspended from the Medical Performers List 2015 ("**the Determination**").

3.38 9. Paragraph 3 of the Determination (with our emphasis added) states:

"Qualifying Medical practitioners

3. (1) A medical practitioner may be entitled to receive payments from the Board by virtue of this Determination if sub-paragraphs (2) and (3) apply to that medical practitioner.

(2) This sub-paragraph applies to a medical practitioner who

(a) is suspended; and

(b) immediately prior to the suspension (or the circumstances giving rise to the suspension) is or was-

…

(iii) a locum who has, or has had, a contract for services with a contractor to perform primary medical services,

…

(3) This sub-paragraph applies to a medical practitioner to whom subparagraph (2) applies who, apart from the suspension, and any suspension from the register of medical practitioners which does not provide grounds for removal from the medical performers list under regulation 28 of the 2013 Regulations (grounds for removal from the medical performers list), is able and permitted to perform primary medical services."

3.39 10. Paragraph 4 of the Determination states:

(1) A medical practitioner to whom paragraph 3(2) and (3) applies ("a suspended medical practitioner") is, subject to the following provisions of this Determination, entitled to payments from the Board in respect of any complete calendar month, or part of a calendar month, for which —

…

(d) in a case where the suspended medical practitioner is a locum, that medical practitioner is not entitled to an amount under the contract of service or the contract for services representing at least 90% of what the Board considers is a reasonable approximation of that medical practitioner's normal monthly NHS profits (or a pro rata amount in the case of a part month) from locum work as a performer of primary medical services, whether or not the suspended medical practitioner claims or is in receipt of that amount.

(2) For the purposes of determining what is or are "normal" income, payments, drawings, earnings or profits in respect of this paragraph and paragraphs 5 and 6, an average of the most recently available six complete months of data is to be taken, unless such a calculation is impossible or produces an amount which the Board considers represents an unreasonable amount by way of protected earnings for the medical practitioner during the period in which that practitioner is suspended.

3.40 11. Paragraph 2 of the Determination provides the following definition:

""suspended", in relation to a medical practitioner, means suspended by the Board in accordance with regulation 12 of the 2013 Regulations (suspension)".

3.41 12. Paragraph 6(1) of the Determination states:

"No payments may be made by the Board pursuant to this Determination unless the Board is satisfied that the suspended medical practitioner is entitled to a payment of that specific amount".

3.42 **Relevant facts**

3.43 13. On 28 March 2024, NHS England wrote to Dr M to confirm that in accordance with Regulation 12(1)(a) and Regulation 12(6), NHS England suspended Dr M from the medical performers list with immediate effect [**R/3/14-18**].

3.44 14. On 2 April 2024, in accordance with Regulation 12(7)(c)(ii), NHS England reviewed this decision and upheld Dr M's suspension from the medical performers list [**R/4/19-23**].

3.45 15. On 16 April 2024, Dr M submitted a claim for suspension payments. Dr M provided bank statements for the whole of March 2024 as well as other supporting documents [**R/5/24-27**].

3.46 16. On 9 May 2024, NHS England wrote to Dr M confirming that he was not entitled to suspension payments at that time noting that *"in order to be eligible for suspension payments the 'Determination' states that you must be able and permitted to perform primary medical services to qualify for suspension payments"* [**R/6/28-29**]. NHS England noted that Dr M's claim for suspension payments included a medical fitness notification from his GP, Dr W, dated 3 April 2024 which advised that he was *"not fit for work"* from 12 March 2024 until 11 May 2024 ("**Fit Note 1**") [**R/7/30**].

3.47 17. On 14 May 2024, NHS England wrote to Dr M to confirm that Fit Note 1 had now expired and that this "*…is likely to change your eligibility to receive suspension payments as if you are deemed fit to work you may become eligible for payment*". Dr M was asked to "*provide either a fit note or a continued sick note*" so that NHS England had clarity on the situation [**R/8/31-32**].

3.48 18. On 20 May 2024, NHS England wrote to Dr M to confirm that the decision taken on 9 May 2024 confirming that Dr M was not entitled to suspension payments had been reviewed by the North East and Yorkshire Region and upheld [**R/9/33-35**]. The conclusion was that the interpretation of the Determination (regarding being fit and able to provide NHS services at the point of suspension) was correct and the decision to not pay suspension payments was upheld.

3.49 19. On 24 May 2024, Dr M wrote to NHS England [**R/10/36-37**] and provided a further Statement of Fitness for Work following an appointment on the same day ("**Fit Note 2**") [**R/11/38**]. Dr M was under the care of the issuer at NHS Practitioner Health. The statement detailed that Dr M "*has seen his GP for a review of his physical health. If he were in employment I feel he is fit for work and I would recommend a phased return with time for medical appointments*". This statement in Fit Note 2 covered the period 24 May 2024 to 31 July 2024.

3.50 20. On 29 May 2024, following email correspondence from NHS England, Dr M confirmed his view that "*[Fit Note 2] supersedes [Fit Note 1] because my GP [redacted by NHSR]*" [**R/12/39-41**].

3.51 21. On 30 May 2024, NHS England wrote again to Dr M confirming that in the light of Fit Note 2, he now would be entitled to suspension payments from 25 May 2024. NHS England considered the first full day of Dr M being fit for work (as described in Fit Note 2) as 25 May 2024 as the email and fit note were only received by NHS England after the working day had concluded (21:09 on 24 May 2024). The calculation of the amount of his normal income, on which his suspension payments are based, was based on the months of August, September, October 2023, and January, February, and March 2024 with November and December 2023 discounted because Dr M was unable to work due to breaking his leg and requiring surgery. As set out in paragraph 4(2) of the Determination, normal income is usually calculated as an average of the most recently available six complete month of data, unless (as in this case) NHS England determines this to produce an unreasonable amount by way of protected earnings.

3.52 22. On 12 June 2024, Dr M wrote to NHS England noting that his GP, Dr W, had "*agreed to issue a more accurate sick note that reflects the true amount of time that I was working and he has agreed that this note supersedes [Fit Note 1] that he previously issued in the middle of March when I was still working*" **[R/13/42-47]**. This further Statement of Fitness for work dated

4 June 2024 covered the period 28 March 2024 to 02 April 2024 ("**Fit Note 3**") [**R/14/48**]. This statement outlined that Dr M was not fit for work as a result of [redacted by NHSR].

3.53 23. Dr M appealed this decision on 14 June 2024 [**R/1/1-11**].

3.54 **Response to Dr M's pleadings**

3.55 24. The appeal is explicitly against the decision to *"to decline suspension payments for the period of 28 March 2024 to 24 May 2024"*. There does not appear to be any appeal against the calculation of Dr M's normal monthly income and monthly suspension payment; rather it is against the decision not to pay the suspension payments for the period of 28 March 2024 to 24 May 2024. This is reflected in the focus of these representations.

"At the time of the suspension, Dr M was not "signed off" work and therefore was able to work and entitled to suspension payments from that date"

3.56 25. NHS England submits that the wording of paragraph 3(3) of the Determination (*"who, apart from the suspension… is able and permitted to perform primary medical services"*) is an ongoing condition of entitlement, throughout the period of suspension and is not limited to the time when the practitioner was initially suspended. The Appellant has suggested that the words in paragraph 3(2) "immediately prior to the suspension (or the circumstances giving rise to the suspension)" apply to paragraph 3(3). This is manifestly wrong. Paragraph 3(3) does not include such words.

3.57 26. NHS England submits that Fit Note 1 makes perfectly clear that Dr M was not fit for work from 12 March 2024 until 11 May 2024. There can be no other interpretation that this is the meaning of Fit Note 1 and Dr M does not appear to contest this point.

3.58 27. That the decision to suspend Dr M from the Performers List preceded the issuing of Fit Note 1 is of little relevance to the meaning that Fit Note 1 entails. A medical practitioner determined that Dr M was not fit to work from 12 March 2024 to 11 May 2024 meaning that legally he was not "able" to perform primary medical services under Paragraph 3(3) of the Determination.

3.59 28. For his own benefit, Dr M is attempting to go behind the ordinary, everyday meaning of Fit Note 1. It is not appropriate for Dr M, NHS England, or the PCA, to go behind what Fit Note 1 says. This records the finding of a medical practitioner at the time of the consultation and cannot be rewritten or ignored.

3.60 29. Further, NHS England submits that it has not seen any evidence other than the email of Dr M (*…"he has agreed that this note supersedes the sick note that he previously issued"* **[R/13/42]**) to confirm that by issuing Fit Note 3, Dr W intended this to supersede or impact upon the validity of Fit Note 1. Indeed, had Dr W intended to do so, one would expect Dr W to have issued a note stating that Dr M was fit for work for the period in question. Without this being confirmed by Dr W, NHS England and the PCA can only work on the basis that Fit Notes 1 and 3 are two separate Fit Notes covering different but overlapping timeframes, and that together they state he was unfit to work for the entirety of the timeframes covered.

3.61 30. NHS England submits that there is no ambiguity regarding the Determination and that the relevant words in Paragraph 3(3) are clearly written. In the High Court case of *Sandles v NHS England [2022] EWHC 1582 (Admin) ("**Sandles**")*, Judge Elizabeth Cooke found the following:

> Paragraph 34 – *"whilst it may be open to me to use policy to construe a regulation where it is ambiguous (AA (Nigeria v SSHD [2010] EWCA 773, paragraph 70, in relation to the Immigration Rules), there is no ambiguity in this case. As discussed above, the words of the 2015 Determination are clear"*.

3.62 31. NHS England submits that there is no ambiguity in the meaning of *"able and permitted to perform primary medical services"* and we have Fit Note 1 which in the clearest terms outlines that Dr M was not able to perform primary medical services at that time because he was not fit for work.

"To refuse him suspension payments on the basis of the sick note is to penalise him for complying with the investigation and demonstrating insight into the concerns"

3.63 32. The decision of NHS England in determining whether or not to make suspension payments is limited to applying the Determination as drafted by the Secretary of State. NHS England may only pay suspension payments where it "*is satisfied that the suspended medical practitioner is entitled to a payment"* (paragraph 6 of the Determination). NHS England does not have the power to determine whether a refusal to provide suspension payments would be punitive. Referring again to paragraph 34 of *Sandles*, the wording around suspension payments is not ambiguous and policy should not therefore be used to construe the Determination.

3.64 33. Looking further at the decision in Sandles:

> Paragraph 39 – *"I agree with the Defendant that it is clearly the policy of the 2015 Determination to make provision for suspension payments where a practitioner is unable to earn because of the suspension, and the 2015 Determination will generally achieve that aim".*

3.65 34. Looking also at the decision made in the Primary Care Appeal for *SHA/23356* Paragraphs 4.19-4.40 **[R/15/61-65]**, concepts of fairness and penalisation are not relevant when determining whether a performer is *"able and permitted"*. NHS England particularly notes:

> Paragraph 4.39 – "*I am however not persuaded that I am able to read into the 2015 Determination additional wording that excludes the Appellant's particular situation from the existing wording, particularly where:*
>
> *…*
>
> *4.39.3 the meaning of the existing wording of the eligibility for suspension payments in the 2015 Determination is clear and unambiguous.*"

"The sick note was provided as part of the NHS Investigation into the concerns raised. It was not submitted for the purpose of the suspension payments, or with knowledge or consent that it would be used in this way"

3.66 35. NHS England submits that this is not a relevant factor for the consideration of this appeal. NHS England is concerned with the facts, not what information Dr M may selectively choose to present to suit his own purposes. Neither the Regulations nor the Determination, nor any facts or circumstances in this case, prevent NHS England or the PCA from relying upon Fit Note 1. To do so would be to ignore relevant evidence.

"To refuse to provide payments on the grounds that a doctor is unwell is an act of discrimination, as per the Equality Act 2010"

3.67 36. Whilst denying that any discrimination has taken place and noting that Dr M has not made out the grounds for discrimination, NHS England submits that it is not a matter for the PCA to determine whether the Determination is discriminatory under the Equality Act 2010. NHS England and the PCA must apply the Determination. The question for the PCA is whether Dr M was or was not entitled to suspension payments for the period in question, applying the Determination.

3.68 **Conclusion**

3.69 37. For the reasons set out above, NHS England invites the PCA to dismiss this appeal, and confirm that Dr M is not entitled to suspension payments for the period in question."

Appellant's Representations

3.70 None were received.

NHS England's Observations

3.71 None were received.

Appellant's Observations

3.72 "**Preamble**

3.73 1. The observations below are provided on behalf of the Applicant in response to the Respondent's representations dated 15 July 2024 ("the Representations"), in accordance with regulation 13(8) of The National Health Service (Performers Lists)(England) Regulations 2013.

3.74 2. Within the observations provided below, we use the same nomenclature as that adopted by the Respondent within their Representations. Additionally, where reference is made to page numbers within the Respondent's bundle attached to the Representations, we adopt same reference format as that adopted by the Respondent (R/x).

3.75 3. We have confined our observations below to rebuttal of the points asserted within the Representations. These observations are nonetheless extensive. This reflects both the irrationality of the Respondent's position, the clear inaccuracy of many of its assertions, and the paucity of reasons that had previously been provided by the Respondent for its decision, in advance of its Representations of 15 July 2024.

3.76 **Overview**

3.77 4. The Respondent's Representations seek to rely upon the assertions listed below in contesting Dr M's appeal (paragraph numbers below refer to the relevant numbered paragraphs within the Representations):

3.77.1 A. Fit Note 1 issued to Dr M on 3 April 2024 represents clear and unambiguous evidence that Dr M was not 'able and permitted to perform primary medical services', for the purposes of paragraph 3(3) of the Determination (paragraphs 26 – 27).

3.77.2 B. In seeking to reply upon Fit Note 3 (dated 4 June 2023) in support of his claim for suspension payments, Dr M is seeking to persuade the Respondent to 'ignore' Fit Note 1; and in doing so, to overlook relevant evidence (paragraphs 28-29 and 35).

3.77.3 C. The Respondent has no discretion in relation to its decision, but is bound by the unambiguous wording of the Determination (paragraph 32). Applying this wording to Dr M's case, it is clear that he is not entitled to suspension payments for the period 28 March until 24 May 2024 (paragraph 31).

3.77.4 D. The Respondent has no power to determine whether a refusal to provide suspension payments would be punitive (paragraph 32). Concepts of fairness and penalisation are not relevant to the Respondent's application of the Determination (paragraph 34).

3.77.5 E. The High Court authority of *Sandles v NHS England [2022] EWHC 1582 (Admin),* and the Primary Care Appeal decision in *SHA/23356,* both support the Respondent's position (paragraphs 30 and 33-34).

3.78 5. We explain below why all of the above assertions (A – E), which underpin the Respondent's position, are incorrect. Furthermore, we will reiterate, in the light of the Respondent's position, why it would be manifestly wrong to deprive Dr M of the contested suspension payments.

3.79 6. We respond to each of the assertions relied upon by the Respondent, as listed above:

3.80 **A. Fit Note 1 issued to Dr M on 3 April 2024 represents clear and unambiguous evidence that Dr M was not 'able and permitted to perform primary medical services', for the purposes of paragraph 3(3) of the Determination (paragraphs 26– 27).**

3.81 7. The Respondent's decision, and the position articulated within its Representations, places a significant emphasis upon the effect of Fit Note 1. This can be summarised by reference to the Respondent's assertion at paragraph 27 of the Representations (with our emphasis added):

> *That the decision to suspend Dr M from the Performers List preceded the issuing of Fit Note 1 is of little relevance to the meaning that Fit Note 1 entails.* ***A medical practitioner determined that Dr M was not fit to work from 12 March 2024 to 11 May 2024 meaning that legally he was not "able" to perform primary medical services under Paragraph 3(3) of the Determination.***

3.82 8. It is thus asserted by the Respondent that:

> a. Fit Note 1 represented a 'determination' by a medical practitioner that Dr M was not fit to work; and
>
> b. That Dr M was thus not 'legally able' to perform primary medical services under Paragraph 3(3) of the Determination.

3.83 9. In fact both of the above assertions distort the real status of Fit Note 1, a copy of which appears at R/30:

> a. The wording of the Fit Note signed by Dr W is 'I advise you that [x] you are not fit for work'. The Fit Note does not represent a 'determination' of the kind suggested by the Respondent. Its status is advisory to the patient.
>
> b. Furthermore, the right hand column of Fit Note 1 contains the following information for patients (our emphasis added):
>
> ***What your advice means***
>
> *'You are not fit for work'*
>
> *Your health condition means that you* ***may*** *not be able to work for the period shown.* ***You can go back to work as soon as you feel able to and, with your employer's agreement, this may be before your fit note runs out.***

3.84 10. It is thus clear from the information printed on the face of Fit Note 1 that it does not purport to determine the fitness of the patient to work. Nor does it represent (or purport to represent) a legal determination of the kind asserted by the Respondent. Its function is advisory to Dr M. Significantly, when it is read in full, it explicitly states that he may not be able to work for the period shown, and that he can nonetheless go back to work as soon as he feels able to, and that this may be before Fit Note 1 runs out.

3.85 11. The Respondent's insistence as to the unassailable significance of Fit Note 1 is all the more remarkable, given the repeated confirmation provided by Dr M and his representatives that he continued providing primary medical services from 12 March 2024 up until the date of his suspension on 28 March 2024:

> a. This was confirmed by Dr M within his email to Ms G of NHS England dated 12 June 2024 (at R/42):
>
> > I was still working until you told me to cease working on the 28th of March 2024… During the start of the period that my GP signed me off sick retrospectively, I was still working as you know (up until you told me to stop).
>
> b. The same information was conveyed within the written appeal lodged by Dr D on behalf of Dr M on 14 June 2024 (at R/1 and 2):
>
> > On 28 March 2024 [Dr M] was suspended form the Performers List… Dr M complied with the suspension and stopped working… At the time of the

suspension, Dr M was not “signed off” work and therefore was able to work and entitled to suspension payments from that date.

3.86 12. It is notable that the Respondent does not appear to contest Dr M’s assertion that he worked from 12 March up until the date of his suspension on 28 March 2024. However, the Respondent has equally not addressed this important point at any stage within its Representations. This is perhaps because this point undermines entirely the Respondent’s wholesale reliance upon Fit Note 1.

3.87 13. That Dr M continued working between 12 and 28 March 2024 (notwithstanding the advice within Fit Note 1 that he may not be able to work) highlights, even more clearly, that Fit Note 1 cannot reasonably be regarded as having the legal effect attributed to it by the Respondent. The information within Fit Note 1 is clear that:

a. It is not determinative, but only advisory in nature; and

b. It does not restrict the patient from working, if they consider they are able to do so.

3.88 14. The Respondent’s Representations state at para 28 say that ‘It is not appropriate for Dr M, NHS England, or the PCA, to go behind what Fit Note 1 says.’ We respectfully agree with the Respondent on this point. Fit Note 1 should be read fully. Its content should be given its ordinary, everyday meaning.

3.89 15. Read in this way, Fit Note 1 does not represent clear and unambiguous evidence that Dr M was not ‘able and permitted to perform primary medical services’, for the purposes of paragraph 3(3) of the Determination; nor does it purport to do so. To seek to impose such a meaning upon Fit Note 1 is to distort both its legal status and significance. As is plain from a fair and objective reading, its status is that of an advisory document. Properly construed, its significance to the application of paragraph 3(3) is far from determinative.

3.90 **B. In seeking to reply upon Fit Note 3 (dated 4 June 2023) in support of his claim for suspension payments, Dr M is seeking to persuade the Respondent to ‘ignore’ Fit Note 1; and in doing so, to overlook relevant evidence (paragraphs 28- 29 and 35).**

3.91 16. The Respondent’s Representations assert at paragraph 28:

For his own benefit, Dr M is attempting to go behind the ordinary, everyday meaning of Fit Note 1.

3.92 17. As explored above, this assertion is entirely incorrect. When Fit Note 1 is read fully, fairly and objectively, it is clear that it is not Dr M, but the Respondent, who seeks to impart a distorted meaning and significance to Fit Note 1.

3.93 18. Notably, and as was confirmed within Dr D’s appeal letter of 14 June 2024, Dr M did not seek to rely upon the content of Fit Note 1 in respect of his application for suspension payments:

While there was no need for him to obtain a sick note, he did so as he wished to address the identified health issues in a responsible manner. (R/1)

3.94 19. To suggest that Dr M is seeking to persuade the Respondent to ‘ignore’ Fit Note 1 is thus a gross distortion of the reality: Dr M obtained Fit Note 1 not for the purposes of applying for suspension payments, but to demonstrate that he wished to address the health issues in a responsible manner.

3.95 20. In no respect does Dr M seek to suggest that Fit Note 1 should be ‘ignored’, nor is there any reason for him to do so: its effect upon his entitlement to suspension payments, when considered fairly and objectively, is minimal, when considered in the light of all the circumstances.

3.96 21. It is of course entirely reasonable for the Respondent to consider Fit Note 1 as *part* of the evidential picture pertaining to Dr M’s application for suspension payments. However, in

seeking to place sole reliance on what it asserts is the unambiguous effect of Fit Note 1, the Respondent is, we assert, behaving irrationally, by ignoring the following evidence, which is of equal (if not greater) relevance to Dr M's appeal:

> a. The advisory status of Fit Note 1; the clear wording within it, to the effect that the patient '*may'* not be able to work for the period shown; and the clear statement within it that the patient can return to work before the end of the time period, if they feel able to work (these elements all having been explored above).
>
> b. Dr M's unambiguous confirmation that he worked up until the date of his suspension, despite the (retrospective) advice within Fit Note 1 that he *may* not be able to do so. This information is highly significant, on any impartial consideration of the case.
>
> c. The retrospective nature manner in which Fit Note 1 was issued.
>
> d. The actual time period covered by Fit Note 1. Despite the Respondent's multiple assertions that the PCA should not look behind Fit Note 1, it is notable that Fit Note 1 only purported to provide advice regarding Dr M's fitness to work until 11 May 2024. Despite this, the Respondent has still refused to pay suspension payments to Dr M between 11 and 24 May 2024. This is a further illustration of the irrationality underpinning the Respondent's interpretation of Fit Note 1.

3.97 22. Thus, whilst the Respondent seeks to assert that Dr M is attempting to persuade the Respondent to ignore Fit Note 1 and to overlook relevant evidence, this is entirely inaccurate. Dr M has no reason to adopt such an approach. He welcomes the Respondent's fair and objective consideration of Fit Note 1, in conjunction with all of the available evidence.

3.98 **C. The Respondent has no discretion in relation to its decision, but is bound by the unambiguous wording of the Determination (paragraph 32). Applying this wording to Dr M's case, it is clear that he is not entitled to suspension payments for the period 28 March until 24 May 2024 (paragraph 31).**

3.99 23. The Respondent's Representations repeatedly rely upon the assertion that the Respondent has no discretion in relation to its decision. For example:

> *The decision of NHS England in determining whether or not to make suspension payments is limited to applying the Determination as drafted by the Secretary of State.* (paragraph 32)

3.100 24. It is instructive to note that, within her judgment in *Sandles v NHS England [2022] EWHC 1582 (Admin)*, (an authority relied upon by the Respondent within its Representations), Judge Elizabeth Cooke clarified the legal status of the Determination:

> *The 2015 Determination is not a statutory instrument. It is a statement of policy by the Secretary of State. It was suggested at the hearing that it is comparable to the Immigration Rules, save that it has not been laid before Parliament.* (*Sandles*, paragraph 10)

3.101 25. Whilst the question as to the applicability of the Determination is one that falls outside the remit of this appeal, it is notable that, despite the absence of parliamentary approval for the Determination, the Respondent seeks to abdicate itself of any discretion in respect of the Determination. Indeed, it may be considered that the Respondent is unduly fettering its own discretion in respect of such matters.

3.102 26. An additional observation arises, in the light of the Respondent's abdication of discretion in respect of the application of the Determination. As Judge Cooke highlighted, the Determination is a statement of policy. NHS England has a further *Policy on managing the NHS Performers Lists (England)*, paragraph 14.6 of which relates to 'Payments to suspended performers'. This states (with our emphasis added):

Where a performer is suspended from a Performers List, they may be entitled to receive suspension payments. ***NHS England must advise the performer that this is the case and signpost them to the relevant Secretary of State Determination, which sets out the process and defines the eligibility criteria.*** *The process set out in the Performers List Regulations and the associated determinations must be adhered to; this includes but is not limited to the following principles…*

3.103 27. Notably, the Respondent's letters to Dr M dated 28 March and 2 April 2024 both contained the same paragraph in relation to his ability to apply for suspension payments. This states:

> *Suspension from the Performers List is a neutral act, designed to protect patients and practitioners whilst further actions are considered. Whilst suspended, you may qualify for payments under a Determination from the Secretary of State on payments to doctors suspended from medical Performers Lists. Further information will be provided on how to apply for these payments from your case manager.* (R/16 and R/21)

3.104 28. The Respondent is insistent within its Representations as to the primacy of the Determination (despite its status being no more than a statement of policy), yet it has not brought this document to the attention of Dr M. Despite the clear indication within paragraph 14.6 of the *Policy on managing NHS Performers Lists* that the Respondent 'must… signpost [the performer] to the relevant Secretary of State Determination':

> a. The Respondent's letters of 28 March and 2 April 2024 did not include the title of the Determination, nor the year of its coming into existence. Their reference only to '**a** Determination…' (using the indefinite article), creates unnecessary uncertainty and ambiguity. This is in contrast to other documents referred to within the body of the same letter, in which their specific titles are used (with relevant years being provided), as well as being clearly identifiable by appropriate use of capitalisation.
>
> b. The Respondent's letters did not make any attempt to highlight to Dr M that the Determination is a document he would have been able to access himself. Dr M is not a legal professional, so to have conducted research based upon the limited information within the Respondent's letters of 28 March and 2 April 2024 would have been fanciful. Moreover, the letters in question contained information about his suspension from the Performers List, and thus would have been inherently stressful for him to read. It is entirely foreseeable that identifying and obtaining a copy of the relevant Determination, on the basis of the minimal information conveyed within these letters, would be an overwhelming challenge for him.
>
> c. The Respondent's letters made no effort to attach a copy of the Determination, nor did they contain a hyperlink to the Determination to facilitate Dr M's access to it, despite the inclusion of numerous other hyperlinks to documents within the same letters.
>
> d. There is no information elsewhere within the Respondent's bundle to suggest that Dr M was provided with a 'signpost' to the relevant Determination.

3.105 29. On the basis of the above, it can reasonably be asserted that the Respondent's letters of 28 March and 2 April 2024 both failed to meet the requirements articulated within paragraph 14.6 of the Respondent's *Policy on managing NHS Performers Lists*. Given the Respondent's overwhelming emphasis upon the lack of ambiguity existing within the Determination, and the lack of discretion asserted by the Respondent in its application of the Determination, it is surely all the more incumbent upon the Respondent to ensure that clear information about the Determination is conveyed to performers at the time of their suspension.

3.106 30. It is clear that the Respondent's failure to adequately signpost its *Policy on managing NHS Performers Lists* has resulted in unambiguous detriment to Dr M:

> a. A brief review of the application form completed by Dr M (at R/24 – R/27) reveals that he had no comprehension as to the relevance, or otherwise, of the information

he was providing therein regarding his health. See, for example, his responses to question 4 at R/25, which betray a confusion as to the questions he was being asked.

b. The same is clear from Dr M's submission of his Fit Note 1 to the Respondent. Dr M was not under any duty to submit this document, nor was it advantageous for him to do so. That he nonetheless elected to submit this document to the Respondent illustrates that he was not provided with adequate notice of the Determination as required within the Respondent's *Policy on managing the NHS Performers Lists (England).*

3.107 31. It is inaccurate for the Respondent to suggest that the wording of the Determination makes clear that Dr M is not entitled to suspension payments for the period 28 March until 24 May 2024. As we have highlighted above, such an interpretation represents a self-serving distortion of the real impact of Fit Note 1. Moreover, the Respondent's insistence on the absolute primacy of the Determination is irrational and incongruous, when considered in the light of the Respondent's own failure to adequately signpost this document to Dr M (as it was required by policy to do), at the time of his suspension. As *Sandles* confirmed, the Determination is no more than a statement of policy itself.

3.108 **D. The Respondent has no power to determine whether a refusal to provide suspension payments would be punitive (paragraph 32). Concepts of fairness and penalisation are not relevant to the Respondent's application of the Determination (paragraph 34).**

3.109 32. Throughout its Representations, the Respondent has purported to abdicate itself of any discretion in respect of its application of the Determination, as discussed above. Moreover, the Respondent has referred to two other decisions involving application of the Determination, on the basis of which the Respondent asserts that concepts of fairness and penalisation are irrelevant to its application of the Determination:

> *Looking also at the decision made in the Primary Care Appeal for SHA/23356 Paragraphs 4.19-4.40* ***[R/15/61-65]****, concepts of fairness and penalisation are not relevant when determining whether a performer is "able and permitted".* (paragraph 34)

3.110 33. We consider the decisions relied upon by the Respondent further below. However, in the first instance we respond to the Respondent's remarkable assertion that concepts of fairness and penalisation are irrelevant to its decision.

3.111 34. The Respondent is a public authority, exercising a public duty, in respect of a practitioner whose work is conducted in the public sector, and funded by public funds. Notwithstanding the Respondent's interpretation of the meaning of the Determination, its decisions upon the application of the Determination are manifestly made within the public realm.

3.112 35. As the Respondent will no doubt appreciate, the public nature of the function being exercised by the Respondent in this matter renders those decisions susceptible to the review of the courts. Thus the Respondent must, in any event, ensure that its decisions are consistent with the law, rational, and procedurally proper. This means that the Respondent must not fetter its discretion in the making of such decisions; equally, that it must take all relevant considerations into account; and that its decisions must be procedurally proper (they must be consistent with concepts of fairness and natural justice). On Dr M's behalf it is asserted that the Respondent's approach in this matter fails to achieve this:

a. The Respondent's failure to properly signpost the Determination to Dr M within its letters of 28 March and 2 April 2024, considered against its subsequent insistence that the wording of the Determination is absolute and affords the Respondent no discretion, is strongly suggestive of a procedural bias, to Dr M's detriment.

b. Equally, the Respondent's insistence that it has no discretion in relation to the interpretation of the Determination; and that it is unable to look past or go behind Fit Note 1, might reasonably be regarded as a fettering of its discretion.

c. Similarly, the Respondent's failure to acknowledge or have regard to the other valid considerations such as the real status of Fit Note 1; its expiry on 11 May 2024; and Dr M's continued working between 12 and 28 March 2024, represents a failure to take all relevant considerations into account.

3.113 36. For the reasons above, it is asserted on Dr M's behalf that it is wholly incorrect to suggest that concepts of 'fairness' and 'penalisation' are irrelevant to the Respondent's decision. They are manifestly relevant to any exercise of a public function by a public authority.

3.114 37. Furthermore, public servants are also subject to the *Nolan principles* in the exercise of their duties. As the UK government website confirms:

> *The Seven Principles of Public Life (also known as the Nolan Principles) apply to anyone who works as a public office-holder. This includes all those who are elected or appointed to public office, nationally and locally, and all people appointed to work in the Civil Service, local government, the police, courts and probation services, non-departmental public bodies (NDPBs), and in the health, education, social and care services. All public office-holders are both servants of the public and stewards of public resources. The principles also apply to all those in other sectors delivering public services.*

3.115 38. Thus, in addition to its decisions being subject to the judicial review of the courts, the Respondent is bound by the *Nolan principles* in its decision-making. In contrast to the assertions made by the Respondent within paragraph 34 of its Representations, the *Nolan principles* include the following:

> ***1.3 Objectivity***
>
> *Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.*
>
> ***1.4 Accountability***
>
> *Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.*

3.116 39. It is submitted on behalf of Dr M that the Respondent's approach in this matter:

a. lacks objectivity, particularly in that the Respondent seeks to attach a distorted meaning and significance to Fit Note 1;

b. lacks fairness / objectivity, in that the Respondent continues to place such a specific and significant emphasis upon the importance of the wording of the Determination (a statement of policy), when it has not afforded a similar significance to its duty to provide adequate information about the Determination to Dr M in accordance with its *Policy on managing NHS Performers Lists*;

c. lacks accountability, in that the Respondent has failed to comply with its *Policy on managing NHS Performers Lists* by not signposting the Determination to him within its letters of 28 March and 2 April 2024, and thus by failing to adequately forewarn him of the criteria that would be applied, and the lack of discretion afforded to the Respondent in applying that criteria.

3.117 40. Furthermore, as was asserted within Dr D's appeal letter of 14 June 2024, the Respondent's approach is discriminatory against Dr M, in accordance with the provisions of the Equality Act 2010. The provisions of this legislation (which include provisions to prevent unfairness and discrimination) are undoubtedly applicable to the Respondent in the exercise of its duties. Although the Respondent suggests, at paragraph 36 of its Representations, that it is not a matter for the PCA to determine whether the Determination is discriminatory under the 2010 Act, the Respondent does not appear to contest the suggestion that its decision-making (and that of the PCA) in applying the Determination, is subject to the provisions of the Equality Act 2010.

3.118 41. Considerations of fairness are inherent in the exercise of any public function by a public body in the United Kingdom by virtue of their susceptibility to judicial review. The Respondent's decisions fall within this category. Moreover, the Respondent's decisions are also bound by the *Nolan principles* and fall within the scope of The Equality Act 2010. That the Respondent has sought to assert within its Representations that concepts of fairness and penalisation are irrelevant to its decision-making is remarkable, concerning, and strongly suggestive of a bias towards a predetermined outcome.

3.119 **E. The High Court authority of *Sandles v NHS England [2022] EWHC 1582 (Admin),* and the Primary Care Appeal decision in *SHA/23356,* both support the Respondent's position (paragraphs 30 and 33-34).**

3.120 42. The Respondent seeks to rely upon two other decisions in support of its position. Those decisions include the High Court authority of *Sandles* (citation above), and the Primary Care Appeal decision in *SHA/23356.*

3.121 43. Turning first to the Primary Care Appeal decision, the Respondent asserts within paragraph 34 of its Representations that this decision supports its position that 'concepts of fairness and penalisation are not relevant when determining whether a performer is 'able and permitted''. The Respondent draws specific attention to paragraphs 4.19 – 4.40 within the *SHA/23356* decision.

3.122 44. As a preliminary observation, nowhere within the relevant extract of the *SHA/23356* decision referred to by the Respondent is it stated that concepts of fairness and penalisation are not relevant when determining whether a performer is 'able and permitted'. The decision does not say what the Respondent suggests it says, and the Respondent's reliance upon it is misplaced.

3.123 45. The decision in *SHA/23356* did not concern the status of fit notes. Nor did it concern a practitioner who was able and permitted to perform primary medical services during the period of the contested suspension payments. The case involved a practitioner who, during the period of the contested suspension payments, was imprisoned [redacted by NHSR].

3.124 46. That the decision maker in *SHA/23356* decided that the performer was not 'able and permitted' to perform primary medical services is entirely appropriate. Indeed there could not reasonably have been any other outcome. The performer had been deprived of their liberty by a judicial legal process. They were no longer within the community (where primary medical services are delivered), nor were they at liberty to consult with primary care patients in any form.

3.125 47. In no respect are the factual circumstances in *SHA/23356* analogous to the circumstances of Dr M's suspension. The Respondent's attempt to draw upon this decision in support of its interpretation of 'able and permitted' (for the purposes of paragraph 3(3) of the Determination), illustrates the irrationality in its approach towards Fit Note 1. A custodial sentence following a criminal conviction can only result from a rigorous and detailed legal process. It is the most severe interference with a citizen's rights that any legal process in this country is capable of imposing. Yet the Respondent seeks to draw analogy between this and the issuing of a GP fit note, in support of its position. This is plainly wrong, and demonstrative of the lack of objectivity with which the Respondent has approached Dr M's case.

3.126 48. Moreover, the decision in *SHA/23356* is not binding upon the PCA in this matter.

3.127 49. Turning to the decision in *Sandles* (full citation above), the Respondent seeks to rely upon Judge Cooke's comments at paragraph 34:

> *…whilst it may be open to me to use policy to construe a regulation where it is ambiguous (AA (Nigeria v SSHD [2010] EWCA 773, paragraph 70, in relation to the Immigration Rules), there is no ambiguity in this case. As discussed above, the words of the 2015 Determination are clear.*

3.128 50. Significantly, it has not been suggested on behalf of Dr M that the wording of the Determination is ambiguous. What has been suggested above, and within Dr D's appeal letter

of 14 June 2024, is that the Respondent's wholesale reliance upon Fit Note 1, to the exclusion of other equally relevant evidence, is inconsistent with the wording of the Determination, and moreover that it is entirely unfair and discriminatory towards Dr M. Thus the Respondent's reliance upon this extract of *Sandles* is misplaced. It does not assist the Respondent's position.

3.129 51. *Sandles* bears similarities to the case of Dr M in that it concerned an appeal by a performer against a decision by NHS Resolution in respect of suspension payments for which he was deemed ineligible. However, there are also marked differences. Notably, Dr Sandles' case did not involve health concerns, but an allegation of misconduct. A distinction of particular importance is that Dr Sandles was not a locum GP (as is Dr M), but a partner in a GP partnership (*Sandles* paragraph 12). The decision that he was not entitled to suspension payments was made, not on the basis of concerns regarding his fitness to work, but because he had retired from the partnership (*Sandles* paragraph 16). Thus, the judgment focussed primarily on the interpretation of paragraph 4 of the Determination, rather than paragraph 3.

3.130 52. Due to the factual circumstances in Dr Sandles' case, the judgment was not focussed upon matters of health. Significantly, however, insofar as the Judge Cooke did refer to the applicability of the Determination to matters of health, her comments were supportive of Dr M's position (rather than that of the Respondent). At paragraph 38 she stated (our emphasis added):

> *I agree that the 2015 Determination would enable an employed doctor to get suspension payments in circumstances where he or she was not earning for a different reason – perhaps by virtue of having reached a compulsory retirement age* ***or because of serious ill-health****.*

3.131 53. Judge Cooke's comments within paragraph 38 are clearly supportive of Dr M's circumstances in his application for suspension payments. That she included both compulsory retirement age and serious ill-health as examples in which she envisaged the Determination *enabling* a performer to obtain suspension payments, undermines entirely the Respondent's position, and illustrates, with absolute clarity, the irrationality and injustice inherent therein.

3.132 54. Put simply, the Respondent's position in respect of Fit Note 1 is completely contradicted by Judge Cooke's comments within paragraph 34.

3.133 55. It is notable also that, elsewhere within *Sandles,* Judge Cooke considered issues of fairness in relation to interpretation of the Determination. At paragraphs 27 – 31 the Judge considered a submission by the Claimant that the Defendant's construction of paragraph 4(1)(b) was 'absurd and unfair', because it led to partners being treated differently to others without justification.

3.134 56. Whilst the specific issue considered within paragraphs 27 – 31 of the judgment is not of direct relevance to the case of Dr M, it is notable that, in rejecting the Claimant's submission regarding unfairness, Judge Cook made no suggestion of the kind made by the Respondent in this matter, that fairness is not relevant to interpretation of the Determination. Indeed, at paragraph 29 she considered the question of unfairness in some detail:

> *I see no unfairness here. The employed doctor has no choice if he is dismissed in those circumstances, subject to any claim for unfair dismissal which will not yet have been determined. He or she is not going to be able to get another employed position during the suspension and it is fair that he or she gets an interim payment. Likewise a locum will simply be unable to work during suspension. A partner by contrast retires by his own choice, either because the terms of the partnership to which he signed up require it or at the request of his partners to which he accedes.*

3.135 57. The judgment's detailed consideration of the question of fairness in interpretation of the Determination extends for a further two paragraphs, in addition that quoted above. At no stage does Judge Cooke suggest within her reasoning that fairness is not a relevant factor for the purposes of decisions under the Determination. Neither does her detailed consideration of the question of fairness provide any support for the Respondent's contention that issues of

fairness and penalisation are not relevant to its application of the Determination. Had the Respondent been correct, then it seems unlikely that Judge Cooke would have considered the issue in as detailed a manner as she did. It would have been open to her, instead, to dismiss the submission within a single paragraph.

3.136 58. Whereas the Respondent seeks to suggest that its position is supported by the decisions in in *SHA/23356* and *Sandles*, this is incorrect:

a. *SHA/23356* does not assist in the application of the Determination in circumstances in which a performer has received a fit note but nonetheless considers they are able to continue practising. Moreover it does not bind the Respondent or PCA in its decision on Dr M. Indeed the Respondent's reliance upon a case involving factual circumstances so far removed from those of Dr M only serves to illustrate the irrationality and lack of objectivity in the Respondent's position;

b. *Sandles* concerned a scenario that was materially different to that of Dr M. However, insofar as the comments of Judge Cooke can be regarded as relevant to the decision in Dr M's case (i.e. relating to matters of health and fairness), the judgment supports Dr M's position, rather than that of the Respondent.

3.137 **Concluding observations arising from the Respondent's Representations**

3.138 59. As is clear from the observations provided above, the assertions underpinning the Respondent's position in this matter are ill-founded.

3.139 60. The Respondent attempts, within its decisions and Representations, to abdicate its discretion and responsibility for undertaking a fair and objective assessment of Dr M's entitlement to suspension payments, in accordance with the Determination. On a fair and balanced assessment (which the Respondent is dutybound to undertake), Fit Note 1 represents only a part of the evidence before the Respondent. It is notable, for example, that the Respondent does not appear to contest that Dr M worked between 12 and 28 March 2024, yet the Representations contain no response on this important point, and its implications for the Respondent's interpretation of Fit Note 1.

3.140 61. Within its Representations the Respondent has also sought to suggest that Dr M's interpretation of Fit Note 1 is amiss. In fact, it is the Respondent who has sought to distort the meaning and significance of Fit Note 1 beyond a fair, objective, and everyday interpretation. This is absolutely clear upon reading the wording upon the note (R/30):

a. The document is advisory only (the advice being given for the benefit of Dr M, as the patient of Dr W);

b. The right hand column clarifies the meaning of the advice 'You are not fit for work', making plain that this does not in any sense represent a prohibition or a legal bar to Dr M working, and that he may return to work sooner if he feels able to.

3.141 62. Fit Note 1 thus represented advice from Dr M's GP to him. As was confirmed within Dr D's appeal letter of 14 June 2024 (R/1-3):

> *…there was no need for Dr M to seek, or be provided with, a sick note. His reasons for doing so were to demonstrate compliance with the NHS England investigation.* (R/2)

3.142 63. Although the Respondent asserts throughout their Representations that the sick note is determinative for the purposes of paragraph 3(3) of the Determination, it has yet provided no authority to support its position in this regard.

3.143 64. Moreover, as we have explored above, the Respondent's treatment of Fit Note 1 in this manner is all the more remarkable, given that it failed to comply with its own obligation as articulated within paragraph 4.5 of its own *Policy on managing NHS Performers Lists.* That policy requires the Respondent to signpost the relevant Secretary of State's Determination to the performer at the time of suspension.

3.144 65. It is plain from a brief review of the Respondent's correspondence to Dr M of 28 March and 2 April 2024, that the information provided therein failed absolutely to signpost the Determination.

3.145 66. Within both letters, the Determination was referred to in oblique terms only, with no clear reference to the name of the document, and no copy of the document (or link to it) being provided. Moreover, all of these aspects are in marked contrast to the manner in which other documents were referred to within those letters. In the context of a long and detailed letter to a medical performer (with no legal training), regarding allegations which had resulted in their suspension from the Performers List (and thus would be likely to cause inherent stress), these letters offered no realistic prospect that Dr M would understand the criteria that would be applied by the Respondent in assessing his entitlement to suspension payments.

3.146 67. Dr M was entirely unaware as to the existence and the significance of the Determination, until after he received notification from the Respondent that he was not entitled to the suspension payments he had claimed for. His lack of awareness of this, and the unique (and we say, wholly contorted) interpretation that appears to have been applied to Fit Note 1 by the Respondent, meant that Dr M could not reasonably have anticipated that, by obtaining and disclosing Fit Note 1 to the Respondent, he would effectively be rendering himself ineligible for the payments he claimed for.

3.147 68. There is a clear injustice in the above, in that the Respondent's own policy confirms that the Respondent is responsible for signposting the Determination to performers who are suspended. The Respondent's failure to meet this requirement has placed Dr M at a clear disadvantage, in circumstances in which he could not reasonably have anticipated that the Respondent would regard Fit Note 1 as being determinative of his application. As we have highlighted above, the Respondent's position in relation to Fit Note 1 is, in any event, irrational, in that it does not appear to afford the document its ordinary, everyday meaning, but instead seeks to import a wholly artificial status to the document.

3.148 69. The status of Fit Note 1 is no more than an advisory document to the patient. It is not advice that is provided for the benefit of the Respondent, neither does it purport to be. The advice is not determinative in any sense, as the Respondent seeks to suggest. Had the Respondent sought to obtain clear and objective advice as to the question of whether Dr M was 'able and permitted' to perform primary medical services for the purpose of its consideration of paragraph 3(3) of the Determination, then it was incumbent upon the Respondent to seek its own advice from an Occupational Health practitioner, rather than seeking to elevate artificially the status of Fit Note 1.

3.149 70. Significantly, Dr M underwent Occupational Health assessment at the request of the Respondent, on 4 June 2024. He is uncertain as to whether he has received a copy of that report.

3.150 71. The Respondent has suggested within paragraph 36 of its Representations that 'Dr M has not made out the grounds for discrimination.' There is no onus upon Dr M to 'make out' the grounds of discrimination at this stage. Nor is there any obligation for Dr M or his representatives to advise the Respondent as to their responsibilities under the Equality Act 2010. Rather, responsibility falls to the Respondent to ensure that its decision-making is consistent with the provisions of the Equality Act 2010, and that its conduct towards Dr M is not discriminatory.

3.151 72. The manner in which the Respondent has purported to abdicate its responsibility in respect of undertaking a fair consideration of Dr M's entitlement to suspension payments in accordance with the wording of the Determination is inconsistent with its responsibilities, both as a public authority, and as an organisation subject to the provisions of the Equality Act 2010. For the above reasons, we reiterate our submission that it would be manifestly unfair, irrational, and discriminatory, to withhold the suspension payments claimed by Dr M for the period 28 March – 24 May 2024."

<u>NHS England's further Submissions</u>

3.152 **“Background**

3.153 1. The Applicant, Dr [redacted by NHSR], appeals against the decision of the Respondent, NHS England, to refuse his application for suspension payments for the period 28 March 2024 – 24 May 2024 as a result of non-eligibility. The appeal letter (11 pages) was filed with the PCA on 14 June 2024. This was then sent to the Respondent by the PCA on 24 June 2024.

3.154 2. Representations were provided by the Respondent on 15 July 2024. The Applicant did not provide any representations.

3.155 3. Observations were provided by the Applicant on 1 August 2024. These included new information and submissions that the Respondent had not had the opportunity to rebut.

3.156 4. On 12 August 2024 the PCA granted the Respondent’s request to provide observations on the Applicant’s observations.

3.157 5. The Applicant set out his observations in five sections, labelled A to E. The Respondent sets out its observations in this document following the same structure.

3.158 6. NHS England encloses a supplementary bundle of documents with these observations. Reference to documents within the bundle use the format [**R/Document Number/Page Number**].

3.159 **The Respondent’s Observations**

A. *Fit Note 1 issued to Dr M on 3 April 2024 represents clear and unambiguous evidence that Dr M was not ‘able and permitted to perform primary medical services’, for the purposes of paragraph 3(3) of the Determination (paragraphs 26 – 27).*

3.160 7. In his observations at paragraph 7-9, the Applicant places great emphasis on the Respondent stating that *“A medical practitioner determined that Dr M was not to work”* within Fit Note 1. The Respondent used the verb *“determine”* in its ordinary, everyday sense. It is obviously necessary for a medical practitioner to determine a person’s fitness to work in order to issue the Fit Note, regardless of the legal status of the Fit Note.

3.161 8. In paragraph 9, the Applicant goes on to say that the fit note’s *“status is advisory to the patient”*. The Respondent acknowledges that this is correct. However, that advice is based on medical practitioner’s assessment of whether the Applicant is fit to work. The inclusion of advice does not impact upon the relevance and significance of the document as medical evidence of the Applicant’s general fitness to work.

3.162 9. Through its observations, the Applicant has not presented a full picture of what the Fit Note says, or the wider process and circumstances through which it is issued. Dr W has advised the Applicant that he is “*not fit for work*”. The Respondent refers to the Department for Work and Pension guidance **Fit note: guidance for healthcare professionals** **[R/16/66-85]** and in particular the following (our emphasis):

> a. *“A statement of fitness for work, commonly known as a fit note or ‘med 3’, is a form of medical evidence that can enable an individual to access health-related benefits or evidence eligibility for Statutory Sick Pay (SSP)”* **[R/16/69]**.
>
> b. *“The fit note is based on an assessment by a healthcare professional about their patient’s fitness for work. Legislation requires the healthcare professional to undertake an assessment, either through a face to face, video call, telephone consultation or through considering a written report by another healthcare professional, in order to complete a fit note”* **[R/16/69]**.
>
> c. *“Your assessment about whether your patient is fit for work is about their fitness for work in general and is not job specific, but you may adapt your advice when considering your patient’s situation. You do not need to issue a fit note if your assessment is that the patient’s fitness for work is not impaired by their health condition”* **[R/16/73]**.

d. *"If your clinical assessment of the patient is that they should refrain from work due to their health condition the 'not fit for work' box would apply. You should only tick this box if the patient cannot do any type of work. You should ensure that you continue to review their fitness for work at regular intervals"* **[R/16/75].**

3.163 10. In summary, Fit Note 1 is evidence that, following a clinical assessment by the Applicant's GP, the GP determined that the Applicant was not fit to do any type of work, and advised the Applicant of this. The Respondent respectfully submits that making an assessment that somebody cannot do any form of work at all is not an assessment that a healthcare professional would make lightly and equally should not be discounted or minimised for the purposes of this appeal, as the Applicant seeks to do.

3.164 11. At paragraph 14 of his observations the Applicant says that the contents of Fit Note 1 "*should be given its ordinary, everyday meaning*". The Respondent submits that a reasonable and well-informed person, taking the ordinary, everyday meaning of Fit Note 1 would take Dr W's statement that the Applicant was not fit for any form of work at face value. Moreover, the reasonable and well-informed person would surmise that the purpose of attending a GP to obtain a note confirming that they were/are unfit to work for a period of time would be to confirm – and obtain medical evidence – that they considered themselves unfit to work during that period. The Respondent respectfully submits that the Applicant has departed far from the ordinary, everyday interpretation of a Fit Note in its observations.

3.165 12. For the avoidance of doubt, the Respondent has not, as the Applicant suggests, insisted that Fit Note 1 is *"unassailable"* evidence of the Applicant's fitness to work (paragraph 11). Rather, the Respondent's position is that Fit Note 1 is relevant and significant evidence of an independent clinical assessment by a medical practitioner of the Applicant's fitness to work, and that the Applicant has not presented sufficient evidence to demonstrate that the Applicant's GP's clinical assessment is wrong or outweighed by other facts and evidence presented.

3.166 13. On this point, it is important to recognise that the burden of proof for evidencing entitlement to suspension payments is on the Applicant. It is for the Applicant to satisfy the Respondent, and now the PCA, that he was entitled to suspension payments for this period, for which he must show that he was (but for the suspension itself) able and permitted to perform NHS primary medical services. Paragraph 6 of the Secretary of State's Determination: Payments to Medical Practitioners Suspended from the Medical Performers List 2015 ("**the Determination**") states that no payments may be made by the Respondent pursuant to the Determination unless the Respondent is satisfied that the suspended medical practitioner is entitled to suspension payments. The Respondent has considered the evidence and is not satisfied that the Applicant is so entitled.

3.167 14. Ultimately the weight to attach to Fit Note 1 will be a matter for the PCA to determine but the Respondent submits that: the evidence of a fit note stating that the applicant was unfit for any type of work; the guidance on use of fit notes in particular the meaning behind "*not fit for work*"; the ordinary everyday meaning of Fit Note 1; and the logical reason as to why the Applicant was seeking a fit note, all point towards a conclusion that the Applicant was unfit for work, that he knew he was unfit for work and that the Respondent is right to conclude from Fit Note 1, alongside all other evidence available, that the Applicant was not able to perform NHS primary medical services for the period in question.

B. *In seeking to reply upon Fit Note 3 (dated 4 June 2023) in support of his claim for suspension payments, Dr M is seeking to persuade the Respondent to 'ignore' Fit Note 1; and in doing so, to overlook relevant evidence (paragraphs 28-29 and 35).*

3.168 15. The parties are in agreement that the PCA should consider the totality of evidence and the Respondent stands by paragraph 29 of its representations which stated that "*NHS England and the PCA can only work on the basis that Fit Notes 1 and 3 are two separate Fit Notes covering different but overlapping timeframes, and that together they state he was unfit to work for the entirety of the timeframes covered*". There is not any evidence to demonstrate that Fit Note 3 supersedes Fit Note 1.

C. The Respondent has no discretion in relation to its decision, but is bound by the unambiguous wording of the Determination (paragraph 32). Applying this wording to Dr M's case, it is clear that he is not entitled to suspension payments for the period 28 March until 24 May 2024 (paragraph 31).

3.169 16. The Respondent accepts that the Determination is not a statutory instrument as noted in paragraph 24 of the Applicant's observations. However, Regulation 13(1) of the National Health Service (Performers Lists) (England) Regulations 2013 ("**the 2013 Regulations**") states the following (emphasis added):

> *"(1) During a period of suspension under regulation 12, payments may be made by NHS England to... a Practitioner in accordance with a determination by the Secretary of State where the Practitioner has made an application in accordance with paragraph (A1)"*

3.170 17. As a result of Regulation 13, the Respondent and by extension the PCA, may only make suspension payments in accordance with the Determination. While the Determination itself is not a statutory instrument, it is set by the Secretary of State, and not within the policy remit of the Respondent. Paragraph 6 of the Determination explicitly states that no payments may be made by the Respondent unless the Respondent is satisfied that the suspended medical practitioner is entitled to suspension payments, under the criteria set out in the Determination. For the Respondent to pay suspension payments where the Applicant does not meet explicit eligibility criteria within the Determination would not be in accordance with the Determination and therefore would be in breach of Regulation 13(1). Therefore, the Applicant's suggestion that the Respondent has discretion to pay suspension payments in such circumstances, including those of the Applicant himself, is wrong. Alternatively, (though not the position adopted by the Respondent or the PCA or High Court previously), if the Applicant is right that the Respondent *is* permitted to exercise discretion contrary to the Determination, the Applicant has in no way demonstrated that there is an exceptional basis upon which the Respondent or the PCA should not apply the Determination.

3.171 18. By acting in accordance with the Determination, as required by Regulation 13(1), the Respondent is not fettering its discretion as suggested at paragraph 25 of the Applicant's observations. Where discretion is allowed (e.g. Paragraph 4(2) of the Determination regarding reasonableness of a suspension payment) the Respondent will use its discretion. There is however no discretion given to the Respondent in respect of Paragraphs 3(3) and 6(1) of the Determination meaning that where the Respondent finds an applicant is not "*able and permitted to perform primary medical services*", they will not be entitled to a payment, and "*no payments may be made*".

3.172 19. The Applicant has raised an issue starting in paragraph 26 of the observations regarding the Respondent's requirement to signpost the Applicant to the Determination. The Applicants submissions on this point are misconceived in multiple respects:

a. Firstly, the NHS England's *Policy on managing the NHS Performers Lists* was published and took effect on 10 July 2024, and therefore was not in existence at the time the Applicant was suspended, or when the application for suspension payments was made.

b. Secondly, the Respondent *did* signpost the Applicant to the Determination. In fact, the Respondent sent an email to the Applicant on 2 April 2024 regarding the outcome of the review of the Applicants suspension. The Determination was attached to this email under the name "determination_payments_to_suspended_gp.pdf" **[R/17/86]**. A separate copy of this email is enclosed so that the attachments may be inspected.

c. Thirdly, the Applicant was also made aware of the Determination in letters on 28 March 2024 **[R/3/14-18]** and 2 April 2024 **[R/4/19-23]** that "*you may qualify for payments under a Determination from the Secretary of State on payments to doctors suspended from medical Performers Lists*".

d. Fourthly, the Determination is referred to within the 2013 Regulations and is published online.

3.173 20. In paragraph 28b of the Applicant's observations it is noted that "*Dr M is not a legal professional, so to have conducted research based upon the limited information within the Respondent's letters of 28 March and 2 April 2024 would have been fanciful*". As set out above, no research was necessary as the Respondent had provided a copy of the Determination to the Applicant and referred to it on multiple occasions. However, even if the Applicant had not received the Determination directly, it was always open to him to:

a. Look for further information online: a Google search of the wording used in the letters of 28 March and 2 April 2024 "*Determination from the Secretary of State on payments to doctors suspended from medical Performers Lists*" brings up the correct Determination as the first result.

b. Contact the Respondent's case manager, who added in the covering email of the letter dated 28 March 2024 that "*I have attached the regulatory letter which advises of your suspension and the reasons why this decision has been made. There is a lot of information contained within the letter and I would be very happy to go through this with you in detail so you fully understand the process that will now take place*" **[R/18/92]**. The case manager's email address and telephone number were clearly written on both of the aforementioned letters; or

c. Raise this issue in the meeting with the Respondent on 18 April 2024 in which suspension payments were discussed.

3.174 21. The Respondent respectfully submits that the ability to undertake any of the basic steps outlined above does not require research or legal advice or representation. The Applicant's statement that it was *"fanciful"* for him to undertake any single one of these basic steps himself is absurd.

3.175 22. In any event, the question for the PCA to determine in this appeal is whether the Applicant is entitled to suspension payments under the Determination, and the Applicant has now had the opportunity to familiarise himself with the Determination and make detailed submissions upon it.

D. The Respondent has no power to determine whether a refusal to provide suspension payments would be punitive (paragraph 32). Concepts of fairness and penalisation are not relevant to the Respondent's application of the Determination (paragraph 34).

3.176 23. The Applicant has made observations questioning whether the Respondent has fettered its discretion by not taking into account concepts of fairness and penalisation in its application of the Determination and noting that such concepts are "*manifestly relevant to any exercise of a public function by a public authority*" and that the Respondent is subject to the *Nolan Principles*.

3.177 24. At no point as the Respondent suggested that it is not required to act in accordance with usual public law principles, including (but not limited to) those mentioned by the Applicant. However, the point being made by the Respondent, as set out above, is that Regulation 13(1) requires it to only make payments in accordance the Determination, and it does not have discretion to make payments where it is not satisfied that the Applicant is eligible under the explicit criteria set out in the Determination, which is what the Applicant is inviting the Respondent and the PCA to do. The Applicant is wrong to say that *"it would be manifestly unfair, irrational, and discriminatory"* to objectively apply Regulation 13(1) and the Determination to the Applicant's circumstances, as the Respondent seeks to do.

3.178 25. The Respondent also wishes to make clear that while it acknowledges the Applicant feels that the Respondent's decision is *"unfair"*, there is no evidence whatsoever of *"penalisation"* or *"discrimination"*. The Respondent's decision is based on the objective application of Regulation 13(1) and the Determination to the Applicant's circumstances.

E. *The High Court authority of Sandles v NHS England [2022] EWHC 1582 (Admin), and the Primary Care Appeal decision in SHA/23356, both support the Respondent's position (paragraphs 30 and 33-34).*

3.179 26. In the Applicant's observations at paragraph 44, it is noted that nowhere within the relevant extract of the *SHA/23356* decision is it stated that concepts of fairness and penalisation are not relevant when determining whether a performer is *"able and permitted*". This is factually inaccurate for the following reasons:

a. In Paragraph 4.21 of the *SHA/23356* decision, the adjudicator states that "*I am being asked by the Applicant to not apply the literal meaning of the words due to the unfairness to the Applicant that would result"*. In essence, that is the same submission being made by the Applicant in this case, which the adjudicator rejected in *SHA/23356*;

b. In Paragraph 4.38 of the *SHA/23356* decision, the adjudicator acknowledges that *inter alia* being deprived of income is "*unfair*" and in the following paragraph notes their inability to factor this into a reading of the Determination.

3.180 27. The Respondent's representation (paragraph 34) was that no words can be read into the wording of the Determination regarding eligibility. The Respondent referred specifically to fairness and penalisation by way of a summary of the issues raised in *SHA/23356* and by the Applicant in their initial appeal letter.

3.181 28. The Applicant observed at paragraphs 45-48 that the facts of *SHA/23356* are not the same as those in this appeal and the Respondent agrees with this. This is true. The similarity however is the construction of Paragraph 3(3) of the Determination which was made in *SHA/23356* and will need to be made in respect of this appeal. Namely, that the applicant in both appeals were not *"able"* to work for the period in question and considered that this depriving them of suspension payments was unfair.

3.182 29. The Respondent agrees with the Applicant's comment in paragraph 51 that the *Sandles* judgment focussed on interpretation of paragraph 4 of the Determination rather than paragraph 3. Paragraph 3 had no relevance to the *Sandles* case. However, the *Sandles* case is a binding legal precedent regarding the principles by which the Determination should be interpreted and provided.

3.183 30. In paragraph 52 of the Applicant's observations, the Applicant has referred to comments made by Judge Cooke "*…that the 2015 Determination would enable an employed doctor to get suspension payments in circumstances where he or she was not earning for a different reason – perhaps by virtue of having reached a compulsory retirement age or because of serious ill-health*". These comments do not assist the Applicant in this appeal because:

a. This comment was made to illustrate the different treatment of partners and employees under paragraph 4, which was the issue in the *Sandles* case. Compulsory retirement age and serious ill-health are examples of where *"it is perfectly possible for an employed doctor to lose his job after suspension for a reason unrelated to it"*, yet an employee would continue to meet the eligibility criteria under paragraph 4.

b. Additionally, or alternatively, Judge Cooke specifically used the word *"perhaps"* when giving examples of compulsory retirement age or serious ill-health. The word *"perhaps"* is used to express uncertainty or possibility. That uncertainty or possibility would encompass the practitioner being ineligible on other grounds, as in this case.

c. Additionally, or alternatively, as noted above, the *Sandles* case did not concern paragraph 3 of the Determination in any respect. This comment was made to illustrate the different treatment of partners and employees under paragraph 4. The comment was made in passing and on a hypothetical matter which did not require a decision. As such, this comment is *obiter dictum* and does not create binding legal precedent regarding the interpretation of paragraph 3.

3.184 31. In paragraphs 55-57 of the Applicant's observations, the consideration of fairness in relation to interpretation of the Determination is considered in the context of the *Sandles* decision. Whilst the submission of the Applicant in respect of "*absurdity and unfairness*" was considered and commented on in brief, this did not go on to form any part of the decision. The Respondent reiterates that the binding precedent from *Sandles* for the PCA to keep in mind is that Judge Cooke stated that "*the words of the 2015 Determination are clear*" and as a result, when this is the case, it is not an option to use policy to construe those words.

3.185 **Conclusion**

3.186 32. For the reasons set out above, read alongside the Respondent's representations, the Respondent invites the PCA to dismiss this appeal, and confirm that Dr M is not entitled to suspension payments for the period in question."

4. CONSIDERATION

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

4.2 The Notice of Appeal is in respect of the Appellant's eligibility for suspension payments between 28 March 2024 and 24 May 2024. The Appellant submits that his entitlement to suspension payments during that period should not be impacted by the issuing of a fit note(s) by his GP.

4.3 As I have already set out, the 2015 Determination establishes a medical practitioner's entitlement to suspension payments in accordance with Regulation 13 of the Regulations.

4.4 I note that the Appellant has stated that the 2015 Determination amounts to a statement of policy, as per Cooke J in *Sandles v NHS England [2022] EWHC 1582 (Admin)*. The Appellant has stated that in consequence of NHS England's reliance on the 2015 Determination it may be "*unduly fettering its own discretion*".

4.5 I note that NHS England has agreed that the 2015 Determination is not a statutory instrument, however states that Regulation 13(1) of the Regulations makes it explicit that:

"During a period of suspension under regulation 12, payments may be made by NHS England to... a Practitioner in accordance with a determination by the Secretary of State where the Practitioner has made an application in accordance with paragraph (A1)."

4.6 Whilst the 2015 Determination is not a statutory instrument, to make payments, other than in accordance with Regulation 13(1), would be in breach of the Regulations. I consider that in making any determination as to the eligibility of a medical practitioner for suspension payments, the Regulations are expressly clear that they must be made in accordance with a determination made by the Secretary of State. The relevant determination is the 2015 Determination, and as such properly applying the 2015 Determination is not a fettering of NHS England's decision making.

4.7 I consider that NHS England is correct that where the criteria in the 2015 Determination is not met, then there is no ability for NHS England to make the payments and no discretion to do so. As such, I do not consider that NHS England has fettered its decision making in the way alleged by the Appellant.

4.8 The 2015 Determination must be followed when considering eligibility for suspension payments. Paragraph 3 of the 2015 Determination states:

3.-(1) A medical practitioner may be entitled to receive payments from the Board by virtue of this Determination if sub-paragraphs (2) and (3) apply to that medical practitioner.

(2) This sub-paragraph applies to a medical practitioner who -

(a) is suspended; and

(b) immediately prior to the suspension (or the circumstances giving rise to the suspension) is or was—

(i) a contractor (including a partner in a partnership which is a contractor),

(ii) a person employed or engaged by a contractor to perform primary medical services,

(iii) a locum who has, or has had, a contract for services with a contractor to perform primary medical services,

(iv) a locum employed or engaged by a body that provides or provided locum or deputising services to contractors who, in the period of six months beginning immediately prior to the suspension, performed primary medical services which were provided at a contractor's practice,

(v) a locum who does not, or did not, have a contract of service or a contract for services with a contractor or a body referred to in paragraph (iv) but who, in the period of six months beginning immediately prior to the suspension, performed primary medical services which were provided at a contractor's practice.

(3) This sub-paragraph applies to a medical practitioner to whom sub-paragraph (2) applies who, apart from the suspension, and any suspension from the register of medical practitioners which does not provide grounds for removal from the medical performers list under regulation 28 of the 2013 Regulations (grounds for removal from the medical performers list), is able and permitted to perform primary medical services

4.9 It is not disputed that the Appellant meets the criteria in paragraph 3(2), by way of being employed as a locum providing primary medical services immediately prior to the suspension.

4.10 However, I note that both sub-paragraphs (2) and (3) must apply to the Appellant for the Appellant to be entitled to payment, as per sub-paragraph (1). As sub-paragraph (2) applies to the Appellant, sub-paragraph (3) requires that the Appellant must also be "*able*" and "*permitted*" to perform primary medical services.

4.11 I note that in its Decision, NHS England has stated not being able to and permitted to perform primary medical services as being the reason for determining that the Appellant was not eligible for suspension payments. It did not specify which paragraph of the 2015 Determination it was relying on. However, it is clear that this must have been paragraph 3(3). The evidence of the Appellant's inability to perform primary medical services, as stated by NHS England, was the first fit note, dated 3 April 2024 ("**Fit Note 1**"). I note that in its Reconsideration dated 30 May, NHS England also relied on the second fit note, dated 24 May 2024 ("**Fit Note 2**").

4.12 In its Observations, the Appellant states that Fit Note 1 does not represent a legal determination and that its function is advisory to the Appellant. The Appellant states that the fit note is not clear and unambiguous evidence of the Appellant's ability to perform primary medical services. The Appellant indicates that the effect of Fit Note 1 should be considered to be minimal in considering all of the circumstances and evidence.

4.13 Due to these opposing views of the evidentiary weight to attach to the fit notes, I consider it necessary to not only consider fit notes in general but to review each of the fit notes issued to the Appellant. I note that fit notes themselves refer to guidance available, and that additional guidance has been provided by NHS England. I have had regard to both of these pieces of guidance, alongside the parties' statements.

4.14 I note that in its Observations, the Appellant has indicated that a fit note is advisory in nature, and specifically that it was for the benefit of the Appellant. Secondly, the Appellant has stated that the use of the word "*may*" indicates that it does not represent a prohibition on the

Appellant's ability to work. Thirdly, the Appellant states that the fit note is not determinative of the Appellant's ability to work.

4.15 I note that in NHS England's further Submissions it has responded to the reference to fit notes' determinative nature, stating that where in its Representations it had used the word "*determined*" this was in its ordinary "*everyday sense*". I note that NHS England has further stated that a fit note is evidence of a clinical assessment in which a GP has determined an individual is not fit to do any type of work, and has supported this with citations from the guidance. I note that NHS England has summarised its position at paragraph 12 of its further Submissions, which is provided above.

4.16 Having considered both of these lines of reasoning, I consider that a fit note is not definitive evidence of an individual's ability or inability to work for the purposes of the 2015 Determination. However, I also do not consider that it should be completely overlooked. In regards to the Appellant's reference to it being for the Appellant's benefit I note that the guidance makes reference to its benefit to an employer as well, and that it can provide advice directly to them. A fit note is also evidence for eligibility for Statutory Sick Pay. As such, I consider that it must carry some weight for NHS England, who, in making suspension payments, are in a position not dissimilar to an employer.

4.17 As to the weight attached to a fit note, I consider that this will be entirely dependent on the contents of the fit note, the circumstances of its issuing and any surrounding corroborative information. Whilst I agree with both parties that it is not *de facto* determinative of an individual's ability or inability to work, I consider that there may be circumstances where it is strong enough evidence to demonstrate an inability to work, for the purposes of the 2015 Determination. Whilst an individual may choose to work, I consider that the opinion of a healthcare professional, in a clinical setting, who must make a determination of an individual's ability cannot simply be ignored. Where a fit note is issued indicating that an individual is not fit for work, I consider that there then would need to be reliable evidence to rebut the ordinary and everyday understanding that such an individual would be unable to work. I also consider that there may be evidence that demonstrates the fit note to be unreliable. As such, I consider it necessary to evaluate each of the fit notes, in depth, considering the weight to attach to them individually, and collectively, taking into account corroborative evidence and considering them not just as fit notes, but by what information they contain.

4.18 Fit Note 1 was issued by the Appellant's GP. I have been provided a copy of it and have had due regard to it. Fit Note 1 provides no other details other than the nature of the Appellant's condition and the period for which it advises the Appellant that he is not fit for work. I note that it was back-dated to 12 March 2024, which was the date of the initial incident which led, later, to the Appellant's suspension. I note that the "Fit Note: guidance for healthcare professionals" was provided by NHS England and states that a healthcare professional may back-date in certain situations, though it does not provide for what those situations are.

4.19 The second fit note ("**Fit Note 2**") was issued by a different clinician at NHS Practitioner Health. This was dated 24 May 2024. The fit note is not advice that the Appellant is not fit for work, but rather that he may be fit for work and suggests a phased return with amended duties and altered hours. The period for this phased return was from 24 May 2024 until 31 July 2024. The note details the events that had led to a phased return now being appropriate, mainly that the Appellant's [redacted by NHSR]. I note that these covering emails also state that Fit Note 2 supersedes Fit Note 1, according to the Appellant:

"The new fit note supersedes the GP sick note because my GP [redacted by NHSR]".

4.20 The third fit note ("**Fit Note 3**") was issued by the Appellant's GP. It was dated 4 June 2024 but provides that the Appellant was advised that he was not fit for work from 28 March 2024 until 2 April 2024. This would be a total period of 6 days and was back dated just over 2 months. Fit Note 3, similar to Fit Note 1, also has no further comments from the GP. The Appellant has stated that the GP had intended this to supersede Fit Note 1. I note that no correspondence with the GP has been provided for consideration as part of the appeal. Having regard again to the fit note guidance, I note that a period of 6 days is unusual as an individual may self certify if they are sick for a period less than 7 days. I further note that the date of

assessment on the fit note is 4 June 2024. The guidance provided by NHS England indicates that if the GP was relying on an earlier assessment, then that should be the date provided in the fit note. As this is not the case, I consider the reasonable inference to be that this fit note is not based on the GP's assessment on 3 April 2024, but based on a new assessment carried out on 4 June 2024.

4.21 I note that the Decision by NHS England was based on Fit Note 1, as that was the only fit note available, however the Reconsideration on 30 March 2024 includes Fit Note 2. Fit Note 3 was only provided to NHS England on 12 June 2024. I note that it was not referred to in the Notice of Appeal, but was referred to in NHS England's representations and the Appellant's Observations. As such, I will consider it as part of this appeal.

4.22 In contemplating the weight to attached to these fit notes, I consider it necessary to look at the inconsistencies created by them. Firstly, whilst a fit note may be backdated, I note that where a previous fit note has been issued, point 11.4 of "Fit Note: guidance for healthcare professionals" indicates that this will be based on an estimate. Fit Note 1, therefore, estimates this date to be 12 March 2024. As the Appellant has stated, and is not disputed, the Appellant continued to work from 12 March until 28 March 2024. Returning to the 2015 Determination, the key point of consideration for this appeal is the word "*able*". I consider it very difficult to reconcile the fact that the Appellant was in fact working, with the statement that he was also, supposedly, unable to do so.

4.23 I note that the Appellant has raised this point, and suggests that this "*undermines the entirety*" of reliance on Fit Note 1. I consider that this conclusion goes slightly too far. As I have noted above, the GP was estimating a back-date for the fit note, most likely based on the evidence before him. Whilst the fact that the back-dating is incorrect is important, it does not suggest that the GPs assessment, on the day, of the Appellant, and his ability to work from the date of assessment, would also be incorrect. I consider there to be a vast difference between estimating the past, and considering the present and future where the GP was able to rely on his own assessment of the situation, rather than that reported to him by the Appellant.

4.24 At this point in my analysis, I consider it important to also make reference to the substantial comments in Fit Note 2. As I have asserted, Fit Note 2 is of a different nature to Fit Notes 1 and 3. This is due to the fact that it does not say the Appellant is unable to work. Indeed it states the opposite – that he is fit to work. I note that NHS England has relied on this statement to start making suspension payments from 25 May onwards. I note that the Appellant has not disputed the information in this fit note, or NHS England's reliance on it and has made no reference to it in either their Appeal Notice or Observations.

4.25 As noted, Fit Note 2 provides for a phased return to work starting on 24 May 2024. I consider that this creates a problem for the Appellant's suggestion that suspension payments should be payable for the entire period between 28 March 2024 to 24 May 2024. The reason for this is that whilst a phased return could only be instigated from 24 May 2024, the Appellant is suggesting that on 23 May 2024 he was entirely able to work. This does not appear to make sense.

4.26 As I have noted, in considering fit notes, I must also look at the content and surrounding information. I have set out above the issues which were mentioned in Fit Note 2, and I consider that these issues have been further evidenced by the email chains, provided by NHS England, between the Appellant and the relevant healthcare professional. Therefore, I am inclined to place more weight on Fit Note 2 than Fit Note 1, especially since it was not backdated.

4.27 Where Fit Note 2 provides for a phased return from 24 May 2024, this must mean that there was a period prior to this that the Appellant was not suitable for any return. The only indication I have that presents a date the Appellant was fit to work (albeit on a phased return) is 24 May 2024.

4.28 Finally, I must consider Fit Note 3. I note that NHS England stated that Fit Notes 1 and 3 are *"two separate fit notes covering different but overlapping timeframes*". I note that the Appellant has invited me to consider it as part of the evidence of Fit Note 1's minimal impact. I consider Fit Note 3 unhelpful in establishing when the Appellant was unable to work. There is no

reasoning provided as to why the same GP has come to a different determination on timescales for unfitness to work which themselves are much earlier than the date Fit Note 3 was issued. Given that Fit Note 1 was made contemporaneously I am inclined to consider it as stronger evidence than Fit Note 3. I also note that Fit Note 3 makes no reference to Fit Note 2, or the [redacted by NHSR]. Consequently, I cannot consider Fit Note 3 of anything other than a duplication of Fit Note 1, but backdated further, and of little evidential significance.

4.29 I consider that these three fit notes therefore present a complex timeline. Having reviewed them I consider these facts to be beyond repute - on 28 March 2024 the Appellant was suspended, on 3 April 2024 he was seen by a GP who, at that time, considered him unfit to work, and then on 24 May 2024 he was seen by a different clinician who deemed him fit for a phased return to work. I consider there to be an issue with Fit Note 1's estimated date of when the Appellant was rendered unfit to work, as set out above. I note that, had the Appellant not been suspended he would have, almost certainly, gone to work on 28 March 2024, as stated by the Appellant. Which leaves me in the position where I must determine at what point between 28 March 2024 and 24 May 2024 the Appellant was unfit to work as per my analysis of Fit Note 2. As I have set out earlier in this determination, where a fit note is issued indicating that an individual is not fit for work, I consider that there then would need to be reliable evidence to rebut the ordinary and everyday understanding that such an individual would be unable to work albeit that there may be evidence that demonstrates the fit note to be unreliable.

4.30 I note that the Appellant was seen by his GP on 3 April 2024. I consider that the GP on that date, and upon assessment, deemed him unfit to work, as per Fit Note 1. For reasons set out earlier in this determination, I find the estimation of his unfitness starting before this date to be unreliable, certainly prior to 28 March 2024 given he was actually working. Whether he was unable to work between 28 March 2024 and 3 April 2024, I am unclear (having determined that Fit Note 3 has little evidential significance).

4.31 I consider the fact that the GP was able to physically assess the Appellant and declared him unfit for work to be significant evidence of his inability to work as at the date the Appellant was assessed, i.e. 3 April 2024. The point at which the Appellant was suitable for a return to work (and thus able to work) was 24 May 2024 and as such he must have been unable to work at some point before that, as per Fit Note 2. As I cannot be certain as to what date between 28 March 2024 and 24 May 2024 the Appellant became unable to work, I consider that the only date on which I am certain a healthcare professional was of the view that he was unable to work, and which I have evidence for, must be 3 April 2024. In the absence of any evidence to the contrary, I then consider that the Appellant was thus unable to work until 24 May 2024. I consider that this analysis of the dates represents the only time period during which I have evidence that satisfies me that the Appellant was unable to work.

4.32 As I have already considered, suspension payments may only be made in accordance with the 2015 Determination. As the Appellant was, as I have considered, unable to work from 3 April 2024 until 24 May 2024 he is not entitled, under Regulation 13 of the Regulations, to suspension payments for the period from 3 April 2024 until 24 May 2024. However, due to the evidential issues with Fit Note 1, and the lack of any definitive proof otherwise of the Appellant's inability to work, I consider that the Appellant was able to work from 28 March 2024 until 2 April 2024, and was thus eligible, under Regulation 13 of the Regulations to suspension payments for the period 28 March 2024 until 2 April 2024.

4.33 I have noted within the Appellant's Observations the reference to the Sandles judgment and specifically the part that refers to "serious ill-health". The Appellant indicates that Judge Cooke includes compulsory retirement age and serious ill-health as examples in which she envisages the 2015 Determination enables a performer to obtain suspension payments. I note NHS England's response that the judgment relates to paragraph 4 and not paragraph 3, the reference is about the difference between partners and employees, and that the reference to ill-health is prefaced by "perhaps". I am not satisfied that the reference to ill-health in the judgment should be read as Judge Cooke stating that a locum who has a fit note indicating unfitness to work should be considered "able" to work for the purpose of satisfying paragraph 3(3). I agree with NHS England that it is stated in respect of a different part of the 2015 Determination. The reasoning behind this is not set out and I note that the Sandles judgment

does not relate to a performer suffering ill-health. I would need much more detail set out in the judgment to be satisfied that Judge Cooke was stating that a locum who has a fit note indicating unfitness to work should be considered "able" to work for the purpose of satisfying paragraph 3(3).

4.34 Finally, I note in the Appellant's Observations they raise the issue of not having received the 2015 Determination. I accept NHS England responses to this, that it was provided on 2 April 2024, that it was easily available and that the "Policy on managing the NHS Performers Lists", upon which the Appellant seeks to rely, was published on 10 July 2024, after the correspondence had taken place.

5. DETERMINATION

5.1 Pursuant to paragraph 3(1) of the 2015 Determination I determine that the Appellant is entitled to suspension payments for the period of 28 March 2024 until 2 April 2024 and from 25 May 2024 until eligibility ceased. I also determine that pursuant to paragraph 3(1) of the 2015 Determination, the Appellant is not entitled to suspension payments for the period of 3 April 2024 until 24 May 2024.

Head of Appeals
NHS Resolution