NHS Resolution

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26 June 2025

FILE REF: **SHA/26528**

DECISION MAKING BODY: **NHS GREATER MANCHESTER ICB ("THE COMMISSIONER")**

GDS CONTRACTOR: **SMILE MANCHESTER**

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

RE: **DISPUTE RESOLUTION WITH REGARD TO RECOVERY OF MONIES**

1 Outcome

1.1 I am of the view that the Contractor has failed to meet the criteria for its Force Majeure application to succeed.

1.2 The Commissioner can make the financial recovery as specified in the 2022/23 year end reconciliation for Contract 2453720006.

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

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RE: **DISPUTE RESOLUTION WITH REGARD TO RECOVERY OF MONIES**

1 INTRODUCTION

1.1 The Contractor has referred the dispute in relation to its General Dental Services ("GDS") Contract for dispute resolution under the provisions of Paragraph 55 of Schedule 3 of the National Health Service (General Dental Services Contracts) Regulations 2005 (the "Regulations").

1.2 The Secretary of State for Health and Social Care has directed that NHS Resolution exercise the functions of dispute resolution on their behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2 APPLICATION FOR DISPUTE RESOLUTION

2.1 By email dated 20 February 2025 the Contractor applied to NHS Resolution for dispute resolution.

2.2 I have had regard to the following documents made available to me in consideration of this matter to ensure the just, expeditious, economical and final determination of this dispute: -

2.2.1 Email from the Contractor dated 20 February 2025 with enclosures;

2.2.2 Email from the Contractor dated 24 February 2025;

2.2.3 Email from the Contractor dated 5 March 2025 with enclosures;

2.2.4 Email from the Commissioner dated 8 April 2025 with enclosures;

2.2.5 Email from the Contractor dated 25 April 2025 with enclosures; and

2.2.6 Signed GDS Contract.

3 PARTIES SUBMISSIONS

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

3.1 “Thank you for your response regarding our appeal for contract number 2453720006. While we acknowledge your position, we strongly disagree with the conclusions reached and are formally escalating this matter to NHS Resolution for independent review.

3.2 Your reliance on the 5 working day notification rule as grounds for rejecting our force majeure request is a flawed and unreasonable justification. Upon reviewing the NHS General Dental Services (GDS) contract and force majeure guidance, it is clear that:

3.3 The NHS England Force Majeure Policy states that contractors must inform the commissioning team immediately upon becoming aware of an event impacting service delivery. However, the policy does not explicitly define “immediately” as 5 working days – this is an arbitrary restriction you have chosen to enforce rigidly.

3.4 Force majeure applies to sudden, one-off, unforeseen events. Covid-19 related absences and recruitment difficulties were long-term systemic challenges affecting all practices and could not reasonably by [sic] reported within a narrow window. Expecting such notification under force majeure is entirely inappropriate.

3.5 The power outage was report [sic] to NHS England at the time it occurred, meaning it was in line with force majeure notification requirements. It is entirely unacceptable for you to claim non-compliance when you were informed of the issue as it happened.

3.6 <u>Key grounds for escalation</u>

3.7 1. Procedural Unfairness in Applying the 5 Day Rule

3.7.1 NHS England has taken month – sometimes over a year – to response [sic] to our critical contract related queries. Yet, you expect us to comply strictly with a five day reporting window.

3.7.2 This double standard is unacceptable, and NHS England’s own delayed communication contributed to our inability to act sooner. A rigid application of this rule ignores the broader reality of operational delays within NHS England itself.

3.8 2. Force Majeure is not designed for long-term issues like COVID-19 or recruitment

3.8.1 NHS England’s own guidance states that force majeure applies to discrete, unexpected events that directly impact service delivery.

3.8.2 COVID-19 and recruitment issues were persistent, nationwide challenges – not singular, unforeseen incidents. They should not have been expected to be reported as force majeure within five days.

3.8.3 Your rejection based on force majeure process non-compliance fails to acknowledge this fundamental distinction.

3.9 3. Inaccurate Claim that we did not notify NHS England of the power outage

3.9.1 We did notify NHS England at the time of the power outage. The fact that it was not logged as a formal force majeure request does not mean it was unknown to your team.

3.9.2 The GDS contract guidance clearly states that force majeure notification should be made “immediately”, which we complied with by reporting the incident at the time.

3.9.3 Dismissing this event on a technicality is wholly unreasonable and inconsistent with NHS policy.

3.10 4. NHS Resolution has already considered similar cases (Case 24584)

3.10.1 You dismiss case 24584 as unrelated, but you fail to address the underlying principle – namely, NHS Resolution has ruled in favour of contractors where exceptional workforce related circumstances caused underperformance.

3.10.2 NHS England has previously recognised such appeals, yet our case is being dismissed outright without meaningful engagement with the actual circumstances that impacted our ability to meet UDA targets.

3.11 Immediate request to pause clawback

3.12 Given this matter is now being formally escalated to NHS Resolution, we expect that the clawback process will be immediately suspended until a determination is made.

3.13 Proceeding with clawback while an appeal is active is procedurally unfair and financially damaging to the practice.

3.14 The refusal to consider reasonable alternatives – such as carrying forward UDAs or adjusting repayment terms – ignores established NHS England precedents.

3.15 Next Steps & Request for Confirmation

3.16 We require written confirmation of when our case will be formally escalated to NHS Resolution and what steps, if any, we need to take.

3.17 We expect written confirmation that clawback will be paused pending NHS Resolution's determination."

Letter to NHS England dated 7 February 2023

3.18 "I hope this message finds you well. We are writing to discuss the current UDA situation across both practices in Urmston and Sale (Contracts: 2453720005 2453720006), and the challenges that they have faced this year. It appears that we are likely to be behind target across both sites, potentially 5000 UDAs short in total and are contacting you in preparation to develop a future action plan.

3.19 One of the most significant reasons for underperformance is that recruiting dentists has been a major issue. Due to our UDA value, we have been unable to compete with some of the values and locum offers which are being offered to Dentists in other areas of Manchester and the Northwest. We also do not benefit from the 'golden handshake' which other commissioning bodies are being able to offer performers.

3.20 We also believe that since COVID-19 there are longer courses of treatments for patients which has contributed to the delay in completing treatments and completing UDAs.

3.21 All this has contributed to underperformance, and we find ourselves in a position where it is no longer sustainable to incur another large NHS clawback. If this were to occur, it would force out [sic] practice to review our NHS commitment and potentially default on bank loans owed. This would put everyone's employment in these already uncertain times. We therefore must take action in this situation to ensure this doesn't happen. Inflation has already hit the practice massively in terms of increased material costs, and staffing costs. We also now have to rely on locum nurses and locum agencies at significant additional costs to the practice to fill the nursing support gap we have.

3.22 We kindly request your consideration and a meeting if feasible to discuss our options moving forward with you. The option that would benefits us both would be both our contracts rolling over the undelivered activity to the 2023/2024 period. We realise recruitment historically has not been a mitigating factor taken into account for underperformance (under the 4%), however we believe that we are in unprecedented times of NHS recruitment difficulty and as such as

this should carefully be considered in mitigation. If this is not feasible then we would appreciate consideration of extending the repayment time of the clawback owed to 24 months and understand this would require further finance approval.

3.23 Moving forward, we appear to have resolved our recruitment issues as we have taken on previous Foundation Dentists as associates now, we have also completed a sponsorship application for overseas dentists and finally we have started the process of assisting overseas dental graduates to achieve their performer number to become performers on our contracts, thereby filling the workforce gap.

3.24 To fit the additional dentists into both practices, we have created additional space for them by adding an extra dental chair to Urmston, and an extra 3 dental chairs to Sale (by way of a double storey side extension).

3.25 We believe that we now have the space and the dentists to be able to fulfil our existing NHS contracts in both sites, plus the additional 5000 UDAs we potentially are behind upon (across both contracts).

3.26 We would be grateful for your response and as mentioned we are happy to attend a meeting to discuss our options further as required."

Representations

The Commissioner's representations

3.27 "Thank you for your letter dated 24 March 2025 in relation to an application for dispute resolution by Smile Manchester.

3.28 Please find below, and attached, a list of documents in relation to this application for dispute resolution.

3.29 List of documents in relation to the Appeal by Smile Manchester in date order:

3.29.1 Letter from Smile Manchester to Area Team – 07/02/2023

3.29.2 Letter to Smile Manchester – 24/02/2023

3.29.3 Letter from Smile Manchester to Area Team – 13/03/2023

3.29.4 Letter from Smile Manchester to Area Team – 06/04/2023

3.29.5 DCCP – Smile Manchester FM request – 17/05/2023

3.29.6 Email to Smile Manchester – 22/05/2023

3.29.7 Letter from Smile Manchester to Area Team – 24/05/2023

3.29.8 DCCP – Smile Manchester – Updated – 28/06/2023

3.29.9 Smile Mcr [sic] – DCCP Outcome Letter – 23/07/2024

3.29.10 0006 – Appeal Letter – 30/07/2024

3.29.11 Letter to Smile Mcr [sic] – DCCP Appeal Response Letter – 20/01/2025

3.29.12 Smile Mcr [sic] response to DCCP Letter – 21/01/2025

3.29.13 DCCP Appeal response letter – 18/02/2025

3.29.14 Response to [redacted by NHS Resolution] – 18/02/2025

3.30 The information in relation to the national decision on the year end reconciliation for 2022/23, referred to within letter 11 – Letter to Smile Mcr [sic] – DCCP Appeal Response Letter – 20/01/2025, was taken directly from the following national publication:

3.30.1 Publication reference: PR00350 – Managing the 2022/23 year end reconciliation. Dated 19 June 2023 https://www.england.nhs.uk/wp-content/uploads/2023/06/PRN00350-Guidance-re-dental-contract-management-arrangements-for-2022-23-year-end-reconciliation-June-2023.pdf

3.31 The information in relation to force majeure policy was taken from the following national publication:

3.31.1 Publication Reference: PR1976 – Policy Book for Primary Dental Services – Updated version April 2023 – Chapter 14, Adverse Events. https://www.england.nhs.uk/long-read/policy-book-for-primary-dental-services/ "

The Contractor's representations

3.31.2 No representations received from the Contractor.

Observations

The Commissioner's observations

3.31.3 No observations received from the Commissioner.

The Contractor's observations

3.32 "Thank you for your letter dated 17 April 2025, providing the opportunity to make final observations in response to the representations submitted by NHS Greater Manchester. We appreciate the structed nature of this process and are grateful for the chance to provide clarity on several important matters.

3.33 We would like to respectfully submit the following rebuttals, which we believe demonstrate that the proposed clawback is both procedurally and substantively unfair.

3.34 Inconsistent Application of Force Majeure Requirements

3.35 NHS Greater Manchester has relied heavily on an interpretation that force majeure requests must be submitted within five working days. However, the official NHS England Dental Force Majeure Policy states that notification should be made "immediately", without defining a specific time period.

3.36 Further, the NHS Business Services Authority (NHSBSA) references five working days as a guidance benchmark, not a statutory requirement. Their own administrative delays — with responses sometimes taking over a year — stand in stark contrast to the rigid timeframe they expect from practices, creating a clear double standard.

3.37 We acted responsibly and proactively throughout:

3.37.1 We submitted our initial notification on 7 February 2023, well before year-end.

3.37.2 This letter laid out in detail the recruitment and operational difficulties we faced.

3.37.3 The power outage was reported at the time it occurred, satisfying the "immediate" requirement.

3.38 To dismiss our force majeure claim based purely on technicalities, while ignoring the substance of our communication and the reality of system delays, is procedurally unfair.

3.39 Prior Panel Discussions Supported the Carry Forward Proposal

3.40 Internal discussions from the Direct Commissioning Contract Panel (DCCP) meeting on 17 May 2023 clearly indicate that our proposal to carry forward UDAs was discussed positively:

3.41 “The contracts during this period are given the opportunity to achieve the carried forward UDAs (with no clawback) in the 2023/2024 period.”

3.42 Further emails confirmed an intent to review and support the carry forward option, recognising it as a practical and fair solution.

3.43 The fact that this position was subsequently not formally put to us and in effect reversed without clear justification represents inconsistency and procedural unfairness.

3.44 Strong Track Record and Demonstrated Recovery

3.45 The underperformance in 2022/23 was a one-off event caused by exceptional circumstances, not systemic issues.

3.46 We responded by:

3.46.1 Investing in expanded surgeries at both sites

3.46.2 Recruiting additional dentists

3.46.3 Improving operational delivery

3.47 In 2023/24, we delivered 100.49% of our contracted UDAs — exceeding our target and demonstrating full recovery, similar performance was seen in 2024/2025.

3.48 Lack of Transparency in Reconciliation Process Undermined Our Planning

3.49 NHS Greater Manchester chose to reconcile two contract years together without informing us of this decision during the relevant periods.

3.50 Had we known that a two-year reconciliation was intended, we would have:

3.50.1 Mobilised additional workforce earlier

3.50.2 Focused efforts specifically on exceeding 2023/24 targets to recover shortfalls

3.51 The absence of timely communication prevented us from proactively addressing the underperformance, undermining our opportunity to deliver the required UDAs and further contributing to procedural unfairness.

3.52 Panel Acknowledged Financial Instability Risks

3.53 Internal documentation records [sic] that NHS England recognised our financial vulnerability:

3.54 "Financially they are unable to incur a large NHS clawback. Inflation has increased costs for materials and staffing which [is] impacting on their financial stability."

3.55 Yet despite acknowledging the real financial risks to the sustainability of NHS dental provision in our area, they proceeded with clawback enforcement without considering the

consequences. This approach is entirely inconsistent with NHS England's duties regarding safeguarding access and contractor sustainability.

3.56 Recognition of Inflationary and Systemic Pressures

3.57 NHS Greater Manchester's own internal notes accept that:

3.57.1 Inflation had severely increased material and staffing costs

3.57.2 Workforce shortages continued to affect delivery nationally

3.58 These factors further substantiate that 2022/23 was impacted by genuine exceptional circumstances, not business-as-usual risks.

3.59 Proactive Steps Taken to Improve Access

3.60 The panel acknowledged that we had:

3.60.1 Expanded premises

3.60.2 Recruited additional dentists

3.61 Our actions directly contributed to:

3.62 "Improved patient access in two busy urban areas in Manchester, with essentially a net zero additional funding commitment."

3.63 This demonstrates that our proposed recovery model would have benefited patients, protected services, and supported NHS strategic goals, without increasing public expenditure.

3.64 Procedural Fairness and Natural Justice

3.65 The clawback was initiated:

3.65.1 Without prior consultation or breakdown of the reclaim

3.65.2 Without giving us opportunity to respond

3.65.3 While our appeal was still pending

3.66 This breaches principles of fairness and transparency and conflicts with the spirit of NHS Resolution's dispute management guidance.

3.67 Precedent – Case 24584

3.68 While NHS Greater Manchester dismissed Case 24584 on technical grounds, the key principle it affirms remains highly relevant:

3.69 That exceptional workforce-related disruptions can justify contractual flexibility and prevent automatic clawback enforcement.

3.70 Consistency and fairness require that similar principles are applied across similar cases.

3.71 Conclusion and Request

3.72 We respectfully request that NHS Resolution:

3.72.1 Uphold our appeal and reverse the clawback for contract 2453720006.

3.72.2 Recognises that we have demonstrated full compliance and recovery, confirming our capacity to deliver contractual obligations, and allow us to deliver the required additional activity in the 25/26 period now. We still have capacity for this.

3.72.3 Acknowledges that NHS Greater Manchester's actions — including inconsistent communication, delays, and a reversal of earlier support for carry forward — resulted in procedural unfairness.

3.72.4 Confirms that no further recovery action should proceed in respect of the disputed period.

3.73 We remain fully committed to continuing to deliver high-quality NHS dental care and would welcome any further opportunity to clarify or support this position."

4 CONSIDERATION

4.1 As part of this consideration of the application for NHS dispute resolution, I required an up-to-date version of the Contract in dispute containing all variations agreed since the Contract was signed. This was provided and has not been disputed by the commissioner.

4.2 I have considered whether local dispute resolution has taken place. I note from the information provided by both parties that, following the Commissioner's decision regarding the underperformed UDAs, a letter was sent from the Commissioner dated 23 July 2024 stating:

4.2.1 "*If you do not agree with the decision from DCCP, please contact us within 28 days of this letter. The process of escalation beyond DCCP would be to the Greater Manchester Primary Care Commissioning Committee (GMPCCC). The DCCP paper, evidence, panel discussions and outcome would be presented to the Committee who will review the information alongside the reasons you have submitted for an appeal.*

If you do not agree with the decision from the GMPCCC, you would need to contact us within 28 days of that notice. If, after making every reasonable effort, we are unable to resolve the dispute, you may wish to refer the matter to the NHS dispute resolution procedure by sending a written request to:

NHS Resolution, FHS Appeal Unit, 1 Trevelyan Square, Leeds, LS1 6AE [sic]."

4.3 Further to the above, I note that there has been correspondence between the parties dated 20 January 2025 in which the Commissioner states "*The appeal you have submitted gives only a disagreement with the decision made by the Panel, it does not offer any additional information to what was provided as part of the original request, therefore we are unable to take this to PCCC for further discussion and decision".* I therefore conclude that there have been attempts to resolve the matter at local level. The Contractor having taken the opportunity to make an application to NHS Resolution, has also in my view, accepted that local dispute resolution is exhausted. In the circumstances, I am content that I may proceed to determine the current application.

4.4 As the application is with regard to the year ending 2022/23, I am satisfied that the application for dispute resolution has been made in time.

4.5 I am mindful that I have not been provided with a copy of the Force Majeure application to the Commissioner.

4.6 The application for dispute resolution relates to the Commissioner's decision to recover monies paid to the Contractor following underperformance of its contractual UDAs.

4.7 I note in its application for dispute resolution, the Contractor states:

4.7.1 "*The NHS England Force Majeure Policy states that contractors must inform the commissioning team immediately upon becoming aware of an event impacting the service delivery. However, the policy does not define "immediately" as 5 working days – this is an arbitrary restriction you have chosen to enforce rigidly.*

Force majeure applies to sudden, one off, unforeseen events. COVID-19 related absences and recruitment difficulties were long-term systemic challenges affecting all practices and could not reasonably be reported within a narrow window. Expecting such notification under force majeure is entirely inappropriate.

The power outage was reported to NHS England at the time it occurred, meaning it was in line with force majeure notification requirements. It is entirely unacceptable for you to claim non-compliance when you were informed of the issue at it happened"

4.8 I note that the Commissioner, in its letter dated 20 January 2025 to the Contractor states:

4.8.1 "*Adverse incidents are dealt with in the form of a Force Majeure (FM), and requests are processed as such using a nationally agreed process for dental relief as a way to measure and calculate the activity that the contractor was unable to provide as a result of this. The Panel discussed the information provided and unfortunately they rejected the request as the information didn't meet the national guidance / policy that we have to adhere to. The Panel queried the contractual requirement for Providers to notify Commissioners of their FM within 5 days, the initial letter we received from yourself in February 2023 detailed general issues within the practice over the financial year which led to the underperformance, the main issue raised related to recruitment which unfortunately isn't a FM."*

4.9 The Commissioner, in its representations, references Chapter 14 of the NHS England Policy Book for Primary Dental Services which states:

*"**14.7 Unacceptable Events or Circumstances for Dental Relief Claims:***

14.7.4 Long term sickness causing some incapacity, disability, maternity, paternity, or adoption leave of a performer

Long term sickness causing some incapacity disability, maternity, paternity, or adoption leave of a performer.

The term long term "sickness is often applied when the course of the disease lasts for more than four weeks. An example of long-term sickness includes but is not limited to, cancer, inflammatory arthritis, and severe and enduring mental illness.

It is expected that the Contractor will make necessary provision for the continuation of the service in the performer's absence. Contractors are advised to refer to the relevant SFE for information about payments in respect of long-term sickness, maternity, paternity, and adoption leave."

4.10 I have reviewed a number of paragraphs within the NHS England Policy Book for Primary Dental Services which state:

*"**14.3 Force Majeure Event***

A force majeure event is one which is caused by circumstances beyond the reasonable control of either the Commissioner or the Contractor that could not have been avoided or mitigated with reasonable care and where the event has had a material effect on the fulfilment of the contract.

Examples of events that may invoke the force majeure provisions are as follows:

fire;

flood;

severe weather conditions and for which precautions are not ordinarily taken to avoid or mitigate the impact (for example a severe hurricane);

industrial action which significantly affects the provision of public services or services upon which the party is reliant;

death of a significant performer or close relative (for the purposes of this policy. a close relative is defined as, mother, father, sister, brother, wife, husband, civil partner, daughter, son, grandparent, grandchild, parent-in-law, son-in-law, daughter-in-law, sister-in- law, brother-in-law, step-parent, step-child, step-sister, step-brother, foster child, legal guardian, domestic partner or fiancé/fiancée);

pandemic disease or circumstances that might otherwise be considered "an act of God";

war;

civil war (whether declared or undeclared);

riot or armed conflict;

radioactive, chemical, or biological contamination;

pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speed;

acts of terrorism; and/or

explosion.

…

14.4 Dental relief

Throughout this policy the term dental relief is used. This is used as an outcome measure that will effectively determine the total units of activity that the Contractor was delayed or prevented from providing during the force majeure period and which may be 'carried forward' to the following financial year, instead of the Commissioner recovering the overpayment in respect of the UDAs/UOAs not provided.

The Commissioner's decision whether to grant dental relief will be based on the assessment of a Contractor's claim for relief, where there has been an inability to deliver the contractual activity required. This policy provides the template documents that are relevant to the process of assessing eligibility for and granting dental relief, and also sets out the criteria, processes, and examples of what would constitute a force majeure event. There is also a calculator and methodology provided for calculating the amount of dental activity that can be carried forward.

If the Commissioner is satisfied that a force majeure event occurred and all reasonable efforts have been made to mitigate the consequences of the force majeure event, it may allow the Contractor to carry forward to the following financial year a number of unfulfilled UDAs or UOAs which, it is estimated, were not delivered as a direct result of the force majeure event. It is expected that any activity carried forward will be delivered within the next financial year.

…

14.6 Possible Events or Circumstances for Dental Relief Claims

The following is a list of examples of events or circumstances where the claim for relief may be considered, but it is not exhaustive.

…

14.6.3 Significant period of absence due to accident or sudden serious ill health of a significant performer

If a performer responsible for a significant proportion of the contracted activity is suddenly taken ill and is unable to deliver the services for a significant period of time, the Commissioner may consider that this is a circumstance for which relief may be considered.

…

14.7.4 Long term sickness causing some incapacity disability, maternity, paternity, or adoption leave of a performer

Long term sickness causing some incapacity disability, maternity, paternity, or adoption leave of a performer.

The term long term "sickness is often applied when the course of the disease lasts for more than four weeks. An example of long-term sickness includes but is not limited to, cancer, inflammatory arthritis, and severe and enduring mental illness.

It is expected that the Contractor will make necessary provision for the continuation of the service in the performer's absence. Contractors are advised to refer to the relevant SFE for information about payments in respect of long-term sickness, maternity, paternity, and adoption leave.

…

14.10 Contract compliance

Contractors are required under the terms of their contracts to promptly notify the Commissioner (which for the purposes of this policy is within five working days) of a force majeure event, detailing the cause or event, what service provision is being delayed or prevented and what action(s) within their power they are taking in order to comply with the terms of the contract as fully and promptly as possible. Submitting at year end claim form.

Failure to notify the Commissioner will mean that the Contractor is not absolved from its obligations under the contract and will render any claim for dental relief invalid. This may mean that the Contractor is in breach of its contract because of under delivery of its contracted activity which will not be mitigated against as a result of the force majeure event occurring.

Neither party will be responsible to the other for any failure to delay in performing its obligations and duties under the contract which is caused by an event of force majeure."

4.11 Further, the Policy Book states:

*"**8.4.3 Under delivery of UDAs or UOAs – below 96%***

Where a Contractor has delivered less than 96% of their contracted activity, the Commissioner will recover the full amount of money (the overpayment to the Contractor in respect of the activity delivered under the contract) up to the full contract value.

Financial recovery will be administered by NHSBSA and will routinely be via three instalments of deductions from September to November's scheduled payments (inclusive).

Any requests to extend instalments beyond this will be forwarded to the Commissioner for consideration. NHSBSA will retain responsibility for administering the agreed instalment plan in Compass once agreed by the Commissioner…"

4.12 I note the Contractor's comment regarding the "*procedural unfairness in applying the 5 day rule"* and its claim that the Commissioner implied an arbitrary restriction on the term 'immediately'. I have considered paragraph 14.10 of the Policy Book (as above) and am unable to clearly see the reference to 'immediately'. I can, however, see that the Policy Book is explicitly clear in the following:

"*Contractors are required under the terms of their contracts to promptly notify the Commissioner (which for the purposes of this policy is* ***within five working days****) of a force majeure event, detailing the cause or event, what service provision is being delayed or prevented and what action(s) within their power they are taking in order to comply with the terms of the contract as fully and promptly as possible."* [emphasis added by NHS Resolution.]

4.13 I note that the parties are not in dispute that the notification of the UDAs not being met happened in February 2023, towards the end of the financial year, and the issues giving rise to the underperformance of UDAs occurred throughout the 2022/23 period. In this regard, I would expect, at certain points of the year, a contractor to monitor and review performance against indicators. On the information available to me, it is unclear if the Contractor did this and so may explain why it was not until 7 February 2023 that notification of force majeure was submitted.

4.14 I have noted, as far as I can ascertain, the Contractor's reasons for its force majeure application; the power outage, Covid-19 related sickness and recruitment issues.

4.15 The Contractor refers to "*a mains electric power outage where [we] had to close down and revert to [our] business continuity policy for 3 days".* I note that I have not been provided with the date of the power outage in the information provided by either party and the Contractor has not detailed what the impact of this was on activity levels.

4.16 The Contractor states it informed the Commissioner of a power outage, which contributed to its application for force majeure, at the time it occurred. I note that the Commissioner, in its letter to the Contractor dated 18 February 2025, states "*unfortunately, no force majeure application was submitted by yourselves regarding the power outage, we were only informed of this as part of the letter requesting a force majeure for the whole underperformance during 22/23"*. I note that the Contractor has not provided any evidence, either in the form of a telephone note or written communication, to demonstrate that the power outage was reported to the Commissioner during the immediate timescale.

4.17 I have next considered paragraph 14.6.3 "Significant period of absence due to accident or sudden serious ill health of a significant performer" of the Policy Book as quoted above and have taken into account the information provided by the Contractor. Based on the information, the absence at the Contractor's premises was not caused by an 'accident', nor is there any indication about how 'sudden' the absences were and that it resulted in a 'significant period of absence'. Whilst I have been provided with details in the Commissioner's representations that shows "*Dentist illness (hours): 134.75"* for Contract 2453720006, I have not been informed if this total was for a singular dentist or all dentists employed on the Contract or the impact on activity. I note that, in its supporting documents, the Contractor refers to a Dr F that was injured in an accident in 2019 which led to underperformed UDAs in 2019 however I have not been

informed of the relevance of Dr F's circumstances to the underperformance in 2022/23 and the force majeure application to which this dispute relates.

4.18 Dental relief is predicated on the basis that "*…the Contractor will make necessary provision for the continuation of the service in the performer's absence".* I have considered paragraph 8.4.3 of the Policy Book as above and note that the Contract in question (2453720006) achieved 88.5% of activity. In this regard, I have no information as to how the Contractor tried to mitigate for its recruitment and staff sickness issues. Whilst I have been informed of the measures the Contractor has taken to ensure a similar occurrence does not happen again; I have not been provided with information to demonstrate what efforts were undertaken by the Contractor at the time.

4.19 The Contractor cites that "*since Covid 19 there are longer courses of treatments for patients which has contributed to the delay in completing treatments and completing UDAs"* but provides no information in this regard.

4.20 I understand that the Contractor has listed 'Covid-19 related absences' as a reason for the underperformed UDAs. I note that the Commissioner, in a letter dated 20 January 2025, stated:

4.20.1 "*The following is taken directly from PR00350 guidance from NHS England in June 2023 in relation to the changes made for 2022/23:*

4.20.2 *"We are aware that due to the Covid-19 restrictions in place at the start of the year, dental contractors have continued to experience challenges in contract delivery as a consequence of the pandemic. This guidance sets out that on an exceptional basis* ***for 2022/23 only, a revised contract tolerance of 90% for UDA based contracts will be in place, to support practices by reducing financial recovery in 2023,*** *and to create an extended recovery period by prioritizing capacity towards patients who have been unable to access care as the NHS emerges from the pandemic."*

4.20.3 *This national decision was made to reduce the contract tolerance to support all Providers during the 22/23 as all Providers and practices were experiencing the same issues in recruitment, locum costs and high volumes of patients failing to attend or cancelling their appointments. Unfortunately, your contract did not meet this change to the minimum requirement and was therefore subject to a financial reclaim for underperformance."* [emphasis added by NHS Resolution.]

4.21 I am of the view, therefore, that the Commissioner had put in place measures to assist contractors with the impact that Covid-19 may have had on their ability to meet their contracted UDAs for the year 2022/23.

4.22 I am sympathetic to the struggles that the Contractor appears to have encountered. However, in view of the limited information regarding the measures taken to mitigate the events leading to the underperformance of its contracted UDAs, and the time taken to report the circumstances of such, the Commissioner was correct to refuse the application.

4.23 The Contractor has referred to a previous determination SHA/24584 – as being a basis upon which this dispute can be determined in their favour. There are a number of factors that differentiate 24584 from the instant dispute, specifically the fact that an associate was pregnant so her activity ceased and that there was a high volume of cancelled appointments.

5 DECISION

5.1 I am of the view that the Contractor has failed to meet the criteria for its Force Majeure application to succeed.

5.2 The Commissioner can make the financial recovery as specified in the 2022/23 year end reconciliation for Contract 2453720006.

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

Head of Appeals
NHS Resolution