8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

16 June 2025

REF: SHA/26580

COMMISSIONER: **SOUTH YORKSHIRE INTEGRATED CARE BOARD**

GMS CONTRACTOR: **UPPERTHORPE MEDICAL CENTRE**
30 ADDY STREET
UPPERTHORPE
SHEFFIELD
S6 3FT

DISPUTE RESOLUTION – NATIONAL HEALTH SERVICE (GENERAL MEDICAL SERVICES CONTRACT) REGULATIONS 2015

RE: MATERNITY CLAIM PAYMENTS

1 **Outcome**:

1.1 I, as an authorised officer of NHS Resolution, find the application for NHS dispute resolution in favour of the Commissioner and determine that the Commissioner does not have to pay the additional amounts requested by the Contractor.

A copy of this decision is being sent to:

Upperthorpe Medical Centre
South Yorkshire Integrated Care Board

8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

REF: SHA/26580

COMMISSIONER: **SOUTH YORKSHIRE INTEGRATED CARE BOARD**

GMS CONTRACTOR: **UPPERTHORPE MEDICAL CENTRE**
30 ADDY STREET
UPPERTHORPE
SHEFFIELD
S6 3FT

DISPUTE RESOLUTION – NATIONAL HEALTH SERVICE (GENERAL MEDICAL SERVICES CONTRACT) REGULATIONS 2015

RE: MATERNITY CLAIM PAYMENTS

1 INTRODUCTION

1.1 The Contractor referred the dispute in relation to its General Medical Services Contract for dispute resolution under the provisions of Regulation 83 of the Regulations.

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

2 BACKGROUND

2.1 I provided a previous determination dated 2 April 2025, in which I finally determined certain matters and provided the opportunity for the parties to provide further representations on certain other matters. I indicated that on receipt of comments, I would make a final determination on any outstanding matters.

2.2 In respect of the Commissioner, I indicated that it should provide:

2.2.1 comments on whether, it considers the explanation provided by the Contractor is acceptable in relation to the requirements of the SFE; and

2.2.2 any other comments it considers appropriate bearing in mind the comments I make in this determination.

2.3 In respect of the Contractor, I indicated that, it should:

2.3.1 explain how it considers that the additional locum services fit under the wording of the SFE regarding maintaining normal service levels;

2.3.2 provide any other comments it considers appropriate, bearing in mind the comments I make in this determination; and

2.3.3 consider whether it can provide any other evidence in relation to the normal service levels and how this was maintained.

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

2.5 I indicated in my previous determination that I would not consider comments made in relation to any matter that I have indicated were finally determined in the earlier determination.

3 FURTHER REPRESENTATIONS

3.1 In its further representations, the Commissioner stated:

"*1.4.1 Does the ICB consider the explanation provided by the Appellant is acceptable in relation to the requirements of the SFE*

Paragraph 42 and 43 of the ICB's submission do refer to this point.

The ICB has considered the explanation provided by the Appellant in relation to the locum reimbursement claimed and, on the basis of the information provided to it, does not consider the explanation acceptable in relation to the requirements of the SFE.

The stated purpose of locum reimbursement as provided by the SFE (Section 9 (1) (2)) is to maintain the level of service the Contractor normally provides. The interim determination accepts that sessions are the simplest way, in the absence of some reason to assume that sessions are not an accurate assessment of what normal looks like, to measure payments for reimbursement.

The Contractor has submitted no information indicating that the GP worked in a pattern that makes sessions an unsuitable measure of service provision such as a contract of employment specifying alternative working arrangements or allocation of duties across the working day/week which would make assessment of payment on a sessional basis unreasonable.

The Contractor explains that, within a session, locums they employ may not provide the number of hours worked or workload as the absent GP and that therefore it is appropriate to claim for additional sessions however, the Contractor has not provided information to support this argument with respect to workload undertaken by the absent GP or locum cover. Furthermore, the ICB considers that, as the contracting organisation is within the scope and responsibility of the Contractor to negotiate an appropriate session length and assessment of work with a locum that reflects the level of service to be maintained and that if it has not done this it is not reasonable to expect this to be remedied by seeking payment for additional sessions. In doing so it notes the guidance provided by to [sic] employers of locum GPs Guidance for locums and employers that:

- a session is an agreed period of time or agreed task of work, not usually exceeding four hours.
- a session should usually include adequate time for administrative work arising during clinical contacts in that time.

and that,

- each session length and content has to be negotiated and agreed with a realistic assessment of work to be undertaken. Any additional administrative workload incurred is negotiable with the contracting organisation.

The ICB is willing to consider any further information provided by the Contractor that provides further clarification on these points.

1.4.2 any other comments it considers appropriate bearing in mind the comments I make in this determination

The ICB has no further comments on the points made in this determination."

3.2 In the covering email to its further representations, the Contractor stated:

"Our biggest concern with the interim position is a statement that seems to permit the ICB to do something because it is not expressly forbidden by the SFE (4.34).

This has been the crux of the argument to date. With this statement in place the argument would come down to:

Us: 'The SFE doesn't allow you to limit claims to sessions'

ICB ' Well it doesn't say we can't so we will'

And we would be back at square one.

It also appears to contradict 4.31 which says the commissioner is not able to introduce this (sessions) into its own local guidance.

We also note that that our second point for clarity (overlapping sessions) does not appear to have been clarify[*sic*]."

3.3 In the attached further representations, the Contractor stated:

"Thank you for your detailed consideration of our application for dispute resolution. We welcome the opportunity to respond further and to clarify the points raised. We would like to take this opportunity to address key elements of your preliminary findings and to provide clarification in respect of the use of sessions, the interpretation of the SFE, and the evidence of cover provided.

1. Acknowledgement of dispute resolution attempts and issues with SFE Interpretation:

We note and appreciate your confirmation that:

1. *All routes for local dispute resolution had been sought (4.9)*
2. *NHS guidance is not helpful and is not binding in its own right (4.21)*
3. *The legal opinion received by the ICB gives no definitive answers (4.22)*
4. *The Regulations and SFE have ultimate authority over local guidance (4.23)*

2. Position on the use of sessions versus maintaining level of cover

The first of the two areas we sought clarification on was: *Can we receive reimbursement to cover the hours worked by the absent performer to maintain the level of cover as is the intent of the SFE?*

This issue was specifically in relation to the claim for Dr [K], a Partner at the practice. We are seeking reimbursement to maintain the hours Dr [K] worked and the commissioner is seeking to reimburse based on numeric sessions, as opposed to the hours worked within the sessions used to cover.

Clarifying our debate: By way of using extremes to demonstrate the point, if the absent performer worked four sessions a week, each 6 hours long, we would be looking to cover 24 hours to maintain the level of service, as is the intention of the SFE. If, due to availability, we could only find locums who were prepared to work one hour a session, I would need to employ 24 locum sessions a week to cover the hours. This would not be permitted by the commissioner as they are requesting a neat four session for four session cover. The 24 one-hour sessions in this example should be recoverable under the rules of SFE as they provide the cover needed to maintain the level of service.

We note and appreciate your confirmation that:

1. *There is no use of the word "session" in section 9 of the SFE. (4.29),*
2. *That if it was the intention of the SFE for maternity cover to be based on the number of sessions then it would have been included within the SFE(4.30),*
3. *As there is no reference to "session" in the SFE……the Commissioner is not able to introduce this in its own local guidance. (4.31)*
4. *In situations where there is some reason to assume that sessions are not an accurate assessment of what normal looks like, a commissioner will need to take this into account, otherwise it is at risk of fettering its decision making without a proper basis (4.35) We see point four specifically as providing the clarity we sought, that the commissioner should consider the actual cover required.*

3. Position on overlapping sessions

The Second of the two areas we sought clarification on was: *Can we allocate those hours as we see fit across the week to maximise access for patients as there is nothing in the SFE that prohibits this? i.e. if we want to put them all on one day because it benefits the patient, can we? As the commissioner currently does not permit this.*

We do not feel that this has been covered in the interim decision.

This issue is relevant to the claim for Dr [H] a five-session salaried GP at the practice. We have, in some cases had two locums working at the same time to maintain the **weekly level of service**. The commissioner has essentially said that, as the contractor could not work two clinics at the same time, they do not permit the cover to work two clinics at the same time.

Appendix 4 shows the cover provided for Dr [H] to maintain the weekly level of service. We have, on nine of the 26 weeks, had two cover Drs working at the same time.

Clarifying our debate: The SFE states that cover is to maintain the level of service normally provided. It does not define a timescale for this. For example, it does not say that every hour and minute must be covered like for like. We refer to GPs as working either a number of sessions a week or as working a number of hours a week. All references are to the capacity in a week.

As long as the hours in a week to be covered to maintain the level of service are not exceeded, when they are deployed has no financial impact to the commissioner. In the previous example, if all 24 one hour locums worked the same hour on the same day of the week, there would be no additional financial impact on the commissioner and the weekly level of service would be maintained.

To this end, we would suggest that adding in this restriction is unnecessary. It introduces a restriction which is not explicitly permitted by the SFE (that two sessions cannot overlap), it adds unnecessary steps in the administration process for the commissioner and can prove to be unworkable due to locum availability.

The hours we have employed in any given week have been necessary to cover the hours we were missing from the absent performer.

Our claim is based solely on cover actually and necessarily engaged, in accordance with paragraph 9(3) of the SFE. The claim summary is provided at Appendix 5.

Clarity on this point would be appreciated and necessary to resolve the dispute related to the claim for Dr [H].

4. Evidence that locum sessions were actually and necessarily engaged

You asked us at 5.5.1 to explain how we consider that the additional locum services fit under the wording of the SFE regarding maintaining normal service levels.

We assume here that you are asking why we employed five sessions when the Dr nominally worked four. We aim to evidence this by demonstrating the hours the Dr typically worked prior to maternity leave and demonstrating how this was covered (not exceeded) with locum cover. Very simply, the Dr worked longer than a typical session and so we needed more 'typical' sessions to cover the difference.

We provide the following as evidence:

1. **Evidence of the hours typically worked by the absent performer. - Appendix 1** Audit Summary of Dr [K] hours in the six months prior to maternity leave
2. **Evidence of the hours covered by week - Appendix 2** – Cover for Dr [K] claimed
3. **Evidence that the financial reimbursement requested fits in with the financial limits set in the SFE -** Appendix 3 – Summary of finances for Dr [K] Claim

We will also tie this in with your comment at 4.37, that the contractor is required to demonstrate that the use of sessions is not appropriate in the circumstances for which it is claiming;

The use of session is not relevant for the following reasons:

> *1. As sessions are not mentioned in the SFE in this section, they are not defined in it. Is a session 04:10 as per the BMA recommendation? 5 hours as per previous clinics set before the BMA proposed 04:10 (contracts that some salaried GPs are still on) or AM or PM, no matter what time the clinician starts.*
>
> *2. Hours and minutes are a more commonly understood measure of time and a simple audit of typical hours worked is less than a 30 minute piece of work to undertake. Had this be supported [sic] at the start of the maternity claims process to agree with the commissioner the number of hours that the practice will be permitted to claim, this dispute could potentially have been avoided.*

3. Partners are not contracted and so the 'contracted sessions' section of the claim form is irrelevant to a partner claim

4. The partner worked two days per week which is nominally four sessions. However, you will see from the Audit Summary that the Partner worked and average of 21.44 hours per week which is the equivalent of 5.15 BMA defined sessions. So if the definition of a session was to follow the BMA guidance, sessional comparison would not be sufficient to maintain the level of service.

5. BMA four session hours equivalent would be 16 hours and 40 minutes which would be insufficient to maintain the level of service.

Appendix 1 identifies the hours needed to be covered (necessity). For Dr [K], this was 21.44 hours per week.

Appendix 2 shows the hours actually covered. On average, we employed 20.96 hours per week.

Our claim is based solely on cover actually and necessarily engaged, in accordance with paragraph 9(3) of the SFE.

5. Evidence of normal service levels

You asked us under 5.5.3 to consider whether we can provide any other evidence in relation to the normal service levels and how this was maintained. We believe this is covered in section 4 and appendices 1 and 2.

6. Any other comments

You asked us at 5.5.2 to provide any other comments we considered appropriate, and we thank you for the opportunity. We make the following observations with regards [sic] to areas that we feel may leave room for ambiguity:

a. The interim determination makes it clear that sessions are not referred to in the relevant section of the SFE, that this is intentional, and that the commissioner is not able to introduce it into its own guidance. Section 4.34 then appears to permit the commissioner to introduce sessions into their own guidance and limit payments when it says '***I note that the SFE does not say that sessions explicitly cannot be used as limiting a contractor's entitlement to payment, it just does not specify that they must be.***

b. Again, this line in section 4.34 appears to suggest that the commissioner can impose any limitation not expressly prohibited. A proposition that would be unworkable and appears to run contrary to public law principles.

c. With regards [sic] to the comment: ***I note that sessions are an easily understood and quantifiable measure of what normal service looks like. As such I consider that they can be sensibly used by commissioners to evidence if service is being maintained and that in most situations the Commissioner should be entitled to rely on the statement of sessions provided by the Contractor as establishing a limitation for the payments.*** We accept that session data may be considered as evidence in determining whether service has been maintained. However, this is a fundamentally different question from whether "sessions" can be used to limit a contractors entitlement to reimbursement as the first line of 4.34 suggests.

d. Including sessions as a simple method of evidencing cover does risk both under and **over** payments by the commissioner. In the situation of underpayments, you have allowed in section 4.35 for the contractor to propose

an alternative justification to the commissioner. It is not clear what would happen in the event of a dispute here.

e. Again, with regards [sic] to the statement ***'I note that sessions are an easily understood and quantifiable measure of what normal service looks like***, at appendix 6, we provide an audit of other Drs hours throughout February to demonstrate that sessions are not a uniform measure in general practice. You will see that we have:

Detail	Average Hours per session
7 session partner	5.48
5 session partner	6.11
5 session partner	4.74
8 session Partner	5.04
6 session salaried	4.91
7 session partner	4.99

We would suggest that a simple way to ensure the correct payment was made to the contractor would be to:

1. Run a simple audit of the absent partners hours prior to maternity/sick leave and agree an average number of hours per session
2. Multiply that rate by the number of sessions the GP worked
3. Agree that the result, is the number of hours that the practice can claim reimbursement for.
4. Remove the administrative burden for the commissioner to check that the cover was not overlapping by agreeing that the contractor can use those hours within the week as they see fit to maintain the weekly level of service.
5. Remove the requirements from the commissioner that the hours must be covered within the same number of sessions as the absent performer worked as this is not always workable on the ground and not specified in the SFE

We thank you again for the opportunity to provide further clarity in this case."

3.4 The Contractor provided the following:

3.4.1 ***Appendix 1 Audit Summary of Dr [K] hours in the six months prior to maternity leave (defining the need)***";

3.4.2 ***Appendix 2 – Actual Cover for Dr [K] claimed***; and

3.4.3 ***Appendix 3 – Summary of Finances for Dr [K] Claim***;

These are, collectively, 11 pages of tables, made in Microsoft Word, providing information in relation to what their titles indicate.

4 FINAL OBSERVATIONS

4.1 The Commissioner stated:

1 "The Contractor comments that '*The interim position … seems to permit the ICB to do something because it is not expressly forbidden by the SFE (4.34). With this statement in place the argument would come down to: Us: 'The SFE doesn't allow you to limit claims to sessions' ICB ' Well it doesn't say we can't so we will*'

The Commissioner considers this to be a misinterpretation of the Adjudicators position, set out at 4.29 to 4.36 of the Preliminary Determination. The Commissioner interprets the Adjudicator's position to allow sessions to be used, as the simplest method of assessing normal service under the SFE but that, if a Contractor provides evidence and explanation why sessions are not appropriate then the Commissioner should consider if this information justifies the use of an alternative approach to assessing normal service for the calculation of financial reimbursement.

The Commisioner [sic] notes the Adjudicator's position that it should be for the Contractor to evidence and explain why sessions should not be used to assess their claim and that the Adjudicator asked the Contractor, in their comments, to '*5.5.1 explain how it considers that the additional locum services fit under the wording of the SFE regarding maintaining normal service levels;*'. The Commissioner considers that the Contractor has not provided any explanation of why it considers that the additional locum services it seeks to claim fit under the wording of the SFE and therefore asks the Assessor to determine that the on [sic] the basis of the evidence provided, a sessional comparison may be used to limit the Contractors reimbursement in this case.

2 The Contractor comments that '*It [4.34] also appears to contradict 4.31 which says the commissioner is not able to introduce this (sessions) into its own local guidance*.'

The Commissioner understands the Adjudicators interpretation to be that the Commissioner may not limit reimbursement only to sessions (4.31) but may in most situations rely on the statement of sessions provided by Contractor as establishing a limitation for payments (4.34) unless the Contractor provides evidence and explanation why sessions are not appropriate. However, given the Contractor's comments further asks the Adjudicator, when providing their Final Determination, to consider:

- further clarifying paragraph 4.31; and
- suggesting appropriate amendments the local guidance set out in the Contractor's bundle to reflect their conclusions in the Preliminary Determination on when and how sessions, or other measures may be used to set limitations on reimbursement.

3 The Contractor comments that '*Our second point for clarity (overlapping sessions) does not appear to have been clarify [sic]*'.

The Commissioner notes that this point is not expressly addressed in the Interim Determination. In response it notes the purpose of reimbursement provided in the SFE (Part 4, 9 (2)) is '*to maintain the level of services that it normally provides and the position of the Adjudicator at 4.40*.' and would argue that this would reasonably be interpreted to be maintaining the existing pattern of clinical sessions/surgeries and so, overlapping locum sessions would not be acceptable unless the Contractor provided explanation and evidenced why this was necessary that was acceptable to the Commissioner and that did not reply on their previous statement that their locums work fewer hours within a session unless they were able to provide further evidence (as confirmed by the Adjudicator at 4.39) . The Commissioner considers this to be consistent with the Adjudicator's conclusion but asks for further clarification.

4 In their Preliminary Determination the Adjudicator asked the Contractor to '5.5.3 consider whether it can provide any other evidence in relation to the normal service levels and how this was maintained.' The Contractor has provided no further evidence in response to the Adjudicator's request. In the absence of further evidence or explanation, the Commissioner does not consider that the Contractor has made a satisfactory argument that in order to maintain normal service levels additional locum sessions were required and therefore asks the Adjudicator to determine that it is appropriate to limit reimbursement to four locum sessions per week in this case.

Finally, not related to the Contractors comments but, when re-reading the Preliminary Determination I noticed that 4.45 reads '*To the extent that the Contractor has explained why **4** sessions were required instead of **six** I note their statements:' and, having considered the intended meaning I wonder if this should in fact read 'To the extent that the Contractor has explained why **six** sessions were required instead of **4** I note their statements:*'

[my bold/underline to highlight the possible amendments]."

4.2 The Contractor stated:

"**The first of the two areas we sought clarification on was**: *Can we receive reimbursement to cover the hours worked by the absent performer to maintain the level of cover as is the intent of the SFE*?

The **Preliminary Determination** confirmed that:

1. *There is no use of the word "session" in section 9 of the SFE. (4.29),*
2. *That if it was the intention of the SFE for maternity cover to be based on the number of sessions then it would have been included within the SFE(4.30),*
3. *As there is no reference to "session" in the SFE……the Commissioner is not able to introduce this in its own local guidance. (4.31)*

If the Preliminary Determination had left it there, we would have the clarity we sought (and the process needs) and the commissioners would not have been able to respond as they have.

Our rebuttal would then read:

1. The commissioner has made 10 references to sessions in their rebuttal and, as the determination made clear, they are not able to introduce this into their own guidance.
2. They have again made reference to a lack of employment contract which, as we pointed out in our original rebuttal, is not possible for a Partner because they are not contracted.
3. They make reference to a session as typically being four hours. This session length has no reflection on reality.

However, at 4.34, the preliminary determination then went on to allow the commissioner to add in any additional criteria they wanted as long as the Directions don't explicitly say that criteria cannot be used.

This removed the clarity we sought and is the only basis on which the commissioner has been able to respond.

The commissioner clearly has no issues with reimbursing the 21 hours we needed to cover, just as long as we wrap it up in a specific limiting criteria that they introduced and that the SFE specifically intended to avoid (*as confirmed by 4.3 if it was the*

intention of the SFE for maternity cover to be based on the number of sessions then it would have been included within the SFE).

The commissioner's insistence on sessions goes against the intent of the SFE just to make the process 'simple' for them to administer. It also puts them at risk of overpaying - if my GP had worked four 2-hour sessions, I feel certain the ICB would have accepted a claim for four 4-hour sessions just because the session numbers match. This would be a 100% overpayment.

If the final determination allows the commissioner to add any criteria not specifically forbidden, they can essentially rewrite the directions. Will the next criteria be that all locums covering must wear green? As ridiculous as that sounds, it is as arbitrary as a four-hour session in this context.

The SFE states that cover is to maintain the level of service normally provided.

Our claim is based solely on cover actually and necessarily engaged, in accordance with paragraph 9(3) of the SFE.

Please remove the ambiguity."

4.3 The Contractor submitted further final observations, received by NHS Resolution, on 24 January 2023, 24 hours after the deadline set for receipt of final observations. No explanation of the delay was provided. In accordance with my express comment in my previous determination, I have not had regard to those further final observations.

5 CONSIDERATION

5.1 This determination should be read alongside my previous determination which set out the relevant provisions of the SFE.

5.2 I made comments in my previous determination on the need for evidence and explanation regarding why the use of sessions as the basis for assessing the Contractor's claim for reimbursement was not appropriate in the Contractor's circumstances, and to demonstrate that the level of locum cover claimed for is actually to maintain the normal level of service, in accordance with the SFE. I considered that if both of these elements could be proven then the Contractor would be entitled to the maximum amount payable as provided in paragraph 5 of section 9 of the SFE.

5.3 I must reiterate that there needs be some way for the Commissioner to assess the level of service normally provided, as required by paragraph 2 of section 9. This is because if the locum is not being employed to maintain the normal level of service, then said locum is plainly not providing cover for the absent GP performer, and is instead being utilised by the Contractor for some other purpose. Thus, any payment to them would not be suitable for reimbursement under section 9 of the SFE. Additionally, I note that paragraph 3 of section 9 indicates that a commissioner is only obliged to provide financial assistance, which may or may not be the maximum, if such cover was "actually and *necessarily* engaged", [my emphasis]. As such, the locum must be necessary to cover the GP performer, rather than purely something that would be beneficial to the Contractor.

5.4 I note that the Contractor has stated that my previous determination was contradictory. The Commissioner has stated that this is a misinterpretation of my position. I am inclined to agree with the Commissioner. For absolute clarity, the position I was stating is that, the Commissioner cannot enforce absolute and sole reliance on sessions as the evidentiary basis for the assessment of normal service. However, they may be entitled to rely on them in most cases, as they will represent an easily measured and understood basis for assessing a contractor's normal service, and will at the same time, to a fairly high degree, accurately reflect the actual service provided.

5.5 I do not consider this to be a contradiction. The Contractor's statement of "the SFE doesn't allow you to limit claims to sessions" is overly simplified and incorrect. I consider that the SFE does allow you to limit claims to sessions, where they are being used to measure the level of normal service, under paragraph 2 of section 9, and necessity, under paragraph 3. It does not allow the blanket limitation of all claims based on the number of sessions a GP performer usually provides. Instead, where sessions are not an accurate measure of normality and necessity, some other form of analysis must be used. The SFE is silent on how to analyse these factors, hence, sessions, or some other basis must be implicitly used. Consequently, it must be open to the Commissioner to establish some process for measuring service, in order to establish that cover is actually for the GP performer, based on the criteria in the SFE.

5.6 I will now consider the arguments included in the Contractor's further comments. Firstly, the question of the GP performer, Dr K's, ("Doctor 1") time reimbursement. I note that the Contractor has stated that it is seeking reimbursement based on the hours worked within the sessions rather than the number of sessions. I am mindful that the Contractor has provided a helpful illustration of why the two numbers may not always align, though I must note that there will, equally, be occasions where they do. I consider this must be the case, as otherwise sessions would be a wholly pointless premise.

5.7 The clarity I provided in my previous determination, is that the Commissioner may consider actual cover required, however, if it is to do so, I also considered that that means there must be suitable evidence and explanation in support. I consider that, to satisfy the evidentiary requirements a level of objectivity is required. Equally, an explanation of that evidence must show why the locums did maintain normal service and why it was necessary. I note that the Commissioner has requested that I provide appropriate amendments for its local guidance, however I consider this to be outside of my remit on this matter, and hence make no further comment on that point.

5.8 I note that the Commissioner, in its further representations, sets out an issue with the Contractor's scenario, as provided in its own further representations. I note that contractors, as the contracting body, are responsible for the negotiation of contracts with locums, which includes session length based on the level of work required. The Contractor's scenario involves a hypothetical situation whereby it was forced to employ locums for a series of 1 hour sessions. As I am given to understand the situation, the Contractor's responsibility for negotiation consequently means that if it is paying inflated amounts for poorly negotiated contracts it is its own fault. The Commissioner states that it is not reasonable for it to remedy this situation.

5.9 However, I am mindful that the SFE makes no comment as to the reasonableness of any price paid by the Contractor in relation to the locums it needed to employ, and, as I have established, makes no mention of sessions. The only limiting factors are if normal service is maintained, if the locum employment was necessary, and the maximum payable amount. This element of reasonable price, or poor negotiation, is not covered by either aspect. As such, it is not applicable to the current determination and I make no comment as to the reasonableness as to the price paid for locum services, or session length.

5.10 However, if contractors were indeed forced to employ 1 locum per hour, then this would be evidence of why sessions were not appropriate in the circumstances to represent the maintenance of normal service to the Commissioner. However, I have not been provided with any evidence that the Contractor was forced to employ short period locums to cover Doctor 1 in the information which I have been provided for this final determination.

5.11 The information which I have been provided relates to the hours worked by said Doctor 1. I note that the Contractor has stated that Doctor 1 worked longer than typical sessions, so an additional session was required in order to provide the same level of cover. The evidence it has provided of this is a table of hours worked over the past six months.

5.12 As a preliminary point, I note that I have not been provided with the actual logs by way of screenshot, or the underlying evidence which proves that these are accurate recordings of the information. The extent to which these tables can be considered evidence is questionable. I am unclear as to whether the Commissioner has had regard to the attached comments or annexes as its further observations only make reference to the language used in the covering email. I also note that the Commissioner states that no evidence has been provided, which I find especially peculiar given that the annexes are purported to be evidence. However, these comments may be taken as refuting whether the annexes constitute evidence, given their nature of being reproductions of information without the originals, or could be read as commentary on the contents of the annexes. What I consider clear is that the Commissioner has disputed the Contractor's comments. As such, I have considered the annexes in detail below.

5.13 I have noted several key issues with the information provided. Firstly, I note that the Contractor has removed annual leave and bank holidays as they "skew the average". I am concerned, therefore, that I am not being provided with the complete picture. Whilst I appreciate the impact that weeks with less days worked would have on the weekly average, I must note that it would have been simple enough to calculate a daily average and multiply this by two, as the number of days worked per week. They also could have been provided, but the data excluded, so that I would still be given the opportunity to consider the complete picture.

5.14 Secondly, I note that these are purely logs of when the individual logged in, and logged off, which creates several issues. I note that Doctor 1 does not appear to have taken any breaks most days, and when they did, these were only for short periods in the evening. I would expect that most individuals would take some form of lunch break, or other period of rest, especially across 11 hour days.

5.15 Additionally, I note the language of the SFE under section 9 paragraph 2 indicates that, even for a partner, the cover is for their role as a performer under a GMS contract. I highlight this language, as a partner in a practice will have separate obligations, tasks and responsibilities depending on which hat they are wearing. I also note that these activities will likely overlap, but will result in there being more work for a partner to carry out as compared to a regular GP performer. The work that Doctor 1 carried out purely as a partner of the practice is not suitable for reimbursement under the GMS contract, only the work carried out as a GP performer, as per the language of the SFE. What these logs do not show is what work is being carried out and when. In fact, as I have already noted, they are particularly unhelpful for calculating what, if any work, was being done or breaks being had.

5.16 I note that what I have not been provided with is any evidence as to the nature of the work being carried out during the hours which Doctor 1 was working. I note that the Contractor's core hours are 8:00am until 6:30pm. However, Doctor 1 generally worked from 8:30am until 7:30pm. I consider that this creates the possibility that from 6:30pm onwards, on any given day, they were likely carrying out tasks associated with being a partner rather than as a GP performer. However, I have not been given any clarity regarding this by the Contractor, as I have not even been provided the opening hours of the practice.

5.17 Having noted these working hours I proceeded to review the information provided by the Contractor regarding the locum cover's hours. Of additional note is that Doctor 1 worked Mondays and Thursdays for almost the entire sample of dates provided, except for two weeks where they worked Tuesday instead of Monday. Additionally, only two days were ever worked during a week. Therefore, by being absent a gap would, by inference, have been created during these days. I am mindful in particular of paragraph 3 of section 9 of the SFE which specifically states that the contractor must not only "actually" employ cover, but must also do so "necessarily". I raise this section as I have noticed a discrepancy between when the locums being claimed were employed and the hours vacated by Doctor 1.

5.18 Having assessed the information provided to me regarding locum cover it appears that there was no consistent working pattern of replacement regarding locum cover, instead the timings appear almost random. I note that very rarely did a two day work week occur, and never on the two days that Doctor 1 worked. Furthermore, some days which had a two day work week, there would be double cover during one of these periods. I also noted that none of the locums worked the hours that Doctor 1 worked, either starting later or finishing earlier.

5.19 I note that a key element of the Contractor's line of reasoning is that Doctor 1 worked more hours, which necessitates more cover. However, I note that these additional hours tend to be from 18:00 to as late as 20:56. However, no locum was ever employed for hours beyond 18:00. This suggests that it was not necessary to employ cover for those hours. Yet, these are the hours that the Contractor claims require an additional locum in order to ensure cover. I note that there is an inherent contradiction here. The Contractor claims they are entitled to employ someone for these hours which must be, as per paragraph 3 of section 9, because they necessitate cover, but instead of working those hours, they are instead employed elsewhere, which suggests that cover is not needed for those hours.

5.20 I note that it is not necessary for the locums to work the exact same hours as the GP performer, however, I consider that these discrepancies in hours and days worked make it difficult to assess where a locum is being used to cover Doctor 1 and where they are being employed for other purposes. I consider that this is further hampered by the fact that the evidence of the hours worked by Doctor 1 is incomplete and lacking in detail. In combination I considered it immensely difficult to assess whether these locums were being used to cover a GP performer, both actually and necessarily for the purposes of paragraph 3.

5.21 Referring to my earlier comments, I note that basing the assessment on a purely sessional basis allows for these issues to be avoided, as sessions are clearly being worked as a GP performer, and locums can be employed on the same basis which ensures that cover is maintained, without elaborate scrutiny. I note that the Contractor has provided information on other performers and their hours per session, in order to demonstrate the fallibility of sessions. I note that these hours are based on the same information as Doctor 1, that is log in and off times from a computer. I also note that, similarly, these individuals do not appear to take any breaks during work, even if they are working more than 6 hours. The hours also vary per day with no consistent start or finish times. It is unclear what this is trying to illustrate. When some level of breaks are accounted for then most of these performers are working similar sessions to the BMA suggested session lengths.

5.22 Having assessed all of this information, I consider that the information before me is difficult to interpret. The lack of cohesion between Doctor 1's hours and the cover engaged makes it impossible to determine whether normal service was being provided, as it represents almost a wholly different work schedule, across more days and working simultaneously. I return back to the wording of paragraphs 2 and 3 of section 9 of the SFE. There is a requirement that normal service is maintained, but also that the locum is being necessarily employed to cover a GP performer. A key point as to whether the cover was necessary, I consider to be that no locum ever worked the same hours as Doctor 1, in any week. There is no week, in the records provided to me, where locum cover was used to only cover the Monday and Thursday from 8:30am until at least 7:30pm. I do not consider that the additional evidence provided by the Contractor supports this position, and instead I must favour the Commissioner's view that 4 sessions needed covering and 4 sessions needed to be reimbursed as per the SFE.

5.23 I next turn to the question of simultaneous cover. The Commissioner has stated that normal service would refer to the existing pattern of clinical surgeries. I also note its comments that overlapping surgeries would need to be necessary, if they were to be suitable for reimbursement. I consider that these two propositions are in keeping with the language of the SFE, as I have already cited. I note the Contractor's explanation

that service should be gauged on a weekly basis, and that provided the hours are the same then that is all that is required. I do not consider this accords with the language of the SFE. The entire section in question is regarding cover. I find it difficult to see how two performers acting at the same time could ordinarily be considered necessary cover for a single individual. However, I agree with both parties that it might be possible that a situation arises whereby overlapping locum cover is necessary.

5.24 Given this possibility I consider that in order for such locum cover to be recoverable, due to the extra-ordinary nature of such a situation, the Contractor should demonstrate adherence to the language in paragraph 3, that being it was entirely necessary. I note the Contractor states that any such restriction would be both unnecessary and is not explicitly permitted by the SFE. I do not consider this to be the case. The SFE states that the commissioner is only obliged to provide financial assistance where cover is necessary. I return to the fact that in an ordinary sense it would not appear to be in keeping with the idea of "cover" to have two individuals replacing one. As such the SFE, implicitly, has language which is in keeping with the Commissioner's construction, rather than the Contractor.

5.25 I return to the evidence provided by the Contractor. I do not consider any of the statements made, or the information provided indicate that overlapping locums was "necessary" or in keeping with "normal service". Instead, I note that it was beneficial to the Contractor for the arrangement to be as such. If the GP performer was so industrious that normal service could only be maintained by two locums, such a proposition would require evidence. Due to the lack of any such evidence, I consider the Commissioner's position is correct, and that any use of two locums to cover one individual would require significant justification and evidence, indicating both necessity and that normal service was being maintained, which has not been demonstrated by the Contractor.

6 DECISION

6.1 I, as an authorised officer of NHS Resolution, determine this application for NHS dispute resolution in favour of the Commissioner and determine that the Commissioner is not required to pay the additional amounts requested by the Contractor.

Head of Appeals
NHS Resolution