



**FILE REF:** SHA/19984Tel: 0113 86 65500  
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Email: appeals@resolution.nhs.uk**DECISION MAKING BODY:** NHS ENGLAND – NORTH  
(CHESHIRE AND MERSEYSIDE)**GDS PROVIDER:** COUNTY ROAD DENTAL PRACTICE  
158 – 160 COUNTY ROAD  
LIVERPOOL  
L4 5PH**DISPUTE RESOLUTION:** APPEAL AGAINST BREACH NOTICE  
WITH REGARD TO CALCULATION OF  
FINANCIAL RECLAIM**RE:** NATIONAL HEALTH SERVICE (GENERAL DENTAL SERVICES  
CONTRACTS) REGULATIONS 2015

## 1 Introduction

- 1.3 The contractor has referred the dispute in relation to its GDS contract for dispute resolution under the provisions of paragraph 54 of Schedule 3 of the National Health Service (General Dental Services Contracts) Regulations 2015 (the “Regulations”).
- 1.4 The Secretary of State for Health and Social Care has directed that NHS Resolution exercise the functions of dispute resolution on his behalf. I, as an authorised officer of NHS Resolution, have made this determination.

## 2 Application for Dispute Resolution

- 2.1 By letter dated 7<sup>th</sup> September 2018 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 Letter, with enclosures, from the Contractor dated 7 September 2018
- 2.2.2 Letter, with enclosures, from NHS England dated 25 October 2018
- 2.2.3 Letter, with enclosures, from the Contractor dated 2 November 2018

## 3 Consideration

- 3.1 The Contract was previously held as a partnership and the current Contractor joined, by a variation dated 1 August 2017 when the Contract was then held by 3 practitioners. I note that two of the practitioners decided to retire and that with effect from 1 February 2018 the Contractor took over the GDS contract for this practice as a single handed practitioner.

- 3.2 NHS England wrote to the practice on 23 October 2017 with the “2016/2107 End of Year reconciliation” ‘Calculation of carry forward activity’ advising that they had finalised the year end delivery position and that the contract had achieved 95.90% of the contracted activity. The letter went on to state that as this was within the contractual tolerance permitted by the contract, NHS England will carry forward the 904 UDAs.
- 3.3 Following the year end reconciliation for the year 2017/2018 NHS England wrote to the contractor in a letter dated 9 July 2018 “Calculation of financial reclaim” advising that the contractor had achieved 95.30% of their contracted activity for the year 2017/2018 and that there was a total shortfall in UDAs of 1,037.40, being made up of the shortfall for the year 2017/2018 as well as the 904 UDA carried forward from 2016/2017.
- 3.4 NHS England issued a Breach Notice to the contractor dated 9 July 2018 which stated:
- “You have not delivered the amount of services specified in the Contract
  - Your year end delivery is 21,029 UDAs
  - Your contractual obligation was to delivery 22,067 UDAs.”
- 3.5 The Contractor is seeking to dispute the issuing of a Breach Notice by NHS England in respect of the underperformance of the Contract as well as the way that NHS England are recovering the monies in respect of the historical underperformance on the contract and the length of time this has taken.
- 3.6 The Contractor states, in their application for dispute resolution, that:
- “The issuing of this breach notice is too heavy handed given that our underperformance was only 0.7% more than is permitted in the contract. We do not dispute that we inherited responsibility for the previous under performance and understand that the LAT have targets to deliver. However, whilst the LAT say that they are following national guidance, we think that they failed to properly consider the temporary local circumstances we faced and give us the support we desire all for the sake of 0.7%”*
- 3.7 I note that NHS England state, in their representations, that contractors are able to keep track of their performance in various ways. Further, NHS England go on to state that the current Contractor was party to the previous contract prior to the 1 February 2018 variation and “would be expected to be aware of the 904 extra UDAs that would need to be completed during 2017/2018 following the previous year’s underperformance”.
- 3.8 NHS England also state in their representations that a challenge from the Contractor against the issuing of a breach notice has already been considered by NHS England and that “it was considered that the circumstances listed by the contractor did not fall into “circumstances that might be considered exception” when reviewed against those circumstances listed in Annex 49 and Sec 9.1 (Exceptional Circumstances) of the Policy Book for Primary Dental Services.”
- 3.9 The Contractor, in their final submissions, accept that there are many ways that a contractor can keep track of their performance but remains of the view that given the length of time that it took NHS England to finalise the accounts that the portal was not updated until November 2017 following the letter of 23 October 2017 from NHS England. The Contractor seeks to argue that until this was updated then their position on the portal was looking favourable and they had no cause for concern.
- 3.10 The Contractor further states that they were aware of the underperformance of the contract as part of the due diligence process in taking over responsibility for the practice and that they had the funds available to repay the underperformance. The Contractor states that the decision on how to treat this underperformance was not communicated to them until the letter of 23 October 2017.
- 3.11 The Contractor further states that as no breach notice was issued for the underperformance of the year 2016/2017 this shows that this is discretionary. The Contractor goes on to state

that section 9.6 of the Policy Book demonstrates that it is not automatic that a breach notice will be served as it states “the Commissioner may also serve a breach notice...”

- 3.12 The Contractor states that as the UDA target was amended in October 2017 this gave them less than 5 months to achieve the new revised target and that they should have been given at least 12 months in which to deliver this underperformance.
- 3.13 Whilst I note that there is no dispute between parties with regard to the number of UDAs provided by the Contractor for the year 2016/2017 or further that this resulted in a shortfall of 904 UDAs, there appears to be some dispute as to how the underperformance was going to be managed and how NHS England were going to reclaim the monies that had been overpaid to the Contractor. I further note that there is no dispute between the parties that the Contractor would have completed 99.3% of their annual contract for the year 2017/2018 if the 904 UDAs had not been added to the contract in October 2017.
- 3.14 I have been provided, by NHS England, with the 2016/2017 End of year activity statement which is dated June 2017. This shows that there is a Balance of activity (UDA) of 904 DR, giving a Contracted general activity schedule of 95.90%. I note that the Contractor was advised, in a letter dated 23 October 2017 of the 2016/2017 End of Year Reconciliation and that the underperformance of UDAs were to be carried forward to the next contract year. I further note that this is in line with both the Policy Book as well as the GDS Contract.
- 3.15 I note that NHS England state that the Contractor would have been able to keep track of their performance through the Compass portal. I note the comments from the Contractor that the Compass portal was not updated until November 2017, following the letter from NHS England of 23 October 2017. I note that I have not been provided with any information, from either party, to confirm the monthly figures that were showing on the Compass portal for the beginning of the 2017/2018 contract year or further when these monthly figures were updated to show that the shortfall for the 2016/2017 year had been carried forward.
- 3.16 Further, whilst I have before me a copy of the June 2017 End of year statement of activity, I have only been provided with page 3 of the statement and I have no information as to when this was communicated to the Contractor either through the Compass portal or via another form of communication or what information was contained on the other 2 pages. Without this information before me, I am unable to be certain as to when the June 2017 End of year statement was provided to the Contractor and further I do not know if the Compass Portal had been updated during the 2016/2017 year to enable the Contractor to see if they were on schedule to reach their contracted UDAs, however it is a matter for the Contractor to monitor the Compass portal on a regular basis.
- 3.17 I am of the view; from the information before me, that the first time that I can be certain that the Contractor knew that there was an underperformance was when they received the letter of 23 October 2017.
- 3.18 I note the comments from the Contractor that they were aware of this underperformance when they took over the contract and state that “*we do not dispute that we inherited this responsibility for the previous under performance*”. This is confirmed in an undated letter included in the papers from NHS England with the latest variation of contract which is dated 1 February 2018. The letter states

*“We, Drs O’Gorman, Bowker and Geoghegan, confirm that we have agreed that any PCR, guarantees/repairs or any shortfall will be offset against the remaining individual provider (Paul Geoghegan).*

*In addition any PCR still to be deducted will be offset against the individual contract and Dr Geoghegan will be responsible for the full year UDA target.”*

- 3.19 I further note the comments from the Contractor in a letter to NHS of 1 August 2018 that “*we were not aware that the 904 UDAs carried over in to 17/18 was a contractual obligation on which a breach notice could be issued*”. The Contractor went on to state “*we understood*

*that it would be treated as a financial clawback and since taking over the contract we have ring fenced the money to be repaid. I regret not contacting you early on in my tenure to confirm my understanding.”*

- 3.20 I note that there is no dispute between the parties with regard to the underperformance or that the responsibility for this underperformance then fell to the contractor when they took over the contract with effect from 1 February 2018. I note that the Contractor states that he was under the impression that the underperformance was going to be dealt with by way of clawback as opposed to having to do additional UDAs in the next contract year. I note however that NHS England, in a letter to the practice, addressed to Brian O’Gorman and Andrew Bowker dated 23 October 2017, advised the Contractor that they had achieved 95.90% and that there was an underperformance of 904 UDAs. The letter further goes on to state that the shortfall will be added to the annual contractual delivery and gave a revised figure for the UDAs expected for the year 2017/2018 of 22,971.
- 3.21 Further the letter from NHS England of October 2017 clearly sets out what the new UDA total for the 2017/2018 year will be and that the contractor has until the end of the current financial year to deliver this additional activity. Further, NHS England directs the contractor, via a web address, to the ‘Dental Policies’ as well as the ‘Policy Book for Primary Dental Services’. It was a matter for the Contractor to be aware as to how the shortfall for the year 2016/2017 would be repaid and this is set out in the ‘Policy Book for Primary Dental Services’ at section 9.
- 3.22 I note that the Contractor was party to the Contract in October 2017 and therefore should have been aware in October 2017 of the shortfall of UDAs for the year 2016/2017 and that these were to be added to the annual contractual delivery for 2017/2018. I note that the Contractor states that “as part of the due diligence process in taking over the responsibility for the practice, we were aware of the underperformance” I am of the view therefore that the Contractor, in being aware of the underperformance, should also have been aware that NHS England were dealing with this underperformance by way of adding these UDAs to the contractual delivery and increasing the UDAs they expected the contractor to deliver in 2017/2018 rather than by clawback.
- 3.23 I am therefore of the view that the Contractor should have been aware that if there was an underperformance of activity in relation to UDAs then this would have to be recovered. I am also of the view that the Contractor should have been aware that any underperformance of a contract could lead to a breach notice being issued and the monies paid by NHS England to the Contractor would have to be clawed back during the next year (2107/2018).
- 3.24 I note the comments from the Contractor that they deem it to be unfair that NHS England has also issued a breach notice to them for not achieving 96% of their UDAs for the year 2017/2018 given that their underperformance was only 0.7% lower than 96%. I note that there is no dispute that, had the 904 UDA’s not been carried forward to the 2017/2018 year the Contractor would still not have met their contracted UDAs for the year 2017/2018, however this would not have resulted in a breach notice but the underperformance would have been carried forward to the 2018/2019 year.
- 3.25 I note that it states in the Policy Book under section 9.6:
- “In addition to recovery of the overpayment, the Commissioner may also serve a Breach Notice on the contractor for the failure to deliver the contracted activity (Annex 46). The Commissioner will have regard to the reasons for the under delivery including those covered by circumstances in Annex 49”*
- 3.26 I note that the Contract has underperformed for 2 consecutive years (2016/2107 and 2017/2018). I have also had regard to the circumstances as set out in Annex 49 to the Policy Book and have had regard to the letter from the Contractor to NHS England dated 1 August 2017. I note that the Contractor states that it had taken some time to find a replacement dentist and train them following the departure of another dentist. I note that “Recruitment difficulties” are listed as a “non allowable circumstance” in Annex 49 of the

Policy Book. I further note the comments from the Contractor with regard to the updating and computerisation of the premises, being in a high need area and the failure to attend rate of the practice. I note however that "Re-decoration of premises", "Patient Failed to attend (FTA)" and "High needs patients" are also listed in the "Non allowable circumstances" in Annex 49.

- 3.27 I accept, given the wording in the Policy Book, that it is the discretion of NHS England whether or not to issue a Breach Notice, however I further note that this is the second year that the practice has not met the UDAs set out for the practice.
- 3.28 I am of the view that it is a matter for NHS England, taking all of the information before them in to consideration, to decide whether or not a breach notice should be issued. I am of the view that the Contractor should have been aware of the consequences of not meeting their required UDAs and that the issuing of a breach notice given the circumstances was not disproportionate. I agree with NHS England that there is a debt owing to NHS England as a result of the underperformance of this Contractor for the year 2016/2107 and that NHS England is entitled to reclaim the overpayment made to the Contractor.
- 3.29 I confirm the decision of NHS England to issue a Breach Notice.

### **Head of Primary Care Appeals**