

30 January 2019

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Boar Lane
Leeds
LS1 6AE**FILE REF: SHA/21023**Tel: 0113 86 65500
Fax: 0207 821 0029
Email: appeals@resolution.nhs.uk**DECISION MAKING BODY: NHS ENGLAND YORKSHIRE (NORTH) and HUMBER****GMS CONTRACTOR: DR KESHRI (RETIRED)****PREMISES: 128 CHELMSFORD MEDICAL CENTRE,
CHELMSFORD AVE,
GRIMSBY,
DN34 5DA.****DISPUTE RESOLUTION: NHS (GENERAL MEDICAL SERVICES
CONTRACTS) REGULATIONS 2015****DIRECTIONS: NHS (GENERAL MEDICAL SERVICES – PREMISES
COSTS) DIRECTIONS 2004****RE : RECURRING PREMISES COSTS - FEES****1 Outcome**

- 1.1 I determine that NHS England is not obliged to reimburse the contractor's surveyor's fees.

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Unit 1-2020

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DETERMINATION

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**DIRECTIONS: NHS (GENERAL MEDICAL SERVICES – PREMISES
COSTS) DIRECTIONS 2004**

RE : RECURRING PREMISES COSTS - FEES

1 Introduction

- 1.1 As a retired GMS Provider, the above contractor has referred the matter for dispute resolution.
- 1.2 The NHS (General Medical Services Contracts) Regulations 2015 (the "Regulations") came into force on 7 December 2015. The Regulations apply to an agreement to which the National Health Service (General Medical Services Contracts) Regulations 2004 applied immediately before this date.
- 1.3 The Secretary of State for Health 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 The Following Points are relevant to this Application for Dispute Resolution

- 2.1 The contractor has applied to NHS Resolution for Dispute Resolution. The application relates to the reimbursement of surveyor's fees that the contractor has paid in relation to a number of notional rent reviews since 2007.
- 2.2 NHS England refuses reimbursement on the basis that it has no obligation to do so.
- 2.3 The contractor has retired and the surgery has closed.
- 2.4 Recurring premises costs are dealt with in the NHS (General Medical Services – Premises Costs) Directions, of which there are two versions, 2004 and 2013. As the contractor has been receiving rent reimbursement since before 1 April 2013, the 2004

version of the Directions applies. The transitional provisions in paragraph 56(1) of the 2013 Directions require that once any payments are made under the 2004 Directions they will continue to be paid under that version of the Directions. As a matter of fact, in all aspects material to this claim, the versions of the Directions are the same.

2.5 I have had regard to the following documents (together with any enclosures and annexures) made available to me in consideration of this preliminary issue:

2.5.1 General administrative correspondence from NHS Resolution's file;

2.5.2 Application to NHS Resolution 15 November 2018;

2.5.3 Representations from Contractor 18 December 2018;

2.5.4 Representations from NHS England 20 December 2018;

2.5.5 Observations from Contractor 15 January 2019;

2.5.6 Observations from NHS England 4 January 2019;

3 Statutory Framework

3.1 The Regulations apply in this case. Paragraph 83 of the Regulations, indicates with some exclusions, that the NHS dispute resolution procedure applies in the case of "any dispute arising out of or in connection with the agreement which is referred to the Secretary of State –

(a) in accordance with section 9(6) of the Act (where the agreement is an NHS contract); or

(b) in accordance with paragraph 75(1) (where the agreement is not an NHS contract)."

3.2 Part 3 deals with professional fees and Part 5 with recurring premises costs.

4 Consideration

4.1 The contractor retired in March 2016. Prior to his retirement, he had been in several disputes with NHS England and the PCT in relation to the notional rent payable in respect of the Premises following the three yearly reviews in 2007, 2010 and 2013.

4.2 The contractor makes much of the fact that the notional rent which was finally determined for these reviews was higher than the sum first put to him by NHS England's valuer (for example paragraph 6 of his Application and paragraphs 5 and 6 of his submissions) which is why he needed to appoint an expert surveyor.

4.3 The contractor asks at paragraph 9 of his submissions whether it would be possible to look again at the reviews from 1990 to 2004 as given the negotiations necessary to reach an acceptable figure for market rent for the 2007, 2010 and 2013 reviews, he is concerned that the notional rent for this period was too low.

4.4 The contractor submits that he appointed a surveyor for each review at a total cost of £# (inclusive of VAT).

4.5 The invoice for the 2007 review (for £# plus VAT) does not have GP Surveyor heading (although it has some branding) and is dated 10 December 2018 which is after the contractor made his referral to Primary Care Appeals. There is no evidence that this invoice has been paid.

- 4.6 I have seen invoices on headed notepaper from GP Surveyors for £# plus VAT for negotiating the 2010 review and £# plus VAT for the 2013 review.
- 4.7 The contractor submits that paragraphs **13**, **14** and **15** of the 2004 Directions entitle him to reimbursement of surveyor's fees (paragraph 13 of his Representations). He also refers to paragraph **33(b)** which deals with uplifts to current market rent (not notional rent) in areas of deprivation. In addition, in his Observations he relies on paragraph **6** which allows NHS England to provide financial assistance towards premises costs in circumstances not contemplated by the Directions.
- 4.8 He further submits that the current market rent has been reduced by the amount of surveyor's fees that he has incurred in reaching a settlement of the level of reimbursement. In an email of 15 October 2018 to NHS England, the contractor states that he had 3 successful appeals to Primary Care Appeals (formerly FHSAU) "That means that the NHS England had been looser (sic) for all the three occasions and hence the looser has to pay the cost for justice to take place."
- 4.9 The contractor submits that he feels he is being harassed by NHS England in breach of his GMS contract.
- 4.10 The contractor makes much of delays in the process of negotiating the reviews and in making payments. However, as these issues do not have an impact on the sums claimed in this appeal (surveyors fees were a fixed percentage of any uplift negotiated), I will not deal with them further.
- 4.11 NHS England submits that the contractor does not appear to appreciate the need to appoint an agent to represent him in rental valuation disputes. NHS England further submits that it is "accepted practice" for the fees of the surveyor to be the responsibility of the contractor. NHS England has not found anything in the GMS contract or Directions or protocol for Local Dispute Resolution that can require NHS England to be responsible for the costs (sixth paragraph of the Representations). NHS England has sent a letter to the contractor dated 15 October 2018 in response to his claim for reimbursement in these terms "You have the right to appeal the valuations, but in exercising this option you take responsibility for your own costs in relation to the engagement of the agents..."
- 4.12 NHS England in its Observations submits that paragraphs 13 and 14 of the Directions relate to professional fees incurred in occupying new or substantially refurbished premises and so do not apply to a case of notional rent reimbursement.

5 Determination

- 5.1 It is not unusual for current market rent levels to be agreed at a level higher than the figure initially proposed by NHS England's valuer. It is also not unusual for this process to take some time. Valuation is not an exact science and appropriate comparables have to be found and debated. This is why it is common practice for contractors to appoint surveyors in the early stages of a valuation dispute. I accept NHS England's submissions on this point.
- 5.2 I also accept NHS England's submission that there is nothing in the contract, Regulations or Directions that entitles the contractor to reimbursement of surveyors fees paid in relation to notional rent reimbursement.
- 5.3 In particular:
- 5.3.1 Paragraphs 13, 14 and 15 of the Directions (Part 3) relate to the recovery of professional fees in circumstances where the contractor has new or significantly refurbished premises. They do not apply to notional rent reimbursement as a recurring premises cost dealt with in Part 5.

- 5.3.2 Paragraph 33 is in Part 5 but does not entitle a contractor to claim professional fees. It entitles NHS England to uplift the current market rent in areas of deprivation. It does not apply to notional rent applications.
- 5.3.3 Paragraph 6 entitles NHS England to provide such assistance as it considers fit in circumstances not contemplated by the Directions. These are generally temporary contracts or emergency situations. This paragraph is clearly not designed to cover issues relating to recurring premises costs which are covered in Part 5 of the Directions.
- 5.4 The contractor submits (referred to in paragraph 4.8 above) that as the reviews in question have been the subject of applications to Primary Care Appeals (formerly FHSAU) then as the “losing” party NHS England should be responsible for the contractor’s surveying fees. Quite apart from the fact that in general litigation costs do not follow the result in the simplistic way that the contractor suggests, it is a principle of the constitution of Primary Care Appeals in hearing claims under the Directions that neither party will be entitled to claim any costs.
- 5.5 I therefore determine that NHS England is not obliged to reimburse the contractor’s surveyor’s fees.**
- 5.6 I should also deal with the contractor’s reference to reviews prior to 2007. Paragraph 58 of the 2004 Directions (paragraph 53 in the 2013 version) provides that NHS England can only consider approving applications for costs that fall due within 6 years of the date of the application.
- 5.7 There is no evidence in the papers that have been submitted to me that the contractor has been the subject of harassment, as he claims.

Head of Primary Care Appeals