

14 September 2020**FILE REF: SHA/23368**Tel: 0203 928 2000
Fax: 0207 821 0029
Email: appeals@resolution.nhs.uk**DECISION MAKING BODY: NHS COMMISSIONING BOARD
("NHS ENGLAND & NHS
IMPROVEMENT" or "NHSE&I")****GDS CONTRACTOR: DEVONSHIRE QUARTER DENTAL PRACTICE
1 CONVENT WALK
SHEFFIELD
S3 7RX****DISPUTE RESOLUTION: NATIONAL HEALTH SERVICE
(GENERAL DENTAL SERVICES
CONTRACTS) REGULATIONS 2005****RE: LATE SUBMISSION OF CLAIMS****1 Outcome**

- 1.1 If the Contractor is able to submit information to NHSE&I or NHS BSA within 28 days of the date of this determination and that information reasonably satisfies NHSE&I (if the information is provided to NHS BSA, then NHS BSA must liaise with NHSE&I within a reasonable timescale for NHSE&I to make a decision) that the relevant claims were sent by the Contractor within the two month timescale, then NHSE&I must require the NHS BSA to credit the Contractor with the UDAs from the relevant courses of treatment. It appears that this will likely change the Contractor's delivery position for 2019/2020 and the NHS BSA must therefore ensure that it is appropriately amended.
- 1.2 If the Contractor does not submit information to NHSE&I or NHS BSA or if NHSE&I considers, acting reasonably, that it is not satisfied that the relevant claims were sent by the Contractor within the two month timescale, then NHSE&I is able to recover the appropriate amount in accordance with paragraph 11 of the GDS SFE.

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DECISION MAKING BODY: **NHS COMMISSIONING BOARD**
(“NHS ENGLAND & NHS
IMPROVEMENT” or “NHSE&I”)

GDS CONTRACTOR: **DR KATHRYN HOULDING**
DEVONSHIRE QUARTER DENTAL PRACTICE
1 CONVENT WALK
SHEFFIELD
S3 7RX
(“CONTRACTOR”)

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

RE: **LATE SUBMISSION OF CLAIMS**

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 Paragraphs 54 and 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 his behalf. I, as an authorised officer of NHS Resolution, have made this determination.
- 1.3 In this matter, NHS Business Services Authority (“NHS BSA”) has acted on behalf of NHS England and NHS Improvement on actions and decisions relating to the relevant claims. NHS England and NHS Improvement is considered to be the decision making body and so references in this determination to actions or decisions taken by the NHS BSA should be taken as actions or decisions of NHS England and NHS Improvement.

2 Application for Dispute Resolution

- 2.1 By letter dated 31 March 2020, received 1 May 2020, 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 Contractor dated 1 May 2020 together with copy letter dated 31 March 2020;
- 2.2.2 Email from Contractor dated 6 May 2020 together with copy of GDS Contract and NHS BSA decision letter dated 31 January 2020;
- 2.2.3 Email from Contractor dated 5 June 2020 together with supplementary information;
- 2.2.4 Email from NHS BSA dated 5 June 2020 together with representations;
- 2.2.5 Email from NHS BSA dated 6 August 2020 together with responses to questions asked by NHS Resolution by letter dated 23 July 2020; and
- 2.2.6 Email from the Contractor dated 6 August 2020 together with responses to questions asked by NHS Resolution by letter dated 23 July 2020.

3 Consideration

- 3.1 I note that the application for dispute resolution is in relation to a number of claims for courses of dental treatment undertaken between 9 September 2019 and 25 September 2019 being rejected by the NHS BSA on grounds of late submission (though I note that there are also references to the latter date being 23 September 2020).
- 3.2 I have been provided with a background to the dispute. I note an email from the Contractor dated 20 January 2020 to NHS BSA, which states that having spoken to its local commissioner, it asks for NHS BSA to look at over-riding a late submission for some units of dental activity (“UDA”) claims, after some of its UDAs have been sent back as late submission claims from September 2019. The Contractor states that its computer software company (Software of Excellence) has looked into things and it cannot see what has happened. The Contractor states *“We submit regularly and fully and we have no explanation for why this happened and nor do SOE.”* The Contractor further states that: *“The dates where things have not gone through are between 09/09/19 and 23/09/19. I would be very grateful if an over-ride of the late submission could be done in this case as I feel that I have done nothing differently and cannot explain why this has happened and so feel I could not have done anything in any other way”.*
- 3.3 In its letter dated 31 January 2020, the NHS BSA informed the Contractor that its decision was not to allow late submission of these claims in this instance. The reason given for this is as follows: *“Based on our findings, the names within the dates from 9/9/19 to 23/09/2019, claims were submitted outside the two month rule [sic]. For example, date of acceptance and completion 23/09/2019 — date of receipt 26/11/2019. Therefore, in line with our procedures Dental Charges Service team can only authorise late submissions if the fault lies with the NHSBSA.”* And further that if the Contractor did not agree with the decision, it should contact the NHS BSA within 14 days of the notice.
- 3.4 In an email dated 12 February 2020, the Contractor informed the NHS BSA that it did not agree with its position and therefore would like to appeal against the decision. The Contractor states that *“It can be seen that this is not a case that we simply forgot to submit claims for more than two months – we transmitted claims regularly throughout that same two-month period and fully believed these claims to have been submitted. I feel that we have performed our contractual obligations under the NHS*

contract because we did submit the claims within the allocated time, but for some reason only some bundles have been sent through and not others. We cannot see how or why this has happened, but clearly there has been some problem over which we ourselves also had no control. I understand that the fault does not seem to lie with the NHSBSA, but I cannot find a fault from our side either, and the impact upon us as a small practice and business is enormous.”

- 3.5 In its email of 16 March 2020, the NHS BSA informed the Contractor that following further investigation, it was unable to action any of the issues raised in its email.
- 3.6 I note it is against this decision that the Contractor wishes to dispute.
- 3.7 From the information provided it appears as though parties have attempted to resolve the matter via local dispute resolution however they have been unable to reach agreement and therefore I am of the view that I can proceed to consider this application for dispute resolution.
- 3.8 I note in its letter of 31 March 2020, stated to be an appeal of the NHS BSA's decision, the Contractor states that the courses of treatment that were rejected amounts to all courses of treatment completed between 9 September 2019 and 25 September 2019. I note that the number of disallowed UDAs is 193.6 UDAs which according to the Contractor, amounts to 3.73% of its overall contract allocation.
- 3.9 The Contractor states that it does not agree with the NHS BSA that the claims were not submitted and that it *“submits claims routinely and regularly and the NHS BSA can see that it did indeed transmit claims on a number of occasions during the same time period as these disallowed claims. I have been an NHS provider and NHS performer for many years and transmit claims electronically in the same way as I always have. I therefore expected that, upon transmitting claims on the various occasions in September, October and November that all courses of treatment up to the date of each transmission were sent through to the NHSBSA for processing as they always have been before. I can see no reason for this, but it appears that the above claims were not included in those transmissions.”*
- 3.10 The Contractor contends that the approach taken by the NHS BSA is unjust and unreasonable as it is accepted that the work has been carried out as the NHS BSA has claimed the relevant patient charges relating to the courses of treatment.
- 3.11 The Contractor asserts that something has happened that has inadvertently caused a disruption to the usual submission of claims.
- 3.12 The Contractor states further that the refusal to credit the claims *“goes against the spirit of the contract, the requirement of the parties to act in a fair and reasonable way, and the fundamentally collaborative nature of the relationship between the NHS and a committed and conscientious provider of its NHS services such as myself.”*
- 3.13 I note the Contractor states that prior to the claims being rejected, it was on track to perform all UDAs required in the financial year. Further that a consequence of these claims being rejected, the Contractor will now probably be subject to a clawback at the end of the financial year as it will fall slightly below the 4% allowance, despite the fact that it has performed these UDAs, resulting in a significant financial penalty to the Contractor.
- 3.14 The Contractor states that it appreciates the need for a cut-off point to allow smooth administration of the service but it seems entirely unfair that there is no flexibility in

these rules to credit contractors who may experience a technical hiccup or unknown eventuality.

- 3.15 The Contractor requests that NHS Resolution override the NHS BSA's decision and credit the Contractor with the activity from the above courses of treatment.
- 3.16 I note in its supplementary information, the Contractor states that: *"The Applicant is seeking payment and credit of the Units of Dental Activity for work completed under the above contract between 9th September 2019 and 25th September 2019 and submitted to the Business Service Authority (BSA) during the months of September, October and November 2019. The submissions were submitted by the Applicant but not received by the BSA and despite investigation by the Applicant, their software provider and the BSA the reason for this cannot be determined and therefore where the fault lies cannot be determined. The claims were resubmitted but received 2 months after the courses of treatment were completed. The BSA subsequently refused to pay the claims but did recover the NHS patient charges. Neither party dispute that the work has been done by the Applicant and that they submitted the claims in the usual way to the BSA."*
- 3.17 The Contractor goes on to state that it believes that NHSE&I is in breach of clause 11 of the GDS contract to act fairly and in good faith by not using its discretion to direct the NHS BSA to pay the Contractor for the work they have completed.
- 3.18 The Contractor also states that clause 239 of the GDS contract requires NHSE&I to make prompt payment and they have failed to do so in respect of these claims. Failure of NHSE&I to pay contractors for work they have completed is wrong particularly given NHSE&I is a public body. The Contractor also claims that the principle in *Powys Teaching Health Board v Dusza & Anor* that work that has been completed by the dentist should be paid for by NHSE&I as per their contract can be applied here, and that even though the *Powys* judgment is focused on record keeping, the principle is transferable to reinforce the contract law principles which underpin the contract – the work has been performed in consideration for payment, therefore payment is due.
- 3.19 I note that clause 10 and 11 of the Contractor's GDS contract contain mutual obligations on the parties to act reasonably and in good faith and that NHSE&I is also required to act as a responsible public body required to discharge its functions. I also note that clause 239 of the Contractor's GDS contract requires NHSE&I to make payments to the Contractor under the contract promptly and in accordance with both the terms of the contract (including, for the avoidance of doubt, any payment due pursuant to clause 240), and any other conditions relating to the payment contained in directions given by the Secretary of State for Health and Social Care.
- 3.20 I also note that in *Powys Teaching Local Health Board v Dr Piotr Dusza, Dr Hako Sobhani* [2015] EWCA Civ 15, the Court of Appeal considered, inter alia, whether a failure by a GDS contractor to ensure that a full, accurate and contemporaneous record is kept in the patient record in respect of the care and treatment given to each patient would entitle NHSE&I to withhold payment, or to reclaim money already paid, for treatment actually rendered. The Court of Appeal upheld the High Court's decision that there was nothing in the contract, or in the Regulations, which expressly imposed compliance with the dentist's obligation to keep accurate and complete records, including a record of the examination, as a precondition to payment. Such a record could not be so vital to the course of treatment that a failure to record it went to the substance of the dentist's entitlement to be paid.

3.21 I note in its representations to NHS Resolution, the NHS BSA states that it sought confirmation from the Dental Activity Team (Dental Charges Team) that the delay in submitting these claims was not the result of NHS BSA act, error or omission (such as a failure of its systems) and they confirmed that there did not appear to have been a software issue on the NHS BSA's end during the period in question. Following a sample check, all claims appeared to have been submitted outside of the 'two-month rule'.

3.22 NHS BSA further states that: *"The 'two-month rule', as it is commonly referred to, relates to paragraph 38 of the NHS General Dental Services Regulation which sets out that all claims should be submitted by a contractor within two months of the date a course of treatment is completed. The effect of this is further clarified on page 76 of the NHSBSA Dental Handbook – A guide for commissioners, practices and dentists in England, which states:*

"valid FP17s should be received by NHS Dental Services within two months of the date of completion of a course of treatment, Any FP17s received outside of that period will be processed and the patient charge deducted. However, no units of dental activity will be awarded for the course of treatment. The only exceptions to this rule are incomplete treatment and orthodontic courses of treatment".

Having found no evidence that the late submissions were a result of NHSBSA act, error or omission, we made a recommendation to the PCT commissioner on 28 January 2020 that the request be rejected."

3.23 I note that Schedule 3, Part 5, paragraph 38 of the NHS (General Dental Services Contracts) Regulations 2005 states:

"Notification of a course of treatment, orthodontic course of treatment etc.

38.—(1) The contractor shall, within two months of the date upon which—

(a) it completes a course of treatment in respect of mandatory or additional services;

(b) it completes a case assessment in respect of an orthodontic course of treatment that does not lead to a course of treatment;

(c) it provides an orthodontic appliance following a case assessment in respect of orthodontic treatment;

(d) it completes a course of treatment in respect of orthodontic treatment;

(e) a course of treatment in respect of mandatory services or additional services or orthodontic course of treatment is terminated; or

(f) in respect of courses not falling within sub-paragraph (d) or (e), no more services can be provided by virtue of paragraph 5(4)(b) of Schedule 1 (orthodontic course of treatment) or paragraph 6(4)(b) of this Schedule,

send to the Primary Care Trust, on a form supplied by that Trust, the information specified in subparagraph (2).

(2) The information referred to in sub-paragraph (1) comprise of—

(a) details of the patient to whom it provides services;

(b) details of the services provided (including any appliances provided) to that patient;

(c) details of any NHS Charge payable (and paid) by that patient; and

(d) in the case of a patient exempt from NHS Charges and where such information is not submitted electronically, the written declaration form and note of evidence in support of that declaration”.

3.24 I also note that the above provisions of paragraph 38 are set out in clauses 221 and 222 of the Contractor’s GDS contract.

3.25 I also note that paragraph 9.2 of the Policy Book for Primary Dental Services published by NHSE&I states:

“The Commissioner must, by 31 October in the relevant financial year, determine the number of UDAs and UOAs that the contractor has provided between 1 April and 30 September in that year. This information will be based on the notifications of treatment (FP17s) made by the contractor under paragraph 38 of Schedule 3 of the GDS Regulations and paragraph 39 of Schedule 3 of the PDS Regulations and provided to the Commissioner by NHS DS. Where the notifications of treatment are disputed by the contractor, the contractor should liaise directly with NHS DS for resolution of their issue. Notifications of courses of treatment must be made within 2 months of a course of completed treatment. Contractors must ensure that notifications are made on time as the Commissioner is not obliged to pay for activity which is not notified in accordance with this 2 month deadline.”

3.26 I note that clause 372 of the Contractor’s GDS contract states as follows:

“372 Neither party shall be responsible to the other for any failure or delay in performance of its obligations and duties under this Contract which is caused by circumstances or events beyond the reasonable control of a party. However, the affected party must promptly on the occurrence of such circumstances or events:

372.1. inform the other party in writing of such circumstances or events and of what obligation or duty they have delayed or prevented being performed; and

372.2. take all action within its power to comply with the terms of this Contract as fully and promptly as possible.”

3.27 However, I note that this is qualified by clause 373, which provides that any actions or omissions of either party’s personnel or any failures of either party’s systems, procedures, premises or equipment shall not be deemed to be circumstances or events beyond the reasonable control of the relevant party for the purposes of this clause, unless the cause of failure was beyond reasonable control. I also note that the Contractor has not relied upon clause 372 in this dispute.

3.28 Based on the information provided by the parties to the application, I was not satisfied that I had sufficient information to be able to determine the application for dispute resolution. I therefore wrote to both parties asking them to respond to the following questions:

3.28.1 What is the process for submission of claims and what is meant by reference to “bundles”?

- 3.28.2 What verification or confirmation of submission is received or is obtainable by the contractor after sending the claim information and does this indicate the time/date of submission?
- 3.28.3 What verification or confirmation of submission is received or is obtainable by NHS BSA after sending the claim information and does this indicate the time/date of submission?
- 3.28.4 Was such verification/confirmation received/obtainable in relation to the claims for 9-23 September?
- 3.28.5 If it was received/obtainable, can evidence be provided now to NHS Resolution (e.g. a screenshot/print out) with an indication that the parties should provide any such evidence to NHS Resolution?
- 3.29 Both parties responded by email dated 6 August 2020.
- 3.30 The Contractor responded as follows:

“What is the process for submission of claims?”

The practice submits claims electronically to the NHSBSA. All claims are now required to be transmitted in this way but we have done so for many years. In our practice I am responsible for the submissions and carry out this process personally myself every two weeks or so, which is sufficient for the size of our practice and the number of claims submitted.

The practice software that we use, EXACT, automatically generates or ‘opens’ a course of treatment (COT) when a patient attends for an appointment. At the same time, an electronic FP17 form is generated, which is the standard NHSBSA form for submission of claims. From the patient’s first appointment there will therefore be an open course of treatment in EXACT relating to that patient until such time as it is indicated or confirmed on the FP17 that treatment has been completed.

Before the COT can be confirmed as ‘treatment completed (TC)’, EXACT requires all necessary information for the completion of the FP17, such as patient details, clinical notes with details of full treatment provided to the patient, any patient exemptions from charges, and so on. When all of this information is included, and the performer TC’s the course of treatment to confirm that the treatment is completed, a ‘TC’ date is included on the FP17 form to show the date of completion of treatment. When a COT has been TC’d it is then stored in the system ready for transmission to the NHSBSA.

As an example, in the case of a straightforward dental examination where the patient does not require any further treatment beyond that initial appointment, the COT will be opened at the start of the appointment, clinical notes added during the appointment giving details of the services and treatment provided, and the COT will be confirmed as completed (TC’d) at the end of the appointment. The electronic FP17 will therefore have the same Start of Treatment and Treatment Completion date on the form. I attach a screen shot of one such claim. I have redacted the personal details of the patient from the top but can confirm that this is one of the disputed claims.

[A redacted screenshot was provided with the Contractor’s response]

In the event that the patient requires a further appointment or appointments to complete their treatment, the COT will be opened at the first appointment, but then will only be TC'd after the treatment has actually been carried out at the later appointment. In this case, the Start of Treatment date and the Treatment completion date will be different.

Courses of treatment that are not TC'd will remain within the system as open courses of treatment, so especially with this second example, there is the possibility for COTs getting lost within the system and remaining open for long periods, particularly where a patient later cancels a subsequent treatment appointment or changes their mind, and the open-COT is not immediately revisited to indicate that the further treatment is no longer required.

However, I would like to stress that this is not what has happened in this case with these disputed claims. All of these claims were carried out as expected and the COTs were marked as Treatment Completed at the appropriate time at the completion of treatment as described above, contemporaneous with the end of treatment, and were believed to have been submitted within the appropriate timeframe.

Please indicate what is meant by “bundles” in the context of the submission of claims

Rather than each individual claim being submitted to NHSBSA one-by-one as they are completed, EXACT collects the claims which are then sent in ‘bundles’ or ‘batches’. This is done by a function in EXACT called ‘Transmit Claims’, and EXACT asks you to input which dates you would like to select claims from. In order to collect all claims currently within the system that are awaiting to be transmitted, I always change the date to pick up any claims within the last 2 months. As stated previously, I do this regularly and in the same way I have always done without issue. The system sends claims in bundles of 90, so if there are more than 90 claims to be sent then a second bundle will be required, and the system will ask you to confirm to submit the next batch until all are sent. Often there can be less than 90, other times more than 90 claims to be sent, in which case I transmit until it says there are no more claims to be submitted. As we a small practice, this works well and one or two bundles will be needed each time. This is the same process every time and it is always myself that does this and I will always do it until it says there are no more bundles to transmit.

What verification or confirmation of submission is received or obtainable after submitting the claims. Does this indicate time/date of submission?

When the transmission is sent, EXACT receives an electronic pop-up response to say that the files have been received and whether there are any responses, such as disputed claims that have been returned. This response is immediate so the software must be linked up with the NHSBSA software somehow, but it does act as an instant verification that the submission has been made and successfully received by the NHSBSA.

The bundles, once transmitted, are then listed in EXACT, and I attach below a screenshot of the bundles transmitted during this period. Each bundle will have the date of transmission, but not the time. As it can be seen, there were numerous claim bundles transmitted throughout September, October and November within which I had assumed that these disputed claims were included in the appropriate bundles. I continued to transmit normally and unaware of any issue until 26 November, where it can be seen that several bundles were required to transmit the completed courses of

treatment and we received an immediate electronic response from the NHSBSA system stating that a number of those claims had been rejected.

[A further screenshot was provided with the Contractor's response]

I really do not know how or why this happened, but I feel that we could not have done anything differently to either prevent or detect any issues as there was no indication, until the claims were rejected, that there was any type of problem or interruption in the normal transmission of these claims. Throughout this period I transmitted claims in the very same way as I always have and naturally assumed that the claims had been included in the bundles transmitted in the usual way.

Further information since application:

On 29 July 2020, the NHSBSA on behalf of NHS England issued all practices with their the End-of-Year delivery position for 2019/2020, stating how many Units of Dental Activity were performed by that practice in relation to its contracted target. Practices that perform 96% or more of their contracted activity are permitted to carry the outstanding UDA's into the next financial year without financial penalty or 'clawback' for any underperformance. Practices that achieve less than 96% are subject to a clawback of the full difference between their final delivery position and 100% contract value.

Our practice has never fallen outside of this 4% window before or received a clawback of any sum for underperformance. However, as a consequence of these rejected claims, our delivery position for 2019/2020 was stated as being at 94.5% and we received notification in that same communication that the NHSBSA intend to clawback the outstanding 5.5% of the contract value - a sum of around £9,700 - despite the fact that these units were actually performed. The number of UDAs in dispute account for approximately 3.7% of the overall contracted activity, so the practice has in fact delivered around 98.2% which is firmly within the permissible window to avoid financial penalty. Again, given that we have carried out these treatments and it is accepted that this is the case through the deduction of the relevant patient charges, it seems utterly unfair that we should be required to repay NHS England for work that is known and accepted that we have done and we had submitted these claims in the usual way throughout this time. This financial penalty, on top of the financial strain that COVID-19 has had on us as a practice through complete loss of any non-NHS income, is detrimental."

3.31 NHSE&I responded as follows:

"1) Providers must submit their claims within two months of the treatment closure date. Claims for dental treatment must be submitted to CoMPASS via electronic FP17 claim form and claims for orthodontics must be submitted via electronic FP17(O) claim form. This can be done via a practice management system purchased by a dental practice or via the online form within CoMPASS.

NB: Further information on Dental Activity Processing can be found on the NHSBSA's website

2) Surgeries often refer to files containing claims as "bundles".

3) I am unable to comment on what confirmation of submission is available via practice management system but understand from my colleagues in Dental Operations that claim submissions are available to view almost immediately in

CoMPASS and the server sends an acknowledgement of all WEB EDI files received. I can also confirm that each claim form indicates the time and date of submission for individual claims. Additionally, on the 1st of every month contract holders are able to view their monthly statement on CoMPASS which details how many claims they have submitted in that month. Contractors are able to see in CoMPASS which claims have failed validation and subsequently amend claim details as necessary for re-submission.

4) The NHS BSA can view the same claim information (including the date and time of submission) in CoMPASS as contractors, as described in point 3. If a contractor contacts the NHS BSA to confirm that claims have been submitted and received to CoMPASS, we would be able to search for these. The NHS BSA are not privy any information on practice management systems.

5) At the time the claims were submitted to CoMPASS in November 2019, the NHS BSA would have been able to verify and confirm their submission to Ms Houlding, had she requested it. Prior to this, as the claims to which the dispute relates did not transmit from Ms Houlding's practice management system, the NHS BSA would have had no way of knowing that the claims had not submitted."

3.32 Both parties were given an opportunity to comment on the other party's responses to these questions but neither party chose to do so.

4 Determination

4.1 In my mind there are two issues arising from this matter. The first is whether the relevant claims were sent to the NHS BSA. The second is, if it is determined that they were not sent, should the NHS BSA credit the UDAs within those claims to the Contractor for the reasons given by the Contractor.

4.2 On the first matter, I have had regard to the submissions of the parties and their comments on submission of claims. I note that the Contractor is adamant that submission of claims was carried out in the September, October and November period as they always have been and that the NHS BSA's position is that it did not receive the claims until after the two month period. I note the comments by the Contractor that it cannot understand why the claims were not received by the NHS BSA. I note that both parties have reported no faults on their respective IT systems for the period in question.

4.3 I consider that the information provided by the parties leads me to conclude that the claims were not received by the NHS BSA.

4.4 I consider that it is impossible on the basis of the information provided to me to identify why the information was not received by the NHS BSA. The question of whether this is due to human error, an undetected IT system failure or some other reason may never be answered. Information subsequent to this determination may come to light which assists with this point and I return to the potential to submit further evidence later in this determination.

4.5 I note that the NHS BSA indicated in its further information that "*on the 1st of every month contract holders are able to view their monthly statement on CoMPASS which details how many claims they have submitted in that month. Contractors are able to see in CoMPASS which claims have failed validation and subsequently amend claim details as necessary for re-submission.*" This and the reference to the ability to contact

the NHS BSA to confirm claims have been submitted and received, indicates to me that there are or were means to clarify whether claims have or had been submitted.

- 4.6 The Contractor has not indicated if it viewed the monthly statement to check the claims had been submitted and there is no indication that the Contractor requested confirmation that the claims had been submitted and received. It is not clear to me if the monthly statement for the relevant time is still available but if it is, and if it indicates that the relevant claims were sent in the two month period, then it may provide evidence that the Contractor did indeed send the claims to the NHS BSA and there was some unidentified fault with the NHS BSA's systems that led to non-receipt of the claims.
- 4.7 In light of my comments above I consider that if the Contractor is able to submit information to NHSE&I or NHS BSA within 28 days of the date of this determination and that information reasonably satisfies NHSE&I (if the information is provided to NHS BSA, then NHS BSA must liaise with NHSE&I within a reasonable timescale for NHSE&I to make a decision) that the relevant claims were sent by the Contractor within the two month timescale, then NHSE&I must require the NHS BSA to credit the Contractor with the UDAs from the relevant courses of treatment. It appears that this will likely change the Contractor's delivery position for 2019/2020 and the NHS BSA must therefore ensure that it is appropriately amended.
- 4.8 If the Contractor does not submit information to NHSE&I or NHS BSA or if NHSE&I considers, acting reasonably, that it is not satisfied that the relevant claims were sent by the Contractor within the two month timescale, then the second matter arises, namely should the NHS BSA in any event credit the UDAs within those claims to the Contractor for the reasons given by the Contractor.
- 4.9 I have noted the arguments of the Contractor as to why it should be paid even if the relevant claims were submitted late. The Contractor contends that NHSE&I is in breach of clause 11 of the GDS contract to act fairly and in good faith by not using its discretion to direct the NHS BSA to pay the Contractor for the work it has completed. Additionally, the Contractor relies on the principle in *Powys Teaching Health Board v Dusza & Anor* that work completed by the dentist should be paid for by NHSE&I.
- 4.10 On the first argument, potential breach of contract by NHSE&I of the requirement to act fairly and in good faith, I consider that the requirement to act fairly and in good faith does not mean that where a Contractor has not provided evidence of submission of claims information within the timescales expressly required by the GDS Contract, that NHSE&I is required to credit the UDAs within those claims to the Contractor such that the Contractor is paid for those claims.
- 4.11 This is particularly the case given the statutory framework for payments related to GDS contracts which I consider in more detail below.
- 4.12 The statutory framework relating to payments under GDS contracts also provides an explanation as to why I consider that the principle in *Powys Teaching Health Board v Dusza & Anor* does not apply to this situation.
- 4.13 As I have indicated above, the Court of Appeal in *Powys Teaching Health Board v Dusza & Anor* upheld the High Court's decision that there was nothing in the contract, or in the Regulations, which expressly imposed compliance with the dentist's obligation to keep accurate and complete records, including a record of the examination, as a precondition to payment.

- 4.14 I have noted the provisions in the GDS Contract and the Regulations on provision of the claims within the two month period but I also note that the parties have not pointed to a provision of the GDS Contract or Regulations that expressly links compliance with the timescale for claims submissions to payments.
- 4.15 I have, however, noted that no party has referred to the General Dental Services Statement of Financial Entitlements Directions 2013 (the "GDS SFE") as amended. The GDS SFE contains provisions relevant to payments which must be considered in any matter that is concerned with payments under a GDS contract.
- 4.16 The GDS SFE is brought into the contractual framework for GDS arrangements by virtue of Clause 239 of the GDS Contract which makes clear that payments must be made to the Contractor in accordance with the terms of the GDS Contract and in accordance with conditions related to payment contained in directions given by the Secretary of State for Health and Social Care. The GDS SFE are directions given by the Secretary of State.
- 4.17 There are a number of provisions of the GDS SFE that are relevant here. Paragraph 3.23 relates to the Annual Reconciliation Report. The Contractor has indicated that it has received from the NHS BSA the "*End-of-Year delivery position for 2019/2020, stating how many Units of Dental Activity were performed by that practice in relation to its contracted target*". I have assumed that this is the Annual Reconciliation Report.
- 4.18 Paragraph 3.23(e) explains that the Annual Reconciliation Report must include the number of UDAs that "*the contractor was contracted to provide and actually provided, based on the data submitted to [NHSE&I] by the contractor, in accordance with its contract condition set by virtue of paragraph 38 of Schedule 3 to the GDS Contracts Regulations*". Paragraph 3.23(e) also requires the Annual Reconciliation Report to include, where relevant, the number of UDAs that the contractor was contracted to provide but did not provide.
- 4.19 The reference to setting out in the Annual Reconciliation Report the number of UDAs actually provided based on data submitted in accordance with paragraph 38 clearly indicates to me that the Annual Reconciliation Report will not include UDAs within claims that were not submitted in accordance with paragraph 38. Claims submitted outside the 2 month period will be an example of information not submitted in accordance with paragraph 38.
- 4.20 There is therefore a situation in which the Annual Reconciliation Report indicates that the Contractor has not provided the level of UDAs that it was expected (and paid) to provide. The GDS SFE contains provisions relating to recovery of overpayments which I will return to shortly.
- 4.21 Before turning to the overpayment provisions I would also make reference to paragraphs 3.19 and 3.20 of the GDS SFE which state that the monthly payment to a contractor is only payable if certain conditions are satisfied. If a contractor breaches a condition, then NHSE&I may withhold payment. One of the conditions listed in paragraph 3.19 is that the contractor must make available any information which NHSE&I does not have but needs (including the returns required by virtue of paragraph 38 of Schedule 3 to the GDS Contracts Regulations).
- 4.22 The provisions relating to overpayment and withheld amounts are set out in paragraph 11.7 of the GDS SFE. This states that where a payment is made to a contractor under a GDS contract and:

“(b) the Board was entitled to withhold all or part of the payment because of a breach of a condition attached to the payment, but is unable to do so because the money has already been paid; or

(c) the Board is entitled to repayment of all or part of the money paid”

then NHSE&I *“may recover the money paid by deducting an equivalent amount from any payment payable pursuant to this SFE (in instalments, where that is appropriate), and where no such deduction can be made, it is a condition of the payments made pursuant to this SFE that the contractor must pay to [NHSE&I that equivalent amount.”*

- 4.23 I consider that the above provisions of the GDS SFE provide the necessary contractual rights for NHSE&I, acting through the NHS BSA, to seek recovery at year end of the amount paid to the Contractor for the value of the UDAs within the claims forms that were provided after the two month period and that this is on the basis that either the Contractor was paid an amount on account that overestimated the amount due or that NHSE&I was entitled to withhold part of a monthly payment due to a breach of the condition in paragraph 3.19 but the money had already been paid.
- 4.24 I am therefore satisfied that, for the reasons given above, the decision to not credit the UDAs within the relevant claims to the Contractor on the basis that they were not submitted within the two month timescale set out in the Regulations and the GDS Contract, which led to a recovery of payments, is not a breach of clause 11 of the GDS Contract and does not offend the principle in *Powys Teaching Health Board v Dusza & Anor*.
- 4.25 To reiterate, my determination is that if the Contractor is able to submit information to NHSE&I or NHS BSA within 28 days of the date of this determination and that information reasonably satisfies NHSE&I (if the information is provided to NHS BSA, then NHS BSA must liaise with NHSE&I within a reasonable timescale for NHSE&I to make a decision) that the relevant claims were sent by the Contractor within the two month timescale, then NHSE&I must require the NHS BSA to credit the Contractor with the UDAs from the relevant courses of treatment. It appears that this will likely change the Contractor's delivery position for 2019/2020 and the NHS BSA must therefore ensure that it is appropriately amended. If the Contractor does not submit information to NHSE&I or NHS BSA or if NHSE&I considers, acting reasonably, that it is not satisfied that the relevant claims were sent by the Contractor within the two month timescale, then NHSE&I is able to recover the appropriate amount in accordance with paragraph 11 of the GDS SFE.

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