

17 December 2020

Arena Point
Merrion Way
Leeds
LS2 8PA

FILE REF: SHA/23409

DECISION MAKING BODY:

**NHS COMMISSIONING
BOARD (“NHS
ENGLAND”)**

Tel: 0203 928 2000
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GMS CONTRACTOR :

DR R HANS, DR M THIEVACUMAR AND DR D SAMUELS

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

RE: TERMINATION OF GMS CONTRACT

1. Outcome

- 1.1 I do not consider that the issues I have been asked to determine in this application for NHS Dispute Resolution are a new application for NHS Dispute Resolution.

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RE: TERMINATION OF GMS CONTRACT

1 INTRODUCTION

- 1.2 The above contractor referred the dispute in relation to its General Medical Services Contract for dispute resolution under the provisions of paragraph 83 of the National Health Service (General Medical Services Contracts) Regulations 2015 (the "Regulations").
- 1.3 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 email dated 15 October 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 the contractor's representatives dated 15 October 2020 together with enclosures;
- 2.2.2 Email from NHS England's representatives dated 10 November 2020 together with enclosure;
- 2.2.3 Second email from NHS England's representatives dated 10 November 2020 together with enclosure;
- 2.2.4 Third email from NHS England's representatives dated 10 November 2020 together with enclosure;
- 2.2.5 Email from the Contractor's representatives dated 10 November 2020 together with enclosure;
- 2.2.6 Email from the Contractor's representatives dated 20 November 2020 together with enclosures; and
- 2.2.7 Email from NHS England's representatives dated 20 November 2020 together with enclosure.

3. CONSIDERATION

- 3.1 I have been provided with a detailed background to this application for NHS Dispute Resolution by the parties for which I am grateful.
- 3.2 I note that the Adjudicator has previously determined disputes in relation to this GMS Contract and that significant elements of the application, representations and observations relate to those disputes and the outcomes of them.
- 3.3 I note the Contractor's comment in their application that "the Claimant also request that Primary Care Appeals determine as a new dispute, (a) the binding nature of the contractual agreement between the Claimant and NHS England in relation to the termination or otherwise of the Contract and (b) whether the contract was terminated on 14 August 2020 in the circumstances and manner suggested by NHS England."
- 3.4 I note the Contractor's comment, in their representations that "These representations are made on behalf of the Applicants for Dispute Resolution following the Respondent's claim that the Claimants' GMS Contract was terminated on 14th October 2020 on the basis that they had withdrawn its Appeal that was remitted to the Primary Care Appeals by the High Court for redetermination, following a claim for Judicial Review."
- 3.5 I note "The Issues" (for determination by the Primary Care Appeals) as set out in the Contractor's representations (and repeated in their observations) are:
- "a. Whether there was a binding agreement between the parties as to disposal of the dispute resolution application (SHA/21098) and which was the basis of the conclusion of the dispute
- b. If it is now decided by the PCA that the agreement between the parties was not binding or effective to dispose of the dispute resolution (SHA/21098) notwithstanding the Respondent's knowledge of the Applicants' representation and its silence, whether the Applicants can be held to have withdrawn their appeal on a misunderstanding that there was an agreement which was not denied by the Respondent.
- c. If it is now decided by the PCA that the agreement between the parties was binding and effective to dispose of the dispute resolution (SHA/21098) notwithstanding the Respondent's knowledge and decision to remain silent, whether the Respondent should be held to that agreement.
- d. In all of the circumstance, whether the PCA should re-determine the dispute (SHA/21098) remitted to it by the Court under the consent order of 03 March 2020 in the interest of justice"
- 3.6 I do not consider that the issues I have been asked to determine in this application for NHS Dispute Resolution are a new application for NHS Dispute Resolution.

Issue "a"

- 3.7 I will refer to dispute resolution application (SHA/21098) as the "original appeal".
- 3.8 The Primary Care Appeals' file regarding the original appeal was closed on 14 August 2020.
- 3.9 Issue "a", as set out above, assumes that the original appeal was "concluded" on the basis of a purported agreement between the parties.
- 3.10 Primary Care Appeals sent a letter to the parties' representatives dated 15 October 2020 in which it was stated that:

“Your letter of 9 October states that your understanding is that the PCA closed its file on the basis of your clients’ agreement with NHS England and not on the basis of your clients having withdrawn the appeal. If that statement refers to the PCA’s state of mind, it is not correct as the letter of 14 August makes clear. The PCA expressly took no view on your clients’ reasoning or the position between the parties. The reasons for parties to bring, defend or withdraw appeals are not for the PCA to comment on, and nor are any agreements parties may or may not reach. The PCA expresses views on the positions of parties only after an appeal process in its decision letters.

If the statement refers to the state of mind of your clients or of both parties then the PCA cannot agree or disagree with it.

The PCA considers that the appeal lodged by your clients on 1 April 2019 was brought to an end on 14 August 2020. The reasons for that being the case are (1) that the PCA informed the parties that the appeal would be treated as closed unless either party indicated before 14 August 2020 that this should not be the case, and no such indication was received, and (2) the appellant positively indicated that the PCA should close its file on 13 August 2020. In short, while the Consent order in the judicial review undoubtedly did provide an opportunity for either party to require the PCA to re-determine the appeal, neither party did so. The PCA twice enquired of the parties whether a redetermination was needed, on the second occasion making clear that the file would be closed if no redetermination was requested, and no redetermination was requested but rather the PCA was invited to close its file.”

- 3.11 By letter of 15 October 2020 Primary Care Appeals acknowledged receipt of a referral of a new dispute by the Contractor by letter from the Contractor’s representatives dated 9 October 2020. This was described as a “new dispute” regarding “the binding nature of an agreement reached by the parties in relation to the termination of the contract”. It is clear from the correspondence that this is the dispute on which Primary Care Appeals sought the Contractor’s representations in the present application for NHS Dispute Resolution. Primary Care Appeals was and remains willing to consider this issue as a new dispute in the ordinary way.
- 3.12 However, issue “a” does not appear to relate to this new dispute. Instead it appears to relate to a dispute regarding the basis on which the original appeal was “concluded” or “disposed of” and the consequences in respect of the original appeal. These are not new issues. See my response to issue “d” below.
- 3.13 Issue “a” therefore does not raise a valid new dispute between the parties over which I have jurisdiction.
- 3.14 If the Contractor still wishes to refer a dispute relating to the validity of an alleged agreement reached between the parties as to whether the GMS contract between them is continuing then I will allow it the opportunity to submit new representations. Those representations must focus on the narrow issue of whether there is a binding agreement between the parties as to whether the GMS contract between them is continuing. If such representations are received then Primary Care Appeals will consider them in the ordinary way.

Issue “b”

- 3.15 Given my comments on Issue “a”, issue “b” falls away.

Issue “c”

- 3.16 Given my comments on Issue “a”, issue “c” falls away.

Issue “d”

- 3.17 Issue “d” asks whether Primary Care Appeals should re-determine the original appeal between the parties (SHA/21098), in the interests of justice.
- 3.18 Primary Care Appeals’ file regarding the original appeal was closed on 14 August 2020. Therefore, if issue “d” were resolved in the Contractor’s favour this would require Primary Care Appeals to re-open this file.
- 3.19 Primary Care Appeals has already made its position on this issue clear. In short, Primary Care Appeals is unable to re-open and then re-determine the original appeal. This has been explained in detail in correspondence from Primary Care Appeals to the Contractor’s representatives (and copied to NHS England’s representatives) dated 15 October 2020 and 22 October 2020, in which Primary Care Appeals explained that it is unable to re-open the original appeal on the basis that:
- 3.19.1 Primary Care Appeals’ determination of the original appeal was rendered a nullity as a result of the consent order dated 3 March 2020. The consent order agreed between the parties provided that “The application for dispute resolution shall be remitted back to [the PCA] for re-determination”.
- 3.19.2 After it was made aware of the consent order, Primary Care Appeals gave the parties two opportunities – on 4 and 14 August 2020 - to confirm by 4 pm on 14 August that they wished Primary Care Appeals to re-determine the appeal, failing which it warned them that the appeal would be treated as withdrawn. This provided a reasonable opportunity for the parties to confirm whether there was still a dispute between them that they wished to refer to Primary Care Appeals for resolution.
- 3.19.3 Neither party did so. Instead, the Contractor positively asked Primary Care Appeals to close its file on 13 August 2020.
- 3.19.4 Having been asked to close its file and not asked to re-determine the original appeal by 4pm on 14 August, Primary Care Appeals closed its file and treated the appeal as withdrawn.
- 3.19.5 Primary Care Appeals had informed the parties that it would treat the appeal as withdrawn, and this was confirmed on 14 August for the avoidance of doubt. It was made clear that the reasons that the parties took the positions that they took were not for Primary Care Appeals to concern itself with.
- 3.19.6 It is important that parties to dispute resolution in front of Primary Care Appeals can rely on its decisions.
- 3.20 I do not consider that issue “d” can properly be characterised as a new application for NHS Dispute Resolution. Even if it is, I determine that Primary Care Appeals cannot re-determine the original dispute between the parties (SHA/21098) for the reasons previously provided to the Contractor’s representative and summarised above.
- 3.21 Where the Contractor considers that it has a new dispute it may make an application for NHS Dispute Resolution of that new dispute.

Jonathan Haley
Head of Operations, Primary Care Appeals