

Interim approach to awarding Interest

1 Introduction

- 1.1 The purpose of this note is to set out the interim approach of Primary Care Appeals to the consideration of awarding interest including the guiding principles and process involved. The interim approach set out in this note is subject to review and evaluation.
- 1.2 NHS Resolution is the operating name of NHS Litigation Authority:
- 1.2.1 Through our Primary Care Appeals service, we are responsible for ensuring the prompt and fair resolution of appeals and disputes between primary care contractors and NHS England and NHS Improvement (NHSEI). Primary care contractors include GPs, dentists, opticians and pharmacists. The relevant regulations are set out below¹.
- 1.2.2 Through our Claims Management service, we handle negligence claims on behalf of the members of our indemnity schemes: NHS organisations and independent sector providers of NHS care in England and since April 2019, beneficiaries of state-backed indemnity for general practice.
- 1.2.3 Through our Practitioner Performance Advice service, we provide impartial advice to healthcare organisations to effectively manage and resolve concerns raised about the practice of individual practitioners.

2 Background

- 2.1 This paper applies only to the work of Primary Care Appeals.
- 2.2 The Court of Appeal in determining *SSP Health Limited v NHS Litigation Authority et al*² has set out its expectation that “if a party to a dispute has been kept out of their money, it is *prima facie* appropriate that the resolution of that dispute should include provision to reflect and compensate the party for that fact”.
- 2.3 The court has held that Primary Care Appeals has a power to award interest when it finds that a contractor has been underpaid (and equally when a contractor has been overpaid and must make a payment back).

¹ the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 and the National Health Service Litigation Authority (Pharmaceutical Remuneration – Overpayments) (England) Directions 2018

the General Ophthalmic Services Contracts Regulations 2008;
the National Health Service (General Dental Services Contracts) Regulations 2005;
the National Health Service (Personal Dental Services Agreements) Regulations 2005;
the National Health Service (General Medical Services Contracts) Regulations 2015;
the National Health Service (Personal Medical Services Agreements) Regulations 2015;
the National Health Service (Performers Lists) (England) Regulations 2013 (as amended)

² <https://www.judiciary.uk/wp-content/uploads/2020/11/SSP-v-NHS-Litigation-Authority-judgment.pdf>

- 2.4 Primary Care Appeals has sought the views of a range of stakeholders to assist us in establishing an approach which is set out below.

3 Guiding principles

- 3.1 The following guiding principles will apply to our approach:
- 3.1.1 We are committed to delivering fair resolution;
 - 3.1.2 We are committed to ensuring a fair and equitable approach to both NHS England and the contractor on the matter of interest payments;
 - 3.1.3 We seek to incentivise early resolution by reducing the potential for additional liability and/or costs to either party in pursuing the dispute through to Primary Care Appeals;
 - 3.1.4 The conduct of parties whilst attempting to resolve the dispute both at local level and through the NHS dispute resolution procedure will be taken into account;
 - 3.1.4.1 Parties are reminded to make reasonable efforts to communicate and co-operate with each other with a view to resolving the dispute promptly and without needing to involve Primary Care Appeals.
 - 3.1.5 We will support the appropriate use of public funds;
 - 3.1.6 We will recognise the opportunity cost of loss of access to funds by the party due to receive payment following resolution of the dispute;
 - 3.1.7 Where a contractor has received an overpayment in good faith, interest will not always be awarded; and
 - 3.1.8 Where NHS England has, in good faith, not made a payment, interest will not always be awarded.

4. Process

- 4.1 The Adjudicator will only consider awarding interest if claimed by a party when the application for dispute resolution is lodged or raised by the other party. This will enable submissions on interest to be received before the substantive adjudication.
- 4.2 If interest is not claimed, the substantive adjudication will state this.
- 4.3 If claimed, the substantive adjudication will set out with reasons:
- 4.3.1 If interest is not awarded, or
 - 4.3.2 If interest is awarded and if so, on what amount, at what rate and over what time period (the first and latter will be specific to the dispute in question).

- 4.4 If interest is awarded, the rate will normally be 8% above base rate³ although the Adjudicator will have discretion. Interest awarded will be simple rather than compound.
- 4.5 If interest is awarded, it will be payable at the same time as the substantive amount.
- 4.6 In some adjudications, it may be necessary for both parties to reconcile the substantive amount. This does not remove the right to interest if so directed by the adjudication.

5. Discretion

- 5.1 Interest is discretionary. In light of the Court of Appeal's comments in *SSP Health Limited v NHS Litigation Authority et al Primary Care Appeals* anticipates that the usual position will be that interest, where it is claimed, will be awarded but factors that may support a departure from that expectation include but are not limited to:
 - 5.1.1 where the conduct of the claiming party would make the award of interest unreasonable, for example, undue delay in resolving the dispute, or culpability in why a principal sum was under or overpaid
 - 5.1.2 where an overpaid sum was received in good faith and repayment with interest would cause unreasonable hardship, particularly if it could impact on the delivery of primary care services to the public
 - 5.1.3 where payment of interest would not represent a proper use of public money or where claiming interest does not represent proper conduct for a public body
 - 5.1.4 where the assumption that a winning party to a dispute has been kept out of their money is not supported by the facts of the case.

Effective from 7 April 2021

³ <https://www.gov.uk/late-commercial-payments-interest-debt-recovery/charging-interest-commercial-debt>