

22 February 2010

FILE REF: 15512

PRIMARY CARE TRUST: #

PMS CONTRACTOR: #

DISPUTE RESOLUTION: NATIONAL HEALTH SERVICE (PERSONAL MEDICAL SERVICES AGREEMENTS) REGULATIONS 2004

RE: DISPUTE RESOLUTION

1. INTRODUCTION

- 1.1 The Contractor has referred the dispute in relation to its Personal Medical Services Agreement ("the Agreement") for dispute resolution under the provisions of paragraph 95 of Schedule 5 of the National Health Service (Personal Medical Services Agreements) Regulations 2004 ("the Regulations").
- 1.2 The Secretary of State for Health has directed that the NHS Litigation Authority exercise the functions of dispute resolution on his behalf. I as an authorised officer of the NHS Litigation Authority have made this determination.

2. APPLICATION FOR DISPUTE RESOLUTION

- 2.1 By letter dated 18 November 2009, the Contractor applied to the FHS Appeal Unit of the NHS Litigation Authority 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 e-mail from the Contractor's Representatives dated 18 November 2009 together with enclosures;
 - 2.2.2 letter from the Contractor's Representatives dated 18 November 2009;
 - 2.2.3 e-mail from the PCT's Solicitors dated 4 December 2009;
 - 2.2.4 e-mail from the PCT's Solicitors dated 8 December 2009;
 - 2.2.5 note of a telephone conversation with the PCT's Solicitors dated 18 December 2009;
 - 2.2.6 e-mail from the PCT's Solicitors dated 21 December 2009 together with enclosure;
 - 2.2.7 letter from the PCT's Solicitors dated 21 December 2009 together with enclosures;
 - 2.2.8 letters from the Contractor's Representatives dated 26 November 2009 together with enclosures;

- 2.2.9 e-mail from the Contractor's Representatives dated 8 January 2010;
- 2.2.10 letter from the Contractor's Representatives dated 8 January 2010;
- 2.2.11 e-mail from the PCT's Solicitors dated 12 January 2010;
- 2.2.12 e-mail from the PCT's Solicitors dated 13 January 2010 together with enclosure;
- 2.2.13 letter from the PCT's Solicitors dated 13 January 2010;
- 2.2.14 letter from the PCT's Solicitors dated 22 January 2010; and
- 2.2.15 e-mail from the PCT's Solicitors dated 22 January 2010 together with enclosure.

3. **CONSIDERATION**

- 3.1 The Contractor's Representatives state that the dispute relates entirely to the fact that the practice is entitled to make an election as to whether or not they move from a Cost Rent to a Notional Rent but have been prevented from making that election as the PCT have refused to instigate the outstanding review and issue a current market rent for that review. The Contractor's Representatives have provided a chronology of the events leading up to the application.
- 3.2 The Contractor and the PCT are parties to a PMS Agreement, a copy of which has been provided to me. Schedule 10 of the Agreement details payments under the Agreement. It is not disputed that the PCT and the Contractor agreed a revision to the rent payments which were effective from 1 August 2008. By e-mail dated 22 June 2009 the PCT confirmed that it would accept the effective rent review date of 1 August 2008.
- 3.3 The Contractor's Representatives state that they "then proceeded as per my instructions, to try to ascertain the appropriate CMR with effect from August 2005, this being the proceeding triennial review under the terms of the Notional Rent Scheme". This was refused by the PCT following formal representations to the FHS Functions Committee of the PCT. The PCT confirmed by e-mail on 2 November 2009 that the Committee had decided not to support "backdating the rental to 2005".
- 3.4 The PCT have set out the provisions of paragraph 95(4) of Schedule 5 of the Regulations which state that any party wishing to refer a dispute is mentioned in sub paragraph (1) must send the request under sub paragraph (3) within a period of 3 years beginning with the date on which the matter giving rise to the dispute happened or should reasonably come to the attention of the party wishing to refer the dispute.
- 3.5 The PCT states that the "dispute surrounds the referral by the PCT to agree to a variation to the PMS Agreement for an increase rent or payment from 2005. The application was brought in 2009 in relation to matters that are more than three years old and consequently is out of time." The PCT's solicitors correctly refer to the Contractor's representations which make comment in relation to the time limitation for making application for dispute.
- 3.6 The PCT states that it received an e-mail from the Contractor in June 2006 seeking a revised rent. I have received a copy of the e-mail dated 9 June 2006 which states "could you please help us. We were wondering if you could arrange for the district valuer could come and reassess our premises? Or do we arrange this for ourselves. I have forgotten how we went about this. Many thanks." The PCT's solicitors state that if the application were not out of time it should be disposed of because the PCT is not obliged to agree to the requested variation and therefore is within its rights to reject the proposed variation.

- 3.7 I am not satisfied that the application for Dispute Resolution is out of time as the e-mail dated 9 June 2006 is not sufficiently detailed to satisfy me that the matter in dispute had happened or should reasonably have come to the attention of the Contractor.
- 3.8 The Contractor's Representatives state that "the relevant guidance in relation to the payment of recurring premises costs is enshrined within the National Health Service (General Medical Services – Premises Costs) (England) Directions 2004 ("the Premises Costs Direction"). In a helpful summary the Contractor's Representatives state "the Contractor contends that GMS Directions should apply to the treatment of the Premises Costs element of the PMS Agreement as explored" and that "the Contractor is entitled to a Notional Rent review effective from August 2005 under the basis of the GMS Directions. Instruction of the District Valuer is sought to resolve this and agree the specific levels thus the actual alteration of the PMS Agreement at local level."
- 3.9 Part 5 of the Regulations stipulate a number of matters that must be included within a PMS Agreement. Regulation 13 of the Regulations provide that a PMS Agreement must contain a term which has the effect of requiring payments to be made under the Agreement promptly and in accordance with the terms of the Agreement and any other terms on which the payment is made and any other conditions relating to the payment contained in the Directions given by the Secretary of State under Section 8 or Section 94(4) of the NHS Act 2006 (previously Section 17 and 28E(3A) respectively of the NHS Act 1977.) This provision is set out at Section 12 of the PMS Agreement provided to me. Whilst the Secretary of State has made some Directions under those sections that require equivalence in some areas as between GMS and PMS contracts, none of those Directions relate to the premises elements of the Statement of Financial Entitlements or the Premises Costs Direction.
- 3.10 Subject only to the requirements of Regulation 13, the levels of payment for the services under a PMS Agreement are for local agreement PCTs and Contractors may agree to have regard to the level set in the GMS Statement of Financial Entitlements and the parties may (but do not have to) agree to those being the level and terms for payment when negotiating the terms of the contract. PMS Agreements are not standard Agreements which are provided by the Department of Health. So whilst any PMS Agreement must comply with the Regulations, it is for the parties to enter into their own locally agreed Agreement.
- 3.11 The Premises Costs Directions, which came into force on 1 April 2004, generally do not apply to PMS Agreements. Direction 3 of the Premises Costs Directions states that "these Directions are given to PCTs and apply in relation to payments made to Contractors" A "Contractor" is defined in the interpretation section of the Directions as being "unless the context otherwise requires, means the person entering into, or who has entered into, a GMS Contract with the PCT." A GMS Contract is defined as meaning "a general medical services contract under Section 28Q of the NHS Act 1977." The Contractor has not suggested, and I have seen no evidence to indicate, that the context in which this dispute has arisen requires the Premises Costs Directions to apply to the PMS Agreement in question. That context is a negotiated contract between two parties within which provision for payments for premises has been expressly agreed between those parties,
- 3.12 Contractors are not directed by the Secretary of State to make payments in accordance with the Directions to PMS Contractors. In the absence of any conditions relating to payment contained in Directions given by the Secretary of State in relation to PMS Agreements, the arrangements for payment under a PMS Agreement must be set out within the PMS Agreement as envisaged by Regulation 13 of the Regulations. There is an entire Agreement provision at Section 21 of the PMS Agreement provided to me.
- 3.13 The PCT does not agree with the suggestion that the Premises Costs Directions apply to the determination of the rent payable to the Contractor under the PMS Agreement. The PCT's Solicitors state that "It is the PCT's view that the Directions only apply to a PMS Agreement if the parties agree expressly in writing (i.e. within the PMS Agreement) that they should apply". The PCT's solicitors state that the PCT and the Contractor have never agreed that

the GMS Costs Directions apply to the PMS Agreement. What they did agree (which is evidenced by the PMS Agreement) was that the PCT would pay the Contractor in relation to premises, the amount specified in the Finance Schedule (Schedule 10) of the PMS Agreement. The premises figure within that Schedule was revised periodically by mutual agreement. The most substantial uplift occurred as a result of the variation in June 2009 when it was agreed that the rent would be uplifted (with effect from 1 August 2008) to a figure representing the current market rental value of the premises at the effective date. It should be noted that the parties only agreed a variation to the premises figure within Schedule 10, they did not agree that the GMS Premises Cost Directions would apply to the PMS Agreement whether before or after the variation".

- 3.14 I accept that the PCT and the Contractor could agree that the Premises Costs Directions apply to the PMS Agreement. I have not received any evidence which suggests that the PCT and the Contractor have agreed that the Premises Costs Directions apply to the PMS Agreement. The PCT has expressly stated that it does not agree with the suggestion that the Premises Costs Directions apply to the determination of the rent payable to the Contractor under the PMS Agreement.
- 3.15 The Contractor seeks to rely on the General Practitioner's Committee of the BMA issuing guidance for GPs relating to PMS Agreements in September 2004 which states "PMS practices have equal access to the premises "flexibility" negotiated as part of the new GMS Contract and to any new funding to implement premises initiatives. The relevant legislation covering premises costs are the [Directions]. Although these are GMS Directions, the intention is for these to be used as best practice with PMS as well. There are no separate Directions relating solely to PMS premises costs". The content of the Guidance necessarily reflects the view of the BMA and is not binding on the PCT. I also note that this statement is made in relation to a number of elements of the then "new" GMS contract to which the Guidance relates that were to be offered to PMS practices, such as the Quality and Outcomes Framework and the premises "flexibilities" referred to. The Guidance does also emphasise that "the defining feature of PMS agreements is their local nature". It also states that "most financial aspects of PMS remain ungoverned by statutory instruments. This is in marked contrast to new GMS, which is underpinned by a national, guaranteed system of payment laid down in the Statement of Financial Entitlements (SFE). So despite the broad equivalence of GMS and PMS in certain areas of law and policy, PMS remains a genuinely local agreement as far as practice level finance is concerned. Practices should only enter a PMS agreement if they are confident with this fact and fully aware of its implications".
- 3.16 There is no legal requirement for PCT's when negotiating PMS Agreements or working with PMS practices pursuant to those Agreements to follow the nationally agreed pay structure for GMS. PMS Contractors and PCTs are free to negotiate separate payment arrangements. Although common elements are often found in both PMS Agreements and GMS Contracts, this is the product of negotiation and agreement between the parties and not any specific legal or policy requirement.
- 3.17 I am not satisfied that the PCT agreed to move to a Notional Rent reimbursement under the Directions with effect from August 2008 or that this should be applied to August 2005 for the same reasons. I am satisfied that the PCT have agreed to accept the effective rent review dated 1st August 2008 and that the parties have varied the PMS Agreement to reflect this agreement.

LISA HUGHES
Appeals Manager