

se

**In the National Health Service Litigation Authority  
Concerning an Application for Dispute Resolution  
National Health Service (General Medical Services Contracts) Regulations 2004 (As  
amended)**

Cases no: 15154

**Heard at** NHS Litigation Authority  
Napier House, 24 High Holborn, London  
**On** 15 September 2009

**Before**

#  
#  
#

**Between**

#

**and**

# Primary Care Trust

**Applicant**

**Respondent**

**Representation:**

For the Applicant: None  
For the Respondent: None

**DECISION AND REASONS**

**The Application**

1. This is an application for the resolution of a dispute about the termination of a contract for the provision of general medical services between # and # Primary Care Trust (the PCT).

**Background**

2. In 2004 the applicant entered into a GMS contract with the PCT. The applicant is a single handed practitioner.
3. On 1 October 2008 the PCT issued a remedial notice to the applicant requiring various matters to be remedied by 9 January 2009.
4. On 19 January 2009 the PCT issued the applicant with a breach notice and advised that

- failure to remedy the items identified in the remedial notice would result in breach of the GMS contract and that a termination notice would be issued.
5. On 4 March 2009 the PCT notified the applicant that he had not complied with the breach notice and as a result the GMS contract would be terminated with effect from 6 April 2009.
  6. The matters requiring remedy as set out in the breach notice may be summarised as follows:
    - a. Submission of a practice leaflet
    - b. Submission of a complaints information leaflet for patients
    - c. Return of all outstanding patient records to the PCT patient services department as requested
    - d. Submission of a health and safety policy and risk assessment
    - e. Submission of a proposal on how to ensure confidentiality of patient records
    - f. Submission of a child consent policy and form
    - g. Submission of a robust call and recall system for patients requiring ongoing monitoring and management of chronic disease
    - h. Confirmation of undertaking training in assessment of foot neuropathy
  7. In the course of the hearing the PCT confirmed that item h above was not pursued.
  8. By letter dated 27 March 2009 the applicant applied for dispute resolution. The Panel note here that the application is not framed in a way that raises issues about whether or not the correct legal procedure was followed in the issuing of the various notices. The applicant's case in essence is that either he has remedied the breaches (items a, b, e and f), or that the breaches are being addressed (items c and d), and that item g is not a contractual matter

#### **The documents and evidence considered at the hearing**

9. The evidence before the Panel comprised two bundles of scheduled evidence indexed and paginated to 111 (bundle 1) and 43 (bundle 2) together with the contract. The PCT also produced a written submission headed Summary Statement. The applicant filed a copy of a practice leaflet.
10. The Panel heard oral evidence from the applicant; and on behalf of the PCT from # head of primary care development and # primary care commissioning manager. The case on behalf of the PCT was presented by #.
11. The Panel noted that the applicant was not represented. In the interests of fairness the Panel directed that the PCT present its case first followed by presentation of the applicant's, with leave given for final submissions with the applicant having the last word.

#### **The law**

12. The relevant law is set out in the National Health Service (General Medical Services Contracts) Regulations as amended. In brief they provide amongst other things for the

termination of a GMS contract following issue of the requisite notices.

13. By regulation 115(7) the PCT, in terminating a contract following issue of appropriate notices, shall not exercise its right to terminate unless satisfied that the cumulative effect of the breaches is such that the PCT considers that to allow the contract to continue would be prejudicial to the efficiency of the services to be provided.

#### **Opening submission and evidence on behalf of the PCT**

#

14. # relied on her summary submission and answered questions put to her. Her written and further submissions may be summarised as follows. There were a number of areas in respect of which the applicant was in breach of contract; some were more serious than others.
15. The applicant had failed to provide accurate practice and complaints leaflets despite having been provided with templates.
16. Since 2005 the PCT had requested the applicant to return patient records in respect of those who had either died or moved to another PCT but the applicant had failed to do so. At one point the PCT were awaiting the return of 300 such files.
17. The applicant had failed to keep patient data secure. Patient records were stored in the reception area which was unattended. Patient records were stored in heaps on the floor.
18. The applicant did not have a policy for the consent of treatment of children that conformed to child protection procedures, nor for matters relating to health and safety.
19. The applicant had failed to ensure provision of essential services by not maintaining a systematic call and recall system of patients or by maintaining an organisational infrastructure to provide such a system.
20. The applicant had been provided with advice and practical support by the PCT and the LMC. The applicant either failed to respond to such offers or having responded failed to implement agreed actions. The applicant had also failed to demonstrate that he is able to sustain changes. He had employed a receptionist, however such employment had not lasted long. The PCT had obtained the return of some patient records, but only by making arrangements for collection despite responsibility for returning records resting with the applicant.
21. All items a-h as set out in the notices still required remedial steps, save for item h which was not relied on. The most recent estimate of unreturned records showed that about # were still outstanding.
22. In respect of the applicant's provision of essential services under schedule 6, part 9, paragraph 125 of the regulations the applicant was required to have regard to all relevant guidance. The applicant had failed to show regard for PCT guidance by not having a robust call/recall system.
23. The PCT had chosen not to take action against the applicant under the performers list system because the present matters related to safety and effective management of the contract rather clinical concerns about the applicant's performance.
24. The decision to terminate the contract had been considered by a reference committee of the PCT, a performance group, and the board as part of its business heard in private

session. The PCT had not sought legal advice on the decision. It was accepted that the documents before the Panel did not show that explicit consideration had been given to the question of whether or not the cumulative effect of the breaches was such that the PCT considers that to allow the contract to continue would be prejudicial to the efficiency of the services to be provided.

25. # was not aware that the applicant had the previous day submitted a new practice leaflet to the PCT. It was accepted that engagement with the QOF process was voluntary, however as a result of those visits the PCT had considered the paper records which provided a more detailed view of the applicant's practice. It was accepted that the PCT had reduced the numbers of Barnet PCT registered patients from # to # in the last quarter of 2008; however that exercise was separate from the issue relating to the return of patient records following their relocation.

#

26. # adopted as evidence in chief her statement dated 7 September 2009 which may be summarised as follows. The PCT have offered support to the applicant from 2004/05 particularly in the light of his having no practice staff. The applicant was offered support in respect of recruitment of staff, the provision of documentation relating to QOF payments, funding for premises and information technology. However the applicant was unable to make effective use of such support. In course of QOF visits it was noted that medical records were lying on the consultation room floor area. It was recommended that they should be locked away.
27. # further oral evidence so far as material may be summarised as follows. The applicant would have had some monies for paying for staff within the global sum awarded under the new GMS contract: she understood there was an Minimum Payment Income Guarantee associated with the contract and that there had been payments under the staff reimbursement scheme prior to the new GMS contract. It was accepted that, given the applicant's relatively small list size, such sum would be correspondingly smaller than in other practices.

#

28. # adopted as evidence in chief her statement dated 9 September 2009 which may be summarised as follows. # had had meetings with the applicant in November 2007, February 2008, April 2008 and June 2008. On 2 March 2009 she had delivered the termination notice to the applicant.
29. # had met the applicant in November 2007 to follow up issues arising from an earlier contract monitoring visit. At that time # noted that patient's notes were scattered all over the floor and piled haphazardly on shelves and in the consulting room. An action plan was drawn up.
30. At the visits in February 2008 and April 2008 there were discussions about the lack of progress in implementing the action plan. Concerns were expressed about the security of patient records and the failure to return records to the PCT on request.
31. In June 2008 # visited the applicant and was accompanied by # # to consider the delivery of the NSF and the management of medical conditions. # # came to the view that the applicant lacked a robust call up/recall system for patients.

#### **Summary of oral evidence and submissions of the applicant**

32. The applicant addressed items a-g in the following terms.
33. Item a - the practice leaflet: the applicant had produced a new updated practice leaflet which was now made available to the Panel. Annual updating was not required by the contract, only that it be reviewed annually. The most recent leaflet had been updated in September 2009. There had been some delay because there was confusion as to where patients needed to be directed and the appropriate address of the PCT.
34. Item b - complaints leaflet: the complaints system had merged with PALS and by the time the applicant had caught up with this matter he had been emailed a document setting out further changes to the complaint system.
35. Item c - return of records: it was accepted that the applicant was at fault. He pleaded *mea culpa*. The number of records that need to be returned was between # and #. The applicant had been returning the records but it was accepted that there was still work to be done.
36. Item d – health and safety policy: a risk assessment had been undertaken by the PCT. It was accepted that there was no written health and safety policy.
37. Item e – confidentiality of patient records: The observations made by the PCT's witnesses are not disputed. However, since April 2009 the applicant has employed a receptionist, # who works 23 hours per week. # # has not been offered a formal contract of employment. She has no formal training beyond working as a general secretary and being a trained homeopath. The doors at the practice are now locked. In the past it would not have been possible to gain access to patient records in the surgery because they would have been seen to do so by other people present.
38. Item f – child consent form: the applicant had attended a meeting about such policies and the applicant had been informed that that was all that was required. The applicant had worked in family planning and was aware of issues relating to the obtaining the consent of children.
39. Item g – essential services: this aspect of the PCT case relates to the QOF assessment. Engagement in the QOF assessment is an entirely voluntary matter and not a contractual matter. In any event, the applicant has a system for calling and recalling patients. The applicant has a computer program known as *population manager* which enables him to identify which patients need calling up and recalling. The applicant uses this program in combination with repeat prescriptions to invite patients in for review.
40. The applicant's response to questions from the Panel may be summarised as follows. The backlog in the return of records had built following the computerisation of his practice in 2004. The applicant had not realised that the relocation and death of patients were dealt with electronically through the computer system.
41. The turnover of patients within the practice is about 15 per month. It is not disputed that that the PCT is requesting return of records relating to patients who have moved; however some patients had been inappropriately removed and had to be re-registered.
42. The applicant had not adopted the approach of 'blitzing' the problem. The process of return with computerisation now had a number of steps compared to the old system. In due course the receptionist will be trained up to carry out this work. It is also hoped that # # will be trained up as a health care assistant.
43. It was accepted that health records were scattered about the practice; however that is the applicant's *modus operandi*.

44. Since 2004 the applicant had employed a number of different staff members for periods varying from one week to 9 months.

#### **Closing submissions on behalf of the PCT**

45. # # on behalf of the PCT made closing submissions that may be summarised as follows. The applicant had breached the GMS contract in a number of respects. The evidence shows the applicant to be highly disorganised. It was accepted that some of the breaches were relatively minor; however there were particularly serious breaches relating to the non-return of patient records, proper storage of patient data and lack of systematic review in essential services. The applicant had been offered support to meet these breaches but he had failed to either respond or sustain any change. In consequence there a was a risk to patients and patient care such that the contract should be terminated.

#### **Closing submissions of the applicant**

46. The applicant made a number of submissions that may be summarised as follows. A number of the breaches had now been remedied, although it was accepted that there were outstanding issues. The applicant had not been helped by lack of staffing for which he had only a limited budget. The applicant had an appropriate call up and recall system based .

#### **Findings, reasons and decisions**

47. The Panel considered all the documentary evidence, the oral evidence, the submissions of the parties and reminded itself of the relevant law.
48. The Panel notes that there is only limited and minor dispute about the primary facts, as opposed to their interpretation. The applicant in oral evidence accepted that the descriptions of the locations of the patient records in his practice were accurate and confirmed that this represented, in his own words, his *modus operandi*. The applicant also accepted, again in his own words *mea culpa*, that there was a backlog in his providing the PCT with the records of patient who had relocated. The applicant put the number of such cases at between # to #; the PCT's most recent estimate undertaken approximately two weeks prior to the hearing was in the region of # such cases.
49. Accordingly the Panel makes findings in relation to the alleged breaches of contract itemised a to g as follows.
50. Item a - the practice leaflet: the applicant has now produced a new practice leaflet updated September 2009. The previous leaflet as set out in bundle 1 at page 23 showed handwritten amendments relating to changes in 2006. The Panel finds that applicant has breached schedule 6, part 5, paragraph 76 of the regulations in that the applicant has failed to make any necessary amendment to maintain the accuracy of the leaflet; but that that breach has now been made good.
51. Item b - complaints leaflet: the applicant has failed to produce for the Panel hearing a separate leaflet for patients on how to make a complaint. The appellant relies on a leaflet produced by PALs, as set out at page 26 of bundle 1 and the reference in his practice leaflet to a complaints procedure. The Panel finds that the applicant has breached schedule 6 part 6 paragraph 92(2) of the regulations by failing to take reasonable steps to ensure that patients are aware of the complaints procedure.
52. Item c - return of records: The applicant has consistently failed to return patient records

over a number of years. The applicant's estimate of the number of records that need to be returned at the time of hearing is between # and #. The Panel finds that the applicant has breached schedule 6 part 5 paragraph 73(6) of the regulations by failing to send, as soon as possible at the request of the PCT, the complete records relating to patient where the patient is no longer registered with the applicant.

53. Items d and f – health and safety policy and child consent policy: the PCT submits that schedule 6 part 9 paragraph 125 of the regulations has been breached by the applicant's failure to provide a health and safety policy and risk assessment and a policy on child consent. This part of the regulations reads as follows:

*The [applicant] shall comply with all*

*(a) relevant legislation and*

*(b) have regard to all relevant guidance issued by the PCT, the strategic health authority or the Secretary of State.*

54. The Panel finds that the wording of paragraph 125 is an expression of the general duty of public contractors to comply with the law, and guidance from appropriate authorities. The Panel finds that the terms of the paragraph are not sufficiently precise as to impose a contractual duty on the applicant to provide the documentation and policy materials as contended for by the PCT. The Panel finds that the applicant is not in breach of the contract in relation to items d and f.

55. Item e – confidentiality of patient records: the applicant does not dispute the observations made by the PCT's witnesses as to the disposition and location of the files at the practice. The Panel finds patient files have been stored in an unlocked room directly off the waiting area. The Panel finds, given that for much of the time the applicant has been practising without support staff for prolonged period, that he has failed to adequately ensure the security of patient information. The Panel finds that in so doing the applicant has breached schedule 6 part 9 paragraph 125.

56. Item g – essential services: the PCT submits that part 5, paragraph 15(3) together with paragraph 125, as noted above, imposes a contractual duty to provide a systematic call and recall as required by the NSF. Extracts of this part of the regulations extracts read as follows:

*The services described in this paragraph are services required for the management of registered patients and temporary residents who are...*

*(a) and (b)... ill...*

*(c) suffering from chronic disease*

*delivered in the manner determined by the practice in discussion with the patient (Panel's underlining)*

57. The Panel takes particular note of the wording underlined above and rejects the PCT submission to the effect that the applicant is under a contractual obligation to provide a systematic call and recall as approved by the PCT. The underlined wording shows that it is not for the PCT to prescribe the manner of the delivery of essential services.

58. In any event, the Panels finds that the applicant has his own call and recall system. The PCT's contention fails to properly distinguish between acceptable practice and best practice.

59. Accordingly, the Panel finds that the applicant is not in breach of the contract in respect

of item g.

60. The Panel next turned to the considerations under paragraph 115(7) as to whether the cumulative effect of the breaches is such that to allow the contract to continue would be prejudicial to the efficiency of the services to be provided.
61. The Panel finds that the breaches in respect of items c and e are very serious for the reasons set out below.
62. The failure to return to the PCT a patient's full record once they have relocated is a very serious matter that is likely create a real risk of adversely affecting the quality of care offered to that patient. Whilst there will naturally be some delay between the patients physical relocation and the following of their records, the contract envisages that the applicant would provide those records within a reasonable time.
63. In the present case there have there been unconscionable delays in returning patient records. The Panel is unable to determine the full extent of the delays, but some periods of delay may conceivably extend to years. In addition to the period of delay, the number of cases in which there has been a delay is an aggravating feature. In real terms, at any one particular time over a four year period, at worst there were # such cases, and at best between # and # cases.
64. In addition, even now, at the Panel hearing, the best that the applicant can say about these matters is *mea culpa* and that *in time* the receptionist, whom he appointed approximately 5 months ago, will be trained up to deal with the return of patient records. The Panel finds this to be evidence of egregious complacency which severely undermines the applicant's claim to be able to deliver services efficiently.
65. The Panel finds that the applicant's breach of contract in terms of ensuring secure storage of confidential patient information is very serious. Patient confidentiality lies at the heart of the delivery of patient care. The applicant was notified of the PCT's concerns about these matters from at least 2007.
66. Since that time the only concrete step the applicant seems to have taken, besides claiming to keep internal doors locked, is the employment of a receptionist: for 3 months in 2007, for 2 or 3 months in 2008, for one week in December 2008, and since April 2009. This pattern of recruitment is not one that demonstrates that the applicant is capable of retaining qualified and suitable staff, despite being offered considerable support by the PCT on many matters including recruitment.
67. The failure to retain staff is significant, because in the absence of other steps, the applicant appears not have addressed the issue of how to secure patient records. The applicant appeared to find it acceptable, as set out at page 11 of bundle 1, that the presence of other patients, would be sufficient to deter others accessing patient records or that the creaking of the storage area door would be sufficient to alert him to unauthorised access.
68. In considering whether or not to terminate the applicant's contract, consideration must be given to the cumulative effect of the breaches as found by the Panel. In this case the applicant has breached his contract in two very serious respects. In addition there are two breaches which are relatively minor.
69. In considering the cumulative effect of these breaches the Panel finds that by virtue of the combination of the seriousness of the breaches, the number of the breaches, including breaches of a less serious nature; and the failure of the applicant to bring forward adequate evidence showing that he is capable of effectively remedying all of the

breaches, the panel finds that to allow the contract to continue would be prejudicial to the efficiency of the services to be provided.

70. The Panel is of the view that termination of the contract is a proportionate response on the basis of the breaches as found and their cumulative effect.

**Summary**

71. The applicant's GMS contact with # PCT is terminated for breach of contract, such breaches having the cumulative effect that to allow the contract to continue would be prejudicial to the efficiency of the services to be provided under the contract.

Signed

#  
On behalf of the Panel

Dated