

23 October 2009

FILE REF: **SHA/15284**

PRIMARY CARE TRUST:

GMS PROVIDER:

DISPUTE RESOLUTION: **NATIONAL HEALTH SERVICE (GENERAL MEDICAL SERVICES CONTRACTS) REGULATIONS 2004**

RE: **CONTRACT SANCTIONS**

1. Introduction

1.1 As a GMS Provider the above named contractor has referred the dispute in relation to its GMS contract for dispute resolution under the provision of paragraph 101 of the NHS (General Medical Services Contracts) 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 received on 21 July 2009 the contractor applied to the FHS Appeal Unit of the NHS Litigation Authority, for dispute resolution of the above issue.

2.2 I have had regard to the following documents made available to me in consideration of this matter:-

2.2.1 copy of the general medical services contract entered into between the PCT and the contractor dated 27 February 2004;

2.2.2 letter from the contractor received on 21 July 2009 by post enclosing a copy of a letter from the PCT to the contractor dated 23 June 2009 advising the contractor of the PCT's Termination Committee decision to impose a contract sanction of £10,000 on the contractor in accordance with paragraph 117 of Schedule 6 to the Regulations;

2.2.3 letter from the PCT received on 20 August 2009 by post with the following enclosures:

2.2.3.1 letter from the PCT to the contractor dated 23 June 2009 advising the contractor of the PCT's Termination Committee decision to impose a contract sanction of £# on the contractor in accordance with paragraph 117 of Schedule 6

to the Regulations;

- 2.2.3.2 schedule of documents prepared for the PCT's Termination Committee meeting dated 9 June 2009;
- 2.2.3.3 unconfirmed minutes of the PCT's Termination Committee meeting dated 9 June 2009;
- 2.2.3.4 Information Office Press Release and copy of undertaking;
- 2.2.3.5 remedial notice BC 2/07 dated 19 April 2007;
- 2.2.3.6 remedial notice BC 3/07 dated 27 December 2007;
- 2.2.3.7 remedial notice BC 2/08 dated 19 December 2008;
- 2.2.3.8 remedial notice BC 3/08 dated 19 December 2008;
- 2.2.3.9 remedial notice BC 1/07 dated 18 July 2008;
- 2.2.3.10 remedial notice BC 1/08 dated 18 July 2008;
- 2.2.3.11 recommendation report prepared for the PCT's Termination Committee dated 24 February 2009;
- 2.2.3.12 minutes of the PCT's Termination Committee meeting dated 24 February 2009;
- 2.2.3.13 excerpt from the FHS AU's decision letter dated 25 January 2008; and
- 2.2.3.14 letter to the FHS AU from the contractor in respect of SHA 14065/14099 dated 23 July 2007.

2.3 The PCT states that the contractor has breached his contract on several occasions as follows:

- 2.3.1 for dispensing to patients for whom he was not authorised to dispense during October-December 2006, the PCT issued a remedial notice (BC 2/07 dated 19 April 2007);
- 2.3.2 for dispensing prescriptions to ineligible patients in June 2007, the PCT issued a further remedial notice (BC 3/07 dated 27 December 2007);
- 2.3.3 for dispensing prescriptions to ineligible patients in February 2008, the PCT issued a breach notice (BC 2/08 dated 19 December 2008);
- 2.3.4 for dispensing prescriptions to ineligible patients in August 2008, the PCT issued a breach notice (BC 3/08 dated 19 December 2008);
- 2.3.5 for charging a patient a private fee, the PCT issued a breach notice (BC 1/07 dated 18 July 2008);
- 2.3.6 for breaching the confidentiality of patient identifiable information in contravention of the Data Protection Act, the PCT issued a breach notice (BC 1/08 dated 18 July 2008).

2.4 The contractor previously referred the matter of remedial notices BC 1/07, BC 2/07 and BC 3/07 for dispute resolution (File Ref: 14447, 4 July 2008), whereupon the FHS Appeal Unit determined remedial notices BC 2/07 and BC 3/07 to be valid, and upheld the PCT's decision to issue those notices. No determination was made in respect of remedial notice BC 1/07 as the PCT's submission indicated that this was to be re-submitted to the PCT's FHS Contract Management Committee.

3. Contractor's comments

3.1 In his application to the FHS Appeals Unit by way of letter dated 21 July 2009, the contractor does not seek to overturn the findings of breach by the PCT, nor does he dispute the PCT's entitlement, under paragraph 117(2) of Schedule 6 to the Regulations to terminate the contract or to impose sanctions instead of termination. His rationale for not doing so is irrelevant for the purposes of this application.

3.2 The contractor states that under paragraph 117(3) of Schedule 6 to the Regulations the contract sanction of £# being imposed by the PCT (and detailed in their notice of 23 June 2009), is neither appropriate or proportionate to the circumstances giving rise to the PCT's entitlement to terminate the contract for the following reasons:

- (i) as a pharmacy contractor has recently commenced an NHS contract in the area, which is not a Reserved Location, the loss of his dispensing income once the gradualisation period has expired, will cause prejudice to the proper provision of medical services and is likely to make the practice unviable;
- (ii) the imposition of the proposed 'financial' sanction will make the above a certainty; and
- (iii) Paragraph 117(3) of Schedule 6 to the Regulations prevents the PCT from imposing any sanction that will have the effect of terminating, or suspending, any obligation that relates to essential services, an obligation that the contractor can only meet with the income provided from providing NHS dispensing services.

3.3 He points out that upon the expiry of the gradualisation period, providing dispensing services to the small number of patients who live more than one mile from a pharmacy will not be a viable business proposition so the practice will be obliged to cease offering any dispensing services to patients. Savings of approximately £# will be made from dispensing staff redundancies but with the loss of all dispensing related-income in excess of £#his income will fall to less than £# per annum, and with the loss of at least two members of staff, will prejudice the provision of essential services in the medium to long term.

3.4 The contractor states that the major reduction in income from dispensing services, together with the level of contract sanctions is exorbitant since no patient was harmed, the breaches were the consequence of patients needs and wishes, and there was no real loss to the PCT.

3.5 He therefore makes an appeal under paragraph 117(3) of Schedule 6 to the Regulations, against the PCT's entitlement to impose such significant 'financial' sanctions, if at all.

4. PCT's comments

4.1 The PCT refers to paragraphs 115(4), 115(6), and 115(7) of Schedule 6 to the Regulations in support of its entitlement to terminate the contract where there has been more than one remedial/breach notice served on a contractor or where a contractor has failed to comply with the terms of a remedial notice. These paragraphs provide that:

(4) Where a Primary Care Trust is satisfied that the contractor has not taken the required steps to remedy the breach by the end of the notice period, the Primary Care Trust may terminate the contract with effect from such date as the Primary Care Trust may specify in a further notice to the contractor.

(6) If, following a breach notice or a remedial notice, the contractor -

(a) repeats the breach that was the subject of the breach notice or the remedial notice; or

(b) otherwise breaches the contract resulting in either a remedial notice or a further breach notice,

the Primary Care Trust may serve notice on the contractor terminating the contract with effect from such date as may be specified in that notice.

(7) The Primary Care Trust shall not exercise its right to terminate the contract under sub-paragraph (6) unless it is satisfied that the cumulative effect of the breaches is such that the Primary Care Trust considers that to allow the contract to continue would be prejudicial to the efficiency of the services to be provided under the contract.

4.2 The PCT states that under the above Regulations it is entitled to terminate the contract on the basis that the contractor has not only failed to remedy the initial breaches (BC 2/07 and BC 3/07) but has repeated them and committed further breaches, one of which (BC 1/08) relating to patient data breaches is of a very serious nature.

4.3 The PCT goes on to assert that on the basis that it is entitled to terminate the contract (for the reasons given above) it can, pursuant to paragraph 117(2) of Schedule 6 to the Regulations, apply contract sanctions. Paragraph 117 of the Regulation provides as follows:

117. - (1) In this paragraph and paragraph 118, "contract sanction" means -

(a) termination of specified reciprocal obligations under the contract;

(b) suspension of specified reciprocal obligations under the contract for a period of up to six months; or

(c) withholding or deducting monies otherwise payable under the contract.

(2) Where the Primary Care Trust is entitled to terminate the contract pursuant to paragraph 112, 113, 114 or 115(4) or (6) or paragraph 116, it may instead impose any of the contract sanctions if the Primary Care Trust is reasonably satisfied that the contract sanction to be imposed is appropriate and proportionate to the circumstances giving rise to the Primary Care Trust's entitlement to terminate the contract.

(3) The Primary Care Trust shall not, under sub-paragraph (2), be entitled to impose any contract sanction that has the effect of terminating or suspending any obligation to provide, or any obligation that relates to, essential services.

(4) If the Primary Care Trust decides to impose a contract sanction, it must notify the contractor of the contract sanction that it proposes to impose, the date upon which that sanction will be imposed and provide in that notice an explanation of the effect of the imposition of that sanction.

(5) Subject to paragraph 118, the Primary Care Trust shall not impose the contract sanction until at least 28 days after it has served notice on the contractor pursuant to

sub-paragraph (4) unless the Primary Care Trust is satisfied that it is necessary to do so in order to -

(a) protect the safety of the contractor's patients; or

(b) protect itself from material financial loss.

(6) Where the Primary Care Trust imposes a contract sanction, the Primary Care Trust shall be entitled to charge the contractor the reasonable costs of additional administration that the Primary Care Trust has incurred in order to impose, or as a result of imposing, the contract sanction.

- 4.4 In accordance with paragraph 117(2) of Schedule 6 to the Regulations the PCT is entitled to impose contract sanctions if these are appropriate and proportionate to the circumstances giving rise to the PCT's entitlement to terminate the contract. The PCT is satisfied that the contract sanction of £# is appropriate and proportionate for the following reasons:
- 4.4.1 the amount reflects monies that would have otherwise been payable under the contract;
 - 4.4.2 will not have the effect of terminating or suspending any obligation to provide, or any obligation that relates to, essential services; and
 - 4.4.3 the PCT is acting fairly and reasonably.
- 4.5 In response to the contractor's statement that the contract sanction is exorbitant, particularly given: (i) the loss of income as a result of the loss of dispensing; (ii) no patient was harmed; (iii) the breaches were the consequence of patients needs and wishes; and (iv) there was no real loss to the PCT, the PCT responds as follows:
- 4.5.1 medical services are separately funded and there is no evidence that income from pharmaceutical services was required to underpin them;
 - 4.5.2 over a significant period of time, the contractor wilfully and knowingly continued to breach the contract by dispensing to ineligible patients despite being issued with breach notices and the FHS Appeal Unit decision (File Ref: 14447, 4 July 2008);
 - 4.5.3 the contract sanction imposed by the PCT does not reflect the entirety of the amount the contractor received from the PCT as a result of dispensing to ineligible patients;
 - 4.5.4 the breach relating to patient data (BC 1/08) was not only a very serious breach of contract, but the breach of confidentiality has subsequently been investigated by the Information Commissioner who has found that the contractor has breached the Data Protection Act.
- 4.6 In support of paragraph 4.5.1 above, the PCT also responds to the contractor's statement that the opening of a pharmacy in the area will, once the gradualisation period has expired, cause prejudice to the proper provision of medical services and is likely to make the practice unviable. The PCT states that the prejudice test applies only in respect of applications for inclusion in the pharmaceutical list and the NHSLA decided that there was no prejudice to medical services in its decision of 25 January 2008 (references SHA/14065 and SHA/14099). Therefore, the prejudice issue is a separate issue from the imposition of contract sanctions.
- 4.7 It asserts that although the practice will lose the majority of its dispensing payments when the patients are transferred from the practice's dispensing list to its prescribing

list in October 2009: conversely it will not be providing a dispensing service with the associated costs. Indeed, a majority of GMS practices in Suffolk succeed in providing the full range of GMS services to a high standard without any supplementary income from dispensing. The PCT points out that a pharmacy opened in Barham and was co-located with the surgery between 2000 and 2003 with no apparent financial detriment to the practice, and that in 2007 the contractor supported an application from an alternative contractor for a pharmacy in Barham which would also have led to the loss of the majority of his dispensing patients.

4.8 The PCT states that its Termination Committee based its calculation of the £# sanction on the following recommendation of the FHS Contract Management Committee:

4.8.1 in relation to the dispensing breaches BC 2/07, BC 3/07, BC 2/08 and BC 3/08, the committee calculated a deduction of:

4.8.1.1 £# based on a dispensing fee of £# per unauthorised item dispensed by the contractor for the period January 2007 to December 2008;

4.8.1.2 £# assuming a similar pattern of dispensing between October 2006 and December 2008;

4.8.2 a £# deduction for the costs of proposed monthly audits in relation to potential prescriptions dispensed by the contractor for six months from January 2009;

4.8.3 a £# deduction to be imposed on the contractor to reflect the seriousness of the breach of identifiable patient data (BC 1/08).

4.9 The Termination Committee only considered the dispensing fees that the contractor received in respect of items provided to patients to whom he was not authorised to dispense. Payments over the two years in question, in respect of those dispensing fees referred to in paragraphs 4.7.1 and 4.7.2 above amounted to an estimated £#.

4.10 The PCT recognised that the contractor may have difficulty in providing essential services under the contract if the full amount of proposed contract sanctions referred to in paragraph 4.7 was imposed. As a result, the Termination Committee decided to abate the proposed level of contract sanctions to £#, deducted over a 12 month period to further reduce the effect to the contractor.

5. Consideration

5.1 The Regulations make clear that the PCT can apply sanctions if it is entitled to terminate the contract i.e. as an alternative to termination (paragraph 117(2) of Schedule 6 to the Regulations).

5.2 On the basis that the contractor has clearly failed to remedy the initial breaches (BC 2/07 and BC 3/07) but has repeated them and committed further breaches that are subject to breach notices, it is my view that the right to terminate the contract has arisen.

5.3 The contractor has sought to argue that the imposition of the contract sanction is not appropriate or proportionate to the circumstances giving rise to the PCT's entitlement to terminate the contract pursuant to paragraph 117(3) of Schedule 6 to the Regulations on the basis that the imposition of the contract sanction will have the effect of terminating, or suspending, any obligation that relates to essential services, an obligation that the contractor asserts he can only meet with the income provided from providing NHS dispensing services.

- 5.4 There is insufficient evidence in the contractor's submission to prove that the provision of essential services will be effected by the imposition of the contract sanction, notwithstanding the loss of dispensing (and the income received from such dispensing). The issue of the prejudice caused to the provision of medical services as a result of a new pharmacy is a separate issue, and not relevant, to the question of whether a contract sanction is appropriate and proportionate in the circumstances giving rise to the Primary Care Trust's entitlement to terminate the contract.
- 5.5 On the basis that the level of contract sanction (being £#) is less than the amount the contractor has received, and the PCT has paid for, under the contract in respect of items provided to patients to whom he was not authorised to dispense, the level of sanction represents a genuine loss to the PCT under the contract. The PCT may also charge reasonable costs of administration incurred in imposing any sanction paragraph 117(6) of Schedule 6 to the Regulations.
- 5.6 Contract sanctions can include the deductions of monies otherwise payable under the contract pursuant to paragraph 117(1)(c) of Schedule 6 to the Regulations, and therefore the proposal that the £# be deducted from contract payments otherwise payable to the contractor under the contract over a 12 month period is acceptable.
6. Determination
- 6.1 Having considered the evidence in support of the imposition of contract sanctions, and the level of those contract sanctions, I uphold the PCT decision to impose contract sanctions under the contract and am satisfied that such contract sanctions are appropriate and proportionate to the circumstances giving rise to the PCT's entitlement to terminate the contract.

LISA HUGHES
FHSAU Appeals Manager