IN THE MATTER OF A NATIONAL HEALTH SERVICE DISPUTE RESOLUTION
SHA/16023
RELATING TO TERMINATION OF A PMS CONTRACT COMMENCING 1st APRIL 2004.

Paul Kelly, Chair
Dr. J. Canning, General Practitioner
Mrs. C. Dorking, Member

DR. JEROME KAINE IKWUEKE

Applicant

and

HARINGEY TEACHING PRIMARY CARE TRUST

Respondent

DETERMINATION WITH REASONS

1. **This matter comes before an adjudication panel appointed by the Secretary of State for Health by virtue of The National Health Service (Personal Medical Services Agreements) Regulations 2004 ("the Regulations") Reg. 95 following an application dated 9th November 2010 on behalf of the Applicant contract holder to engage dispute resolution procedures in relation to contract termination.**

2. **The parties were heard at the offices of the National Health Service Litigation Authority in Leeds on 5th and 6th May 2011 where the Applicant was represented by Neil Garnham Q.C. instructed by Messrs. Lockharts and the Respondent by Robert Jay Q.C. instructed by Messrs. Capsticks. Following closing submissions and further directions dated 17th May the Panel re-convened to consider its decision on the 20th July 2011 – before the outcome of the Applicant's review hearing before the GMC was publicly known. We make the point to deal with any suggestion the Panel's decision was directly or indirectly influenced by concurrent proceedings elsewhere.**

3. **The contract is deemed to have commenced on 1st April 2004 and is an established format "The Lockharts model contract" for providers of Personal Medical Services. By a combination of clauses 507 and 509(2) of the contract and Reg.105 of the Regulations the contracting Primary Care Trust *may* terminate the contract if the contractor is disqualified or suspended from practising by any licensing body anywhere in the world.**

4. **The Applicant was suspended from practice by the GMC for a period of 12 months with effect from 16th July 2010. Acting upon that suspension the Respondent served notice dated 13th October 2010 (page 280 of the bundle prepared for these proceedings) terminating the contract with effect from the 11th November 2010 on the basis of the GMC suspension and other matters contained at points 1-9 pages 281-282 of the**

bundle ("reasons for termination"). The issue for the Panel is whether or not the Respondent properly and fairly exercised its discretion to terminate the contract.

5. **The Respondent compares the discretion to terminate at Reg.105 (1) read with (3) (replicated in clauses 507 and 509.2 of the contract) with the provision at (4) which gives a much broader discretion not to terminate where the suspension is by a licensing body outside the United Kingdom. In that case the PCT must go through the exercise of deciding whether that suspension makes the contractor unsuitable to be party to the agreement whereas termination under 105(1) and (3) is not framed in language which requires such wide consideration. Even though the words used in Reg.105(1) and (3) seemingly require a less stringent approach to the exercise of the discretion in the case of a domestic suspension the basic principle of fairness requires the PCT to consider issues of suitability as part of the exercise of the discretion, whether or not it says as much in the regulation upon which it relies to terminate the contract.**

6. **The Respondent (as did we) had regard to the findings of the GMC (pages 446-485). Those findings (the x case) speak for themselves and are known well enough to the parties but brief extracts commenting on the factual findings and upon the extent of the Applicant's level of impairment are instructive:**

   "1. Your care of xxxxxx was not in the best interests of your patient. It was below the standard expected of a reasonably competent general practitioner and it was a serious breach of your professional duty towards your x patient. It constituted a series of failures over a period of ten months, culminating in your grave error of judgement at the consultation on 26 July 2007." (page 483)

   "4. The Panel notes that the GMC concedes that you do not present a danger to patients in the future. Whilst the Panel is concerned at your limited insight before and during the hearing, it has concluded on the basis of your extensive remedial work and your acknowledgement now of your misconduct, that you do not pose a risk of repeating this behaviour. Further, there is no evidence that you have any deep seated attitudinal or personality problems. The Panel has also noted your undoubted remorse in relation to these events and the adverse effect on you personally.
   In light of the matters set out above the Panel has concluded that despite the serious breaches identified in this case, your misconduct is not fundamentally incompatible with your continued registration as a doctor. Neither does it take the view that that complete removal of your name from the medical register would be proportionate or in the public interest."
   (page 484).

7. **The GMC decision informs grounds 1-5 of the reasons for termination. We have in mind that the GMC is a specialist body dealing with clinical issues. It considered the facts at length, arrived at appropriate findings and imposed an appropriate sanction. Where a contractor is also a practising doctor inevitably there will be an overlap between clinical and contract issues but the principal factor in relation to the contract is the discharge of the contract itself. There is a sharp distinction between a PCT's obligation to ".. commission primary medical services and monitor provision....." NHS Act 2006 sec. 83. and responsibility for clinical performance. That distinction is highlighted if one considers that PMS contract holders need not be practising doctors. There were no contract performance concerns prior to the matters which led to GMC involvement, re-enforced by the Applicant's continued satisfactory discharge of his contractual duties between the GMC suspension on 16th July 2010 and the 11th November 2010 – the date of termination.**

8. **(i) Ground 6 of the reasons for termination reminds the Applicant he is no longer on a Performers List. Services to be performed under the contract do not have to be**

performed by the contractor himself, again, separating contractual from clinical. He does not have to be on a Performers List to discharge his contractual obligations.

(ii) An indication of the Respondent's real view of the Performers List issue is to be found in notes taken at a meeting with the LMC in August 2010 and produced at page 730 of the bundle "Tracey Baldwin said that the PCT was not prepared to (have the Applicant) as a practising GP in Haringey and she wanted.....to offer the PCT's support to help him get back on the performers list and perhaps some support with deanery training." The tenor of that note indicates that in August 2010 the Respondent was prepared to support the Applicant moving on and out by assisting him in securing a post elsewhere, a position inconsistent with ongoing clinical or contractual concerns, but that it had closed its mind to having the Applicant continue to provide services within the district of Haringey. It was against that background the termination letter was sent on 13th October 2010.

9. **Although the Respondent may have intended the Applicant to be primary performer of the contract (ground 7 of the reasons for termination) the fact remains it is not a contractual obligation for him to do so. He can, and obviously has, secured effective alternative means of ensuring contract performance. He has been in attendance at the surgery between suspension and termination, overseeing the contract and maintaining active non-clinical involvement in general practice. The "significant period of retraining" deemed necessary by the Respondent (ground 8) is overstated if one takes into account the Applicants continued involvement with practice and the acknowledged education and re-training undertaken since the GMC suspension – directed especially (but not limited to) the GMC's areas of concern.**

10. **We recognise that the Respondent has to maintain confidence in the PCT and the NHS in the commissioning of primary care service (ground 9). Fairness requires that factor be balanced alongside all competing interests not the least of which are those of the Applicant. In a letter dated 29th July 2010 (243) endeavouring to reach a compromised contract termination the Respondent under 2 (page 244) equated the position of the Applicant to that of an intended contractor also subject to GMC suspension. In that case a PCT would be prohibited from entering into a PMS contract. There is a significant difference between a suspended applicant looking to build a career in PMS hoping to persuade a PCT to grant him a contract and the Applicant in this case who has been in PMS practice for many years; has built up experience; developed a lifestyle consistent with the income generated by the contract and devoted most of his professional life to the patient's of that practice thereby developing goodwill in the non technical sense. It is one thing not to grant a contract – quite another to take away established rights in possession. In many suspension cases the difference may be illusory but in the present case use of the word 'Similarly' and its context suggests the Respondent failed to give proper consideration to the Applicant's interests when exercising the unquestioned discretion.**

11. **There was considerable argument at the hearing on the adequacy or otherwise of the consultation which the Respondent was required to undertake with the LMC. The Panel decided it could exercise its broad powers " to ensure the just expeditious, economical and final determination of the dispute" by conducting its own consultation with the LMC using the contract term as the base. The Panel considered the response, favourable as it is to the Applicant, and also positive references from professional colleagues, patients and an Educational Supervisor. As serious as the matters considered by the GMC are, they form an isolated and remediable lapse in an otherwise unblemished and dedicated career.**

12. **We have sympathy with the Respondent's decision makers who were faced by almost unprecedented publicity over the x case. It needed to be seen to act quickly and**

robustly. The decision to terminate communicated by letter of 13th October was not attended by adequate consideration of competing interests and taken against a seemingly settled intention to remove the Applicant from its patch by whatever legitimate means. We have the advantage of re-considering the case distanced by both time and geography. We understand the Respondent coming to the decision it did, but in a difficult case involving fine judgment, we do not conclude the Applicant unsuitable to continue in contract.

13. **Within the terms of Reg.111(4) of the Regulations we do not permit termination of the contract.**

Dated 3rd August 2011.

.....

Chairman.