

March 2009

GPC

General Practitioners
Committee

Managing disputes with PCOs

Guidance for GPs

Managing Disputes with PCOs

Background

A dispute resolution procedure is needed to resolve issues that arise within the contract, for example a dispute as to whether a contract provision has been properly performed by either the PCO or the providers, or a dispute involving financial entitlement under the contract. Contracts or Agreements between GPs and PCOs fall into three types, employment, "NHS contracts" and civil contracts. This guidance does not cover employment disputes, although the FHSAU procedure does apply to payment disputes for GP registrars.

Dispute resolution routes

If a practice is regarded as a health service body for the purpose of the contract/agreement, disputes are dealt with using the dispute resolution procedure in the appropriate regulations. There is no alternative. If a practice holds a private law contract ie has not elected to be regarded as a health service body for the purposes of the contract, it can choose to use either the NHS dispute procedure or use the Courts in relation to any particular dispute. For practices using the GPsOC route for the provision of GP computing they must be an NHS body and use the NHS procedures set out in the NHS Act, which are slightly different to those in the primary care regulations. For further information on this, see Appendix 1.

Information on health service body status can be found at paragraphs 6.12 to 6.14 of Delivering Investment in General Practice. In England, Part 4, regulation 10 of the NHS (GMS Contracts) Regulations 2004 deals with health service body status. In Scotland, health service body status is dealt with at Part 4, regulation 10 of the NHS (General Medical Services) (Scotland) Regulations 2004.

Types of contract disputes

Contractual disputes are considered under three headings:

- (i) disputes where the contract is an NHS contract
- (ii) disputes where the contract is an ordinary contract at law
- (iii) pre-contract disputes.

These procedures will apply to all disputes¹ that relate to matters relating to contractual terms including:

- (i) payments, including the global sum and quality payments, due under the contract
- (ii) contract variations
- (iii) opt-outs and list closures
- (iv) contract termination
- (v) disputes as to contract compliance
- (vi) payments to GP registrars

Disputes about list closure are subject to a special procedure and separate guidance about this can be found in the GPC guidance note 'Focus on patients registration' available here www.bma.org.uk/ap.nsf/Content/focuspatientreg0404

¹ Disputes relating to the Premises Costs directions are also resolved through the same route.

First steps

If a dispute arises between the parties to this agreement they should try to resolve the dispute locally in the first instance. PCOs and practitioners should make every reasonable effort to communicate and co-operate with each other in attempt to resolve any disputes before considering referring the dispute. If necessary, this should include a conciliation meeting between the provider and the chief executive of the PCO and, where it appears appropriate, could include an appropriately qualified/skilled adviser. At the time of conciliation either one or both of the parties may request the presence and assistance of the LMC (or its equivalent).

Conciliation cannot be a mandatory precursor to formal dispute resolution. However, there is an expectation that both the PCO and the GMS provider will be encouraged to follow this route as it provides a speedier and more efficient method of resolving disputes. Use of the formal resolution procedures will usually represent a failure of that relationship. Where the dispute is not resolved through local conciliation then the appropriate procedure will apply.

The formal process

If local resolution is impossible either party, usually the practice, may seek formal resolution. This is governed by Schedule 6, part 7, paragraph 99 – 103 of the National Health Service (General Medical Services Contracts) Regulations 2004 and equivalents in PMS and devolved nations.² For NHS contracts there is no option other than using the NHS system, but for those with civil contract there is a choice. The practice may take action in the courts or may choose to use the NHS procedure, if the PCT wishes to use the NHS system the practice has a right to insist on a court procedure (GMS Reg Sch 6 Para 100). Most disputes are likely to be resolved in the NHS procedure as the cost for both parties is usually lower.

By whom are NHS disputes resolved? (England)

Where a dispute arises which cannot be resolved locally, either party has the option to refer the matter to the Secretary of State³, whose powers have been devolved to the Family Health Services Appeal Unit (FHSU) of the NHS litigation Authority for consideration. This does not apply to Scotland (covered later in this guidance). The procedures for doing this are set out in paragraphs 36 and 100-101 of Schedule 6 of the GMS regulations. Directions provide wide powers for the FHSU to deal with most cases either by a determination itself, or by the appointment of an adjudicator, or panel of adjudicators to act on its behalf.

Such disputes should be made directly to the FHSU. The FHSU address is:

FHSU
30 Victoria Avenue
Harrogate
HG1 5PR

The FHSU is separate from the FHSAA which determines matters under the Performers List Regulations and is an independent non-departmental tribunal controlled by the President. The

² Welsh regulations: Part 7, paragraph 99. Scottish regulations: Part 7, paragraph 91. Northern Ireland regulations: Part 7, paragraph 93.

³ The equivalents in the devolved nations should be written to in the first instance:

- Edwina Hart, Minister for Health and Social Services, Welsh Assembly Government, Cathays Park, Cardiff, CF10 3NQ
- Nicola Sturgeon, Minister for Health and Wellbeing, The Scottish Parliament, Edinburgh, EH99 1SP
- Michael McGimpsey, DHSSPS, Castle Buildings, Stormont Estate, Belfast, BT4 3SQ

FHSAA is completely independent of the Department of Health, is not a Special Health Authority, and it is not accountable to the Secretary of State for Health. Appeals and Applications are made to it directly.

The FHSAA's President and members are appointed by the Lord Chancellor. It works to procedural rules issued by the Lord Chancellor after consulting the Council on Tribunals. Those rules, along with the Primary Care Act Regulations, can be found at:

The Family Health Services Appeal Authority (Procedure) Rules 2001

www.hmso.gov.uk/si/si2001/20013750.htm

and an amendment to those Rules at:

www.hmso.gov.uk/si/si2002/20021921.htm

The President will allocate appeals and applications to panels normally consisting of a legal chairman, a professional member, and a lay member. The panels will hold oral hearings into the matters referred to them unless the Appellant or Applicant says that they do not want one. Panels may give their decisions at the end of the hearing or they may reserve their determination.

The FHSAU

The purpose of the Appeal Unit is to improve the provision of healthcare by ensuring prompt, fair and reasoned resolution of disputes between primary care practitioners (GPs, dentists, opticians and pharmacists) and their local Primary Care Trusts. It is an arm of the NHS litigation Authority.

Further details are at www.nhs.uk/nhsletters/15F27C71-73EA-4B48-A754-36A1D632C92E/0/FHSAUFactsheet6200607.pdf.

How to prepare a case

It is important for any documents to be clear and structured. The FHSAA structure their decisions by way of a number of short paragraphs that set out and detail the whole case. An example of this can be found at appendix 2. This seems to be a sound approach to follow when preparing a case.

At the outset, background information to the dispute should be given, including any relevant dates. The evidence should include this, detail the full nature of the dispute and any discussions between the parties thus far, in addition to setting out the reasons on which the case is being justified. At this point, any references to the appropriate regulations or past precedents should be made. This can be reinforced with any supporting materials that you feel are appropriate.

Other procedural matters

Throughout the dispute resolution process, there will be a number of deadlines with which both parties are expected to comply. If you have any trouble meeting these, it is important to approach the FHSAA and seek an extension, giving as much notice as possible. Failure to meet any deadlines will not reflect favourably on your case.

NHS dispute resolution (Scotland)

There is no FHSAU in Scotland, so disputes should be referred to the relevant Scottish Ministers. The Ministers or may choose to determine the dispute themselves, or they may feel it is appropriate to appoint a panel to adjudicate.

A written request for resolution should be sent to the Ministers or along with the names and addresses of the involved parties, a copy of the contract and a brief statement on the nature and circumstances of the dispute.

Representatives of the parties may then be called before the adjudicator to provide oral reports, for which the adjudicator may give prior notice of the questions that will be asked or the issues that will be covered. The adjudicators may also seek statements, written or oral, from third parties considered to have knowledge or expertise relevant to the adjudication.

Any written statements or evidence from the involved parties must be provided within the time specified by the adjudicator.

NHS & HSC dispute resolution (Wales & Northern Ireland)

The procedure for Health Service disputes in Wales and Northern Ireland is in line with that outlined in the Scottish guidance above, with request for resolution to be sent to Welsh Assembly Members or The Northern Ireland Department of Health, Social Services and Public Safety Board.

Non-NHS dispute resolution (Scotland, Wales, Northern Ireland)

In each of the devolved nations, non-NHS disputes can be resolved through the courts. However they may also be determined by Ministers if the contractor agrees to this in writing. In doing so the parties agree to follow the NHS dispute resolution procedure and are bound by the adjudicators determination.

For further advice, GPs can contact their LMC or askBMA in the first instance.

Appendix 1

GP Systems of Choice (GPSoC) PCT-Practice Agreement and Dispute Resolution.

The GPSoC PCT-Practice Agreement was developed to clarify the responsibilities of the PCT and the Practice to each other for the delivery and receipt of IM&T services as part of the 2003 GP contract deal between the GPC, NHS Confederation and the Departments of Health. The IT elements of that deal are not part of the NHS (GMS) Contract Regulations 2004 and their PMS and APMS equivalents. Consequently, the dispute resolution process is slightly different to that set out in the rest of this document. The following Q&A helps to clarify the position.

Does a Contractor (GP) need to be regarded as a Health Service Body before signing up to the PCT-Practice Agreement?

No. However, if the Contractor wishes to use the NHS Litigation Authority (Appeal Unit) for dispute resolution then they will need to be regarded as a Health Service Body (i.e. their GMS, PMS, APMS Contract will be an NHS contract) either at the time of signing the PCT-Practice Agreement (and that status must not have changed) or, before the event that led to the dispute resolution procedure being invoked occurred (if at the time the PCT-Practice Agreement was signed the Contractor was not regarded as a Health Service Body).

How does a Contractor come to be regarded as a Health Service Body?

GMS and PMS Contractors have the right to be regarded as a Health Service Body under regulation 10 (part 4, page 17) of the NHS (General Medical Services Contracts) Regulations 2004 as amended or regulation 9(part 4, page 16) of the NHS (Personal Medical Services Agreements) Regulations 2004 as amended.

APMS Contracts can only be NHS contracts if the legal entity holding the Contract already holds an NHS contract for other purposes or if it is one of those bodies detailed in section 9(4) of the National Health Service Act 2006.

Whenever the Contractor is regarded as being a Health Service Body its GMS Contract/PMS Agreement will be an NHS contract. Whenever the Contractor is not regarded as a Health Service Body its GMS Contract/PMS Agreement will not be an NHS contract. Note that only disputes involving an NHS contract can be referred to the NHSLA.

A Contractor is allowed to ask the PCT to change their status from, or to, that of being regarded as a Health Service Body at anytime, there is no limit on the number of changes that can be requested

The status of a GMS or PMS Contractor's existing contract/agreement can be varied at any time by the Contractor writing to the PCT as follows:

"Dear (CEO/Director of Primary Care)

Pursuant to EITHER regulation 10(4) of the NHS (General Medical Services Contracts) Regulations 2004 as amended OR regulation 9(4) of the NHS (Personal Medical Services Agreements) Regulations 2004 as amended (delete as appropriate) I/we wish to request a variation to my/our GMS Contract/PMS Agreement. I/We wish to be regarded as a Health Service Body and understand that our contract will be varied so that it becomes an NHS contract".

or,

"Dear (CEO/Director of Primary Care)

Pursuant to EITHER regulation 10(4) of the NHS (General Medical Services Contracts) Regulations 2004 as amended OR regulation 9(4) of the NHS (Personal Medical Services Agreements) Regulations 2004 as amended (delete as appropriate) I/we wish to request a variation to my/our GMS contract/PMS agreement. . I/We no longer wish to be regarded as a Health Service Body and understand that our contract will be varied so that it is no longer an NHS contract."

Appendix 2

1 May 2007

PRIMARY CARE TRUST: #

GMS CONTRACTOR: #

DISPUTE RESOLUTION – GMS CONTRACTS REGULATIONS 2004 RE: IM&T SYSTEMS PAYMENTS – SCANNER AND ASSOCIATED SOFTWARE

1 INTRODUCTION

1.1 As GMS Providers, the above named contractor has referred the matter of IM&T Systems payments for a scanner and associated software for dispute resolution under the provision of Schedule 6, Part 7 of the NHS (General Medical Services Contract) Regulations 2004.

1.2 The Secretary of State for Health has directed that NHS Litigation Authority exercise the functions of dispute resolution on her behalf. The Family Health Services Appeal Unit discharges that function for the Authority. I as Chief Officer of the FHS Appeal Unit and authorised officer of the NHS Litigation Authority have made this determination.

2 APPLICATION

By application dated 24 January 2007 the contractor applied for dispute resolution. The application states:

2.1 The relevant contractual terms are paragraph 473, 473.2, 473.2 and 474, which the contractor quotes.

2.2 The relevant part of the SFE is Part 5 paragraphs 19.1, 19.2 (a) and (b), and 19.3.

2.3 The contractor has an IT system based on the Vision software supplied by In Practice Systems Ltd (InPS).

2.4 The IT system was initially provided by the practice, but since the NHS determined to support practices in their provision of IT various items of equipment have been provided by the practice, but with financial support from the PCT. This system of support was discontinued in April 2004 and the NHS now supplies the practice with IT facilities.

2.5 As a consequence of the decision to support a scanner the practice moved to a "paper lite" system.

2.6 The PCT has accepted the practice's move to being "paper lite" under both the current GMS Contracts Regulations 2004 and the former arrangements under the GMS Regulations 1992, as amended.

2.7 The practice has made a number of changes to staff contracts and other arrangements to reflect the change of position afforded it by the decisions of the PCT to support a scanner and accept the practice as "paper lite".

2.8 The scanner provided under the old arrangements is no longer fit for purpose and is no longer supported by InPS, spare parts are not available. The scanner no longer performs efficiently and effectively requiring significant additional staff time and expense. Documents that have been folded often need photocopying prior to scanning; otherwise they will not feed through correctly.

2.9 A call was logged with the PCT IT Helpdesk on 28 April 2006. The outcome of this was that a scanner had been reserved and would be released when the required Vision Docman Plus software was available.

2.10 When this software was available, the practice was informed by the PCT that this item was no longer available due to financial constraints.

2.11 After months of fruitless informal discussion the practice wrote to the PCT on 17 November 2006 seeking a replacement scanner and associated software, or confirmation that reimbursement would be available under the terms of paragraph 19.2.

2.12 In a response by email the PCT stated that there is no funding for this item, as it is "non-core".

2.13 The cost of replacement and necessary software is £# and a quotation for this is attached. Furthermore there are ongoing costs as specified of £#.

2.14 The concept of core is not present in the SFE, which is the basis of payments to the practice under the contract.

2.15 Notwithstanding 2.14 the PCT has accepted that the practice is "paper lite" and has previously funded the practice's scanner and software.

2.16 The replacement of the scanner and associated software is "a minor upgrade" under the terms of the SFE paragraph 19.2(b) as without it the IT system and practice cannot perform efficiently.

2.17 By previously funding the scanner and software the PCT has enabled the practice to reassign and redeploy staff to increase the efficiency of its provision of primary medical services.

2.18 The PCT has a duty under SFE 19.2 to provide a scanner and the practice seeks dispute resolution in that respect.

2.19 If the FHSAU is unable to find in the practice's favour on 2.18 the practice seeks as an alternative, dispute resolution that requires the PCT is obliged under SFE paragraph 19.2 to reimburse the full cost to the practice of a replacement scanner and associated software.

2.20 That the delay in providing the practice with its entitlement has resulted in additional staff and other costs to the practice and that a sum should be payable to the practice to defray these costs.

3 PCT REPRESENTATIONS

In a letter dated 27 February 2007 the PCT provided the following comments:

3.1 The PCT feels that as this is an additional investment and as such the contract states that a business case should be submitted by the practice to the PCT for evaluation. The PCT agrees that a business case was submitted in accordance with the contract.

3.2 In accordance with the requirement of the SFE, the PCT has evaluated the request for the scanner and additional software and has rejected funding this investment on financial grounds. The PCT continues to fund support and maintenance for the installed clinical system and document management system as is required by the contract.

4 PCT FURTHER OBSERVATIONS

By letter dated 26 April 2007 the PCT provided the following additional observations:

4.1 The core clinical system in this case consists of a server, core database and software licence for the server and client PCs to perform tasks such as consultation appointments, prescribing etc. Scanner and associated software are not part of the core clinical system and provide additional bolt on functionality that not all General Practices require or utilise in their provision of primary care services to patients. This would therefore indicate that this is outside the provision of the SFE and therefore beyond the remit of the Litigation Authority.

5 CONSIDERATION

5.1 I note that the SFE states the following:

5.1.1 19.1 With effect from 1 April 2003, PCTs ... have become responsible for the purchase, maintenance, future upgrades and running costs of integrated IM&T systems for providers of services under GMS contracts

5.1.2 19.2 ...PCTs must pay to contractors under their GMS contracts amounts representing the reasonable costs of contractors in respect of IT maintenance and minor upgrades.

5.1.3 19.2 (b) "minor upgrades" means upgrades required to ensure that existing clinical systems continue to perform efficiently (for example: memory or hard disk upgrades, and replacement of broken or defective items such as printers, screens and back-up devices).

5.2 The PCT is of the view that as the Scanner and Associated software is not part of the "core clinical system" then it falls out with the SFE for consideration. I note however that the SFE does not refer to "core clinical systems" but instead refers to "clinical systems".

5.3 I note that the contractor states that the PCT initially supported the move to a "paper lite" practice and that financial support was given by the PCT in the first instance. I note that the PCT has not disputed this, nor has the PCT provided evidence of agreements between the contractor and the PCT to demonstrate that this was a limited commitment on behalf of the PCT.

5.4 At 2.9 the contractor refers to a call to the PCT IT helpdesk and that the contractor states that the PCT had confirmed that a scanner had been reserved. This is not disputed by the PCT,

which in my view gives weight to an acceptance by the PCT, as the request was not refused nor was there any indication that funding would not be forthcoming at that time.

5.5 I note that the SFE states examples of minor upgrades as being printers, screens and back-up devices. I am of the view that a scanner is a similar peripheral to those mentioned in the SFE and would therefore be considered a minor upgrade.

5.6 I am of the view therefore that the PCT should re-imburse the contractor the cost of the Scanner and associated software.

5.7 I note at paragraph 2.20 above the contractor requests further monies from the PCT in order to defray costs incurred due to the delay in dealing with the IM&T issues. The contractor has not advised me of where in the contract or SFE it is entitled to such payments, nor has the contractor provided me with any information as to the details of these costs. I therefore do not allow this aspect of the application.