

IN THE MATTER OF A NATIONAL HEALTH SERVICE DISPUTE RESOLUTION  
RELATING TO TERMINATION OF A PMS CONTRACT DATED 1<sup>ST</sup> APRIL 2004.

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

DR. #  
(GMC ref: #)

Applicant

And

# 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 16<sup>th</sup> July 2010 on behalf of the Applicant contract holder to engage dispute resolution procedures.
2. The parties were heard on the 31<sup>st</sup> January 2011 at 44 Wicklow Street, London. The Applicant was represented by Dr. Ogunsanya of Messrs. Hackman, Solicitors and the Respondent by Mr. Beglan of Counsel instructed by Messrs. Capsticks.
3. (i) On 5<sup>th</sup> May 2009 representatives of the Respondent attended the Applicant's practice to undertake a routine QOF visit. This was followed up by a QOF Post Payment Verification visit by Dr. # and others on the 29<sup>th</sup> May 2009.  
  
(ii) Following the 29<sup>th</sup> May visit a Remedial Notice was served on the Applicant on 26<sup>th</sup> August 2009 alleging, in summary, inappropriate exception reporting in breach of the obligation to provide accurate and reliable information relating to QOF payments; failure to provide essential services with reasonable care and skill following assessment that a number of patients randomly selected had received inadequate and/or inappropriate care; disease registers were poorly maintained and poor clinical recording.  
  
(iii) The Remedial Notice provided for a further audit which was undertaken on 23<sup>rd</sup> and 24<sup>th</sup> November 2009 which noted (in a report dated 12<sup>th</sup> February 2010) some improvement in record keeping and keeping QOF data. A number of ongoing concerns remained with the report commenting that "*Regarding the provision an (sic) appropriate level of care and skill, this review showed mixed findings.....*" with the report going on to comment on prescribing anomalies, failures in the practice's medication review and repeat prescription systems.  
  
(iv) It is clear that the 12<sup>th</sup> February 2010 report prompted discussions between the parties with the Respondent hoping to agree termination of the contract.  
  
(v) A separate issue arose on the 8<sup>th</sup> June 2010 when a representative of the Respondent attended at the surgery to find no clinician in attendance. The Respondent understood

this to be in breach of the Applicant's contractual responsibility to provide services within core hours as are appropriate to meet the reasonable needs of the Practice's patients. That issue prompted service of a Breach Notice on 18<sup>th</sup> June 2010.

- (vi) By this time the Respondent decided that non compliance with the Remedial Notice of 26<sup>th</sup> August 2009 and the effect of the Breach Notice dated 18<sup>th</sup> June 2010 were sufficiently serious in themselves and cumulatively to terminate the contract which it did by notice dated 23<sup>rd</sup> June 2010 to take effect from 28<sup>th</sup> July 2010. Termination does not take effect until conclusion of this adjudication.
- 4. The Respondent asks us to take into account two events subsequent to service of the termination notice namely visits to the practice on 5<sup>th</sup> July 2010 and 22<sup>nd</sup> July 2010 when again it was discovered no clinician was in attendance. A Breach Notice was served in respect of both allegations on 2<sup>nd</sup> August 2010. Inevitably the Applicant makes the point that these events if they occurred, did so after termination of the contract; were not part of the grounds alleged in the termination notice, the response to which has provoked this adjudication and that it is simply unfair. We allow evidence in respect of both events on the basis that, although occurring afterwards, they are of a type covered in the termination notice; the Applicant has had ample notice of the Respondent's reliance on those events and an opportunity to deal with them in evidence; we should have the opportunity to consider all issues surrounding the performance of a contractor except (which we do not find) where there is some obvious unfairness to the contractor.
- 5. The Termination Notice (pages 223 – 230 of a bundle prepared for these proceedings) sets out at length specific details of breaches which, in the view of the Respondent, if allowed to continue, would be prejudicial to the efficiency of the services provided under the agreement – the test in 107 (6) and (7) of the Regulations. The Applicant's position is simply that the PCT acted disproportionately and unreasonably in exercising its discretion to terminate the contract on the grounds set out in the Termination Notice.
- 6. (i) There is no evidence that there were concerns about this practice prior to the routine QOF visit in May 2009. We are reminded that participation in QOF is voluntary and is not of itself directly linked to patient care. It took over three months for the Respondent to serve a Remedial Notice and a further six months before a report was completed by Dr. # reporting on her follow up visit in November. The point is that from first being alerted to potential problems it took almost 12 months for the Respondent to begin discussing termination of the contract with the Applicant. We suspect more may have been happening in the background but on its face the evidence suggests the Respondent was not sufficiently concerned about either efficiency of the practice or, perhaps more importantly, the safety of patients to take more timely action.
- (ii) We have in mind that the contract (clause 513) enables immediate termination in the event that patient's safety is at serious risk. Again, the Respondent's concerns do not seem to have extended to patient safety so its contention now that patient care "was a cause for concern" (page 225) appears inconsistent with the procedural route down which the Respondent has chosen to travel.
- (iii) Some thirteen months elapsed between the Respondent becoming aware of issues and service of a Termination Notice. Although failure or delay by either party to enforce provisions in the contract shall not operate as a waiver (clause 563) the time taken in this case is relevant to the reasonableness of the Respondent's subsequent decision to terminate the contract. Against that it is clear discussions (we acknowledge probably one sided) were taking place for agreed termination of the contract. This rather gave an impression to the Applicant that, although the Respondent remained dissatisfied with aspects of his practice, he was being allowed to continue. Again we have no evidence that the Applicant had been suspended or otherwise displaced which would have

happened had the Respondent's concerns have been as serious as we are now asked to believe.

- (iv) No doubt the Applicant was fortified in his view by the fact the audit report dated 12<sup>th</sup> February 2010 recording the visit on 23-24 November 2009 comments on some improvement in the provision of services. During the intervening period the practice had been working hard to introduce protocols and other practice management tools required of the QOF process. We do not find as a fact that the Respondent or its servants informed the practice during the November review it was entirely happy with the work that had been done – perhaps that is what the Applicant believed or hoped he had heard. The matrix (pages 306-308) represents an accurate account of matters that had been complied with and what remained outstanding and paints a picture of some progress although slow and laboured. Further support by the Respondent (if accepted) might have helped the practice to push on, but it leaves us with the impression that genuine and successful attempts were being made to address shortcomings.
7. (i) We have a sense that throughout the period between service of the Remedial Notice in August 2009 and the Termination Notice in June 2010 the Respondent was becoming frustrated that negotiations to agree termination of the contract were not being as constructive as it may have liked. By this time 5 months had passed since the date of the Audit Report outlining outstanding issues. Time was running if the Respondent was to come to a view it should terminate on the grounds of failure to comply with the terms of the August 2009 Remedial Notice. It also had the difficult decision to decide whether the work that remained undone under the terms of the Remedial Notice was, objectively considered, sufficiently serious to justify the extreme sanction of contract termination.
- (ii) We have considered that matter and conclude that the efforts made by the practice to deal with the contents of the Remedial Notice set against what remained to be done and taking into account patient care, did not of itself justify termination of the contract. The Respondent should have continued to work with and support the practice – perhaps considering Performers List alternatives to ensure compliance.
8. (i) The decision of the Respondent to terminate the contract seemingly became easier following the practice visit on 8<sup>th</sup> June 2010 when, at 9.45am it was discovered there was no clinician available to see a patient despite the practice leaflet confirming consultation hours between 9.30am and 11.30am daily. The Applicant says in evidence that he rang staff to say traffic was bad and he would be late. The explanation given at the time by reception staff was that there would be no clinician available until 10.50am – the time of the first appointment. There is no evidence of patients reasonable needs not being met by the absence of a clinician on that occasion and, by itself, that matter could not possibly justify termination of the contract and is, in our view, a 'make weight' allegation attempting to justify termination under reg.107 (6) and (7).
- (ii) The event of the 8<sup>th</sup> June apparently persuaded the Respondent it could proceed to terminate not only on the failure to comply with the termination notice but also because of the 8<sup>th</sup> June breach. Relying on paras 107 (6) and (7) of the Regulations it could terminate if the cumulative effect of the breaches was prejudicial to efficiency of services.
- (iii) For the reasons mentioned we do not consider that either the alleged failure to fully comply with the Remedial Notice or the failure identified on 8<sup>th</sup> June individually or jointly justified contract termination.
- (iv) We agreed to allow in evidence of visits to the practice on 5<sup>th</sup> July 2010 and 22<sup>nd</sup> July 2010 which again revealed the absence of a clinician. Having done so we are obliged to conclude that whatever adverse inferences can be drawn, fairness requires those events should not be used to support the grounds of the Termination Notice which was served before the first of these two dates and in respect of which an application for dispute resolution had been lodged -again before the date of either event.

9. We do not permit termination of the contract in this case which we find to be unreasonable and disproportionate. We do however have a significant matter to raise.
10. (i) The Applicant in this case chose to give evidence. As a panel we were careful to take note of his demeanour, the manner in which he answered questions and his obvious reliance on his wife – the practice manager – who also gave evidence. We are concerned that the Applicant, whilst remaining haltingly fluent in respect of clinical issues ( thus excluding the possibility of a hearing impairment) was unable to absorb and process information or respond appropriately to questions of a more general nature. It is apparent he is relying almost entirely on his wife to whom he turned to answer even basic questions. In passing he says he has never before seen the matrix referred to in the body of our decision, rather re-enforcing our view that these proceedings and probably other matters relating to the practice are effectively under the control of his wife.
- (ii) Our Medical Member properly reminds us of his professional duty to report circumstances where he reasonably believes a fellow professional's ability to practice has become impaired. Even allowing for the novelty of giving evidence and the undoubted strain of the proceedings, as a Panel we are concerned about the Applicants ability to function as a General Practitioner. For those reasons instructions will be given to forward a copy of this determination to the General Medical Council.

Dated 24<sup>th</sup> February 2011.

Paul Kelly,  
Chairman.