GDS Contracts –
The Litigation Continues!

Tim Lee reviews a judicial review of nGDS

During GDS Contract “baseline year”, the claimant employed two qualified dentists.

In calculating the claimant’s baseline activity and contract value, the activity carried out by those employed dentists during the baseline year, were ignored by the PCT.

The PCT did not include the baseline activity and contract values set out in the legislation, the activity of the two employed dentists should be taken into account in such calculations.

The intention of the legislation was that the size and value of the practice was to be protected, to ensure funding was in place for the number of patients serviced by the practice, including its employed dentists. When a particular employee left the practice, it was only feasible to refer to one of the employer’s GDS Contractors.

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Are there any other causes of action?

There may be two possibilities.

1 Firstly there may be an action for “breach of statutory duty”. The framework for calculating the level of activity and contract value is a statutory framework. If the PCT failed to carry out such calculations properly they have failed in their statutory duty, enabling a claim to be brought.

2 Secondly there may be a claim for breach of warranty under clause 23 of the GDS Contract. By those warranties the PCT promised that “all information in writing which is provided to the contractor specifically to assist the contractor to become a party to this Contract was, when given, true and accurate in all material respects”. Under clause 25 are further warranties, for example, that no relevant information has been omitted.

Under the provisions of the 2005 Transitional Provisions Order (which sets out the framework for the transition from the “old” section 35 arrangements to the “new” arrangements), the responsibility for analysing the baseline year data, was specifically given to PCTs. “It might be arguable that if incorrect calculations had been made to the contractor’s baseline UDa’s and contract value, the relevant PCT had been in breach of warranty.” This could lead to a claim for damages for breach of contract.

Actions for breach of contract must usually be brought within six years from the date of the breach in question, so care needs to be taken with limitation periods.

A contractor contemplating action should also ensure that they had not elected, in the Contract to be regarded as a health service body (clause 14) restricting action only to the NHSLA (with the three year limitation period problem). It might be sensible to seek an early “opt out” of clause 14, which is possible under Regulation 9(4). A contractor may, “at any time” request a variation of the Contract to remove the election from health service body status.

Any such opt out should be in place before any proceedings were commenced.

What might a claim be worth?

Firstly how much might a claim be worth? The general rule is that damages for breach of contract are such losses as may have been reasonably foreseeable when the breach took place. An aggrieved contractor might argue that had their GDS Contract been at the appropriate higher level of activity and the higher contract rate, the contractor would have had to pay, say, 50 per cent of each “UDA value” to that relevant employee.

The remaining 50 per cent balance would have been part of their gross annual profits. They might go on to argue that such increased profits would have been the “top slice”, that the practice overheads would already have been provided for by the “lower slice”, and that their net loss was therefore 50 per cent of the value of each UDA lost as a result of the PCT’s breach of contract/breach of statutory duty, on an annual and charging basis. Such loss might amount to a substantial sum.

About the author

Young & Lee’s litigation team, headed by Chris Leek, acted for the claimants before the High Court, and before that in the NHSLA but were not the solicitors, who originally acted for the claimants.

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