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 of the two employed dentists, in the claimants GDS Contract.

The Claimant disputed this and subsequently referred the matter to the NHSLA. The NHSLA decision followed in June 2008.

The Facts
There were three claimants, with essentially, parallel cases. To simplify matters this article will refer to one of the claimants.

The NHSLA decision must be set aside for error of law. Where work had been undertaken during the baseline period, by employee or assistant dentists, such activity and contract value was potentially includable within the employer’s GDS Contract.

Implications for General Dental Practitioners
Other general dental practitioners may have been similarly affected in 2006, by their PCTs issuing GDS Contracts to employed dentists, and not including the baseline activity/contract value of such employees in their principal’s GDS Contract.

Can any such aggrieved contractor bring a claim at this stage or is it too late? What might the value of such a claim be? Both issues may be dependent on the NHSLA’s decision following the remission back to them of the Hussain case, for further consideration.

For potentially affected contractors reading this article, it is clearly too late to refer the matter to the NHSLA. There is a three year “limitation” period in disputes to the NHSLA, the time running from the date of the claim (likely to be March 2006, or at the latest 1st April 2008).
R4 Practice Management Software
GIVES YOU MORE

STERITRAK - tracks your instruments through the sterilisation process

Track your trays of instruments through the cleaning and sterilisation process so that you can prove compliance with CQC outcome 8.

Easy to learn straight out of the box with minimal set up, Steritrak provides immediate access to reports showing the cleaning and sterilisation history of each tray of instruments as well as the tray history for each machine in the practice.

With R4 you will also be able to record which trays of instruments have been used on each patient for each appointment, even if multiple trays were used. Standard reports within R4 will show which patients a specific tray has been used on within a specified period of time, as well as the tray history for a specific patient.

Steritrak is another solution from Carestream which helps you achieve full CQC compliance and gets rid of the need for multiple paper log books and the pressures of ensuring information is updated regularly and kept secure.

For more information or to place an order please call 0800 169 9692
email sales.uk.csd@carestream.com
or visit www.carestreamdental.co.uk

Carestream Dental
© Carestream Dental Ltd., 2011.
Actions for breach of contract must 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 their 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 of the National Health Service (General Dental Services Contract) Regulations (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.

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.

What might a claim be worth?

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.

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 specifically provided to 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 UDAs and contract value, the relevant PCT had been in breach of warranty.” This could lead to a claim for damages for breach of contract.

A contractor contemplating action should also ensure that they had not elected, in their 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 of the National Health Service (General Dental Services Contract) Regulations (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.