

Devil in the detail

Alexander Hall looks closely at PDS and GDS contracts.

The decision of the Court of Appeal in the Crouch case (*Regina (on the application of Crouch) v South Birmingham Primary Care Trust*) in December 2008 acts as a timely reminder that GDS and PDS contracts are, in some ways, like all other commercial contracts. During pre-contract negotiations, the terms should be considered carefully, advice should be taken and in certain circumstances terms may be negotiated and remedies may be pursued.

It is timely because many of the first 'new' three-year PDS contracts entered on April 1, 2006, have now reached the end of their terms.

The new system was designed and intended to be fairer to dentists, better for patients and contracts were to be negotiable.

PCTs may be looking to review, vary, renew on different terms or terminate.

As with many contracts where there is substantial inequality in the respective bargaining positions of the parties, in the Crouch case South Birmingham PCT added an unlawful termination clause, completely in favour of the PCT, to a PDS contract.

Recent history

It is worth remembering the *raison*



● Don't be caught napping when it comes to negotiating a new contract with the PCT.

d'être of the 2006 changes and the introduction of the so-called nGDS and nPDS contracts. Before 2006, contracts were regulated by the Dentists Act 1984, National Health Service Act 1977 and EU Procurement rules.

However, PDS contracts were often of short fixed terms, PCTs could fail to renew them and this would cause uncertainty to the dentist's business. The National Health Service Act 2006 and the 2005 Regulations governing the terms of both the new GDS and PDS contracts, gave the dentist the opportunity to switch to an open-ended GDS contract, and along with it, security and business

stability. PDS contracts were also overhauled, although they still run for fixed periods. The new system was designed and intended to be fairer to dentists, better for patients and contracts were to be negotiable to the extent permitted by the 2005 Regulations. The Family Health Service Appeal Unit (part of the NHS Litigation Authority) had and has the mandate to determine contractual disputes that arise during pre-contract negotiations.

Any dentist holding a pre-2006 PDS contract on or since April 1, 2006, has been entitled under the GDS and PDS Transitional Provisions Order 2005 to a new GDS contract, whilst retaining the



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Contract value.

The GDS contract is also supposed to act as an opportunity for the PCT to ensure dentists provide an array of mandatory services, thereby increasing service standards and choice for patients.

PCTs are keen for dentists to switch to the new contracts, especially the GDS contract. Why? Well, from a closer look at the details of the new contracts it is obvious they are very different to their predecessors.

Terms

Whilst the reasons for the 2006 changes were laudable and appeared to be fair to both sides, the standard contracts were carefully drafted by solicitors at the health department. Pre-2006 contracts were a mixed bag, often vague, short and loosely drafted. Consequently, opportunities for flexibility often arose.

In the 'new' standard contracts, many of the terms are mandatory and are required by the Schedules to the 2005 Regulations.

The standard terms leave the dentist and business person very little room for manoeuvre, whether he be seeking to expand his enterprise by considering alternative business models and vehicles (for example, incorporation) or weathering a temporary financial storm by considering the UDA clawback provisions.

Unaware of the knock-on effects, impact and consequences of the restrictive standard mandatory terms to the commercial options open to most other enterprises, the dentist can find many commercial strategies frustrated.

More sinister is the limited possibility for the PCT to add in non-standard clauses and local variations favourable to the PCT. In a GDS contract 100-150 pages long, these may not be highlighted and not easy to pick out.

The contracts are made more indecipherable by their length, the fact that they contain references to legislation that no longer exists (for example, the National Health Service Act 1977 and repealed sections of the Dentists Act 1984) and the practice of leaving irrelevant standard clauses in the document with the word 'reserved' typed somewhere near the clause. For the layman, the contracts are very hard to read and understand.

For many practices the contract provides most of the income of the business, supports the employment of many staff, and is the main source of wealth for the NHS dentist.

The Crouch case

The 2005 Regulations require PDS and GDS contracts contain certain mandatory terms in connection with termination. The contracts may only be unilaterally terminated by a PCT for certain reasons, for example, following a breach of the contract or the removal of the contracting dentist from a performers list for certain reasons. These termination clauses help to provide the dentist with the certainty and business stability intended by the 2006 changes.

Eddie Crouch was offered a new PDS contract which contained an additional termination clause. The clause purported to give South Birmingham PCT the free-standing right to terminate unconditionally. It made the standard mandatory conditional termination clauses in the contract and in the 2005 Regulations meaningless.

Whilst Eddie Crouch signed the contract 'in dispute' in order to continue providing services to his patients, he began the legal process of disputing the clause and obtaining its removal from the contract. An internal NHS appeal to the FHSU

was not successful, but finally the Court of Appeal ruled in his favour in December 2008. The additional term was unlawful.

What to do

PCTs continue to encourage dentists to switch to the GDS contract and for good reason. On balance, the GDS contract favours the PCT in many ways.

Any consideration of a change from a pre-2006 contract or from a PDS to a GDS contract must include a consideration of the general commercial strategy of the business and the contractor.

Without careful thought and planning, the terms of the new PDS and GDS contracts can prevent the business from pursuing certain expansion strategies or the dentist from pursuing tax planning and exit strategies. All factors must be weighed up in context.

Contractors are also wise to take advice, not only on the standard terms, but on any additional and local terms the PCT may be seeking to include. Before, during and following a successful tender, in exercising an entitlement to a GDS contract or during a review or proposed variation, if there is concern, a misunderstanding or disagreement on terms, raise it and negotiate. The framework envisages and is designed to accommodate such negotiation. A referral and appeal to the FHSU can be effective and is pursued by many.

After all, for many practices the contract provides most of the income of the business, supports the employment of many staff, and is the main source of wealth for the NHS dentist. It is important to get it right. ■