OUTER HOUSE, COURT OF SESSION

[2018] CSOH 18

P220/17

OPINION OF LORD ARTHURSON

In the petition of

JOANNA ADAMCZAK-GAWRYCHOWSKA

Petitioner

For

Judicial Review of a Decision of the Common Services Agency (Practitioner Services (Dental & Opthalmics))

Respondents

Petitioner: P Reid; Clyde and Co
Respondents: O'Rourke, QC; Norma A Shippin NHS Central Legal Office

28 February 2018

Introduction and background

[1] The petitioner is a registered general dental practitioner based in East Lothian. She has undertaken NHS dental work since February 2008. Provision of NHS dental services is regulated primarily by the National Health Service (General Dental Services) Regulations 2010 (hereinafter referred to as "the Regulations"). Matters of remuneration are dealt with in part 3 of the Regulations. Regulation 22 of the Regulations requires the Scottish Ministers to adopt a "Statement of Dental Remuneration", also referred as a "Scale of Fees". In terms of schedule 1 of the Regulations paragraph 20 thereof requires a dentist to claim any fee under the Statement of Dental Remuneration by submitting a claim to the Scottish Dental

Practice Board (hereinafter referred to as "the SDPB"), as established by section 4(1) of the National Health Service (Scotland) Act 1978. The SDPB is part of the Common Services Agency, as established by section 10 of the 1978 Act. The respondents in this petition are a division of the Common Services Agency.

[2] The petitioner was and is a contractor in terms of the Regulations, her contract lying with the territorial health board covering East Lothian, namely NHS Lothian. In terms of regulation 23(2) of the Regulations, it is provided that where the SDPB approves a claim for remuneration made by a contractor in respect of treatment it shall authorise in accordance with the Scale of Fees the remuneration to be paid by the Agency to the contractor in respect of such treatment. In terms of regulation 23(4), it is further provided that the remuneration that has been authorised by the SDPB shall be paid to a contractor.

[3] On 7 August 2013 the petitioner attended a meeting with the senior dental advisor of the respondents. This meeting followed a review by the respondents of a sample of the petitioner's dental patient record cards, which sample consisted of 33 such cards. This sample identified a number of payment claims for treatment by the petitioner of her patients that appeared to the respondents to be incorrect by reference to the applicable Scale of Fees set out within the relevant Statement of Dental Remuneration. The petitioner was accordingly informed that a number of claims submitted for payment by her under the Statement of Dental Remuneration were incorrect and that where any incorrect payments had been made to the petitioner, the respondents would require to seek recovery of those payments from her in terms of regulation 25 of the Regulations. At the conclusion of this meeting there was an expectation that the petitioner would carry out a review of her treatment planning and recording within her patient records.

[4] By letter of 24 September 2013 the respondents wrote to the petitioner requesting that she undertake a review of her record cards covering the period from February 2008 to August 2013, initially requesting a response from the petitioner within 14 days. A substantial review was undertaken by the petitioner. This review covered 5,545 payment claims. The petitioner undertook this review in addition to her normal clinical work and required assistance in this undertaking from nursing staff within her practice. The said nursing staff spent approximately 300 hours assisting the petitioner. By letters dated 30 January and 7 March 2014 the petitioner provided her response to the respondents. In her review the petitioner identified 629 instances in which she accepted that a sum had been incorrectly claimed or that a claim which had been made could not now be vouched. Those claims were worth £10,531.29. The petitioner accepted that this sum fell to be repaid by her. She maintained that the remaining 4,916 claims within her review had been properly made and paid.

[5] By letter dated 17 March 2014 the respondents acknowledged the review material and advised that the petitioner's responses would be discussed with their clinical adviser and that further communications would follow. By letter of 16 June 2014 the respondents wrote to the petitioner advising her that an initial recovery of £1,500 was being made in terms of regulation 25 of the Regulations. Letters in substantially similar terms were sent by the respondents to the petitioner thereafter on a regular basis, the last such letter being the letter which is a subject of challenge in this petition, dated 11 January 2017. In the said letter of 16 June 2014 the respondents intimated that they were "beginning to process the recovery" and that repayments would continue "until the agreed full recovery has finalised".

[6] By email dated 22 May 2015 a schedule was sent by the respondents to the representatives of the petitioner disclosing a proposed recovery by the respondents of the sum of £71,783.48. This figure was based upon an extrapolation from the original sample of 33 records which had itself prompted the initial meeting of 7 August 2013. On 15 October 2015 the respondents wrote to the petitioner confirming that the said schedule had been calculated on the basis that the sample was representative and that the same issues existed in all similar claims. In order to address the disparity between the petitioner's review and the sample founded upon by the respondents on the validity levels of the claims, the respondents suggested two alternative courses of action, namely, first, examination by the respondents of a random selection of sample dental patient record cards selected from patients in respect of whom there were unreconciled claims, or, second, provision to the respondents by the petitioner of a copy of her practice management system software in order to allow the respondents to review sufficient records remotely using that electronic copy. In this letter the respondents maintained that the said schedule was a calculation in respect of the items reviewed, "on the basis that the sample is representative and that the same issues exist in all such claimed items…made during the period examined. The schedule was not designed to take account of the record card review which you carried out."

[7] The respondents issued subsequent letters dated 25 February, 3 May and 1 June 2016 offering on each occasion to carry out a review of sample dental patient record cards. The petitioner did not take up these offers from the respondents. By the date of the letter of 15 October 2015, a sum in excess of the £10,531.29 identified and accepted by the petitioner as the sum due to be repaid by her had been recovered by the respondents. As at the date of the raising of this petition, the sum of £48,000 has been withheld by the respondents.

Submissions for the petitioner

[8] Although the petitioner sought a remedy of declarator within the petition, her counsel at the hearing before the court sought only reduction of the decision complained of on the grounds of irrationality and unfairness (pleas-in-law 2 and 5 of the petition) *et separatim* material error of law (plea-in-law 3).

[9] Counsel focussed in maintaining his error of law contention on the terms of regulation 25 of the Regulations, submitting broadly that this regulation can only be used to recover monies that have been overpaid, and not sums that may have been overpaid when calculated on the basis of inference, sampling or on an educated guess on the part of the respondents. It was important to note, counsel submitted, that in circumstances such as applied in the case of the petitioner, payments had already been submitted to the SDPB and approved, and, that as a consequence of regulation 23(4), the respondents required to pay those claims. Counsel submitted in short that regulation 25 did not accordingly permit the extrapolation exercise undertaken by the respondents in this case and that recovery under this regulation required instead to deal only with monies which had actually been overpaid to the petitioner.

[10] Regulation 25 of the Regulations provides as follows:

> **"25.**—(1) Where the SDPB, the Agency or a Health Board considers that it has made a payment to a person owing to an error or in circumstances where it was not due, it shall, except to the extent that the Scottish Ministers on the application of the SDPB, the Agency or the Health Board direct otherwise, draw the overpayment to the attention of the person to whom that payment was made and the amount overpaid shall be recoverable as a debt by any lawful means.
>
> (2) Recovery of an overpayment under the provisions of this regulation shall be without prejudice to the investigation of an alleged breach of the terms of service."

[11] Counsel submitted that the construction which he had commended to the court on behalf of the petitioner accorded with the plain meaning of the words used in regulation 25.

The regulation referred specifically to "the amount overpaid" which "shall be recoverable as a debt". He submitted that his proposed construction was consistent with the overall scheme of dental remuneration, and that this was unsurprising as the claims had already been authorised. Counsel maintained that any construction which permitted recovery based on a sampling or extrapolation exercise would in itself be contrary to the plain meaning of the words used and would allow the recovery of monies that had not in fact been overpaid, which result would not be just and which would render regulation 25 to be effectively a penalty clause on the basis that any monies recovered would be so recovered on an arbitrary basis. Counsel referred to *Craies on Legislation*, 11th edition, at paragraph 17.1.2; and to *Bennion on Statutory Interpretation*, 7th edition, at paragraph 27.1. On that basis, counsel contended that the decision challenged had been taken by the respondents on the basis of a material error in law, arising as it did from the respondents' position that their extrapolation exercise was sufficient to allow them to form a view that monies recoverable under regulation 25 had been overpaid. Counsel submitted that the petitioner was accordingly entitled to decree of reduction.

[12] The petitioner further sought decree of reduction on the linked grounds of irrationality and unfairness. Counsel submitted on her behalf that the respondents had formed a view based on an extrapolation from a sample of 33 records, against a background in which the petitioner had herself reviewed 5,545 records at the request of the respondents. He argued that it then followed from the limited and unvalidated sample utilised by the respondents in this exercise, the absence of any explanation from them as to the basis on which that sample was considered to be representative, and the disparity between the alleged overpayment based on the sample and the overpayment level accepted by the petitioner herself following her own review, that there could be no reasonable, rational or

logical basis upon which the respondents could have proceeded to conclude that the overpayment claimed by them had here been made. That being so, the respondents were not in these circumstances entitled to rely upon the provisions of regulation 25 and the decision challenged was accordingly unlawful. It was further conspicuously unfair for the respondents to base their claim on such a limited sample, given the specific context in terms of which the SDPD had already authorised the claims for payment. This was a decision, counsel submitted, which simply did not add up: *Fordham, Judicial Review Handbook*, 6th edition, at paragraph 57.3.1. The substantial review undertaken by the petitioner had been put aside without explanation. Counsel observed further that the petitioner's election not to participate in a further sampling exercise was of no consequence, as such an exercise would have in effect been one in terms of which the first extrapolation would have been checked by reference to a second extrapolation, with the respondents falling once more into the same error of law identified by the petitioner's counsel. It was of note that the respondents had power in terms of paragraph 27(3) of schedule 1 of the Regulations to require a contractor such as the petitioner to produce any records on the request of any authorised officer of the respondents within 14 days, and that no such request had ever been made to the petitioner on behalf of the respondents.

[13] Finally, with regard to the contention made by the respondents that an earlier letter would have more properly been the subject of challenge than that dated 11 January 2017, counsel indicated frankly that this letter was simply the most recent decision letter and that those advising the petitioner had at the stage of raising the petition taken the view, along with her, that a line required to be drawn. He noted that the plea of mora in the answers had been departed from and that, standing the two alternative courses of action proposed

on behalf of the respondents in their letter of 15 October 2015, it was clear that by that stage no final decision on the recoverable debt had been taken.

Submissions for the respondents

[14] Senior counsel for the respondents invited the court to refuse the petition and in so doing to consider the following core issue raised by the petition, namely, whether the decision to find the petitioner liable to pay the respondents the sum of £71,783.48 was a decision which no reasonable decision maker, properly instructed, could have reached.

[15] Senior counsel observed that the respondents sought in the discharge of their various functions to seek to achieve a correct balance between the recovery from dentists of public funds, where appropriate, and a payment of these funds to dentists, basing this exercise on a proper understanding and utilisation of the relevant payment mechanisms. He submitted that the genesis of the present case arose from consideration by the respondents of certain practice issues, and observed that the initial meeting of 7 August 2013 had been instigated by the respondents to draw the petitioner's attention to certain feeing anomalies which he characterised as concomitant with these practice issues. Senior counsel noted by way of background that a figure of somewhere between £300,000 and £500,000 in respect of overpaid fees was recovered annually by the respondents in the exercise of their obligations under regulation 25 of the Regulations, and that the policy of the respondents was indeed, as in the present case, to adopt a pattern of sampling of records. The respondents had no direct link with dentists such as the petitioner, who herself had a contract with NHS Lothian. It was accepted that insofar as there had been repeated requests for additional record cards from the petitioner in order to ascertain if the inferences drawn from the initial 33 cards were indeed fully accurate across the board, nevertheless these requests had not been made

expressly in terms of paragraph 27 of schedule 1 of the Regulations. In any event, the petitioner had not provided the records sought for the fresh sampling exercise requested by the respondents.

[16] Senior counsel submitted that the key document in the case was the letter dated 15 October 2015, and that in particular the schedule therein demonstrated that the respondents had, in the words of senior counsel, "grappled with the material" which had been submitted by the petitioner in her review of the record cards. It was patent from consideration of the schedule that the material contained in that review had indeed been considered, notwithstanding the sentence in the letter which stated expressly that "The schedule was not designed to take account of the record card review which you carried out." Senior counsel in advancing this submission appeared to regret the presence of that sentence within the letter which, I understood him to accept, lay in plain contradiction to the submission advanced by him on behalf of the respondents. Senior counsel proceeded to submit that the petitioner's response, onerous and wide ranging as it was, had not shaken the conclusion of the respondents that there had been significant mis-claiming, and in which exercise the respondents had followed their clear and established method of pursuing such enquiries by means of sampling. That exercise practically involved the recovery of sample records and thereafter the undertaking of an analysis of these records. It was accepted by senior counsel that this was indeed an extrapolation exercise, but he submitted that this involved the drawing of an inference which was a reasonable one in all circumstances. The respondents uniformly applied the principle of sampling in their adopted methodology. The samples having been recovered and interrogated, it was the respondents' practice to meet with the practitioner involved and to give that practitioner an opportunity to respond; thereafter to "grapple with" the practitioner's response; and, thereafter, as here, to request,

if appropriate, a further sample. This was a reasonable and rational approach which was entirely within the remit set down in the Regulations for the respondents in respect of the investigation and recovery of potential overpayments.

[17] Senior counsel submitted that where a public body such as the respondents made factual findings, the court must defer to some extent to the integrity of the system which that public body had in place unless it was patently, grossly or obviously irrational. Senior counsel indicated that he had no difficulty with the canons of construction referred to and founded upon by counsel for the petitioner in respect of the terms of regulation 25 of the Regulations, but submitted that Parliament had provided a reasonable degree of discretionary authority to the respondents in respect of the fact finding aspect of the task which they had been charged with, as was reflected in the word "considers" which features in the preamble of regulation 25. In considering that sums were due, the respondents directed themselves by a process of sampling and of entering into a dialogue with the practitioner which itself gave the practitioner an opportunity to demonstrate that the inference drawn by the sampling exercise was not justified. In the present circumstances the respondents had rationally reached a point where they had been factually satisfied that their own assessment of overpayment was correct. A rational process had accordingly been followed leading to the figure founded upon by the respondents in the schedule annexed to the letter of 15 October 2015. In such circumstances the respondents were obliged to recover that figure as a debt, using the mechanism of withholding a certain deduction as a set off figure against fresh payments to the petitioner. The respondents had accordingly correctly directed themselves as a matter of law on the terms of regulation 25 and had further conducted themselves rationally, fairly and in a manner proportionate to the issue engaged, which was of course here the matter of feeing anomalies.

[18] Senior counsel further submitted, in any event, that the challenge to the letter of 11 January 2017 in the instant petition could not open up the respondents' earlier decision of 22 May 2015 regarding the total sum which required to be repaid, albeit, senior counsel observed, it was perhaps the letter of 15 October 2015 which was the real subject of challenge in the instant petition. These earlier letters represented the substantive decision which the petitioner was in effect seeking to challenge by way of these proceedings, and there was an onus on the petitioner to bring proceedings quickly against a public body. The petitioner was accordingly using the vehicle of an ancillary decision related to the monthly set-off payments to challenge the substantial decision making exercise which had been carried out in the earlier correspondence. In advancing these submissions, senior counsel referred to *De Smith's Judicial Review,* 7th Edition, at paragraph 3-026 and to the dicta of Collins J in *R* v *Secretary of State for Education* [2001] ELR 333 at paragraphs 55 to 58. Senior counsel made further reference in passing to *McDonnell's (Mary) Application* [2007] NIQB 125 and *London Borough of Lambeth* v *Secretary of State for Work and Pensions* [2005] EWHC 637 (Admin).

[19] Returning, in closing his submissions, to the core question which he had posed at the outset, senior counsel for the respondents submitted on the challenge of rationality that this could not be said to be a decision which no reasonable decision maker could have reached. The respondents were a government department charged to make certain findings in respect of regulation 25 of the Regulations, and the word "considers" was all important in determining the challenge advanced for the petitioner in this case. A certain level of restraint required to be adopted when considering that challenge, and it could not be said that the approach of the respondents was in any sense an absurd one. An amount of technical knowledge and experience could be attributed to the respondents as they carried

out their task of assessing claims and a degree of deference to the judgment of the decision maker ought to be adopted by the court in the exercise of its supervisory jurisdiction. This was not, in any event, a merits-based examination of the respondents' conduct, and at all times the court should be examining this said underlying question by reference to the rationality or otherwise of the methodology adopted by the respondents. In advancing these submissions, senior counsel referred to *Clyde, Judicial Review,* at paragraph 9.04 and paragraphs 21.02 to 21.11.

Discussion and decision

[20] On the antecedent question of which document in the decision making chain referred to in the agreed factual background could or should have properly been the subject of challenge by the petitioner in this case, I have come without difficulty to the view that the wording of the earlier correspondence was sufficiently open ended in terms of its lack of finality that the petitioner could properly have chosen any regulation 25 letter subsequent to that earlier correspondence to have been the subject of her challenge. In any event, the letter of 11 January 2017 can easily be characterised as a reviewable decision. Further, I was not clear, having heard this chapter of the submissions of senior counsel for the respondents, which document he was actually identifying as more properly being the subject of challenge, and although the point made by him in respect of the desirability of an early challenge was a sound one, the gap in time between the letter of October 2015 and early January 2017 was not in my view a relevant or material one in the whole circumstances. Finally, on this preliminary question of timing, I have chosen to allow all the matters of substance raised in the discussion before the court to be ventilated and determined in view of what I was told

by counsel about the importance of the construction of regulation 25 of the Regulations to both parties to these proceedings.

[21] Turning to the submission advanced on behalf of the respondents to the effect that the schedular material annexed to their letter of 15 October 2015 demonstrated a "grappling" or engagement with the extensive review put forward by the petitioner, I was not persuaded from the documentation produced that this was indeed the case. By way of illustration, and on closer inspection of the documentation produced in the schedules annexed to the letter of 15 October 2015, in schedule 3 the item described as "extensive clinical exam" (presumably, "examination") categorised as item 1(b) in the schedule disclosed a review by the petitioner of 1,086 items with total fees claimed under that item code of £13,112.47, with 144 being the number of invalid claims identified by the petitioner and a consequent figure of £1,738.21 identified by the petitioner as an invalid recovery. On examination of the respondents' engagement with this material disclosed on production 15/6, it appears that only five of those 1,086 items reviewed by the petitioner were actually reviewed by the respondents. The consequence is, on this illustration alone, that a substantial component of the overpayment element which the respondents have sought to recover, certainly under this single head a figure of over £10,000, has been based only on their examination of five samples. I do not consider this to represent a proper engagement with the review requested by the respondents of the petitioner and duly undertaken by her. This simple exercise on item 1(b) makes it clear that the respondents have not engaged at all with the review undertaken by the petitioner and have instead proceeded to draw their own inferences from their original pre-August 2013 sampling exercise. It is difficult to see how any sound conclusions can be based on such a minimal sampling exercise coupled with what appears to be a wholesale disengagement with the

petitioner's own review. I consider that this exercise illustrates further that the respondents have erred materially in their understanding and working out in practice in this case of their obligations under regulation 25 of the Regulations.

[22] I turn now accordingly to consider the proper construction of regulation 25 of the Regulations. In doing this I consider the context to be of some significance, and I refer here to the overview of the system for dental remuneration in Scotland already discussed. As I understand matters the involvement of the respondents at the regulation 25 stage in this case falls after the approval and authorisation of the remuneration claims submitted by the petitioner, and that accordingly, such authorisation having been granted by the SDPB, the obligation in terms of regulation 23(4) upon the respondents is peremptory in its terms insofar as they are required to pay that remuneration, it having been authorised. In that context it is helpful to consider the proper construction of regulation 25. I am satisfied that one can consider it in terms of certain steps to be undertaken, viewed sequentially, namely (i) in the event that the SDPB, the Agency (here, the respondents) or a health board considers that there has been, in terms, an overpayment; *then* (ii) that body (here, the respondents) requires to draw this overpayment to the attention of the payee (the dental practitioner); and *then* (iii) the amount determined by that process to have been overpaid shall be recoverable as a debt. It is important to note the intermediate step (step (ii)) between the relevant body considering that it has made an overpayment (step (i)) and the determination that the amount overpaid shall be recoverable as a debt (step (iii)). That intermediate step is the drawing of the deemed overpayment to the attention of the practitioner, as occurred in the present case at the meeting in August 2013, which of course led to the petitioner's own review and in due course to the respondents' letter of 15 October 2015 and to the subsequent regulation 25 letters.

[23] Putting the matter plainly, in the circumstances of this case the respondents have conflated the first and third of these steps in terms of the sum to be recoverable under regulation 25, that is to say that they appear to have proceeded directly from a provisional situation where there might have been an overpayment to a final position in which a fixed debt was deemed by them to have been established, which debt could be recoverable by any lawful means. I base this construction on the plain wording of the regulation itself set against the overview set out *supra* regarding the overarching purpose of the recovery regime. It was not in these circumstances appropriate for the respondents to engage in an exercise of drawing inferences from the miniscule sampling undertaken by them in this case. In any event such a practice cannot be said to represent the meaningful engagement required of the respondents in terms of step (ii) in this process. In this case I have accordingly concluded that the respondents have proceeded upon an error of law in their direction to themselves of the proper construction of the regulation in question as applied by them in this particular case. While the respondents purported to undertake the intermediate step, they simply did not do so in a meaningful manner.

[24] Further, and in any event, the figure founded on by the respondents in the third and final step of construction and application of regulation 25 was based entirely on the sampling exercise which constituted their basis for consideration of a deemed overpayment in the first step. No explanation was given during the hearing before the court, save the assertion of "grappling", in respect of why the petitioner's own laborious and extensive review was simply discounted from consideration. The respondents were presented with the results of a review of 5,545 records and chose to dismiss this substantial corpus of results and instead to proceed on the basis of an extrapolation exercise based in turn on the results obtained from only 33 record cards. In my view, far from this being a rational approach, the

approach which ought to have been adopted by the respondents when confronted with results on the scale of the petitioner's review should have been, at the very least, to question their own sampling and extrapolation exercises. Instead, as the respondents expressly stated in their letter of 15 October 2015, with reference to the schedular material produced with that letter, "The schedule was not designed to take account of the record card review which you carried out."

[25] In these circumstances I have come to the view that the decision challenged has been based on a material error of law and, further, that the decision bears to be a patently irrational and unfair one which no reasonable decision maker, properly instructed, could have reached. I conclude therefore that in these circumstances and on those grounds decree of reduction should be granted as sought.

[26] Throughout this section of this opinion I have attempted to emphasise that these decisions on error of law and irrationality are based on the particular circumstances before the court in this case. In my view a methodology of sampling could well be characterisable as rational and in accordance with a proper construction and application of regulation 25. I have simply ruled that this was not the position in the circumstances arising in this case.

Disposal

[27] Having reached the view that reduction is appropriate on both grounds contended for on behalf of the petitioner, I accordingly sustain the second, third and fifth pleas-in-law for the petitioner and repel the fourth plea-in-law for the respondent. The expenses of the cause will be reserved meantime. Finally, I wish to thank counsel for their considerable assistance in this case and in particular for the clarity of their respective submissions to the court.