

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY CPNI
FOR JUDICIAL REVIEW (NO. 3)

AND

IN THE MATTER OF DECISIONS AND FAILURES OF THE
DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY
(AND THE MINISTER WITH RESPONSIBILITY FOR THE SAID
DEPARTMENT) AND THE HEALTH AND SOCIAL CARE BOARD

TREACY J

Background

[1] This is the third application by CPNI for judicial review of the actions of the Respondent Department (DHSSPS) and Board (HSBC). All relate to the duty of the Respondent to publish a Drug Tariff for Northern Ireland setting out the prices for drugs which are to be used to calculate payments to local pharmacists. This duty is contained in Reg9 of the Pharmaceutical Services Regulations (Northern Ireland) 1997 ("the 1997 Regulations") which provide as follows:

"Standards of, and payments for, drugs and appliances

9. - (1) For the purpose of enabling arrangements to be made for the provision of pharmaceutical services, the Department shall compile and publish a statement (in these Regulations referred to as "the Drug Tariff") which it may amend from time to time and which, subject to paragraph (2), shall include -

- (a) the list of appliances and in the case of a restricted availability appliance, the categories

of persons for whom or purposes for which the appliance is approved;

- (b) the list of chemical reagents;
- (c) the list of drugs for the time being approved by the Department for the purposes of Article 63 of the Order;
- (d) the prices on the basis of which the payment for drugs and appliances ordinarily supplied is to be calculated;
- (e) the method of calculating the payment for drugs not mentioned in the Drug Tariff;
- (f) the method of calculating the payment for containers and medicine measures;
- (g) the dispensing or other fees payable in respect of the supply of drugs and appliances, repeat dispensing services and of additional professional services;
- (h) arrangements for claiming fees, allowances and other remuneration for the provision of pharmaceutical services; and
- (i) the method by which a claim may be made for compensation for financial loss in respect of oxygen equipment.

(2) The Drug Tariff may state in respect of any specified fee falling within paragraph (1)(g), or any other specified fee, allowance or other remuneration in respect of the provision of pharmaceutical services by chemists, that the determining authority for that fee, allowance or other remuneration for those chemists is the Board, and in such a case paragraphs (4) and (5) shall apply.

(3) The prices referred to in paragraph (1)(d) may be fixed prices or may be subject to monthly or other periodical variations to be determined by reference to fluctuations in the cost of drugs and appliances.

(4) The Board shall consult the Local Pharmaceutical Committee before making any determination by virtue of paragraph (2).

(5) A determination made by the Board by virtue of paragraph (2) shall include the arrangements for claiming the specified fees, allowances or other remuneration, and shall be published by the Board in such manner as it thinks suitable for bringing the determination to the attention of the chemists in its area.

(6) A chemist shall supply, in response to a request from the Department, within 30 days of the notification of the request, any information which the Department may require for the purpose of conducting any enquiry into the prices, payments, fees, allowances and remuneration specified in paragraphs (1)(d) to (i)."

[2] In 1994 the Department agreed with the then Pharmaceutical Contractors Committee (PCC), the precursor to the present Applicant, that the Drug Tariff should follow the Scottish model which itself followed that published by the English Department of Health. In 2003 the English Department of Health used its reserve powers to establish from wholesalers the prices at which generic drugs were supplied to pharmacists in England, Scotland and Wales - but not in Northern Ireland, and new contractual arrangements were introduced in England in 2005. These incorporated reduced prices for generic drugs listed under 'Category M' of a revised Drugs Tariff which reflected reductions in prices payable for such drugs in the wholesale market. Similar arrangements were introduced in Scotland in 2006. The DHSSPS here continued its policy of following the Scottish Drugs Tariff in this jurisdiction, though it recognised that this model was not suitable for conditions in Northern Ireland and that use of that tariff had caused significant losses to pharmacists here. In 2007 the Department sought to remedy this by paying an agreed additional sum in excess of £6million to local pharmacists for the year 2006-07.

[3] By 2009 the Department had still not introduced a Drug Tariff appropriate to conditions in NI and had also failed to make compensatory payments for shortfalls in pharmacists' remuneration in the years following 2006/07. The PCC challenged this failure in the first judicial review in this series of cases. In his judgment in that case Morgan J (as he then was) found that the overriding objective of the statutory scheme was to ensure that pharmacists were fairly and reasonably remunerated in a timely fashion. He noted that it was common case between the parties that the Drug Tariff

introduced in 2006 did not achieve that objective. He found that when the Department encountered difficulty in agreeing a revised tariff it “had ceased work on trying to find a compensatory amount for the years 2007/2008 and 2008/2009” and appeared to have reached a view that it had no legal obligation to pay a compensatory amount designed to deliver the statutory objectives in those years. In these circumstances Morgan J found the Department was failing to comply with its statutory duty under Reg. 9 of the 1997 Regulations. He therefore made a declaration that the payment arrangements being maintained by the Department were unlawful [see Re Pharmaceutical Contractors Committee (NI) Ltd & Anor’s Application (2010) NIQB 3].

[4] Following the first judicial review the Department entered an interim agreement with the Applicant to make retrospective compensatory payments for the years 2007/08 to 2010/11 inclusive. The interim agreement was time limited until either a new Drug Tariff was in place or until 31 March 2011. A new Drug Tariff was introduced here with effect from 1 April 2011. This one was based on the English rather than the Scottish model and this tariff was challenged in a second judicial review which focused on the sufficiency of the evidence used to develop the tariff.

[5] In the second judicial review [see Re CPNI’s Application (2011) NIQB 132] it was established that the Department had engaged external consultants “Tribal” to advise on how best to develop a new Drug Tariff suitable for NI. Tribal recommended that they introduce a tariff based on the English model and that they undertake a ‘margins survey’ in NI to establish what level of profit pharmacists here are able to retain from the drugs they supply. Tribal recognised that there were limitations in this approach including the fact that part of the English Drug Tariff was based on limited information from four sources ‘which are not necessarily reflective of drug pricing throughout the market’, that pharmacists in England have additional sources of income available to them due to a new pharmacy contract which had no equivalent in NI, and that Tribal had limited information available to it about current profitability levels in NI so it had used old data from 2005/06 when developing its report.

[6] Despite the ‘health warning’ that came with Tribal’s report it was established that the Department never in fact conducted an up to date costs of service investigation (CoSI) to establish what it costs to run a pharmacy here; neither had it conducted a margins survey to establish what level of profit pharmacists here were able to retain from supplying drugs. Against this background the court stated “without this core information I consider that the Department failed in its basic duty to acquaint itself with relevant information” and concluded:

“I cannot see how any Regulator could be satisfied that its proposed regulatory instrument would achieve (the statutory) purposes when it had not collected the basic economic facts it needed to inform its decisions.”

[7] Both parties appealed this decision. On 7 December 2012, shortly before that appeal was to be heard, the parties signed an agreement for withdrawal of the appeal and cross-appeal with the following additional terms:

“DHSSPS/Board will provide an interim payment of £7m on a non-recurrent basis only for 2011-12. A further £6m to be paid in 2012-13 on a non-recurrent basis only on the completion of the data collection phase of the CoSI by October 2013.” (Clause 2)

The Department/Board would:

“adopt a collaborative approach to the COSI ... which will be conducted on the basis that all costs will be identified, starting from a “clean sheet” ... (Clause 4)

The Present Case

[8] In the present case the Applicant seeks an order of *certiorari* to quash a decision of the Respondent not to make interim payments to pharmacy owners in respect of the financial years 2013/14 and 2014/15, and of a further decision that it will conduct a cost of service enquiry (CoSI) unilaterally under its statutory powers. The Applicant also seeks declarations that the Department is failing to pay fair and reasonable remuneration to pharmacists within a reasonable time, and orders of *mandamus* compelling the Department to pay fair and reasonable remuneration, to make interim payments for the two financial years for which they have not been made and to complete the outstanding CoSI without delay and in compliance with the agreement dated 7 December 2012.

The Grounds upon which Relief is Sought

[9] The Applicant states:

“That the Respondent Department and Board are under an obligation to pay fair and reasonable remuneration to pharmacists and have failed to do so, particularly by deciding not to make interim payments to pharmacists for the two financial years from 2013-2015;

That the Applicant had a legitimate expectation that interim payments would continue beyond October 2013 in the event that the CoSI was not completed before that date and the Department and Board have unlawfully failed to meet that legitimate expectation;

That the Department and Board are under an obligation to inform themselves adequately of the cost of providing pharmacy services before determining what constitutes 'pay fair and reasonable remuneration', and that they have failed to do so by failing to complete a CoSI;

That the Department and Board entered a written agreement with the Applicant dated 7 December 2012 in which they agreed to carry out a CoSI collaboratively with the Applicant and they have failed to honour that agreement by deciding to conduct the CoSI unilaterally under statutory powers;

That the Department has failed to provide adequate reasons for its decisions to terminate interim payments and to conduct the CoSI unilaterally;

That the Department's position is so conspicuously unfair to the Applicant that it amounts to an abuse of power and/or is *Wednesbury* unreasonable."

The Applicant's Arguments

[10] Mr Scoffield QC on behalf of the Applicant argues that the decision of the Department to conduct a CoSI under its statutory powers 'and otherwise than in collaboration with the Applicant' is in breach of the agreement of 7 December 2012 and is 'likely to seriously undermine ...pharmacy owners' confidence in the CoSI'. He says the collaborative approach was particularly important to the Applicant because 'there were strong disagreements ... as to how to conduct certain investigations which were necessary to inform the Department's decision.' He describes:

- how the Department had 'bought into' the collaborative approach to quite a startling degree;
- how it had agreed that CPNI could contribute to the cost of the CoSI 'so that it had joint ownership of the project and was in a position, with the Department and the Board, of being the appointed expert's client';

- how ‘teams from CPNI and the Board’ worked together to draw up the terms of reference for the external expert;
- how CPNI representatives were to be part of a steering group ‘to guide the development and progress of the enquiry’;
- how the CPNI team was to participate in the appointment process for the external expert.

[11] This elaborate collaborative process was still ongoing in late October 2013 when it transpired that there was a problem with the appointment process that was beyond the control of any party, as a result of which no appointment could be made. On 12 September 2014 the Applicant was formally notified that the Minister had decided the CoSI should proceed under the Department’s statutory powers. This decision had been taken on 11 April 2014. A procurement process was then conducted by the Department and an external consultant was appointed “CPNI simply being informed after the event.”

[12] The Applicant complains that “CPNI is now merely to be represented on an expert group to inform the progress of the CoSI”. It is permitted to offer views but it is not an equal partner in the process and feels ‘the benefits of collaborative working have been lost.’ The Applicant contends that ‘abandonment of the collaborative approach’ is a breach of the agreement of 7 December 2012 and a breach of its substantive legitimate expectation that the collaborative approach would apply.

[13] The Applicant seeks interim payments for the two financial years from 2013-2015. It argues that the withholding of further interim payments is unfair because it was the intention of the agreement of 7 December 2012 that such payments would continue until at least the data collection phase of the CoSI had been completed. The Applicant asserts that it had a legitimate expectation that interim payments would continue. This expectation was derived from the letter and the spirit of the agreement. It further contends that the refusal to make any further interim payments is an abuse of power by the Minister in light of the previous conduct of his Department in relation to interim payments.

The Respondents’ Arguments

[14] In relation to the Applicant’s claim that the Department and Board have failed to pay fair and reasonable remuneration to pharmacists, particularly by refusing to make interim payments for the two financial years from 2013-2015, Mr McGleenan QC on behalf of the Respondents does not accept that the current arrangements are in fact failing to deliver fair and reasonable remuneration in accordance with the statutory objective. He states that emerging evidence held by the Department indicates that the profits

pharmacists are able to retain from the drugs they supply (RPP) are significantly higher than anticipated. He states:

“Since 2011, the annual budget had been calculated on the basis that it would deliver £16.5M of RPP. The Margin Survey shows that the true margin has been very substantially higher, namely: £27.75M (2011/12) and £32.6M (2012/13). The anticipated margin for 2013/14 is in the region of £28M.”

[15] He further states that the Minister has not in fact refused to make any further interim payments- rather he has deferred further consideration of this question until the results of the CoSI are available. This deferral is therefore only a temporary ‘holding position’ which will apply until the information gathering processes are completed and the Department can make its final, fully informed, decision on what the Drug Tariff will be going forward. When the time finally comes for that tariff to be struck the Department will still have an opportunity to make final adjustments to payments made or deferred during this temporary holding phase, in order to ensure that over the whole time span of the investigative process the statutory objectives of the Regulations will in fact have been achieved.

[16] In relation to the Applicant’s claim that it had a legitimate expectation that interim payments would continue in the event that the CoSI was not completed by October 2013 Mr McGleenan notes that such an expectation can only arise on foot of an unconditional promise which is ‘devoid of relevant qualification’ R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (2009) AC 453. He points out that the terms of the agreement the Applicant relies upon do not meet this threshold. Rather the agreement provided for two specific payments both of which were described as ‘non-recurrent’. He asserts that the terms of the agreement make it expressly clear that interim payments would not recur in future years and cannot be said to give rise to any legitimate expectation to the contrary.

[17] In relation to the claim that the decision to conduct a CoSI under the Department’s statutory authority was unlawful because it breached the agreement of 7 December 2012 and breached the Applicant’s legitimate expectation that the CoSI would be conducted collaboratively the Respondent asserts that the CoSI which is currently underway is in fact a collaborative exercise and does in fact satisfy the terms of the agreement. He states that at the time the December 2012 agreement was reached the parties had not fully defined what was meant by a ‘collaborative approach’ to the CoSI. He notes:

- that the current process is overseen by a steering group which is advised by an expert group that includes representatives of the Applicant;

- that the terms of reference of the independent expert appointed to conduct the CoSI follow those previously agreed with the Applicant; that the consultant who has been engaged is PWC - which had previously been retained by the Applicant to conduct a similar exercise;
- that the methodology for the CoSI will be devised by the consultant subject to ultimate agreement by the steering group and therefore will not be imposed or pre-determined by the Department.

For all these reasons the Respondent asserts that the current process ‘provides the Applicant with ample opportunity for collaboration’.

[18] The Respondent further asserts that even if the current process does depart from the collaborative approach, this is justified by the change of circumstances since 2012, including in particular the delay that occurred while efforts were made to organize a CoSI on a collaborative basis which met the demands of the Applicant. He asserts that the Minister had to strike a balance between the need to collaborate with the Applicant and the need to ‘get on with it’ and that ultimately, ‘the need for expediency prevailed’.

Discussion

[19] The Applicant’s main complaints are that the Department is failing to pay fair and reasonable remuneration to pharmacists within a reasonable time in particular by failing to make interim payments for the two financial years from 2013-2015.

[20] The evidence in relation to this claim is that the Department had made interim payments for the two previous years on foot of the agreement of 7 December 2012. That agreement provided:

“DHSSPS/Board will provide an interim payment of £7m on a non-recurrent basis only for 2011-12. A further £6m to be paid in 2012-13 on a non-recurrent basis only on the completion of the data collection phase of the COSI by October 2013.” (Clause 2)

[21] The Applicant places great emphasis on the fact that the 2012-13 payment was made by the Department despite the fact that the condition attached to that payment, namely that it should be paid ‘only on completion of the data collection phase of the COSI by October 2013’ was in the end waived by the Department and the payment was made even though the data collection stage of the CoSI had not been completed by the due date. Mr Scofield states that ‘it is in the light of that conduct (taken together with the agreement) that the applicant contends that a legitimate expectation of further interim payments (at least until the CoSI process was complete) arose.’

[22] The Department's explanation for the making of this payment is different. Mr McGleenan recognises that the Department had committed itself to making a second interim payment to the Applicant in the December 2012 agreement. The agreement did make this payment conditional upon completion of the first stage of the CoSI and this condition was not satisfied at the time the payment was made. He says the Department's decision to release the promised funds before fulfillment of the condition attached to their release 'related to the timing of payment and was not a fundamental change in the obligations it assumed'. He also stresses that the 2012 agreement to make interim payments was not linked to 'fair and reasonable remuneration'. Rather the purpose of it was to incentivize the Applicant to cooperate in the Margin Survey and the CoSI.

[23] The evidence of the Department in relation to these two payments was that their purpose was to 'incentivize' the Applicant to cooperate in the Department's information gathering processes in circumstances where CPNI had, to date, refused to participate in an up to date margins survey and had, in practice, done nothing to inform the Department about the current costs of running a pharmacy in Northern Ireland. After the 2012 agreement the Applicant did in fact participate in the margins survey and the information it has supplied since then has enabled the Department to establish that the profit margins being retained by pharmacists here are those indicated at para 14 above. Also since the agreement the Applicant did in fact take part in preparations for a 'collaborative' CoSI, albeit that these elaborate preparatory steps came to nothing in the end due to circumstances which, it is accepted, were beyond the control of any of the parties.

[24] It should be recalled that while public authorities have a duty to work collaboratively with stakeholders whose core interests are likely to be affected by the authority's regulatory activities, they have an equally pressing obligation to secure the best interests of the 'unrepresented public'- those people who are not at the negotiating table because they are not sufficiently cohesive or organized to get there, but who are also 'stakeholders' in the sense at least that they are the taxpayers who pay for the services professional groups deliver under arrangements with the State and they are also the end users of those services and so have a clear interest in both the quality and the cost of the services they receive. Departments conducting regulatory activities have an obligation to set procedures and processes which strike a fair balance between their obligations to receive and value the input of special interest groups and their overriding duty to secure the wider public interest by achieving value for money in the procurement of services for the public. Departments need to conduct themselves in a way that strikes a fair balance between these different types of stakeholders; they need to avoid giving any impression of allowing the 'tail' of any special interest group to wag the Departmental 'dog'. In the final analysis they must regulate and manage

services in a timely way which strikes a fair balance between the needs of all parties with an interest in the cost and quality of the public services we all rely upon.

Conclusion

[25] In my view there is no basis whatsoever upon which the Applicant can establish a legitimate expectation that interim payments would continue beyond 2012-13. The terms of the agreement itself are clear that these are two separate non-recurrent payments. By definition these payments are not to be repeated. In making the last payment before fulfillment of the condition attached to it, the Department was fulfilling the essence of an undertaking it had made. It was acting generously in accepting that the failure to get the information gathering stage of the CoSI completed was an event beyond the control of any party. To say that action changed the fundamental nature of the obligation the Department had committed itself to is to fly in the face of the clear terms of the agreement. There can be no legitimate expectation of continuing interim payments based on the December 2012 agreement because it contains no clear and unambiguous promise to make any such payments. On the contrary, the plain terms of the agreement show that the intention was to limit such payments to the two specified years and to make it clear that they will NOT recur after that time. I therefore find that the Department has no obligation to make any further interim payments to the Applicant under the agreement. Moreover, it is arguable that any commitment by the Department in a private agreement to refrain from using its statutory powers to conduct its business in the manner it believes best serves the public interest is liable to be challengeable on the basis that it would impose an unlawful fetter on its discretion as to how it should conduct its affairs in the future.

[26] In relation to the Applicant's complaint that the Department's decision to conduct the CoSI under its statutory powers is unlawful because it breaches the terms of the December 2012 agreement, I find that this complaint is unfounded. There is no definition in the 2012 document as what 'collaboration' should mean and I consider that the steps the Department has taken to secure the involvement and co-operation of the Applicant are more than adequate to establish that this CoSI has been run on a collaborative basis.

Far from failing to collaborate with this Applicant, the Department seems to have gone to extraordinary lengths to accommodate it and the current arrangements for conducting the CoSI appear to be entirely consistent with the fair treatment of a stakeholder in this type of process, as well as with the terms of the 2012 agreement itself. The Applicant's claim that its treatment by the Department has amounted to an abuse of power is simply untenable.

[27] In relation to the Applicant's claim for a declaration that the Department is failing to pay fair and reasonable remuneration to pharmacists

within a reasonable time, I find no evidence to support this suggestion. The Department has made interim payments to cushion pharmacists against the risk of under-remuneration occurring in the period up to the end of the financial year 2014-15. It has said it will make further such payments if these are found to be necessary in light of the outcomes of the Margins Survey and the CoSI. The Department has not therefore come to a concluded view on what the final level of remuneration will be. There is room for adjustment either by making further payments or by claw back of some payments already received by pharmacists, if such action is required by the full evidence and is permissible under the terms on which the particular payments were made. In these circumstances I find no basis for making the declaration sought.

[28] In relation to the delay in conducting the CoSI I find that while there has been delay in completing this exercise it has arisen from an excess of caution by the Department rather than any culpable lack of due diligence on its part. Moreover the delay has not caused any detriment to the Applicant which has been receiving precautionary interim payments while the information gathering is underway. In these circumstances I decline to make the declaration sought. Moreover I am satisfied that the Department now has sufficient evidence at its disposal to enable it to make lawfully the interim decisions which are the subject of the present challenge.

[29] I reject as wholly unfounded the contention that the Department failed to provide adequate reasons for its decisions to terminate interim payments and to conduct the CoSI in the manner described above.

[30] For all these reasons I dismiss this application and award costs to the Department.