

Medical Performers List – Primary Health Lists: Law and Hearings



Doctors
Defence
Service

Medical Performers List Legal Advice

Doctors Defence Service advises and represents doctors in **Medical Performers List** proceedings in England and Wales. Medical Performers List law includes matters such as: contingent removal from the list, conditional inclusion on the list, suspension applications, general inclusion applications, applications to remove GPs and Ophthalmic Medical Practitioners from a Performers list.

Doctors Defence Service provides legal advice to doctors in relation to all aspects of Performance List law and First Tier and Upper Tier tribunal appeals, (and judicial reviews, where appropriate).

Below, you will find references to the main Medical Performance List, or Primary Health Lists, legislative materials, including statutory instruments, case law and NHS guidance notes.

Main Performer's List Legislation (NHS England):

The main legislative provisions relating to Primary Health Lists are contained in a statutory instrument called: [The National Health Service \(Performers Lists\) \(England\) Regulations 2013](#) – which sets out the procedures for:

- a) the investigation of concerns relating to performers;
- b) the suspension of a doctor from the list;
- c) the imposition of conditions;
- d) the inclusion and removal of performers.

The 2013 regulations replace the National Health Service (Performers Lists) (England) Regulations 2004.

An appeal from panel decisions now lies to the First Tier of the Care Standards Tribunal. Alternatively, there may be an issue that requires judicial review.

Read the [Performer List Policies and Procedures](#)

and [FAQs](#) (pdf) about process, and the [Toolkit](#) (pdf) for managing concerns. Further, see the [Performers List Process – Summary Document](#) (pdf), and the [Policy and Standard Operating Procedure](#) policy documentation.

For examples of cases, view: [Recent Tribunal Decision in Performers List Cases](#)

(See also our [National Disqualification Information Page](#) to read more about the procedure and the right of a doctor to challenge the PCT's application.)

Discrimination Claims against the NHS – Performers Lists

A claim for racial or other discrimination (such as sex discrimination, disability discrimination) against NHSE, in its operation of the Performers List, would likely fall to be lodged in the Employment Tribunal (ET).

In the case of [Michalak v General Medical Council and others \[2017\] UKSC 71](#) the UK Supreme Court determined (by agreement of the parties) that the General Medical Council (GMC) was a

qualifications body within s54. (November 2017). It went on to determine that the right of judicial review did not preclude a claim being lodged in the ET.

As the NHSE Performers List carries out similar functions to those of the GMC, in controlling which doctors can be on the list, and whether they should be removed from the list, or restricted in some way, the Supreme Court authority is of significant relevance and a persuasive precedent.

OLD LAW:

National Health Service (Performers Lists) Regulations SI 2004 No. 585 (Consolidated Provisions 2010) [View [Performers List Statutory Instrument](#) (External link)] Statutory procedure for doctors' cases in England: inclusion, suspension (for up to six months in most cases, with an extension beyond this being possible if approved by Family Health Services Appeal Authority (FHSAA)), contingent removal. A panel may also make a recommendation for a national disqualification order. The PCT must act to protect the public or otherwise act in the public interest. A suspension is a neutral act but should only be used where there is a case to answer, which includes there being compelling evidence of culpability, or seriously sub-standard performance or lack of competence. A suspension can be longer than six months where a regulatory or criminal body is investigating, or in cases where a decision has been made (to remove or contingently remove) and it is necessary to suspend, until an appeal is concluded. If the Trust does not apply for an extension to the FHSAA within the six months, the suspension lapses. A doctor may be permitted (by the panel Chair) to question witnesses and examine documents within suspension hearings and substantive hearings. However, the Malik judgment calls into question the appropriateness of this approach during interim hearings [18]. Further, in any appeal the FHSAA (with power to hold a full rehearing) is limited to the disposal powers that the PCT enjoys, and the FHSAA cannot

over-rule a mandatory ban or hear an appeal from a suspension. A judicial review of any unlawful decision may be made to the High Court, with permission.

National Health Service (NHS) (Performers Lists) (Wales) Regulations SI 2004 [View [Welsh Law Performers Statutory Instrument](#) (External Link)]. Statutory procedure for cases in Wales, with similar procedures to those in England.

See also: National Health Service (Performers Lists) Amendment Regulations 2010 (2010 No 412) [View [Performance List Amendments](#) (external link)]

A doctor who is included on the Performers List must still separately apply for a contract with a Trust. This is pursuant to the National Health Service (General Medical Services Contracts) Regulations 2004 (S.I. 2004/291) – where a doctor is suspended on an interim basis, a proportion of the doctors' remuneration will continue to be paid. A doctor (medical practitioner) cannot contract with the NHS unless on the Performers List.

See also Family Health Services Appeal Authority (Procedure) Rules 2001 [View [FHSAA Rules](#) (external link)] which govern the way the FHSAA must conduct itself in relation to matters / appeals arising from Performance Lists hearings. See section 49M of the National Health Service Act 1977. [View [NHS Act 1977](#) (external link)] See also: [The Family Health Services Appeal Authority \(Procedure\) \(Amendment\) Rules 2002](#) The FHSAA responsibilities have subsequently been transferred to the tribunal service: [The Tribunal Procedure \(First-tier Tribunal\) \(Health, Education and Social Care Chamber\) Rules 2008 – SI 2699/2008 with amendments made by S.I. 2009/1975](#) and further [Consolidated Procedural Rules \(2012\)](#).

Guidance Notes:

(1) The NHS has produced some guidance notes. Beware that they precede some of the more recent legislative amendments.

Nevertheless, much of the commentary remains relevant to current Performers List hearings.

(2) The NHS has also produced further guidance notes to accompany the 2008 amendments, which mostly cover the the addition of ophthalmic medical practitioners to the performance lists. Note that the 2010 and other amendments may have made some modifications.

Case Law:

Relevant Case law (judicial review challenges brought by doctors and Trusts):

Waltham Forest PCT and Secretary of State for Health v R (Malik) CA [2007] EWCA Civ 265 [View [Full Law Report](#) (External Link)] Appeal Case – This case determined that being on a list is not a Article 1 Protocol 1 Human Rights Convention possession and therefore not a protected right. The case did not determine the lawfulness of the Performers List revocation procedure adopted by the Trust, as the Trust conceded that the first instance decision (in the doctor's favour) should stand.

R (Malik) v Waltham Forest PCT & Secretary of State for Health (interested party) [2006] EWHC 487 (Admin) [View [Full Law Report](#) (External Link)] – This case determined that the Trust acted unlawfully in its approach toward the doctor. Principally, a Trust, if it makes a procedural decision (relating to a suspension) that is wrong in law, cannot impose a suspension of greater than six months, cumulatively. Also, it was not permissible to rely on new allegations at an interim hearing where there had been no prior notice. These matters should have been excluded by the Chair but they were not excluded and appeared to have been taken into account by the panel. [JR was held to be the appropriate way to challenge a decision of such a panel, and not a Part 8 application. Also, judicial doubt expressed that Article 6 covers Performer

List interim orders because such hearings are not determinative of a doctor's rights, as it is not a final order, and the doctor continues to receive remuneration. But: cf. subsequent judgments (such as Wright and Secretary for Health (POVA)].

R (SS) v Knowsley NHS Primary Care Trust (Defendant) The Secretary of State for Health (Interested party) and R (Ghosh) v Northumberland NHS Care Trust (Defendant) The Secretary of State for Health (Interested party) [2005] EWHC 2830 (Admin) [View [Full Law Report](#) (External Link)]

View: [Recent Tribunal Decision in Performers List Cases](#)

For more information about Doctors Defence Service **Performance List legal representation**, contact us to speak to one of our specialist lawyers. Telephone: **0800 10 88 739**

Footnote:

***Lawyers can attend with a doctor, to assist and advise them but may not make representations (according to guidance issued by the Department of Health). However, these guidelines have been considered in Knowsley and in certain circumstances it may well be that the guidelines must be read down to enable a fair process.**

Permission to use a lawyer for making representations, where a doctor is not a member of a medical defence organisation, is usually required. The case law is not particularly clear as to the precise circumstances when a lawyer may be permitted to represent a doctor. In Malik it was said that "fairness will only require the more formal trappings of legal representation and cross

examination in very exceptional cases” [18.]. Trusts frequently instruct lawyers to represent them at Performers List hearings and it is obvious for a doctor to have ‘equality of arms’ (a ECHR convention principle of a fair hearing) that a doctor should be granted permission to be represented by a lawyer. The case law on point is somewhat vague and the statutory legislation talks in terms of medical defence organisations who send lawyers, and friends of doctors who are lawyers that attend. See Kulkarni v Milton Keynes Hospital NHS Foundation Trust [2009] EWCA Civ 789 [View [Full Law Report](#) (External Link)] (July 2009) for possible persuasive authority for when a lawyer may present a doctor’s case – albeit the case interprets other legislation with similar wording. See our [employment law cases](#) page for additional information.] A number of Trusts permit each year a number of doctors to take independent lawyers to Performance List hearings and to make representations. A doctor should also ask whether the Trust is being represented by a lawyer, as this is often the case and a doctor should be given the same opportunity. Even where a Trust does not permit a doctor to be represented, however, Doctors Defence Service can nevertheless advise doctors on procedure and evidence and how to best present their cases themselves or with the assistance of a friend.