

APPEALS IN CONSULTANT JOB PLANNING AND PAY PROGRESSION DISPUTES

MODEL PROTOCOL



An agreement between:
Office of the Strategic Health Authorities
British Medical Association
British Dental Association

Supported by:
Consultant Contract Implementation Team, NHS Modernisation Agency


Modernisation Agency

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Introduction

1. Schedule 4 of the Terms and Conditions of Service (T&Cs) makes provision for a formal appeal in the event that a consultant is not satisfied with the outcome of a mediation procedure in job planning and pay progression disputes. The Heads of Agreement (July 2003, paragraph 10) required that the appeals process should be fair and balanced. This Model Protocol agreed between the SHAs, BMA and BDA and supported by the Consultant Contract Implementation Team (CCIT), sets out a recommended protocol to achieve such fairness in appeals. This protocol should be read in conjunction with the detailed provisions of Schedule 4 of the T&Cs.
2. A formal appeal panel will be convened only where it has not been possible to resolve the disagreement using the mediation process. A formal appeal will be heard by a panel under the procedure set out in the T&Cs and should take into account the guidance set out below.
3. An appeal shall be lodged in writing to the Chief Executive within two weeks of the date of the letter notifying the consultant of the outcome of the mediation process. The letter of appeal should set out the points in dispute and the reasons for the appeal, together with an indication of the desired outcome. The Chief Executive will, on receipt of a written appeal, arrange for an appeal panel to be convened, to meet within four weeks of receipt of the appeal letter.

The appeal panel

4. The appeal panel shall comprise three members, reflecting a balance of interests as follows:
 - a **chair** nominated by the appellant's employing organisation
 - a **panel member** nominated by the consultant
 - an **independent third member** chosen from a list of individuals approved by the Strategic Health Authority and the BMA and BDA

No member of the panel should have previously been involved in the dispute. To ensure probity and to avoid the perception of any conflict of interest, the appeal panel shall not include any individual who may stand to benefit personally from the outcome of the appeal. For example, the spouse or partner of the appellant consultant, or a colleague in the same department who may benefit from the decision of the panel.

(i) The panel Chair

The employer is responsible for nominating the Chair of the panel. It is anticipated that this role would normally be undertaken by a senior person such as a non-executive director of the trust.

(ii) The panel member nominated by the consultant

The consultant is responsible for nominating the second panel member. The local negotiating committee may elect to hold a list of suitable panel members from which the consultant may choose. Alternatively, the consultant can nominate an individual of their own choice.

(iii) The independent third panel member

The Strategic Health Authority will provide the name of the third panel member from a list of individuals jointly approved by the SHA and the BMA and BDA.

5. In the event of an objection raised by either the consultant or the employing organisation to the independent third panel member, the SHA will arrange for an alternative nominee to be allocated from the approved list. Any objection should be made in writing and supported by an explanation of the grounds of the objection, which will be kept on record.

Clinical academic consultants

6. The appeals panel constitution for clinical academic staff is as set out in Annex B to the Honorary Consultant Contract (England), December 2003.

Approving the list of 3rd panel members

7. In order for fairness and balance to be achieved, the third panel member must be regarded by both parties to the appeal as independent and impartial. This should help to ensure that both parties accept the appeal outcome as a final resolution to the dispute, notwithstanding that the final decision rests with the Board of the employing organisation. The appointment process for the third member therefore needs to be seen to be fair.
8. The Strategic Health Authority and the BMA/BDA will nominate individuals for the lists (see paragraph 9 below) to be held by the SHA. Either party will have the right to reject names put forward by the other party. Where a name is rejected, sound reasons must be supplied. If the SHA and BMA/BDA locally are unable to agree a list, or have insufficient names to put forward for appeals, they may draw upon the approved list held by a neighbouring SHA.
9. There shall be four separate lists to be held by the SHA, for appeals by:
 - NHS consultants (other than public health consultants)
 - Dental consultants
 - Public health consultants
 - Clinical academic staff

There is no reason why individuals cannot by agreement be included on more than one of these lists.

10. Each list should consist of equal numbers of names put forward by the SHA and BMA/BDA. The Strategic Health Authority will monitor the way in which individuals on this list are allocated to appeal panels, to avoid particular individuals being routinely called upon and to ensure a fair and balanced selection process. To ensure equity, SHAs will draw names from the lists randomly. The lists of individuals will be regularly reviewed.
11. In nominating panel members for the approved lists, the SHA and BMA/BDA shall consider the key attributes of independence and impartiality required of such nominees. Panel members might be individuals already engaged in analysis and decision making in separate but related NHS fields such as:
 - Members of dispute, grievance and disciplinary panels
 - Members of inquiry and senior interview panels
 - Complaints convenors and assessors (e.g. for the NCAA)

This is an illustrative rather than exhaustive list and should not be seen to exclude particular groups of potential nominees. For example, many consultants and NHS senior managers will equally possess the proven skills to help consultants and employers achieve resolution. It is anticipated that the names of many suitable people will already be known to SHAs, the BMA and BDA locally.

12. The BMA/BDA will determine via their local offices/regional committees the routes for putting forward nominees to the approved lists. This nomination mechanism will differ for the different lists above. SHAs may wish to obtain from trusts and PCTs additional names for joint consideration and incorporation in the lists.

National NHS employers

13. There are a number of employers of consultants that fall outside the purview of the SHA structure, for example the Health Protection Agency and National Blood Authority. For these and similar organisations, the third panel member will be chosen from the appropriate list of the SHA in the area where the consultant is located geographically. SHAs should, wherever possible, seek nominations from such employers for the list of third panel members.

The process

14. The Chief Executive will confirm in writing to the appellant consultant and Medical Director (or other nominated representative of the employing organisation) the membership of the appeal panel and hearing date, and will invite the parties to submit their written statements of case. The parties to the appeal will submit their written statements of case to the appeal panel and to the other party, to be received no later than one week before the appeal hearing. The appeal panel will hear verbal submissions on the day of the hearing. Management will present its case first explaining the position on the Job Plan, or the reasons for deciding that the criteria for a pay threshold have not been met.
15. The consultant may present his or her own case in person, or be assisted by a work colleague or trade union or professional organisation representative, but legal representatives acting in a professional capacity are not permitted.
16. Where the consultant, the employer or the panel requires it, the appeals panel may hear additional expert advice on matters specific to a specialty. The consultant or employer, as appropriate, shall be responsible for arranging the attendance of their expert witness on the day of the appeal hearing. The relevant employing organisation shall pay the reasonable travel and subsistence expenses of any such expert witnesses. Unavailability of a witness will not ordinarily be treated as sufficient reason (subject to the provisions of paragraph 17 below) for delaying or adjourning proceedings.
17. It is expected that the appeal hearing will last no more than one day. However, the Chair will have discretion to adjourn the appeal hearing in order to call on expert advice where the panel requests such expert advice prior to making their decision, or for any other reason that, in the Chair's opinion, would facilitate a full and fair hearing of the issues.
18. The appeal panel will make a recommendation on the matter in dispute in writing to the board of the employing organisation, normally within two weeks of the appeal having been heard. This recommendation will normally be accepted. The parties to the appeal will receive a copy of the recommendation when it is sent to the Board. The Board will make the final decision at their first available opportunity (*normally the next Board meeting*) and will inform the parties in writing of their decision.
19. Group appeals are admissible under this protocol, by prior agreement between the employing organisation and consultants concerned.
20. The recommendation of an appeal panel in a particular case will not set a precedent unless the relevant parties locally agree otherwise.
21. No disputed element of the Job Plan will be implemented until confirmed by the outcome of the appeals process. Any decision that affects the salary or pay of the consultant will have effect from the date on which the consultant referred the matter to mediation or from the time he or she would otherwise have received a change in salary, if earlier.

Appeals in consultant job planning and pay progression disputes - model protocol

22. If a non-executive director has been involved in the mediation stage (normally for a medical director or director of public health), they shall not take part in any subsequent appeal. Any board member involved in the mediation or appeals process for a particular case should not participate in the board's subsequent consideration of the appeal outcome for that particular case.

Agreed document bundle

23. The BMA/BDA and CCIT will work together to establish an agreed bundle of documents (e.g. contract, terms and conditions of service, relevant guidance) to be offered to all appeal panels. This is intended to reduce duplication of workload at a local level. This will not preclude either party to the appeal submitting further evidence.

Induction and training

24. SHAs, the BMA, BDA and the CCIT will work jointly to ensure the provision of induction and training for appeal panel members. Training will focus initially on the lists of third panel members.

Time off and expenses for appeals

25. For those members of panels employed in the NHS, SHAs will write to relevant chief executives requesting that reasonable time off be given for preparation and participation in appeals.
26. The relevant employing organisation shall pay the reasonable travel and subsistence expenses of panel members.

Review

27. Each SHA will monitor the selection of names from the list of third panel members to ensure an appropriate balance is maintained. These details will be shared with the BMA/BDA. The list itself will be reviewed regularly.
28. The operation of the appeals process as a whole will be reviewed by SHAs, the BMA/BDA and CCIT in October 2004 and, subject to the conclusions at that point, again after a further six or twelve months.

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