

Junior doctor banding appeals

Good practice guidance for junior doctors and employers

This paper seeks to offer good practice guidance in the management of appeals from junior doctors against banding decisions made by their employers. An appeal which encompassed the requirements of the Terms and Conditions of Service (TCS) while not following this guidance to the letter would not be invalid, but we would recommend that employers follow the process as set out herein.

As a general rule the management of appeals will be contained within the employing authority.

A banding appeal is a formal process under the TCS for use where there is a dispute between the junior doctors and their employer over the correct banding of a rota (theoretical and/or monitored). An appeal should only be convened if informal discussions between the junior doctors and the employer have not resolved the issue to the satisfaction of either the junior doctors or the employer.

Process once an appeal has formally been requested

Under the TCS, an appeal must be convened as soon as possible and preferably whilst the doctors concerned are still in post. It is the responsibility of the employer to convene the appeal and to run the process fairly and transparently.

Appeal date

Members of the panel should be given adequate notice of the date of the appeal. In particular, the BMA representative may need to give several weeks' notice of the date of the appeal to their own employer in order to get the necessary time off to attend. Where the junior doctors have involved the BMA, local BMA staff will contact the relevant Junior Doctors Committee (JDC) to nominate a representative for the panel. In cases where the BMA is not involved, the employer should contact the relevant JDC office to nominate the representative.

A minimum of four hours should be set aside for the whole process, though employers should allow a whole day if the case is particularly complex.

Membership of panel

The TCS lists the five members of the appeal panel:

- two representatives of the employing authority nominated by the chief executive or medical director of the employing authority (one of whom shall chair the panel)
- a representative from the StR, SpR, or Foundation grades from the same employing authority conversant with the working arrangements applicable to the case
- a representative from a regional list supplied by the relevant BMA Junior Doctors Committee
- an independent external assessor*.

Panel members should regard themselves simply as nominees rather than representatives of the nominating body. No member of the panel should have had involvement in the case prior to the appeal hearing or should stand to gain personally from the outcome of the appeal. It is the employer's responsibility to nominate two representatives and nominate an independent external assessor. It is the BMA's responsibility to supply a JDC representative.

The independent external assessor and junior doctor representative should be appointed by mutual agreement between the parties.

* In Northern Ireland, the independent external assessor will be a member either of the Board Liaison Group team or of its subgroup.

The employing authority should also appoint a secretary to take notes of the discussions on the day, but he or she may not influence or participate in the panel's decision-making.

Documentation

Both parties should have adequate time to prepare statements of case which set out their supporting arguments. These should be exchanged at the same time and circulated to all panel members at least ten working days before the date of the appeal panel.

The employer shall supply panel members with the relevant supporting documentation, which may include:

- the relevant extracts of the TCS
- the national monitoring guidance
- the national rebanding protocol
- AL(MD) 1/2001 (or its equivalent in the devolved administrations)
- other relevant health circulars, ALs, nationally agreed letters of clarification from the DH/NHS Employers.

Employers should circulate all documentation to panel members a minimum of ten working days in advance of the appeal hearing to allow time to read what are often quite lengthy and complex documents. Where a dispute relates to the outcome of a monitoring session, copies of the raw data and any reports generated by monitoring software should be supplied to the panel.

There will be occasions where new evidence comes to light shortly before the appeal is heard. Such evidence may be included in the presentation of the statement of case, at the discretion of the appeals panel on the day. An adjournment may be necessary for all parties to consider any additional evidence.

Status of previous appeal decisions

Individual appeal outcomes do not set legal precedent and the panel must assess each case on its particular merits. However, at the pre-hearing stage, either party may find it useful to refer to previous appeal decisions.

Role of panel at the hearing

The panel should listen carefully to both parties' presentations of their case and put aside any pre-conceived ideas about the dispute. The appeal should be judged on the basis of fact and what is explicit within the Terms and Conditions of Service and any nationally agreed guidance. Where there is ambiguity within the documentation it is the responsibility of the panel to form an opinion as to the best course of action.

The TCS allows for the appeal panel to make one of the following decisions:

- To confirm the junior doctors' position and recommend reimbursement of salary backdated in line with the provisions of paragraph 21 of the Terms and Conditions of Service.
- To confirm the employer's position.
- To replace either position with a new decision which, in the opinion of the appeals panel, is in strict accordance with the Terms and Conditions of Service.

Process during hearing

An agenda for the hearing should be agreed between the parties in advance. The following process should be followed:

1. The five members of the panel and the appeals secretary should meet briefly before the appeal starts to discuss any procedural issues.
2. Management and staff side should have designated private rooms available for private meetings that should be available at least 30 minutes prior to the start of the appeal. A waiting area may also be required for any witnesses.
3. The appellant(s) and their representative(s) as well as the management side representative join the appeal.
4. The staff side case (appellants) should be presented first. This can either be presented by the appellant(s) themselves or by their representative(s).

5. Staff side will have the opportunity to call witnesses with the management side and the appeal panel having the opportunity to cross examine those witnesses. Witnesses should only be present when required to give evidence.
6. Management side will then have the opportunity to ask questions of the staff side regarding points made in the staff side evidence.
7. The panel members may wish to ask questions at this point.
8. Management side will then present their case. This should be presented by the management representative
9. Management side will then have the opportunity to call witnesses. Staff side and the appeal panel will have the opportunity to cross examine those witnesses.
10. Staff side will then have the opportunity to ask questions of the management side regarding points made in their evidence.
11. The panel members may wish to ask questions at this point.
12. Management side will then sum up their case for the panel.
13. Staff side will issue the final summing up for the panel.
14. No new information/evidence is allowed to be presented at the summing up stage.
15. Members of the panel, through the chair may if necessary interject at any point to ask questions of either side or seek points of clarification within the evidence presented. This should be done appropriately so as not to disturb the flow of proceedings.
16. The panel will then consider their decision in private, with only the appeals secretary present. The appeals secretary may clarify points of process but is not permitted to participate in the deliberations.
17. If points of clarification are needed at this point both sides must be brought back into the hearing for clarification of the matter.
18. The decision of the appeals panel should then be verbally communicated on the day to both sides, clearly stating the decision of the panel based on the issues they have identified.
19. The chair of the panel must then issue a written verdict on behalf of the panel to both sides within seven days.

The panel should strive to make a decision on the day based on the information presented to them and on the Terms and Conditions of Service.

Expenses incurred by appeal panel members' attendance should be reimbursed by the employer within one calendar month of the date of any expense claim. Junior doctors involved in the appeal in any capacity should be allowed paid time off to attend the hearing.

Follow up to appeals panels

Both sides must abide by the decision of the appeals panel. Where this decision finds in favour of the junior doctors, back payment of salary shall take place in line with paragraph 21 of the Terms and Conditions of Service . Where the panel finds in favour of the employer, full repayment shall be sought of any overpayment of salary under such policies as are already in place with the employer or as shall be agreed between the parties in the absence of an explicit policy, by a date to be agreed within one calendar month of the panel's decision.

Summary

Appeals panels may seem like complex committees, however, with adequate information and support from the employer organising the appeal, we hope this guidance will help smooth the process leading up to, and during, an appeal and provide useful information to appeals panel members.

Frequently asked questions about banding appeals

1. What are appeals about?

A banding appeal is a formal process under the Terms and Conditions of Service (paragraph 22 l) for use where junior doctors do not agree with decisions concerning the banding of their rota made by their employing employer or regional improving doctors working lives action teams (or equivalent).

Appeals are formal procedures, which are part of the contract of employment of a doctor. Appeals are civil, not criminal procedures, so do not require legal representation on behalf of the respondent or appellant.

2. What kind of issues are people appealing against?

Appeals concern disputes over the banding of rotas. Usually but not exclusively these disputes fall into the following categories:

- a) Monitoring data
- b) Theoretical compliance
- c) Pay protection issues

3. Is the employer always the respondent?

It is usual for employer to be known as the respondent and the junior doctor(s) to be known as the appellant(s). The Terms and Conditions of Service (paragraph 22l) allow for either the employer or the doctor(s) to bring an appeal, therefore the employer could be the appellant rather than the respondent although this would be exceptional.

4. What decisions can the appeals panel make?

There are three potential outcomes of the panel:

- a) to accept the appellant's case
- b) to accept the respondent's case
- c) to reject both cases and replace them with a decision that is, in the opinion of the panel, correct in accordance with the Terms and Conditions of Service.

The outcome of an appeal should always comply with the Terms and Conditions of Service

It is good practice for appellants to be verbally told the decision of the panel on the day and written confirmation from the Chair of the panel to be received within seven days.

5. Who minutes the meetings?

In addition to the panel members, the employer should supply an appeals secretary whose function is to document minutes of the discussions on the day. The minute taker must play no part in the panel discussions.

6. To whom is the decision applied?

In almost all circumstances it is a rota that is being discussed rather than an individual doctor. The decision of the panel should be applied to all doctors on the rota, regardless of whether they were involved in bringing the appeal to the attention of the employer.