

GUIDANCE FOR THE HANDLING OF BANDING APPEALS BY HOST ORGANISATIONS AND LEAD EMPLOYERS IN THE NORTH WESTERN DEANERY

In line with the obligations of Host Organisation as stated in the Service Level Agreement between the North Western Deanery, Lead Employers and Host Organisations: The Host Organisation will “Ensure that the requirements of the ‘New Deal’ and the Working Time Regulations (WTR) applicable to trainee doctor hours are satisfied in respect of each trainee”.

INTRODUCTION

For the purpose of bandings appeals where reference is made to the responsibility of the employing authority in the terms and conditions of service section 22(I); this should be read as the responsibility of the Host Organisation meaning. The Host Organisation is responsible for the management and administration of banding appeals. The Host Organisation will provide regular updates to the Lead Employer on progress and outcomes at each stage of the appeal process.

The Junior Doctor Terms and Conditions of service provide the ability for a junior doctor to appeal against his/her banding supplement. Paragraph 22(I) of the Terms and Conditions of service reads as follows:

22(I). Where either the Host Trust or the practitioner rejects the opinion of the regional improving junior doctors working lives action team (or equivalent) in any case where there is a dispute regarding the allocation of posts to pay bands or in cases where the regional improving junior doctors working lives action team (or equivalent) finds it necessary to intervene, there is a right of appeal:

- i. Appeals shall be heard by a local committee that shall be convened as soon as possible and employing authorities shall be expected to do so while the practitioner remains in post;
- ii. The appeal panel shall be constituted of the following, none of whom shall have been involved in the earlier decision: 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 training grades from the same employing authority conversant with the working arrangements; a representative from a regional list supplied by the BMA's Junior Doctors Committee; an independent external assessor nominated by the regional improving junior doctors working lives action team (or equivalent).
- iii. Decisions of the appeals panel which confirm the appellant(s) had been underpaid shall lead to the practitioner(s) receiving appropriate reimbursement backdated to the date of change, or to 1st December 2000, whichever is applicable.
- iv. Decisions of the appeals panel which confirm the trust's original decision shall lead to the trust receiving appropriate reimbursement backdated to the date of the the change, or to 1st December 2000, whichever is

applicable.

GUIDANCE FOR BANDING APPEALS.

This guidance has been drafted to assist Host Organisations in the North Western Deanery and Lead Employers to ensure that all responsibilities for the banding appeal process are discharged accordingly. It should be read in conjunction with NHS Employers Guidance *appendix 1*. This protocol provides that:

1. Junior Doctors must notify their Host Organisation in writing of the banding claim.
2. The Host Organisation must immediately notify the Lead Employer of the banding claim and its decision on whether to pay the claim or proceed to appeal.
3. The Host Organisation is responsible for nominating an **Appeals Coordinator** who will, in the first instance, convene the banding appeal panel and who will subsequently administer the procedures and manage the process
4. The Host Organisation is responsible for informing the Post Graduate Dean of any breach of New Deal terms and conditions and/or Working Time Regulations (WTR) that have led to an appeal being lodged.
5. The **Appeals Coordinator** will:
 - Coordinate all panel nominations.
 - Arrange a hearing date mutually convenient to the Panel members as soon as possible from the date a banding claim is lodged and refuted by the Host Organisation.
 - Organise a venue for the appeal hearing. This should include a room for a pre-meeting of the panel (including any necessary refreshments) and a larger room if required to accommodate all parties involved in the appeal.
 - Obtain statements of case from both sides and ensure their exchange at least 10 working days prior to the meeting.
 - Ensure all administrative notifications and arrangements are made.
 - Attend the hearing to minute events or nominate as appropriate
 - Notify the Lead Employer in writing when the appeal date is agreed by all parties

6 The Panel

A Panel of five members, none of whom will have been involved with the claim previously or in the decision to dismiss the claim, will be constituted, as follows:

- *2 senior representatives nominated by the Chief Executive of the Host Organisation. One who will chair the panel, (there is no specific stipulation that they must be employees of the Host Organisation).*
- *A representative from the training grades from the same Host Organisation conversant with the working arrangements (i.e. familiar with shift working) and nominated by the Host Organisation.*

- *A representative from a regional list supplied by the BMA's National Junior Doctors Committee (JDC).*
- *An independent external assessor nominated by the regional improving junior doctors working lives action team (or equivalent). To be contacted via the North Western Deanery.*

In the interest of equity amongst the panel it is necessary that all members are conversant with the New Deal contract and the stipulations around working hours, rest and natural breaks. Junior doctors' hours and the New Deal contract are a complex and narrow area of expertise that cannot be assumed on the day without prior experience and/or training. Therefore careful consideration of panel members is required including representation of the Chief Executive or Medical Director. All JDC representatives will have undergone training to sit on banding appeals.

At a banding appeal the Trust case must be actively and clearly demonstrated (as this will be the basis of the staff side case as prepared by the BMA). The Host Organisation case must clearly demonstrate the reasons why no banding claim has been honoured and the panel convened. As much robust evidence as possible must be provided in the statement of case in a format that can be understood by a lay person and expert in New Deal and include the salient points of the decision not to pay additional supplement.

If necessary consider whether you require expert representation of your case in order to make effective argument on the day and be prepared to cross examine juniors during the appeal, based on the evidence supplied in the statement of case.

7 The Day of the Appeal

The format for the hearing is identified below, but upon agreement between management and staff side representatives and the panel, the format can be amended as deemed appropriate. Changes to the format can be discussed during a brief pre-meeting as arranged by the **Appeals Coordinator**.

The **Appeals Coordinator** or nominee will be in attendance at the banding appeal to record all notes and to advise the panel when written communication re outcome will be issued to the doctor(s).

- Introductions.
- Chair of the Panel will clarify the reason for the hearing.
- Staff side presents their case calling witnesses as appropriate.
- Management side (eg Service Manager or Clinical Director supported by Host Organisation Hours of Work Specialist) ask questions of staff side and their witnesses.
- The panel ask questions of staff side and their witnesses.
- Staff side may re-examine the case. At this stage, no new evidence can be produced.
- Management side presents their case, calling witnesses as appropriate.
- Staff side can ask questions of management side and their witnesses.

- i. The panel asks questions of Management side and their witnesses.
- j. The Management side may re-examine the case. At this stage, no new evidence can be introduced.
- k. Management side summarises their case. No new evidence can be introduced.
- l. Staff side summarises their case. No new evidence can be introduced.
- m. The panel adjourns to reach a resolution.
- n. The participants (excluding witnesses) reconvene to hear the decision presented by the chairperson of the banding panel.

8 Post Appeal Administration

After the appeal is heard the **Appeals Coordinator** at the Host Organisation will:

- Deal with the claiming and payment of expenses incurred by the panel within two months of the appeal.
- Take responsibility for formal notification of the outcome in writing (penned by the chair) to the staff side employees concerned within 7 days to allow for occurrences where a decision cannot be reached by the panel on the day of the appeal. A copy of this correspondence should be provided to the Lead Employer.

On receipt of authorisation from the **Host Organisation** to back pay/refund the appellants; the **Lead Employer** will process payment and make appropriate recharges.

Appendix 1 [NHSE guidance]

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, the employer and the regional improving junior doctors working lives action team (RAT) or equivalent have not resolved the issue to the satisfaction of either the junior doctors or the employer, and in particular where the opinion of the RAT or equivalent has been sought on any issue but either party does not accept its decision.

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 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 4 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, SHO or FHO 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 nominated by the regional improving junior doctors working lives action team (or equivalent).

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. As the TCS says it is the employer's responsibility to nominate two representatives, the BMA's responsibility to supply a JDC representative and the RAT or RAT-equivalent to nominate an independent external assessor. The junior doctor representative should be appointed by mutual agreement between the parties.

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 10 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 10 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 to the date of the disputed rebanding
- To confirm the employer's position
- To replace either position with a new decision this, 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 base 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 7 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 within one calendar month following the appeals panel date. 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 I) 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 22I) 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