

5. Overview of the disciplinary process, fitness to practise and interim suspension and disqualification

Introduction

- 5.1. Where sufficient evidence of professional misconduct exists, the Professional Conduct Committee, (the PCC) have the power to refer cases to a Disciplinary Tribunal or to the 'Determination by Consent' procedure to determine the outcome of the disciplinary case.

Determination by Consent

- 5.2. Under Regulation rE41 of the Complaints Regulations, the Professional Conduct Committee has the power to determine the outcome of a disciplinary case with the barristers consent. This is known as 'Determination by Consent' (DBC). Both the members of the Professional Conduct Department and the Committee can refer cases to the DBC procedure and it can be used for internal and external complaints. However, on the whole it is likely to be used predominately for internal complaints as it will be rare for the process to be suitable where a complainant is involved. It is designed to provide a more speedy resolution of straightforward cases without the need for a formal hearing.
- 5.3. The DBC procedure is set out in the Complaints Regulations section A5. For a case to be suitable for the DBC procedure, there should be no substantial disputes of fact and the breaches of the Handbook should not warrant a period of suspension from practice or disbarment. The barrister must consent to the process and if, at any stage, the barrister fails to respond, or a significant dispute of fact arises, the process will stop and the case will be referred to a Disciplinary Tribunal.
- 5.4. DBC cases are considered on the papers. Formal charges are served along with the supporting evidence and a statement of facts for agreement by the barrister. Once the facts have been agreed, a Case Officer will prepare a report for the Committee which includes a recommended outcome and sentence, if appropriate. This will be sent to a Case Examiner to consider and

present to the full Committee. The Committee can impose the following sentences in relation to professional misconduct:

- A fine of up to £50,000 (for acts or omissions that took place on or after 6 January 2014) A fine of up to £15,000 (for acts or omissions that took place on or after 31 March 2009) or up to £5,000 (for acts or omissions that took place prior to 31 March 2009);
- reprimand the barrister;
- order the barrister to attend on a nominated person to be reprimanded; and/or
- give the barrister advice as to future conduct.
- order the barrister to complete additional CPD requirements and to provide satisfactory proof of compliance

5.5. Where the Committee finds the charges proved or they are admitted, it will issue the final report with the findings and sentence. Where the barrister denies the charges but the Committee finds the charges proved, the case will be adjourned pending receipt of the barrister's mitigation. This will be added to the DBC report and the case referred back to the Committee for sentence.

Findings by the Committee have the same status as any other disciplinary finding and therefore the findings of professional misconduct will be posted on the website and disclosed on request to any person enquiring. The barrister will also be subject to further disciplinary action if he/she fails to comply with the sanctions ordered by the Committee.

5.6. If the DBC process breaks down for any reason, the case will be referred to a Disciplinary Tribunal as though the process had not taken place. This means that any agreement to the statement of facts cannot be referred to during the Tribunal process and any report prepared during the course of the DBC cannot be included in the bundle. Any party may refer at the Tribunal to the fact (if relevant) that the DBC procedure was previously used but the BSB cannot refer to the substance of the process or the circumstances of the procedure unless and until the barrister makes reference to it in the course of presenting his/her case (Regulation rE145).

Disciplinary Tribunals

5.7. Procedures for dealing with complaints referred to Disciplinary Tribunals are laid down in the Disciplinary Tribunal Regulations (Part 5 Section B of the Handbook).

Composition of the panels

5.8. Disciplinary Tribunals are composed of either three or five members. The process and powers of three and five person Tribunal panels are the same, except that a three member Tribunal cannot impose a suspension of longer than three months for conduct occurring before 6 January 2014 and 12 months for conduct occurring after that date or disbar a barrister. However, if a three member Tribunal believes that its sentencing powers are not sufficient, it can refer a case to a five person Tribunal for sentencing.

5.9. The Bar Tribunal and Adjudication Service is responsible for appointing lay and barrister members to a panel. Individuals are appointed to sit on a disciplinary tribunal under a convening order signed by the President of COIC. Three person panels normally consist of a Queen's Counsel as chair, a lay member and a practising barrister member. The President of COIC may direct that a three person panel is chaired by a Judge if the defendant is a QC or there is any other good reason to do so. The Professional Conduct Committee is able to make a recommendation to the President when it refers a case as to whether a three person panel should be chaired by a QC or a Judge. Five person panels consist of a Judge as Chair, two barrister members (at least one practising) and two lay members. No current member of a BSB or Bar Council Committee may sit on a Tribunal.

Overview of the stages of the Disciplinary Tribunal process

5.10. Set out below is an overview of the Disciplinary Tribunal process:

Stage 1 - serving the charges and the bundle of supporting documents

Stage 2 - agreeing and complying with the timetable for the case ("Directions phase")

Stage 3 - agreeing and confirming the date of the Disciplinary Tribunal hearing

Stage 4 - exchange of evidence including service of witness evidence

Stage 5 - the Disciplinary Tribunal.

Stage 1 - Service of the charges and bundle

- 5.11. After the Committee refers a case to a Disciplinary Tribunal, the file is passed to the Investigations and Hearings team and assigned to a Case Officer. In most cases a prosecutor will be appointed at this stage and will be responsible for advising on the final charges, the evidence, the bundle of documents and the proposed Directions. In some cases, where the matter is straightforward, such as charges arising from failures to pay administrative fines, the allocated Case Officer will prepare the case for Tribunal without reference to the prosecutor; although a prosecutor will be appointed to present the BSB case at the hearing.
- 5.12. The Regulations require that the charges must be served on the barrister within 10 weeks (or 5 weeks if the Committee decided the proceedings should be expedited) of the decision to refer the matter to a Disciplinary Tribunal.

Stage 2 - Directions

- 5.13. The Directions set a timetable for the tribunal procedure, such as the service of further documents, providing dates of availability for the hearing, witness requirements and the estimated length of the hearing. Standard Directions are used in most cases and a template is available at the end of this document (as set out at Annex 6 to the Disciplinary Tribunal Regulations). If standard directions are not suitable, special directions may be used: examples of special directions are found at rE107 of the Disciplinary Tribunal Regulations and include an application to stay the proceedings and an application for the tribunal to be held in private.
- 5.14. If the Directions are agreed they will be sent to BTAS to be put before a Directions Judge. If the barrister does not reply within 21 days of service, the Directions are deemed to apply and again they are sent to BTAS for the President to appoint a Directions Judge to consider whether to endorse the Directions. If Directions cannot be agreed the papers are sent to BTAS for

the President to appoint a Directions Judge to consider the matter and decide whether an oral hearing is necessary.

Stage 3 - Setting the date for the Tribunal hearing

5.15. Hearings are arranged by the Bar Tribunal and Adjudication Service either using the pre-booked hearing days or via a request for a specific date made by the BSB. If a pre-booked date is not suitable, the BSB will first ascertain the dates of availability of all the relevant parties including witnesses (a deadline for providing available dates is usually included in the Directions). Once a suitable date has been identified by the BSB, a request will be made of BTAS to convene a panel for that date. In some cases BTAS may be unable to find a QC or Judge who is available to Chair the Tribunal and /or Panel. This can cause delays and in some cases it may take a number of months to arrange a date on which all parties can attend.

Stage 4 – Exchange of evidence

5.16 The BSB will serve any further witness evidence as soon as practicable and in accordance with any Directions given. At the investigation stage, we will not necessarily take statements but if the BSB intends to rely on witness evidence at the hearing the Case Officer will normally arrange for any witness statements to be taken before service of the bundle. However, during the Directions stage it may become apparent that witnesses are required by the defence and further statements may need to be obtained.

Stage 5 - The Disciplinary Tribunal hearing (Regulations rE130-rE182)

5.17. The Disciplinary Tribunal Regulations stipulate the powers of the Disciplinary Tribunal panel but do not dictate specific procedures that should be followed at the hearing. On the whole the, manner in which the Tribunal is run is a matter for the Chair.

5.18. The Tribunal applies the criminal standard of proof (beyond reasonable doubt or satisfied so you are sure) when adjudicating upon charges of professional misconduct.

Sentencing Guidance

- 5.19. The Bar Tribunal and Adjudication Service has issued Guidance titled ‘Sentencing Guidance: Breaches of the Handbook’. This document provides comprehensive guidance on the application of sanctions and includes sentencing starting points for common breaches of the Code/Handbook. When a decision maker (such as the Committee or a Tribunal) is imposing a sentence, it should take into account the guidance and, if it departs from the guidance, it should provide clear reasons for doing so.

Fines

- 5.20. If a fine is imposed under the DBC procedure or at a Disciplinary Tribunal, it is normally payable within 28 days of receipt, subject to an order made by the Committee or a Tribunal at the time of the finding that more time should be allowed. Other than this, any representations from the barrister to request more time to pay will be considered by the Professional Conduct Department.

Fitness to Practise

- 5.21. The Fitness to Practise Regulations (Part 5 Section E of the Handbook) sets out the process to be followed where information is received that a barrister who holds a practising certificate may be unfit to practise. If information is received during the course of preparing for a Tribunal which raises concerns that a practising barrister is unfit to practise, it may be necessary to apply for a Direction, adjourning consideration of the disciplinary proceedings pending the outcome of any Fitness to practise proceedings.
- 5.22. If information is received about a practising barrister’s fitness to practise during the course of the Tribunal, the Prosecutor should refer the Tribunal to the guidance at section 7 of the Sentencing Guidance. If the Tribunal considers there are genuine concerns e.g. evidence of long term addiction or mental health problems which affects the barrister’s ability to practise the Tribunal should formally refer their concerns to the PCC and set out the concerns in writing to the PCC with the Chairman’s report.

- 5.23. The Fitness to Practise proceedings are not disciplinary and are run separately to any disciplinary proceedings. Prosecutors are not required to attend Fitness to Practise hearings.
- 5.24. Undertakings: where the PCD determines that there is evidence of ill-health, the option will always be available for the barrister to offer a voluntary undertaking not to practise pending a return to full health. Such undertakings must be given in writing and approved in writing by Experienced Members or an Office Holder of the PCC. If an undertaking is accepted, then the need for formal FTP proceedings will be obviated.
- 5.25. The barrister will be subject to a two-stage panel process; firstly, a Preliminary Hearing, and secondly, if necessary, a Full Hearing: both of which will be heard by a FTP Panel. Panels for the hearings are convened independently by the Bar Tribunals and Adjudication Service (BTAS) and will consist of five members: a QC Chair, two additional barristers (one being a QC), a medical expert, and a lay representative.
- 5.26. Hearings: hearings are relatively informal: the process being at the discretion of the Chair but governed by the rules of natural justice. The barrister is entitled to make submissions in writing or orally and can provide medical evidence in support of his or her position.
- 5.27. The FTP Panel of the Preliminary Hearing can give directions for a Full Hearing to take place and can require the barrister to undergo an independent medical examination or require that medical records should be released to the Full Hearing. The FTP Panel of the Preliminary Hearing can also suspend the barrister from practise, for the protection of the public, until the Full Hearing takes place, or may require the barrister to sign an undertaking not to practise until a final decision of the FTP Panel of the Full Hearing is known.
- 5.27. At the conclusion of a Full Hearing, the Panel can take no further action, allow the barrister to practise subject to conditions or indefinitely suspend the barrister for the protection of the public.

5.28. Appeals and Reviews: the barrister can request, following the imposition of a period of suspension, that a FTP Panel be convened to review any change in circumstances. The barrister is also entitled by right to appeal a FTP Panel's decision and appeals are heard by Review Panels, which are, again, appointed independently by BTAS. Review Panels consist of four members: two QCs, a medical member, and a lay member.

Interim suspension and disqualification

5.29. From time to time, although rarely, it may be necessary to suspend a regulated person for a temporary period from either practising or working in a chambers/entity.

5.30. The Interim Suspension and Disqualification Regulations can be found at Section D of the Enforcement Regulations (Part 5) of the BSB Handbook, which sets out the circumstances in which an interim suspension (or disqualification in relation to a relevant person¹) can be imposed and the procedure for so doing. The circumstances in which the Interim Suspension or Disqualification process can be invoked are where an authorised individual, or relevant person:

- a. Has been charged or convicted of a criminal offence; and/or,
- b. Is subject to a disciplinary finding for professional misconduct by another "approved regulator", which has resulted in a suspension from practise or the termination of his/her right to practise; and,
- c. The criminal charges/conviction or disciplinary findings warrant a referral by the BSB for professional misconduct to a Disciplinary Tribunal to protect the interests of clients (or former or potential clients).

5.31. Formal interim suspensions are very rare. The purpose of the Regulations is to prevent a barrister (or relevant persons) who may be a risk to the public continuing to practise pending the conclusion of criminal or disciplinary proceedings. However, in most cases the person concerned will be prepared to offer a voluntary undertaking not to practise and therefore formal proceedings are often not necessary.

¹ "Relevant Person" is defined at Part 6 of the BSB Handbook, however, in this context it will usually refer to an employee of a BSB authorised person.

- 5.32. Immediate Interim Suspensions or Disqualifications: From 6 January 2014, the Committee has the power to impose *immediate* Interim Suspensions or Disqualifications. It can only do so where the course of action is justified having considered the risk posed to the public if an interim suspension or disqualification were not imposed and having regard to the regulatory objectives. The imposition of an immediate suspension or a disqualification will be very rare and will only occur in exceptional circumstances.
- 5.33. Panels and hearings: Interim Suspension and Disqualification panels are appointed by BTAS, but even after referral, the barrister or relevant person has the option of voluntarily agreeing to be suspended from practise by putting this in writing to the Chair of the Professional Conduct Committee. If no such voluntary undertaking is given then the full process will continue with a formal hearing in front of a panel of five, consisting of three barrister members and two others, of whom at least one will be a lay member.
- 5.34. Hearings are informal and the process is at the discretion of the Chair of the panel subject to the rules of natural justice. The barrister can be represented and can make representations either orally or in writing. After hearing any submissions, the panel will consider:
- Where a conviction or disciplinary finding has caused the referral, whether a period of interim suspension/disqualification or interim prohibition from accepting or carrying out public access instructions or conducting litigation (where relevant) should be imposed.
 - Where a criminal charge has caused the referral, whether the barrister should be directed to notify his professional and lay clients of the criminal offence with which he/she has been charged before undertaking any work or, as the case may be, further work for any client.
- 5.35. Details of interim suspensions or disqualifications, including immediate suspensions imposed by the PCC, will be published on the BSB's website and also listed in the BSB's register of individuals subject to a disqualification order.

5.36. **Appeals:** the barrister or relevant person is entitled to appeal a Panel's decision and appeals are heard before an Appeal Panel. Additionally, the barrister can request, after a period of suspension or a prohibition has been imposed, that a Review Panel be convened where there has been a change in circumstances. It is then a matter for the President of COIC to decide whether the request for a panel to review the circumstances should be granted.