

8. Disciplinary Tribunal hearings

Nature of Disciplinary Tribunals

- 8.1. Disciplinary Tribunals of the Council of the Inns of Court are domestic non-statutory tribunals. As such, the proceedings are relatively informal. The strict rules of civil and criminal evidence do not apply although they are always used as a basis for deciding how to treat any evidential issues that arise. Tribunals are arranged by the Bar Tribunal and Adjudication Service (BTAS) and all forthcoming hearings are listed on the BTAS website tbtas.org.uk.
- 8.2. The Disciplinary Tribunal Regulations (Part 5 Section B of the Handbook) set out 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. Generally Tribunals follow a standard criminal trial process.

Standard of proof

- 8.3. The Tribunal applies the criminal standard of proof when adjudicating upon charges of professional misconduct and in deciding if the disqualification condition has been established.

Parties present at the hearing

- 8.4. The Panel and a clerk to the Tribunal are appointed with a convening order. The Chair usually asks all parties including the Panel members to briefly introduce themselves before the Tribunal starts.

Witnesses

- 8.5. Witnesses will give evidence in the normal manner, waiting outside the Tribunal room until such time as they are called. Most Tribunals take place in public and therefore witnesses are free to remain in the room at the conclusion of their evidence, unless the Chair directs otherwise.

Length of the Hearing

- 8.6. The time estimate for the length of the hearing is usually set at the Directions stage. Generally, the time estimates are fairly accurate, as with any case, however, the Tribunal may run over. Subject to the provisions of rE154 the Tribunal must sit from day to day until it has made a finding and if any charge or application is proved until sentence has been pronounced. Panels may sit into the evening when it is considered necessary to recover time or conclude a case but Chairs are asked to bear in mind that long hearings can be difficult and they will try not to sit late without reference to your diary obligations.
- 8.7. If it is not possible to conclude the hearing within the allocated days, the hearing can go “part-heard” and it will be adjourned until another date when all the parties and the panel members are available. It is good practice to try to agree, at the hearing, the amount of extra time that will be needed and set the date(s). This will avoid further delay in the BSB and COIC having to find a suitable date.

Conduct of the Hearing

- 8.8. Nobody is robed at the hearing and all parties remain seated throughout. At the outset of the hearing, there may be some preliminary matters for the panel to consider. This could include an application that the Tribunal take place in private (this being an order that a Directions Judge will rarely grant since it is for the Tribunal itself to make the final decision). There is a presumption that hearings take place in public and it is exceptional for them to take place in private. If a Tribunal is ordered to take place in private, the panel has no power to prevent subsequent disclosure of the result(s) where there is a finding against the barrister, although it can direct that the findings are not posted on the Bar Council’s website. In some cases the panel may decide the Tribunal should be in public but they will sit in private for parts of the evidence (e.g. medical information) or ask for reporting restrictions for example the name of a child. All Tribunal hearings are recorded usually digitally or a shorthand writer may be present. Please be aware that any discussion or conversation in the Tribunal room when the Panel are not present may be recorded.
- 8.9. After the charges have been put to the barrister and pleas have been taken, you will be required to open the case for BSB. The prosecution witnesses are then called.

Quite often, especially where the prosecutor may have produced an Opening Note, the Tribunal panel will make it quite clear that they are familiar with the facts of the case and ask that the prosecutor proceed to the witness evidence. In most cases there is no need to lead a prosecution witness through his/her evidence and it will be sufficient to ask that the witness statement/letter is accepted as evidence in chief and, apart from asking the standard identification questions, merely tender the witness for cross-examination.

- 8.10. At the end of the prosecution case, there may be a submission of no case to answer by the defence team that will require a response. Where a half time submission is successful and a costs application is made by the defence, the application should be resisted in all cases based on *Baxendale-Walker v The Law Society* [2007] EWCA Civ 233 (see paragraph 8.22 below, section 10 – Costs and section 15, annex 4).
- 8.11. After the BSB has presented its case, the barrister will present his or her case which may include defence witnesses who may need to be cross-examined. If the barrister wishes to present evidence which is not in the papers, he or she should do this under oath and give the BSB an opportunity to cross-examine. If the barrister is not prepared to do this, then the prosecutors should be alert to barristers giving evidence from the “defence table” and raise objections if necessary.
- 8.12. Closing speeches are made where appropriate and if the defendant barrister would like to make a closing speech the Tribunal must allow them to.

Findings

- 8.13. After hearing all the evidence, the Panel will retire to consider the finding(s). The clerk will usually provide updates and will inform you if the Panel are unlikely to return for a long period. It is rare for a Panel not to make a decision on the same day even if this requires sitting late. When it has reached its findings on the charges, the Panel will return and should give full oral reasons for its decisions.

Sentencing and previous convictions

- 8.14. The Case Officer will bring to the hearing copies of reports of any previous findings of professional misconduct against the defendant. Once any of the charges have been admitted or proved, prosecuting counsel should bring to the Tribunal’s attention any

previous disciplinary findings against the barrister so that they can be taken into consideration in sentencing.

- 8.15. The Bar Standards Board takes a neutral stance on sentencing; however the, Bar Tribunal and Adjudication Service sentencing guidance is publicly available and on both the BTAS and BSB websites. All Disciplinary Tribunal members have a copy of the Guidance and copies are available at hearings. Therefore, you should draw the Tribunal's attention to any relevant sections of the Guidance.
- 8.16. The Panel do not have to follow the guidance but if they decide to depart substantially from the starting points, they are asked to give reasons. They are also asked to indicate which aggravating/mitigating circumstances have been taken into account. The Panel may not necessarily refer to all these factors when handing down its sentence but they should be included the written Findings and Sentence sheet which it is required to complete. A departure from the Guidance without good reason may form a basis of an appeal and therefore prosecutors should be alive to sentences that fall outside the terms of the Guidance (see section 9 - Appeals)

Suspension pending Appeal

- 8.17. Where a Tribunal has imposed a sentence of suspension from practice for more than one year or has disbarred the barrister, the Regulations state that the Tribunal must consider whether to order that the barrister's practising certificate be suspended by the BSB (rE203.3). This is because, without such a suspension, a barrister is free to continue practising until such time as the sentence is pronounced or the outcome of an appeal is known (sentences remain in abeyance if an appeal is lodged). The Tribunal should order an interim suspension unless it is inappropriate to do so. Therefore it is important that this Regulation is drawn to the Tribunal's attention at the time a relevant sentence is imposed.
- 8.18. Where a suspension of a barrister's practising certificate is ordered, the Case Officer will arrange for the necessary internal action to be taken to suspend the barrister's practising certificate. This does not mean that the barrister is disbarred or formally suspended, merely that they cannot practise legitimately: the full disbarment or suspension must be implemented by the relevant Inn of Court via the formal pronouncement of the sentence of the Tribunal. This usually takes place approximately 6-8 weeks after the Tribunal or an appeal.

Costs

8.19. Costs can be awarded either for or against the BSB. It is BSB policy to resist all applications for costs made against it. This is based on the general principle, supported by case law (*Baxendale-Walker v Law Society [2007] 3 All ER 330*), that regulators should not be deterred from performing their functions by the threat of large costs claims. Further information about costs applications can be found in section 10 and a copy of the judgment in *Baxendale-Walker v Law Society*, can be found in section 15, annex 4. The Case Officer will inform you before the hearing if the BSB intends to apply for costs including any witness expenses, if a claim for costs is being made the Case Officer will provide you with a costs schedule.

Publication of findings

8.20. All findings of professional misconduct are a matter of public record and are published on the BSB website within seven days of the Tribunal's findings, regardless of whether the sentence has been pronounced or an Appeal submitted. All findings remain on the website for a minimum of two years and findings with a sentence of disbarment or suspension will remain on the website indefinitely. All findings of professional misconduct currently remain on a barrister's record indefinitely as the concept of "spent convictions" does not exist. This means that, even if a finding has been removed from the website, members of the public can still contact the BSB for details about the findings. Findings are also published on the BTAS website.