

TAXATION DISCIPLINARY BOARD

GUIDANCE ON AWARDING COSTS

1. This note sets out guidance for Disciplinary and Appeal Tribunals on the award of costs. It should be stressed that costs are **not** a sanction, but a consequence of a finding that charges are proved (in whole or in part) or an appeal is unsuccessful.

2. Powers to award costs

- 2.1 Regulation 15.9(e) (xii) of the Taxation Disciplinary Scheme regulations 2008 gives a Disciplinary Tribunal power to award costs in dealing with a defendant against whom a charge has been proved.
- 2.2 Under Regulation 20.12, an Appeal Tribunal may affirm, vary or rescind any costs order made by a Disciplinary Tribunal or make any such order for costs as it thinks fit.
- 2.3 Regulation 23 sets out the procedures for implementing a cost order made by a Disciplinary or Appeal Tribunal. This Regulation is reproduced at Annex A to this guidance.

3. Discretion

- 3.1 The presumption that an unsuccessful defendant should pay costs is based on the principle that the majority of professional members should not subsidise the minority who, through their own failings, have brought upon themselves disciplinary proceedings.
- 3.2 The Disciplinary Tribunal's power to award costs against a defendant is discretionary. However, its discretion must be exercised in accordance with the principles of reason and justice. In general, in line with the principle that the polluter pays.
- 3.3 **The general principle is that it would require exceptional circumstances for a Tribunal not to award costs against an unsuccessful defendant** and require their immediate payment. If the Tribunal decides not to award full costs against an unsuccessful defendant, it must give reasons for this decision.

4. Main factors to be taken into account in deciding on the award of costs

- 4.1 The recovery of costs is subject to the overriding principles that they are **appropriate and were reasonably incurred**.
- 4.2 In deciding what order to make about costs, the Tribunal may have regard to the conduct of the parties before and during the proceedings. The primary concern in making an order for costs is to do justice between the parties.

5. Constituent elements of costs

- 5.1 In the TDB's disciplinary procedure, the TDB is the prosecuting authority. Since there is only a limited power to award costs against the TDB (see Paragraph 7 below), the issue which the Tribunal will normally consider is the award of costs from the defendant to the TDB.
- 5.2 The costs of the TDB in any proceedings before a Disciplinary Tribunal may comprise the following:
- The TDB's legal expenses as prosecuting authority
 - The costs of TDB staff in processing the case
 - The expenses of the prosecution's witnesses in attending the hearing
 - The fees and expenses of any prosecution expert witnesses
 - An appropriate proportion of the fees and expenses payable to members of the Disciplinary Tribunal
 - An appropriate proportion of the fees and expenses payable to members of the Investigation Committee in originally considering the complaint.
- 5.3 Tribunal members will be given a breakdown of the costs prepared by the Secretary. (A specimen form is attached at Annex B, together with explanatory notes.)
- 5.4 A copy should be given to the defendant, and the defendant should be given an opportunity to address the Tribunal before the Tribunal makes an order based upon it as to why he should not be liable to pay costs or any part of them, although he may not adduce fresh evidence after the issues have been decided.
- 5.5 In a case where some charges are proved but others are not, the Tribunal will need to consider whether it would be reasonable to abate the costs for which the defendant is liable. In general, it would be appropriate to reduce the costs only if the majority of the charges, or the most serious charges, are not proved. If most charges are proved, or the most serious charges are proved, the Tribunal should consider carefully before making an order for a reduced award of costs, and explain its reasons for so doing. Provided that the majority of charges, or the most serious charges, are proved, the Tribunal hearing will have been justified and thus it will be reasonable for the defendant to bear the costs associated with bringing the case before the Tribunal.
- 5.6 If a member challenges a costs order on the grounds that he lacks the means to pay the sums required, the Tribunal **must require evidence**. For this reason, if he is likely to seek to challenge a costs order, a member will be advised to come to a hearing with some

documentary proof of his or her financial circumstances. If a member does not provide proof of financial means, a Tribunal is entitled to assume that he is able to meet any financial penalty and/or costs that it orders

6. Payment by instalments

- 6.1 The procedures for enforcing cost orders are set out in Regulation 23. A defendant against whom a cost order is made is entitled to request the right to pay by instalments. The Tribunal has discretion to allow payment by instalments.
- 6.2 However, as the TDB does not hold a Consumer Credit Licence, it may not by law permit an arrangement whereby more than four instalments are allowed in any one year.
- 6.3 Thus a Tribunal should **not allow a defendant more than four instalments, all to be paid within a year of its order taking effect.**
- 6.4 Under regulation 23.6, any unpaid costs will bear interest from the date at which they become due. It is the policy of the TDB to seek to enforce any costs order in the County Court.

7. Costs against the TDB

- 7.1 Under Regulation 23.7, there is power to order any party to the proceedings to pay costs if the Tribunal considers that its conduct has resulted in wasted costs.
- 7.2 As the TDB is one of the parties at the Tribunal stage, it is possible for the Tribunal to make a costs order against the TDB. However, Regulation 23.7 is limited by Regulations 15.8 and 20.12(e), which provide that the Tribunal may **not** award costs against the Board unless it is of the opinion that the charge against the member was brought **maliciously or without justification**. The fact that a charge is dismissed by a Tribunal does **not** in itself constitute grounds for concluding that the charge was brought without justification.
- 7.3 Cases in which a Tribunal considers that the TDB has brought the charge maliciously or without justification are likely to be extremely rare, particularly since every case coming before a Tribunal will have first been considered by the Investigation Committee, who will have decided that there was a prima facie case to answer.
- 7.4 The case law relating to costs against a regulator is consistent with this approach. The Court of Appeal has stated that unless there is dishonesty or lack of good faith, a costs order should not be made against a regulator unless there is good reason to do so.

ANNEX A

23. Costs

- 23.1 Any costs which the Disciplinary Tribunal or Appeal Tribunal orders to be paid shall, unless a longer period for payment (whether by instalments or not) is allowed by the order, be paid within 28 days of the service of the order upon the defendant, participant or appellant, as the case may be.
- 23.2 If within the period allowed, a defendant serves notice of appeal against an order made by a Disciplinary Tribunal then a costs order shall not become payable until the appeal has been determined under these Regulations, it shall then be payable, if at all, in accordance with the following provisions of these Regulations.
- 23.3 If, before the appeal has been determined, the appellant by notice withdraws the notice of appeal, the Disciplinary Tribunal's order for payment of costs shall take effect at the end of the period of 14 days beginning with the date on which the notice of withdrawal is served on the TDB.
- 23.4 Any costs ordered by the Appeal Tribunal, together with any unpaid costs ordered by the Disciplinary Tribunal, or so much, if any, of those unpaid costs as remain payable after any reduction or cancellation shall, unless a longer period for payment (whether by instalment or not) is allowed by order of the Appeal Tribunal, be paid within 28 days.
- 23.5 Where any costs ordered under these Regulations are payable by instalments and any instalment is not received by the due date, the whole of those costs or, as the case may be, so much of them as then remain unpaid, shall become due for payment.
- 23.6 Any costs or any unpaid balance of such costs not paid by the due date shall bear interest from that date until payment in full, such interest to be at the rate determined by the TDB under Regulation 27.1.
- 23.7 Where the Disciplinary Tribunal or Appeal Tribunal considers that the conduct of any party has resulted in wasted costs being incurred by another party to the proceedings it may order that other party to pay costs, in full or in part, to any party who has incurred wasted costs, subject to the provisions of Regulations 15.8 and 20.8(d).
- 23.8 Any such application for a wasted costs order must be made with a schedule of all costs applied for; and the party against whom the order is sought must be given reasonable opportunity to reply.

ANNEX B

TAXATION DISCIPLINARY BOARD

DISCIPLINARY TRIBUNAL

Date of hearing..... Name of Defendant.....

Summary of costs incurred	£
Costs of presenter (Fees and disbursements)
Witness expenses
Disciplinary Tribunal costs (Appropriate fees, expenses and meeting room hire)
Investigation Committee costs (Appropriate fees, expenses and meeting room hire)
Administrative costs	
1. Costs of Reviewer
2. Costs of Secretary to Disciplinary Tribunal
Other costs (specified below)	
1.
2.
3.
TOTAL	_____

Explanatory notes

The following notes explain how the different components have been calculated.

1. The fees and expenses incurred by the TDB in prosecuting a case include the costs of the lawyer who is presenting the case. His fees are based upon an hourly rate agreed with the TDB, and any additional expenses incurred will require receipts.
2. In the case of witnesses, costs may include the reasonable costs of their travel, meals and refreshment and demonstrable loss of earnings.
3. In cases where the prosecution requires an expert witness, the Tribunal will need to judge objectively whether it was necessary to instruct an expert witness. If at the last minute an expert witness is deemed unnecessary, he may well charge a cancellation fee, in which case the Tribunal may decide not to allow such costs unless it is clear that the expert has suffered actual loss as a result of the late cancellation.
4. The reasonable costs of the disciplinary hearing will normally be recoverable. Where several cases are heard at the same meeting, the costs of any one case should broadly reflect the amount of time devoted to that particular case.
- 5.

For cases lasting two hours, a standard charge of £450 should be ordered to cover the costs of fees for the members and clerk; for four hours £850; and for a full day £1700. (These figures include the Chairman's fee for drafting the Tribunal's decisions.) In addition, the relevant proportion of the travel costs of Tribunal members (an average of £62 per member) and room hire costs should be charged.

6. The role of the Investigation Committee in deciding whether there was a prima facie case to answer constitutes an indispensable element of the disciplinary process. Its reasonable costs should be included on a similar basis to those of the Disciplinary Tribunal. The average cost of a half-day meeting of the Committee is £1070 for members' fees, £160 for the Secretary's time, £ 300 for travel expenses and £50 for meeting costs. The TDB will provide a costing based on the number of cases heard at the relevant meeting. There may also be occasions when a case has incurred costs of an Investigatory Assessor; and these will then be included.
7. The TDB directly incurs costs through the involvement of its staff in its disciplinary procedures. Under the Regulations, it is the Reviewer who undertakes the administration of the case up to the Investigation Committee stage. Once the case is referred to a Disciplinary Tribunal, it will be processed by the Secretary to the Disciplinary Tribunal. Standardised costs will be charged, based upon the complexity of the case.

For most cases, where there are two rounds of correspondence involving both the member and the complainant, the Reviewer spends on average 7 hours preparing the

case prior to the IC meeting; this would cost the TDB approximately £300. In a straightforward case, with no complications and little correspondence, the Reviewer would spend on average 2—3 hours preparing the case prior to the IC meeting; this would cost the TDB approximately £120. If the case is particularly complex, with more substantial detailed information to assess, the Reviewer might spend up to 12 hours prior to the IC hearing; this would cost the TDB around £500. In a small number of cases, the IC may itself request additional information and consider that information at a further meeting, in which case additional costs will be incurred.

The Secretary to the Disciplinary Tribunal would probably spend an average of 12 hours preparing each case prior to the hearing; the cost to the TDB would be £500.