

## HEARINGS GUIDANCE

### Procedure at first instance hearings before Tribunal

1. The Audit Enforcement Procedure sets out the procedure for hearings before the Tribunal ("Hearings") in Parts 5, 6 and 9.
2. The order of proceedings, unless the Chair or the Tribunal determines otherwise, shall be as follows:
  - (a) The Chair shall introduce the Tribunal members, the secretary, the parties and the note taker;
  - (b) The Tribunal shall consider any preliminary legal arguments;
  - (c) The Chair shall, where the Respondent is present, require the Respondent to confirm their name or otherwise the secretary shall confirm the Respondent's name:
  - (d) The person acting as the secretary shall read out the Allegation and the alleged facts upon which it is based:
  - (e) The Chair must enquire whether the Respondent wishes to make any admissions and where facts are admitted, the Chair must announce that the facts have been found proved:
  - (f) Where facts remain in dispute, Executive Counsel (or his or her representative) shall open the case for the FRC and adduce evidence and, subject to issues of relevance or admissibility, call witnesses in support of it;
  - (g) The Respondent may make submissions regarding whether sufficient evidence has been adduced to find the facts proved and the Tribunal must consider and announce its decision as to whether any such submissions should be upheld;
  - (h) The Respondent may open their case and adduce evidence and, subject to issues of relevance and or admissibility, call witnesses in support of it:
  - (i) The Tribunal may indicate that it would find closing submissions from the Parties helpful;
  - (j) The Tribunal must consider and announce its findings and give reasons for its decision (see guidance in respect of Decision Making and Giving Reasons);
  - (k) In the event of an Adverse Finding the Tribunal may receive further evidence and submissions from the parties as to the appropriate sanction, if any, to be imposed;
  - (l) The Tribunal is directed to the Sanctions Policy which accompanies the Audit Enforcement Policy.
3. Notwithstanding the procedure set out above, the Tribunal may allow the parties to make additional submissions at any time.

### **Adjournments**

4. The Tribunal may, of its own volition or upon the application of a party, adjourn the proceedings<sup>1</sup>. At any stage before making a decision as to sanction, the Tribunal may adjourn for further information or reports to be obtained in order to assist it in exercising its functions in order for the parties to prepare submissions in relation to sanction.
5. In considering whether to adjourn the hearing, the Tribunal shall receive submissions from the parties and have regard to the fairness to both parties and the public interest<sup>2</sup>.

### **Deliberations**

6. At any stage when the Tribunal needs to deliberate, this must be undertaken in the absence of the parties. A secretary may attend the Tribunal during their private deliberations.

### **Secretary**

7. A member of the Secretariat shall act as secretary to any Tribunal or Appeal Tribunal.
8. The secretary will keep a record, or ensure a record is kept, of all decisions made by the Tribunal and the Appeal Tribunal and the reasons for them.

### **Record of Hearing**

9. The Tribunal, assisted by the Secretariat, must ensure all hearings are recorded in writing or electronic form. Any party to the proceedings must, on application to the Tribunal, be furnished with a transcript of the record of any part of the hearing at which he was entitled to be present.
10. The only exception to the above provision is that the private deliberations of the Tribunal must not be recorded.

### **Witness Evidence**

11. A party may not call a person to be a witness unless that party has provided to the other party a written statement of evidence provided by the witness (which includes an attestation and signature by the person making it) in accordance with the Standard Directions or any Case Management Direction unless the Tribunal determines otherwise.<sup>3</sup>
12. The Chair or the Tribunal may refuse to allow witness to give evidence or to give evidence on a particular matter if the Chair or the Tribunal is not satisfied that the witness is in a position to produce relevant testimony or is satisfied that all parts of the evidence that a witness is to provide, or to provide on a particular matter, should have been disclosed to the other party at an earlier stage of the proceedings.
13. The Tribunal may, upon the application of the party calling a witness, direct any details which may identify that the witness shall not be revealed in public.<sup>4</sup>

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<sup>1</sup> Rule 45 of Audit Enforcement Procedure.

<sup>2</sup> Rule 46 of Audit Enforcement Procedure

<sup>3</sup> Rule 37 of Audit Enforcement Procedure

<sup>4</sup> Rule 40 of Audit Enforcement Procedure

14. Witnesses are required to take an oath, or to affirm, before they give their oral evidence.
15. In accordance with the Standard Directions, a witness's statement shall stand as their evidence in chief.
16. Witnesses, other than the Respondent:
  - (a) will usually be examined by the party calling them;
  - (b) may be cross examined;
  - (c) may then be re-examined by the party calling them;
  - (d) may then be questioned by the Tribunal. Questions from the Tribunal should be concise, relevant and focused. It is not appropriate for Tribunal members to conduct "fishing expeditions" or to rehearse evidence without good reason;
  - (e) the parties may then question the witness on matters arising out of the Tribunal's questions, with the party calling the witness given the last opportunity to do so;
  - (f) any further questioning of a witness is to be at the discretion of the Tribunal.
17. The Tribunal may wish to give warnings to witnesses that they should not discuss the case with anyone during any breaks in their evidence and to remind witnesses that they are still under oath when the hearing resumes. This could also include an additional warning to witnesses, once their evidence has concluded, not to discuss their testimony with any witnesses who are still to be called.

#### **Special Measures<sup>5</sup>**

18. Where the Chair and/or Tribunal consider that the quality of a witness's evidence is likely to be adversely affected, the Tribunal may adopt such measures as it considers necessary to receive evidence from the witness. This could include: a witness whose first language is not English; a witness with a physical disability who requires assistance to give evidence; a witness who complains of intimidation; a witness who is significantly impaired in relation to intelligence or social functioning; and any witness under the age of 18.
19. Measures adopted by the Tribunal may include, but are not limited to: the use of video links, the use of pre-recorded evidence as the evidence in chief of a witness, provided that the witness is present at the hearing for cross-examination and questioning; and use of interpreters (including signers and translators).

#### **Disruptive Behaviour**

20. Rule 51 provides that the Tribunal may exclude any person whose conduct has disrupted or is likely to disrupt proceedings. The Tribunal may permit the person to return, if at all, subject to certain conditions.

#### **Non Attendance of a Witness**

21. Where a witness refuses to attend or does not attend without having provided any prior warning of their non-attendance, the reasons for a witness's refusal or non-attendance may need to be

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<sup>5</sup> Rule 43 of Audit Enforcement Procedure

investigated and the Tribunal may consider adjourning for a short time while enquiries are made.

### **Respondent as a Witness**

22. The Tribunal may not compel the Respondent to be a witness; the Respondent is entitled to rely on his privilege against self-incrimination. This does not undermine the FRC's power to require the Respondent to provide information in accordance with Schedule 2 of the Statutory Auditors and Third Country Auditors Regulations 2016.
23. Where the Respondent is a witness, they:
  - (a) will usually be examined by the person representing them or, if there is no such person, must be questioned by the Tribunal through the Chair;
  - (b) may then be cross examined;
  - (c) may then be re-examined by the person representing them (if any);
  - (d) may then be questioned, with leave of the Chair, by the Tribunal whether or not they are represented.

### **Non Attendance of the Respondent<sup>6</sup>**

24. Where the Respondent has failed to attend a Case Management Meeting or Hearing, the Chair or Tribunal may continue in the Respondent's absence if:
  - (a) satisfied that notification of the meeting or hearing date was properly given; and
  - (b) it is fair to proceed in all the circumstances.
25. The Tribunal should demonstrate that it appreciates that the discretion to proceed in the Respondent's absence is to be exercised with a high degree of care and caution.<sup>7</sup>
26. Lord Bingham of Cornhill in the case of *R v Jones (Anthony Williams)*<sup>8</sup> stated that "*the discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution*". The same judgment provided a helpful list of factors that should be considered before proceeding in the absence of the person concerned registered person. These factors are conveniently identified at paragraph 3-222 of Archbold 2016:

*"Whilst the list was not exhaustive, it provided an invaluable guide. The Court of Appeal had said that in exercising the discretion, fairness to the Defendant was of prime importance, but fairness to the prosecution should also be taken into account. The judge should have regard to all the circumstances, including:*

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<sup>6</sup> Rule 48 of Audit Enforcement Procedure

<sup>7</sup> *Raheem v Nursing and Midwifery Council* [2010] EWHC 2549; *Adeogba v GMC* [2014] EWHC 3872 (Admin)

<sup>8</sup> [2002] UKHL 5

- (a) *The nature and circumstances of the Defendant's behaviour in absenting himself from the trial or disrupting it, and in particular whether the behaviour was voluntary and so plainly waived the right to be present;*
- (b) *whether the adjournment would resolve the matter;*
- (c) *the likely length of such an adjournment;*
- (d) *whether the Defendant, though absent, wished to be represented or had waived his right to representation;*
- (e) *whether the Defendant's representatives were able to receive instructions from him and the extent to which they could present his defence [...];*
- (f) *the extent of the disadvantage to the Defendant in not being able to present his account of events;*
- (g) *the risk of the jury [i.e. the Committee] reaching an improper conclusion about the absence of the Defendant;*
- (h) *the general public interest that a trial should take place within a reasonable time;*
- (i) *the effect of the delay on the memories of witnesses;*
- (j) *where there was more than one defendant, and not all had absconded, the undesirability of having separate trials."*

27. The Respondent (who is an individual) may claim ill health as a reason for their non-attendance. The Respondent has the right to be present when the case is put against him and it is wrong for a Tribunal, in the face of unchallenged medical evidence submitted by the Respondent that he/she is not fit to attend a hearing, to proceed in their absence.<sup>9</sup> However, the mere fact that a registered person claims illness does not, of itself, require an adjournment of proceedings.<sup>10</sup>

### Representation<sup>11</sup>

28. The Respondent may represent themselves or be represented by:

- (a) a Solicitor or Counsel;
- (b) another person at the Chair's or Tribunal's discretion providing that the person is not a witness in the case, a member or employee of the FRC.

### Unrepresented Respondents

29. It should have been identified at an early stage of the proceedings, through the Standard Directions and/or Case Management Meeting, that a Respondent is or is likely to be unrepresented. It is possible that a case involving an unrepresented Respondent may have more case management directions than usual to ensure effective case management.

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<sup>9</sup> *Brabazon-Denning v UKCC* [2001] 1HRLR 6

<sup>10</sup> *Yusuf v RPSGB* [2009] EWHC 867

<sup>11</sup> Rule 52 of Audit Enforcement Procedure

30. The Tribunal should not make assumptions about the merits of the case on the basis that the Respondent has not obtained representation.
31. It may be necessary to provide further explanation on the procedure of a hearing than in other cases. However, the Tribunal should be mindful of its responsibility to act fairly and judicially to both parties and the possible inadvertent appearance of bias in its communications to the parties.
32. The Tribunal should communicate clearly and avoid legal jargon or abbreviations.

#### **Joinder of Allegations**

33. The Tribunal can consider and determine Allegations against two or more Respondents at a single hearing where the Allegation against each Respondent concerned arises out of the same circumstances and it is appropriate in all the circumstances.
34. Where there is a joint hearing each Respondent has the right to exercise any of the rights accorded to a Respondent in these Rules whether or not any other joined Respondent exercises that right.
35. The order of proceedings will be altered to reflect the involvement of two Respondents.

#### **Procedure on Appeal before Appeal Tribunal**

36. The Audit Enforcement Procedure sets out the procedure for hearings before the Appeal Tribunal in Parts 7 and 9.
37. Cases will only be heard by the Appeal Tribunal where the Chair of the Tribunal has given permission under Rule 66 which requires there to be arguable grounds and, other than in exceptional circumstances, the appeal to have been lodged within the 28 day time limit.
38. The Chair of the Appeal Tribunal may issue directions or arrange a Case Management Meeting to set out a timetable for the preparation for the hearing of an Appeal.
39. Any request to the Appeal Tribunal to hear any witness (which shall be only in respect of new evidence) shall be in writing and shall be accompanied by a statement in writing of the evidence proposed to be given by such witness. If the Appeal Tribunal accedes to the request, the party to the proceedings so requesting shall be responsible for arranging for the attendance of the witness before the Appeal Tribunal, at such time and place as the Appeal Tribunal may appoint.
40. The order of the proceedings on an appeal shall, unless the Appeal Tribunal otherwise directs, be as follows:
  - (a) submissions by the Appellant;
  - (b) if permitted by the Appeal Tribunal, the re-hearing of any witness called before the Tribunal and/or the receipt of fresh evidence followed by cross-examination and re-examination of such witnesses by or on behalf of the Executive Counsel or the Appellant, as the case may be;
  - (c) submissions by or on behalf of the Executive Counsel, including the submission of evidence and the calling of any witnesses;
  - (d) if requested by the Appellant, closing submissions by the Appellant.

41. The Appeal Tribunal may:
  - (a) revoke or vary the relevant Final Decision Notice on the case;
  - (b) give such direction or take such other steps as the Tribunal could have given or taken;
  - (c) make any other decision which the Tribunal could have made;
  - (d) remit the case back to the Tribunal.
  
42. Rules 87 to 93 of the Audit Enforcement Procedure shall apply in relation to the costs of any appeal.

**Issued by the Conduct Committee  
17 June 2016**