

Approved by the Discipline Board:
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Guidance on the award of costs by ICAS Discipline & Appeal Tribunals



Purpose

ICAS' Discipline & Appeal Tribunals Regulations ("the Regulations") contain provisions which allow a Discipline or Appeal Tribunal ("the Tribunals") to make a costs order on determination of a matter. As the Regulations do not explain in detail how the Tribunals should calculate the costs, this guidance has been prepared to provide greater clarity and consistency in this part of the process.

Regulations

For ease of reference, an extract of the relevant provisions in the Regulations is included as an appendix to this guidance. The following key points are noted:

- Both Discipline and Appeal Tribunals have the power to award costs.
- While the Tribunals have discretion in terms of the level of award, the Regulations refer to "reasonable costs" and provide examples of four types of cost which may be awarded (Regulation 3.31).
- There is a default timescale of 21 days for payment of costs, but this can be varied by the Tribunal.
- Costs may be awarded against ICAS if it is unsuccessful in the matter.

Regulation 3.35 is particularly important and is therefore quoted here in full:

"In deciding whether a direction should be made under Regulations 3.30 to 3.34, a Discipline or Appeal Tribunal shall have regard to such facts and matters as it considers relevant; including the conduct of the Parties".

The full Regulations are available on the ICAS website: <https://www.icas.com/about-us/governance/charter/icas-rules-and-regulations>

When costs are calculated

When a formal complaint or appeal (collectively a "case") is determined, the Tribunal will ask the parties to make submissions on a potential award of costs. At the discretion of the Tribunal, such submissions may be made:

- Verbally or in writing.
- Immediately following the Tribunal's decision, or at a separate hearing specifically for costs and/or related matters.

Given the flexibility here, it is important that parties attend hearings ready to make submissions on costs, and are able to provide appropriate supporting evidence.

It is possible that an award of costs may be made before a case has been concluded (an interim award of costs). This may be appropriate if one of the parties is delaying the hearing of the case.

Success and divided success

Where a case is decided in favour of ICAS, a request will normally be made for an award of costs, with the common position being that 'costs follow success' for a regulatory body.

While the Regulations provide for an award of costs in favour of the Defender if ICAS is unsuccessful, it is important to emphasise that the default position of 'costs follows success' does not apply. As ICAS is exercising its powers in the public interest, it should not be inhibited from doing so through fear of financial consequences.

A Tribunal considering an award of costs against ICAS will carefully consider the facts and circumstances of the case, with particular reference to the following:

- Has ICAS acted unreasonably, improperly, and/or in a consistently inefficient way in its pursuit of the case?
- Is there any evidence of an abuse of process?

- Will the Defender suffer significant financial prejudice if an award of costs is not made?

If the answer to any of these questions is 'yes' then an award of costs against ICAS may be deemed appropriate in the circumstances.

There are two further scenarios which might complicate the consideration of a costs award:

- If there is a 'divided success' (e.g. one part of the complaint has been upheld, whilst another has been dismissed). This may involve a 'setting off' exercise for costs.
- If there are arguments why the successful party should receive a lower level of costs than might otherwise be the case (party behaviour is covered below).

On this basis, both parties should carefully consider whether they wish to make submissions on costs, even if the outcome of the case is not in their favour.

Supporting evidence for costs

The Tribunal is likely to require arguments for costs to be supported by evidence, with the following being a non-exhaustive list of evidence that might be required:

- Invoices from legal agents and expert witnesses
- Receipts for travel and accommodation
- Receipts for disbursements which were required
- Time-sheets setting out the time spent by ICAS investigating a complaint

If a party is unable or unwilling to provide such supporting evidence then the Tribunal may refuse to award costs or may award costs at a lower level.

Relevant factors for costs

When a party has made submissions on costs, and provided appropriate supporting evidence, the Tribunal will consider the level of costs to be awarded. In doing so, it is likely that the Tribunal will take the following three factors into account (in addition to any other factors deemed relevant):

Reasonability of costs

In some cases, the costs will be limited to the fees of external agents, e.g. solicitors, counsel, expert witnesses. A tribunal may express concerns if it considers that one or more of such engagements was excessive. For example, senior counsel might have been engaged to prosecute a fairly straightforward case, or multiple expert witnesses were presented when only one was required.

When considering travel and accommodation costs, the Tribunal will approach these in the same manner as a court or employer, expecting that attempts will have been made to ensure reasonable costs.

Conduct of the parties

Tribunals will have regard to the behaviour of the parties when assessing costs. If a party is seen to have unduly extended or delayed the hearing of a case then the Tribunal is likely to be less sympathetic to their arguments on costs.

Impact of costs / ability to pay

Even if a party is wholly unsuccessful, a Tribunal may lower a costs award once it has taken into account the party's ability to pay. If a party wishes to make arguments in respect of their ability to pay then it is vital that they present supporting evidence (e.g. income and expenditure summaries, details of dependents). Unsupported arguments are likely to carry less weight and may be disregarded by the Tribunal altogether.

Awards of costs

When parties have made submissions on costs, and these have been analysed in light of the factors above, the Tribunal will look to set the figure for costs. In most cases, the Tribunal will do this itself, based on the parties' submissions. However, for more complicated cases it is possible that the Tribunal may consider having the sum calculated by a third party (a 'taxation' process). Given the additional time and costs involved, such referrals will only be made in a small number of cases.

The figure for costs will be explained in the Tribunal's written decision, with supporting reasons provided at the Tribunal's discretion. Where costs are payable to ICAS, they will be broken down in accordance with the Regulations (e.g. £x for the costs of the investigation, £x for the costs of the Tribunal process). There will normally be separate amounts of costs due to the Committee and costs due to the Tribunal. For cases involving divided success, the Tribunal is likely to provide details of any set-off applied.

Costs awarded by a Discipline Tribunal may be appealed in the same way as other orders. Costs awarded by an Appeal Tribunal are not subject to further review or challenge.

Timescales for payment

The Regulations provide a default timescale for payment of 21 days. If a party wishes the Tribunal to extend the timescale, they should be ready to provide an alternative timescale, as well as supporting evidence to explain why additional time is required (see 'impact of costs / ability to pay' above).

While all submissions will be taken into account, a Tribunal is more likely to agree to a variance which will lead to the costs being paid within a reasonable timescale.

Variations to timescales are at the discretion of the Tribunal, with no limitation on how these might be applied. A Tribunal may order a party to pay a certain amount of money every month, perhaps with a lump-sum paid up front, or may simply provide additional time for payment of the full sum. The details of the timescales will be confirmed in the Tribunal's judgement.

Consequences of non-payment

ICAS Rule 6.4 sets out strict consequences for parties who fail to make payment of sums due to ICAS (including any costs awards made by a Tribunal). The Rule is extracted as follows:

- 6.4 *Failure to pay any ... fines or monies owed to ICAS and in accordance with the associated Regulations shall:*
- 6.4.1 *render the Member or CA Student Member liable to removal from Membership without further notice or from such date as Council may direct;*
 - 6.4.2 *permit ICAS to stop regulating the Affiliate or Firm without further notice or from such date as Council or the relevant Regulatory Committee may direct.*

Even if an individual has been removed from membership, further steps may be taken to recover sums due to ICAS, including civil court actions.

Indicative costs

The level of costs incurred over the course of an investigation and Tribunal process(es) may vary considerably on a case-by-case basis, based on the following factors:

- The complexity of the complaint.
- The amount of evidence involved (including witness evidence).
- The preparedness and cooperation of the parties involved.
- The length of the process.

While it would therefore not be possible or appropriate for this Guidance to list the costs which are likely to be incurred at this stage of the process, the following is provided strictly in the interests of giving Defenders an indication of what might be deemed 'standard costs' incurred by ICAS in a 'straightforward case'.

For the avoidance of doubt, Tribunals have full discretion to award higher or lower sums than the sums listed below.

Costs to the point of serving the formal complaint

At this point in the process, there will be two main elements: (i) the costs of the investigation, which will principally reflect the time spent investigating by ICAS employees and members of the Investigation Committee members, and (ii) the costs of drafting the formal complaint.

The costs to this point would be expected to be in the region of £3,000 to £5,000 if the following apply:

- The investigation involved a smaller number of relatively straightforward allegations, with limited evidence, and no requirement for expert external input.
- The investigation did not require significant time (i.e. less than 12 months).
- External solicitors / Counsel have not been engaged.

In the event that external solicitors / Counsel have been engaged to review papers and draft the formal complaint then it would be reasonable to expect these costs to double (i.e. £6,000 to £10,000). The costs will depend on the external solicitors / Counsel used, but hourly rates are likely to be in the region of £200 – £400 for solicitors (partners), and £400 – £600 for Counsel.

Costs to the point of hearing the formal complaint

Once the formal complaint is served, the Tribunal Clerk will assign a date for a preliminary hearing, with the Defender expected to inform the Clerk in writing beforehand if the Complaint or any part of it is admitted. At this stage, ICAS will incur additional costs in reviewing the defence, and preparing for the preliminary hearing. The preliminary hearing will then incur further costs – not only the costs of ICAS, but also the costs of the Tribunal.

At the preliminary hearing, the Tribunal may be able to schedule a date for a full hearing, with instructions to the parties as to what they need to provide each other and the Tribunal in advance of that hearing. It is likely that the Defender will be asked lodge full written 'answers' to the Complaint within a certain period of time.

The costs of ICAS and the Tribunal to the date of the full hearing would be expected to be in the region of £2,500 to £5,000 if the following apply:

- The defence is clearly set out, with limited evidence, and no requirement for expert external input on either side.
- Only one preliminary hearing has been required, with no challenges to the relevancy or competency of the Complaint.
- The Defender has cooperated with the instructions of the Tribunal, meeting all submission deadlines.
- External solicitors / Counsel have not been engaged.

Again, these costs might reasonably be doubled (£5,000 to £10,000) if ICAS is represented by external solicitors or Counsel.

Hearing the formal complaint

The costs incurred by ICAS and the Discipline Tribunal will vary according to how many days are required to hear the formal complaint, including the time required for closing submissions and the parties' submissions on sanction and costs where the complaint has been upheld in full or part.

It would be reasonable to expect daily rates as follows:

- £750 to £1,500 costs for ICAS if the complaint is prosecuted by an ICAS employee.
- £1,500 to £3,000 costs for ICAS if the complaint is prosecuted by external solicitors.
- £2,500 to £5,000 costs for ICAS if the complaint is prosecuted by Counsel.
- £1,500 costs for the Discipline Tribunal.

Appeal Tribunal costs

The same principles will apply for Appeal Tribunal proceedings as set out above (e.g. the time taken to respond to an appeal, the daily rates for Appeal Tribunal hearings etc).

Defender's costs

A Tribunal considering an award of costs against ICAS is likely to expect the Defender's external legal costs to fall in line with the indicative rates outlined above.

Further information

Further information in respect of this Guidance can be requested from the Tribunal Clerk by email: tribunalsclerk@icas.com

Appendix – Extract of the Discipline & Appeal Tribunals Regulations

The provisions on costs in the current Regulations are extracted as follows:

Costs

- 3.30 *An Order made by a Discipline or Appeal Tribunal, or a decision under Regulation 3.28, may include a direction that the Member, Affiliate, Firm or CA Student Member shall pay to ICAS such amount by way of costs as shall be specified in the direction.*
- 3.31 *A direction under Regulation 3.30 may include reasonable costs in respect of one or more of the following, to be determined in such manner as the Discipline or Appeal Tribunal considers appropriate:*
- 3.31.1 *the investigation costs incurred by the Committee under the Investigation Regulations;*
 - 3.31.2 *the costs incurred by the Committee in preparing and presenting a Complaint to a Discipline Tribunal;*
 - 3.31.3 *the costs incurred by the Committee or the Regulatory Committee in responding to an Appeal;*
 - 3.31.4 *the costs of a Discipline and/or Appeal Tribunal.*
- 3.32 *Any costs directed to be paid under Regulation 3.31 shall be paid to ICAS within 21 days from the date of the order of the Discipline or Appeal Tribunal; or by such later date as the Discipline or Appeal Tribunal may direct.*
- 3.33 *If a Discipline Tribunal dismisses a Complaint in whole or part, it may direct ICAS to pay a specified sum towards the costs incurred by the Defender in defending the Complaint.*
- 3.34 *An Appeal Tribunal may direct ICAS to pay a specified sum towards the costs incurred by a Member, Affiliate, Firm or CA Student Member where it has:*
- 3.34.1 *dismissed an Appeal by the Committee under Regulation 5.10;*
 - 3.34.2 *upheld, in whole or part, an Appeal by a Member, Affiliate, Firm or CA Student Member.*
- 3.35 *In deciding whether a direction should be made under Regulations 3.30 to 3.34, a Discipline or Appeal Tribunal shall have regard to such facts and matters as it considers relevant; including the conduct of the Parties.*