

May 2019



Guidance for Discipline and Appeal Tribunals on the making of interim orders



Background

This guidance has been prepared by the Discipline Board to assist Discipline and Appeal Tribunals in their consideration of interim orders under Regulation 6 of the Discipline and Appeal Tribunal Regulations (“the Regulations”).

What is an interim order?

An interim order is an order made by a Discipline Tribunal under Regulation 6.10.1 to apply pending completion of a separate regulatory or disciplinary process. It is primarily designed to protect the public interest during the period of time required to complete the regulatory or disciplinary process.

What are the available interim orders?

ICAS Rule 13.18 lists the interim orders which may be applied by a Discipline Tribunal:

- To suspend a Member or CA Student Member from ICAS Membership.
- To suspend, or apply conditions to, a practising certificate, licence or other authorisation which has been granted to a Member, Affiliate or Firm.

Who can apply for an interim order?

An application for an interim order can be made by either the Investigation Committee or the Authorisation Committee (collectively referred to in this document as “the Committees”).

In what circumstance would there be an application for an interim order?

As there is a wide range of circumstances in which either of the Committees may deem an interim order to be desirable, it is not practical to provide a definite list. However, the following are examples of some circumstances in which an application may be made:

- A Member, CA Student Member or Affiliate has been charged with a serious criminal offence and is awaiting trial.
- ICAS has reasonable concerns over intromissions with a Client Money Account.
- An ICAS monitoring visit has raised serious concerns over the quality of work and is in the process of removing a practising certificate, licence or other authorisation.
- A formal complaint has been made against a Member, CA Student Member or Affiliate and is pending hearing before a Discipline Tribunal, but the Defender is seeking to frustrate the process.

How long do interim orders last?

When an interim order is first made by a Discipline Tribunal, it will last for a maximum initial period of 12 months. Thereafter, an interim order may be extended for further periods of 12 months, if a Discipline Tribunal considers that there are still sufficient reasons to support it.

Discipline Tribunals may apply an interim order for less than 12 months. What is an appropriate timescale will vary depending on the reasons to support the interim order. For example, if a Member’s practising certificate has been suspended due to an ongoing disciplinary process, the interim order would normally be lifted upon completion of the disciplinary process.

When providing its written decision in respect of an interim order, a Discipline Tribunal will be expected to explain the reasons in support of the timescale which has been applied.

What is the process for serving an interim order application?

As set out in Regulation 6, an interim order application will be sent to the Tribunal Clerk by the relevant Committee. The application will confirm the interim order sought, together with supporting reasons. The Clerk will then serve the application on the Member, Affiliate, CA Student Member, or Firm (referred to in the Regulations as ‘the Defender’), who may choose to submit a written response to the application.

When will a hearing be held?

The Clerk will notify the parties of the date on which the application will be considered by a Discipline Tribunal. While hearings will normally be held not less than 28 days after service, the Regulations allow the Chair of a Discipline Tribunal to reduce this timescale, at his or her discretion. It may be decided that a shorter timescale is justified if there is deemed to be an imminent risk to the public.

What is the process for hearing an interim order application?

The interim order application will be considered by a Discipline Tribunal at a hearing, normally held at CA House in Edinburgh. The parties may represent themselves, or may seek to be legally-represented, in accordance with the requirements of the Regulations.

The Regulations allow the Discipline Tribunal to exercise its discretion in deciding the process to be followed at the hearing. However, it will always be ensured that the hearing is conducted in such a way as to ensure fairness to all parties. This means that each party will be given an opportunity to make submissions in respect of the application, which may involve referring to documentary evidence, and possibly the leading of witnesses.

Hearings will normally be held in public, unless the Discipline Tribunal decides that it is appropriate for the hearing to be held in private.

How will evidence be assessed when considering an interim order application?

While this will vary, depending on the circumstances of the case, a Discipline Tribunal will generally avoid undertaking an extensive fact-finding exercise, and will not seek to resolve conflicts of evidence. Although account may be taken of the seriousness of any allegations made against the Defender, the Discipline Tribunal will expect that the facts should be established through the separate regulatory or disciplinary process.

It is therefore important to understand that, in considering an interim order application, the Discipline Tribunal's primary focus is on risks which may arise in the present and the future – rather than on what may have happened in the past.

When will the Discipline Tribunal confirm its decision?

At the conclusion of the hearing, the Discipline Tribunal will retire to deliberate in private. A decision may be confirmed verbally on the day of the hearing, or may follow at a later date if the Discipline Tribunal requires further time to consider its decision. Regardless of when the decision is provided, the Discipline Tribunal will ensure that its decision is confirmed in writing.

What factors will the Discipline Tribunal consider when assessing an interim order application?

In considering whether an interim order should be made, the Discipline Tribunal will consider whether an interim order is necessary for the protection of the public, or is otherwise justified. What this means will vary according to the circumstances of an application, however it could involve consideration of the following:

- A risk to clients of the Defender, including risks to client funds, and risks arising through work falling significantly below the expected standard.
- A risk to the reputations of ICAS and/or the profession of accountancy.
- The need to promote and maintain the standards expected in the profession of accountancy.
- A more general risk to the public interest.

The Discipline Tribunal will assess these factors in the context of what the likely outcome would be if an interim order were not granted.

In assessing the need for an interim order, a Discipline Tribunal will balance its consideration of such factors against the infringement to the Defender's professional life which an interim order is likely to entail. The Discipline Tribunal will also take account of proportionality. If the desired protection can be achieved through measures which fall short of an interim order, a Discipline Tribunal will normally

refuse to grant one, expecting that the relevant committee will pursue such alternative course of action.

What conditions could be applied to an interim order?

A Discipline Tribunal may grant an interim order to apply conditions to, a practising certificate, licence or other authorisation which has been granted to the Defender. As the Regulations do not list the conditions which may be applied, this will be at the discretion of the Discipline Tribunal, taking account of the circumstances of the case, and the risks involved.

The following are some examples of conditions which might be considered by a Discipline Tribunal:

- A Member is only allowed to retain his or her practising certificate subject to ongoing supervision by a third party.
- There is a restriction on the work which may be undertaken in respect of the practising certificate, licence or other authorisation.
- Regular reporting to ICAS or such other third party as may be appropriate.

The Defender will only be allowed to retain the practising certificate, licence or other authorisation so long as the Discipline Tribunal's conditions are followed. Therefore, it is unlikely that a Discipline Tribunal will consider conditions if it cannot be confident that they will be followed.

How can an interim order be challenged?

The Regulations provide that the Defender may appeal a decision by a Discipline Tribunal to apply an interim order. As per the process set out in Regulation 5, an appeal would need to be submitted to the Tribunal Clerk, in writing, within 28 days of the date of the interim order. The interim order will remain in place until an Appeal Tribunal has heard and determined the appeal.

The Regulations set out the available grounds for appeal, summarised as follows:

- The Discipline Tribunal erred in law or fact, or in its interpretation of the Rules or Regulations.
- The hearing was not conducted fairly.
- Significant fresh evidence is available that was not available when the application was considered.
- The interim order is manifestly excessive in all the circumstances.

The process for an Appeal Tribunal hearing is similar to the process for the Discipline Tribunal hearing, as set out above. Having considered the submissions of the parties, the Appeal Tribunal has three options available to it:

- Reaffirm the Discipline Tribunal's decision, retaining the interim order in its current form.
- Quash the Discipline Tribunal's decision, removing the interim order.
- Vary the order applied by the Discipline Tribunal.

How can an interim order be reviewed?

When determining the timescale of the interim order, the Discipline Tribunal will also consider whether it is appropriate to prescribe when the interim order should be reviewed.

In addition to any such provision as may be made by the Discipline Tribunal, an interim order will automatically be subject to review as follows:

- On or within 28 days before the expiry date of the interim order.
- Upon application by the Defender, the Committee, or a Regulatory Committee.

Subject to the underlying requirement for fairness to the Parties, a Discipline Tribunal has the power to determine the procedure to be followed when undertaking a review of an interim order. At the conclusion of its review, it may reaffirm, vary or rescind the interim order.

Further information

Further information in respect of interim orders can be obtained by contacting the Tribunal Clerk by email as follows: tribunalsclerk@icas.com



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