



Financial Reporting Council

# Audit Enforcement Procedure

## Hearings Guidance

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# Hearings Guidance

## Procedure at first instance hearings before Tribunal

1. The Audit Enforcement Procedure (AEP) sets out the procedure for hearings before the Tribunal (Hearings) in Parts 4, 5, and 11.
2. [This paragraph has been deleted].
3. Notwithstanding this procedure, the Tribunal may allow the Parties to make additional submissions at any time.
4. [This paragraph has been deleted].
5. [This paragraph has been deleted].

## Factual evidence

- 5A. Rule 34 of the AEP provides that within 56 days of receipt of notification of the appointment of the Tribunal, or such other period of time as may be agreed between the Parties, Executive Counsel shall serve on the Respondent and the Tribunal an Allegation, together with any factual evidence on which Executive Counsel relies. For the avoidance of doubt, factual evidence under Rule 34 does not include witness statements which have been prepared or are to be prepared for the purpose of that witness giving evidence as part of the hearing or other step in the matter.

## Deliberations

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

## Convener

7. [This paragraph has been deleted].
8. The Convener 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 Convener, 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.

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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 Case Management Directions unless the Tribunal determines otherwise.<sup>1</sup>
12. The Chair or the Tribunal may refuse to allow a 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>2</sup>
14. Witnesses are required to take an oath, or to affirm, before they give their oral evidence.
15. In accordance with the Case Management 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

<sup>1</sup> Rule 50 of the Audit Enforcement Procedure.

<sup>2</sup> Rule 54 of the Audit Enforcement Procedure.

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witnesses, once their evidence has concluded, not to discuss their testimony with any witnesses who are still to be called.

## Special Measures<sup>3</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 71 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 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);

<sup>3</sup> Rule 57 of the Audit Enforcement Procedure.

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- 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>4</sup>

24. Where the Respondent has failed to attend a Hearing, the Chair or Tribunal may continue in the Respondent's absence if:
- a) it is satisfied that notification of the Hearing was properly given; and
  - b) it is fair in all the circumstances to do so.
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>5</sup>
26. Lord Bingham of Cornhill in the case of *R v Jones (Anthony Williams)*<sup>6</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.

*"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 circumstance, including:*

- (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;*

<sup>4</sup> Rule 68 of the Audit Enforcement Procedure.

<sup>5</sup> *Raheem v Nursing and Midwifery Council* [2010] EWHC 2549; *Adeogba v GMC* [2014] EWHC 3872 (Admin).

<sup>6</sup> [2002] UKHL 5.

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- (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 nonattendance. The Respondent has the right to be present when the case is put against them 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>7</sup> However, the mere fact that a Respondent claims illness does not, of itself, require an adjournment of proceedings.<sup>8</sup>

28. [This paragraph has been deleted].

## Unrepresented Respondents

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

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.

33. [This paragraph has been deleted].

34. [This paragraph has been deleted].

35. [This paragraph has been deleted].

36. [This paragraph has been deleted].

37. [This paragraph has been deleted].

38. [This paragraph has been deleted].

39. [This paragraph has been deleted].

<sup>7</sup> *Brabazon-Denning v UKCC* [2001] 1HRLR 6.

<sup>8</sup> *Yusuf v RPSGB* [2009] ewhc 867.

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40. [This paragraph has been deleted].

41. [This paragraph has been deleted].

42. [This paragraph has been deleted].

**Issued by the Conduct Committee with effect from 30 June 2023.**





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