The Solicitors Disciplinary Tribunal

Constituted under the Solicitors Act 1974

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Guidance Note on Sanctions (4th Edition)

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CONTENTS

INTRODUCTION

This Guidance Note consists of a distillation of current Solicitors Disciplinary Tribunal ("the Tribunal") sanctioning principles brought together in one document. Every case is fact-specific, and this Guidance Note consists of guidelines only; it is not intended in any way to fetter the discretion of the Tribunal when deciding sanction. The exercise of its powers and the imposition of sanctions are matters solely for determination by the Tribunal. The purpose of this Guidance Note is to assist the parties, the public and the legal profession in understanding the Tribunal's decision-making process.

The Tribunal is the statutory tribunal responsible for adjudicating upon applications and complaints made under the provisions of the Solicitors Act 1974 (as amended) ("the Act").

It is the function of the Tribunal to protect the public from harm, to maintain public confidence in the reputation of the legal profession (and those that provide legal services) for honesty, probity, trustworthiness, independence and integrity.

The Tribunal deals with an infinite variety of cases. Prescriptive, detailed guidelines for sanctions in individual cases are neither practicable nor appropriate. The Tribunal adopts broad guidance. Its focus is to establish the seriousness of the misconduct and, from that, to determine a fair and proportionate sanction.

The contents of the Guidance Note are reviewed at least annually.

SECTION A: PRINCIPLES AND PROCEDURE

SANCTIONS AND ORDERS AVAILABLE TO THE TRIBUNAL

Solicitors

1. The Tribunal's jurisdiction and powers on an application are set out in Section 47 of the Act and include:

   - the imposition of a reprimand
   - the imposition of an unlimited financial penalty payable to HM Treasury
   - suspension from practice indefinitely or for a specified period
   - striking off the Roll of Solicitors

2. The Tribunal is not restricted as to the number or combination of sanctions which it may impose.

3. Other orders which the Tribunal can make in respect of solicitors or former solicitors include:

- no order
- restrictions upon the way in which a solicitor can practise
- termination of a period of suspension
- restoration to the Roll following strike off
- costs

Solicitors' non-lawyer employees and managers

4. By Section 43 of the Act the Tribunal has jurisdiction to deal with misconduct by those who are not admitted but are employed or remunerated by solicitors. The powers which the Tribunal may exercise in respect of such individuals are:

- to make no order
- to make an order prohibiting, save with the prior consent of the regulator, any solicitor from employing the person to whom the order relates
- to review or revoke a Section 43 Order (see also paragraph 58 below)

4A. The Tribunal's powers in respect of complaints by the Solicitors Regulation Authority concerning employees of solicitors and managers and employees of recognised bodies have been extended by Section 47(2E) of the Act and an amendment by the Legal Services Act 2007 to Schedule 2 to the Administration of Justice Act 1985 respectively. The Tribunal has power to make one or more of the following:

- an order directing payment of an unlimited financial penalty payable to HM Treasury;
- an order requiring the Solicitors Regulation Authority to consider taking such steps as the Tribunal may specify in relation to the individual;
- if the individual is not a solicitor, a Section 43(2) Order;
- an order requiring the Solicitors Regulation Authority to refer to an appropriate regulator any matter relating to the conduct of that employee.

PURPOSE OF SANCTIONS

5. The case of **Bolton v The Law Society [1994] 1 WLR 512** sets out the fundamental principle and purposes of the imposition of sanctions by the Tribunal:

"Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal."

"... a penalty may be visited on a solicitor ... in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way ..."

"… to be sure that the offender does not have the opportunity to repeat the offence; and"

"… the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth … a member of the public … is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires." (***Sir Thomas Bingham, then Master of the Rolls)***

TRIBUNAL'S APPROACH TO SANCTION

6. Guidance on the Tribunal's approach to sanction is set out in **Fuglers and Others v Solicitors Regulation Authority [2014] EWHC 179** (per The Honourable Mr Justice Popplewell, para. 28) as follows:

"28. There are three stages to the approach… The first stage is to assess the seriousness of the misconduct. The second stage is to keep in mind the purpose for which sanctions are imposed by such a tribunal. The third stage is to choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question.

HUMAN RIGHTS, EQUALITY AND DIVERSITY

7. The Tribunal is a "public authority" for the purposes of the Human Rights Act 1998, and it seeks to uphold and promote the principles of the European Convention on Human Rights in accordance with the Act. In deciding what sanction, if any, to impose the Tribunal should have regard to the principle of proportionality, weighing the interests of the public with those of the practitioner. The interference with the solicitor's right to practice must be no more than necessary to achieve the Tribunal's purpose in imposing sanctions. Reasons should be given for the sanction imposed, and the decision should usually be pronounced publicly.

The Tribunal is aware of and committed to the promotion of equality, diversity and inclusion in carrying out all its functions. It aims to ensure that its processes and procedures are fair, objective and transparent and free from unlawful discrimination. Promoting equality is also a requirement under current and emerging equality legislation, and in particular the Equality Act 2010. Everyone who is acting for the Tribunal and Tribunal Members are expected to adhere to the spirit and letter of this legislation.

COMMON PROCEDURAL ISSUES AFFECTING SANCTION

Admission, but dispute as to facts

8. A respondent may admit the alleged misconduct, but dispute particular details. The Tribunal will hear from both parties to determine whether in their view the disputed evidence would materially affect its sanction. If not, the Tribunal will proceed to determine sanction on the respondent's version of events. Where the dispute is such that it would materially affect sanction the Tribunal shall decide, having heard all the evidence, the factual basis upon which sanction will be based.

9. The Tribunal adopts the principle established in **R v Newton [1983] Crim LR 198**, and will only impose sanction upon a respondent where the particular misconduct is either admitted by, or proved against him.

10. If at a hearing to establish the facts on which sanction is to be based (a "Newton hearing"), the respondent fails to adduce evidence in support of facts exclusively within his knowledge, this will entitle the Tribunal to draw such inference from that failure as it might see fit – **R v Underwood [2005] 1 Cr.App.R. 13.**

11. Once the factual basis has been established, the respondent will have the opportunity to make representations as to the level of sanction to be imposed before the Tribunal makes its final decision.

Multiple/Alternative Allegations

12. Multiple allegations involving essentially the same wrongdoing committed concurrently, drafted in the alternative, or numerous similar examples of wrong-doing committed over a period of time, sometimes come before the Tribunal. When some or all of such allegations are found proved, it may be disproportionate and unjust to impose a sanction for each matter. In such a situation the Tribunal may in respect of matters found proved:

- impose a sanction, determined by the totality of the misconduct, which is specified as being in respect of all those matters; or
- impose a sanction on the more serious allegation/s, and make no separate order (or sanction) in respect of other more minor matters.

Sanction for each separate and distinct allegation

13. Where distinct and separate allegations are either admitted or proved, the Tribunal may:

- impose a particular sanction (determined by the totality of the misconduct) specified as being in respect of all matters; or
- determine the individual seriousness of each separate and distinct proven allegation, and the appropriate sanction in respect of each. Sanctions imposed will be proportionate to the totality of the misconduct.

SECTION B: DETERMINING SANCTION

ASSESSING SERIOUSNESS

14. The Tribunal will assess the seriousness of the misconduct in order to determine which sanction to impose. Seriousness is determined by a combination of factors, including:

- the respondent's culpability for their misconduct
- the harm caused by the respondent's misconduct
- the existence of any aggravating factors
- the existence of any mitigating factors

Culpability

15. The level of culpability will be influenced by such factors as (but not limited to):

- the respondent's motivation for the misconduct
- whether the misconduct arose from actions which were planned or spontaneous
- the extent to which the respondent acted in breach of a position of trust
- the extent to which the respondent had direct control of or responsibility for the circumstances giving rise to the misconduct
- respondent's level of experience and harm caused

Harm

16. In determining harm, the Tribunal will assess:

- the impact of the respondent's misconduct upon the public and the reputation of the legal profession. The greater the extent of the respondent's departure from the "complete integrity, probity and trustworthiness" expected of a solicitor, the greater the harm to the legal profession's reputation
- the extent of the harm that was intended or might reasonably foreseeably have been caused by the respondent's misconduct

Aggravating Factors

17. Factors that aggravate the seriousness of the misconduct include (but are not limited to):

- dishonesty, where alleged and proved.
- misconduct involving the commission of a criminal offence, not limited to dishonesty

- misconduct which was deliberate and calculated or repeated
- misconduct continuing over a period of time
- taking advantage of a vulnerable person
- concealment of wrongdoing
- misconduct where the respondent knew or ought reasonably to have known that the conduct complained of was in material breach of obligations to protect the public and the reputation of the legal profession
- previous disciplinary matter(s) before the Tribunal where allegations were found proved

Mitigating Factors

18. Factors that mitigate the seriousness of the misconduct itself include (but are not limited to):

- misconduct resulting from deception or otherwise by a third party (including the client)
- the timing of and extent to which any loss arising from the misconduct is made good by the respondent
- whether the respondent voluntarily notified the regulator of the facts and circumstances giving rise to misconduct
- whether the misconduct was either a single episode, or one of very brief duration in a previously unblemished career
- genuine insight, judged by the Tribunal on the basis of facts found proved
- open and frank admissions at an early stage and/or degree of cooperation with the investigating body

NOTE: Matters of purely personal mitigation are of no relevance in determining the seriousness of the misconduct. However, they will be considered by the Tribunal when determining the fair and proportionate sanction (see below, paragraphs 49 and 50).

PARTICULAR SANCTIONS

19. Having determined the seriousness of the misconduct, the Tribunal will assess whether to make an order, and if so, which sanction to impose. The Tribunal, in making this assessment, will start from the least serious option.

No Order

20. The Tribunal may conclude that, having regard to all the circumstances, and where the Tribunal has concluded that the level of seriousness of the misconduct or culpability of the respondent is low, that it would be unfair or disproportionate to impose a sanction. In such circumstances, the Tribunal may decide not to impose a sanction, save for an order for costs.

Reprimand

21. A Reprimand will be imposed where the Tribunal has determined that the seriousness of the respondent's misconduct justifies a sanction at the lowest level and that the protection of the public and the reputation of the legal profession does not require a greater sanction.

22. Relevant factors may include:

- the respondent's culpability is low
- there is no identifiable harm caused to any individual
- the risk of any such harm was negligible
- the likelihood of future misconduct of a similar nature or any misconduct is very low
- evidence of genuine insight, judged by the Tribunal on the basis of facts found proved
- minor breaches of regulation not dealt with under the Solicitors Regulation Authority's own disciplinary jurisdiction

Fine

23. A Fine will be imposed where the Tribunal has determined that the seriousness of the misconduct is such that a Reprimand will not be a sufficient sanction, but neither the protection of the public nor the protection of the reputation of the legal profession justifies a Restriction Order, Suspension or Strike Off.

Level of Fine

24. The Tribunal will consider the following in determining the appropriate level of Fine or combination of Fines to be imposed:

- there is no limit to the level of Fine the Tribunal may impose. In deciding the level of Fine, the Tribunal will consider all the circumstances of the case, including aggravating and mitigating

factors. The Tribunal will fix the Fine at a level which reflects the seriousness of and is proportionate to the misconduct

- the respondent shall be entitled to adduce evidence that the ability to pay a Fine is limited by his/her means

25. In the absence of **evidence** of limited means, the Tribunal is entitled to assume that the respondent's means are such that he/she can pay the Fine which the Tribunal decides is appropriate.

26. Fines are payable to HM Treasury, which is responsible for enforcing payment.

Restriction Order

27. The Tribunal, exercising its wide power to "make such order as it may think fit", may if it deems it necessary to protect the public, impose restrictions in the form of conditions upon the way in which a solicitor continues to practise. If the conditions are for an indefinite period it must be part of the order that the solicitor subject to the condition(s) has liberty to apply to the Tribunal to vary or discharge the conditions. Any breach of conditions imposed by the Tribunal would be a disciplinary offence which would generally merit a separate penalty. See in particular **Ebhogiaye v Solicitors Regulation Authority [2013] EWHC 2445 (Admin).**

28. Restricted practice will only be ordered if necessary to ensure the protection of the public and the reputation of the legal profession from future harm by the respondent.

29. A Restriction Order may be for either a finite or an indefinite period.

30. If the Tribunal makes an order for an indefinite period, it will specify as part of the order that the respondent may apply to it to vary or rescind the restrictions either at any time or after the lapse of a defined period.

Suspension

31. Suspension from the Roll will be the appropriate penalty where the Tribunal has determined that:

- the seriousness of the misconduct is such that neither a Restriction Order, Reprimand or a Fine is a sufficient sanction or in all the circumstances appropriate
- there is a need to protect both the public and the reputation of the legal profession from future harm from the respondent by removing his/her ability to practise, but
- neither the protection of the public nor the protection of the reputation of the legal profession justifies striking off the Roll
- public confidence in the legal profession demands no lesser sanction

- professional performance, including a lack of sufficient insight (judged by the Tribunal on the basis of facts found proved) by the respondent, is such as to call into question the continued ability to practise appropriately

32. Suspension from the Roll, and thereby from practice, reflects serious misconduct.

33. Suspension can be for a fixed term or for an indefinite period. A term of suspension can itself be temporarily suspended.

Suspended Term of Suspension

34. Where the Tribunal concludes that the seriousness of the misconduct justifies suspension from the Roll, but it is satisfied that:

- by imposing a Restriction Order, the risk of harm to the public and the public's confidence in the reputation of the legal profession is proportionately constrained; and
- the combination of such an Order with a period of pending Suspension provides adequate protection

the Tribunal may suspend that period of suspension for so long as the Restriction Order remains in force.

35. If the Restriction Order referred to at paragraph 34 above is breached, activation by the Tribunal of the term of suspension may follow.

36. If the period under restriction is successfully completed and the Restriction Order lifted, the pending suspension would cease to have effect.

Fixed Term of Suspension

37. Having concluded that the respondent should be immediately removed from practice, but that the protection of the public and the protection of the reputation of the legal profession do not require that he/she be struck off the Roll, the Tribunal will fix a term of suspension of such length both to punish and deter whilst being proportionate to the seriousness of the misconduct.

38. The Tribunal can also impose a staged order with a fixed term of suspension followed by a period of restricted practice under a Restriction Order.

Indefinite Suspension

39. Indefinite Suspension marks the highest level of misconduct that can appropriately be dealt with short of striking off the Roll. In deciding that an indefinite period of suspension is the fair and proportionate sanction, the Tribunal will have formed the view that:

- the seriousness of the misconduct is so high that striking off is the most appropriate sanction; but

- the presence of truly compelling and exceptional personal mitigation makes that course of action unjust; and/or
- there is a realistic prospect that the respondent will recover or respond to retraining so that he/she no longer represents a material risk of harm to the public or to the reputation of the profession

Striking Off the Roll of Solicitors

40. Where the Tribunal has determined that:

- the seriousness of the misconduct is at the highest level, such that a lesser sanction is inappropriate; and
- the protection of the public and/or the protection of the reputation of the legal profession requires it

the Tribunal will strike a solicitor's name off the Roll of Solicitors.

Sanction In Respect of a Registered European Lawyer ("REL") and Registered Foreign Lawyer ("RFL")

41. RELs and RFLs are individuals registered with the SRA under applicable legislation. They are subject to the same rules of professional conduct and regulatory and disciplinary regime as applies to solicitors. The powers of the Tribunal in relation to sanction apply to RELs and RFLs. It should be noted that the Tribunal's powers to sanction a REL include additionally withdrawal or suspension of his/her registration (see Section 26(2), The European Communities (Lawyer's Practice) Regulations 2000).

42. The sanction of withdrawal of registration in respect of a REL "possesses a gravity that lies between the sanctions of suspension and/or strike-off in the case of an English solicitor." - per Lord Justice Laws in **Giambrone v Solicitors Regulation Authority [2014] EWHC 1421 (Admin)** at para. 55. See also para. 60 per Mr Justice Foskett.

DISHONESTY

43. The most serious misconduct involves dishonesty, whether or not leading to criminal proceedings and criminal penalties. A finding that an allegation of dishonesty has been proved will almost invariably lead to striking off, save in exceptional circumstances.

Absence of Dishonesty

44. Striking off can be appropriate in the absence of dishonesty where, amongst other things;

- the seriousness of the misconduct is itself very high; and
- the departure by the respondent from the required standards of integrity, probity and trustworthiness is very serious.

45. In such cases, the Tribunal will have regard to the overall facts of the misconduct, and in particular the effect that allowing the respondent's name to remain on the Roll will have upon the public's confidence in the reputation of the legal profession. See in particular **Solicitors Regulation Authority v Emeana, Ijewere and Ajanaku [2013] EWHC 2130 (Admin.)**

Misappropriation of client funds falling short of Dishonesty

46. The Tribunal regards the breach of the heavy obligation to safeguard clients' money, which is quite distinct from the solicitor's duty to act honestly, as extremely serious.

47. The dishonest misappropriation of client funds will invariably lead to strike off.

48. Strike off can be appropriate in the absence of dishonesty. Where a respondent's failure properly to monitor clients' money leads to its misappropriation or misuse by others, such a serious breach of the obligation could warrant striking off.

"….the tribunal had been at pains to make the point, which was a good one, that the solicitors' accounts rules existed to afford the public maximum protection against the improper and unauthorised use of their money and that, because of the importance attached to affording that protection and assuring the public that such protection was afforded, an onerous obligation was placed on solicitors to ensure that those rules were observed." **Lord Bingham LCJ in Weston v Law Society [1998] Times, 15th July**

PERSONAL MITIGATION

49. Before finalising sanction, consideration will be given to any particular personal mitigation advanced by or on the respondent's behalf. The Tribunal will have regard to the following principles:

"Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. …. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears, likely to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price." **(Bolton above)**

50. Particular matters of personal mitigation that **may** be relevant and **may** serve to reduce the nature of the sanction, and/or its severity include:

- that the misconduct arose at a time when the respondent was affected by a physical or mental illness that affected his ability to conduct himself to the standards of the reasonable solicitor. Such mitigation should be supported by medical evidence from a suitably qualified practitioner
- that the respondent was an inexperienced practitioner and was inadequately supervised by his employer
- that the respondent made prompt admissions and demonstrated full cooperation with the regulator

SECTION C: OTHER POWERS OF THE TRIBUNAL

Application for termination of a period of suspension

51. The length of the period of suspension is determined by the seriousness of misconduct, and the potential for harm to the public and the reputation of the legal profession.

52. Indefinite Suspension can only be revoked by the Tribunal upon the application of the respondent. In considering any such application, the Tribunal will need to be satisfied that revocation of suspension would not adversely affect the reputation of the legal profession nor be contrary to the interests of the public.

53. Any application for the lifting of an Indefinite Suspension, or early termination of a fixed term, must be supported by evidence of changed circumstances that justify the application.

54. Although suspension is one step below the ultimate sanction of strike off, the factors considered by the Tribunal will be similar to those listed below in relation to restoration to the Roll.

Application for restoration to the Roll

55. The Tribunal has power to restore to the Roll the name of a former solicitor whose name has been struck from it. An application in such a case must be supported by a statement setting out:

- details of the original order of the Tribunal leading to strike off
- details of the applicant's employment and training history since the Tribunal's order of strike off
- details of the applicant's intentions as to, and any offers of employment within the legal profession in the event that the application is successful

56. An application for restoration is not an appeal against the original decision to strike off. The Tribunal's function when considering an application for restoration is to determine whether an applicant has established that he/she is now a fit and proper person to have their name restored to the Roll.

57. In considering any application for restoration to the Roll, the Tribunal will have regard to the following factors:

- the period which has elapsed since the order of strike off was made. Save in the most exceptional circumstances an application for restoration to the Roll within six years of the original strike off is likely to be regarded by the Tribunal as premature
- evidence of rehabilitation. This will usually require detailed evidence of substantial and satisfactory employment within the legal profession in the period since strike off
- the applicant's future employment intentions and whether another solicitor would be willing to employ the applicant within a practice in the event that the applicant's name is restored to the Roll
- the extent to which the applicant has repaid any losses sustained by others as a result of the applicant's original misconduct, including any fines and cost orders made by the Tribunal. The applicant must be in a position to demonstrate that he/she has made a sustained effort to meet any such liability
- a criminal conviction recorded against an applicant involving dishonesty or a finding of dishonesty by the Tribunal can constitute an almost insurmountable obstacle to a successful application for restoration
- Specific attention is drawn to the words of Mr Justice Collins in **Ellis-Carr v Solicitors Regulation Authority [2014] EWHC 2411 (Admin)**, 57). What matters when an application for restoration to the Roll is considered by the Tribunal is "the present position and the future … he should be judged on the basis of what he now is and whether there is any real prospect that … he can be regarded as someone who is fitted to be on the roll of solicitors".

Application for Review and Revocation of Section 43 Order

58. The Tribunal has jurisdiction under Section 43(3) and (3A) of the Act to decide an application by the person subject to a Section 43 Order or by the Solicitors Regulation Authority for review of that Order (Section 43(3)(a)). In addition, the Tribunal having made a Section 43 Order, may at any time revoke it (Section 43(3)(b)). Under Section 43(3A) the Tribunal may order:

(a) the quashing of the order;

(b) the variation of the order; or

(c) the confirmation of the order;

and where in the opinion of the Tribunal no prima facie case for quashing or varying the order is shown, the Tribunal may order its confirmation without hearing the applicant. The Tribunal, on hearing any

application under Section 43(3) may make an order for the payment of costs by any party to the application.

59. A Section 43 Order has a regulatory function, not a penal function. That is why the Order is of indefinite duration, subject to review and revocation as set out at paragraph 58 above.

60. The purpose of the Order is to safeguard the public and the reputation of the legal profession by ensuring that certain steps in relation to employment can be taken. In the absence of specific evidence, this could not be established merely by somebody attempting, unsuccessfully, to obtain the necessary experience of working directly under supervision. - per Mr Justice Wilkie in **Solicitors Regulation Authority v Ali [2013] EWHC 284 (Admin.)**

61. It is essential to recognise that the Tribunal carries out a **review** of the imposition of the Section 43 Order. **It does not rehear the original case.** The question that the Tribunal must consider – per Mr Justice Wilkie, **Ali** (*ibid*) is "whether it was, in the circumstances, any longer necessary for the level of regulatory control to be imposed upon the person subject to the Section 43 Order", taking into account the purpose of the order in safeguarding the public and the reputation of the legal profession.

SECTION D: COSTS

62. The Tribunal has the power to make such order as to costs as it thinks fit, including the payment by any party of costs or a contribution towards costs of such amount (if any) as the Tribunal may consider reasonable (Section 47 of the Act). Such costs are those arising from or ancillary to proceedings before it.

63. The Tribunal may make an order for the payment of a fixed amount of costs. This will be the usual order of the Tribunal where the parties are in agreement as to the liability for, and the amount of, those costs. Otherwise, the Tribunal will determine liability for costs, and either summarily assess those costs itself or refer the case for detailed assessment by a Costs Judge.

Costs against Respondent: allegations admitted/proved

General considerations

64. The Tribunal, in considering the respondent's liability for the costs of the applicant, will have regard to the following principles, drawn from **R v Northallerton Magistrates Court, ex parte Dove (1999) 163 JP 894**:

- it is not the purpose of an order for costs to serve as an additional punishment for the respondent, but to compensate the applicant for the costs incurred by it in bringing the proceedings
- any order imposed must never exceed the costs actually and reasonably incurred by the applicant

65. Before making any order as to costs, the Tribunal will give the respondent the opportunity to adduce financial information and make submissions:

"If a solicitor wishes to contend that he is impecunious and cannot meet an order for costs, or that its size should be confined, it will be up to him to put before the Tribunal sufficient information to persuade the Tribunal that he lacks the means to meet an order for costs in the sum at which they would otherwise arrive. ... where a solicitor admits the disciplinary charges brought against him, and who therefore anticipates the imposition of a sanction upon him, it should be incumbent upon him before the hearing to give advance notice to the SRA and to the Tribunal that he will contend either that no order for costs should be made against him, or that it should be limited in amount by reason of his own lack of means. He should also supply to the SRA and to the Tribunal, in advance of the hearing, the evidence upon which he relies to support that contention" (**Solicitors Regulation Authority v Davis and McGlinchey [2011] EWHC 232 (Admin)** per Mitting J and **Agyeman v Solicitors Regulation Authority [2012] EWHC 3472 (Admin)**)

66. Where the Tribunal decides that the respondent is, notwithstanding his limited means, properly liable for the applicant's costs (either in full or in part) and is satisfied that there is a reasonable prospect that, at some time in the future, his/her ability to pay those costs will improve, it may order the respondent to meet those costs but direct that such order is not to be enforced without leave of the Tribunal.

67. Such an order may be appropriate where the respondent adduces evidence of current absence of income and capital or a total, but temporary, dependence upon state benefits.

Costs against Respondent: some allegations not proved

68. Where the respondent is partially successful in defending the allegations pursued by the applicant, in considering the respondent's liability for costs the Tribunal will have regard to the following factors:

- the reasonableness of the applicant in pursuing an allegation on which it was unsuccessful
- the manner in which the applicant pursued the allegation on which it was unsuccessful and its case generally
- the reasonableness of the allegation, that is, was it reasonable for the applicant to pursue the allegation in all the circumstances
- the extra costs in terms of preparation for trial, witness statements and documents and so on, taken up by pursuing the allegation upon which the applicant was unsuccessful
- the extra Tribunal time taken in considering the unsuccessful allegation
- the extent to which the allegation was inter-related in terms of evidence and argument with those allegations in respect of which the applicant was successful
- the extra costs borne by the respondent in defending an allegation which was not found to be proved. (Please also refer to paragraph 72 below)

69. The Tribunal may award costs against a respondent even if it makes no finding of misconduct, "if having regard to his conduct or to all the circumstances, or both, the Tribunal shall think fit" (Rule 18 of the Solicitors (Disciplinary Proceedings) Rules 2007).

Costs against Applicant

70. The starting point adopted by the Tribunal in considering whether costs should be awarded against the regulator (where that is the applicant in a particular case) is:

"In respect of costs, the exercise of its regulatory function placed the Law Society in a wholly different position from that of a party to ordinary civil litigation. Unless a complaint was improperly brought or, for example, had proceeded as a "shambles from start to finish", when the Law Society was discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs followed the event." (per Laws LJ**, Baxendale-Walker v The Law Society [2007] EWCA Civ 233**):

71. Where a respondent seeks to pursue an application for costs against the regulator, the Tribunal will have regard to the following principles:

- an order that the applicant pay a successful respondent's costs on the grounds that costs follow the event should not ordinarily be made on that basis alone
- there is no assumption that such an order will automatically follow
- "to expose a regulator to the risk of an adverse costs order simply because it properly brought proceedings which were unsuccessful might have a chilling effect upon its regulatory function" **Baxendale-Walker, above**

72. The Tribunal must also take into account the decision of **Broomhead v Solicitors Regulation Authority [2014] EWHC 2772 (Admin),** 42, Mr Justice Nicol stated as follows:

"42. However, while the propriety of bringing charges is a good reason why the SRA should not have to pay the solicitor's costs, it does not follow that the solicitor who has successfully defended himself against those charges should have to pay the SRA's costs. Of course there may be something about the way the solicitor has conducted the proceedings or behaved in other ways which would justify a different conclusion. Even if the charges were properly brought it seems to me that in the normal case the SRA should have to shoulder its own costs where it has not been able to persuade the Tribunal that its case is made out. I do not see that this would constitute an unreasonable disincentive to take appropriate regulatory action.

73. The Tribunal will consider the balance to be struck between:

- the financial prejudice to the successful respondent in the particular circumstances if an order for costs is not made in his/her favour; and
- "the need for a regulator to make and stand by honest, reasonable and apparently sound decisions made in the public interest without fear of exposure to undue financial prejudice if unsuccessful" (Per Bingham CJ**, Bradford MDC v Booth (2000) 164 JP 485 DC**)

74. The Tribunal will receive submissions from the parties at the substantive hearing, and will adjourn the hearing insofar as it relates to costs only for that purpose if necessary.