Accountants' Defence & Advisory Services Ltd
The professional lifeline

A recent case from the ICAEW's Disciplinary Committee

Mustard was a sole practitioner. He had been a member of the Institute for many years. Although well past retirement age, he had no intention of retiring.

Spice had been a client of his for a great many years. He had had a problem with the Revenue over tax credits which was eventually resolved to his satisfaction by Mustard, but only after many months of protracted correspondence. However, they fell out over the fees that Mustard proposed to charge. Spice reported matters to the Institute, albeit over two years after Mustard had rendered his fee note. After a protracted investigation, the case was referred to the Disciplinary Committee.

Confident of his abilities to represent himself before the tribunal, Mustard chose not to seek legal advice or arrange to be represented. Both he and Spice gave evidence. Unfortunately, the tribunal upheld both complaints. Mustard was reprimanded, fined £2,650, ordered to pay costs of £17,588 and was to be the subject of publicity. He lodged an appeal.

The complaints

The two complaints were as follows:-

- Between May 2011 and March 2012, Mustard failed to deal efficiently with a personal tax inquiry of Spice.

- Between May 2011 and September 2015, Mustard failed to deal fairly with Spice, in that he told Spice that if he paid Mustard's fees in full, he (Mustard) would ultimately recover the majority of the fees from the Revenue, under the Financial Redress Scheme, but failed to advise Spice that if he was unable to recover those fees, Spice would be liable.

Both complaints alleged that Mustard had failed to act within the Code of Ethics.

The relevant section of the Code under the first complaint imposes an obligation on the practising accountant to act diligently. Diligence is defined as requiring the accountant to act carefully, thoroughly and on a timely basis.

In April 2011, the Revenue decided to review Spice's claim for tax credits. The Revenue's letter called for information for a given period, namely 1st January 2011 to 31st March 2011. No other period was mentioned. The deadline for a

reply was 12th May. Spice immediately engaged Mustard to handle the matter on his behalf.

On 9th May 2011 (three days before the deadline), Mustard wrote to the Revenue answering the points raised on 12th April. He said that most of the information required was not applicable, because Spice had been abroad, convalescing, for most of that time. Copies of bank and building society statements for that period, were produced.

The tribunal was not impressed by Mustard's reply. It felt that he could have been more helpful. It believed that had Mustard suggested an alternative period for the year 2010/11 and provided information about working hours, the matter could have been resolved there and then.

Tax Credits Act 2002

In his appeal, settled by Counsel, Mustard argued that the tribunal had misunderstood the position. The Revenue letter had been sent under Section 16 of the Tax Credits Act 2002 which enables the Revenue to serve notice upon a person in respect of tax credits to provide information and evidence.

The Act specifically refers to information and evidence which the Board of the Revenue considers they may need.

There is no obligation on the recipient of tax credits to proffer different information or evidence in relation to an alternative period.

The Act treats the person in receipt of tax credits as being in the UK for the first eight weeks for any period of absence abroad, or 12 weeks, in the case of illness.

The Revenue letter had referred to one specific period. It did not invite Spice to select an alternative period, if the period selected was not applicable.

In his reply, Spice said that he was on holiday from 5th January to 23rd March 2011.

The Revenue had not served a fresh notice for any alternative period. Instead, the Revenue terminated the award of Working Tax Credits. However, subsequently, the Revenue conceded that, under the regulations, the temporary absence of Spice abroad meant that he was entitled to continue to receive tax credits for that period. The Revenue also conceded that it should have reviewed the information supplied in May 2011. At a later date, the Revenue conceded that it should have served a further notice and apologised.

The transcript

On a reading of the transcript of the proceedings before the disciplinary tribunal, it appeared that neither the case presenter, nor the tribunal itself had considered the Act of 2002 or the regulations dating from 2003. Indeed, neither the Act nor the regulations were placed before the tribunal. Had this occurred, the tribunal would have read that there was no obligation on the taxpayer to provide alternative information or evidence. It would also have read that, under the regulations, it is provided that where the person is temporarily absent abroad, he is treated as being in the UK.

The tribunal had consisted of three individuals, of whom only one was a chartered accountant. On a reading of the questions that he put to Mustard, it appeared that he had been unaware of the Act or the regulations. In fact, in one question, the accountant wrongly put to Mustard that, in his opinion, there was a requirement to demonstrate working hours for an alternative period. Furthermore, he did not appreciate that the Act placed no obligation on the recipient of tax credits, to suggest an alternative period.

The tribunal made no mention of the regulations and gave no consideration to them during the course of the hearing.

Complaint 2

Mustard had sent four letters to Spice about the recovery of his fees. In none of these letters did Mustard tell Spice that if he paid fees in full, Mustard would recover them (or a majority) from the Revenue. Instead, Mustard said that he would do his best. However, he gave no guarantee.

In the grounds of appeal, it was argued that the inference from these letters was that Spice would meet the difference between what had been invoiced and what was subsequently recovered from the Revenue. In fact, Mustard was largely unsuccessful in recovering fees from the Revenue. Only a small amount was recovered.

Reasons

In its reasons for decision, the disciplinary tribunal said that Mustard had not acted diligently by deliberately not suggesting an alternative period. It was argued in the grounds of appeal that there was no proper basis for the tribunal having reached such a conclusion.

It was further argued that there was no obligation on Mustard to do any more. The onus was on the Revenue to say what it wanted the recipient to produce. The Revenue could have served a fresh notice, but chose not to do so.

There was no indication in the transcript that the disciplinary tribunal had, at any time, referred to the Act or the regulations.

In his evidence, Mustard said that, in his experience, it was not in the client's best interests to offer an alternative period. The Investigation Committee (conducting the case against Mustard) did not produce any expert evidence to indicate that Mustard's approach had been wrong.

Numerous letters sent

Whereas it was true that Mustard had written a great number of letters to the Revenue and that the disciplinary tribunal was critical of this, it was argued in the grounds of appeal that the disciplinary tribunal had been side-tracked by that issue. Mustard had never been charged with sending an excessive number of communications to the Revenue or with regard to the content of those letters.

The disciplinary tribunal believed that Mustard had a professional responsibility to offer an alternative timeframe and said that he had been unhelpful in not suggesting an alternative period.

The disciplinary tribunal placed a considerable amount of weight on the fact that an alternative period was eventually provided in December 2011. It concluded that this could and should have been provided in May 2011, following a sensible discussion with the Revenue.

In the grounds of appeal, it was argued that there had been a fundamental failure by the disciplinary tribunal to appreciate that Mustard was under no obligation to provide further information or evidence, than sought by the Revenue. Under the regulations, Spice was treated as being temporarily absent from the UK. He was therefore unlikely to be able to provide information sought by the Revenue for that period.

It was only later that the Revenue requested information for "any period during the year 2010/11". The Revenue had wanted confirmation and evidence that Spice had been working 30 hours a week. After that request was made, the information was duly provided by Mustard.

The tribunal had upheld the second complaint on the basis that Mustard had failed to warn Spice that he may not recover the majority of the fees from the Revenue.

What was the complaint?

However, that was not the charge by way of complaint. The charge was that Mustard had told Spice that if he paid fees in full, he (Mustard) would recover the majority from the Revenue. However, Mustard had said no such thing in correspondence. The tribunal was entitled to consider whether Mustard had given any oral assurance. There had been a single telephone call. However, Mustard was able to produce his own contemporaneous attendance note which verified his account. Spice had not been able to produce any similar attendance note about what he believed had been said during that conversation.

With regard to costs, the Investigation Committee said that it had spent 80 hours on the matter at £150 per hour, the equivalent of £12,000. It was argued in the grounds of appeal that this was an inordinate amount of time to spend on any investigation. Furthermore, Mustard had been given no warning by the Institute that costs of this magnitude were being incurred.

Finally, in the grounds, it was submitted that the Investigation Committee had to substantiate the allegation with regard to both complaints, that the conduct of Mustard was discreditable. What that meant was that the conduct must be capable of damaging the reputation of the member and the trust that others put in him. It would need to be deplorable conduct when viewed by fellow practitioners.

The appeal

Some months after the disciplinary tribunal had made its decision, there was a hearing before the Appeal Committee. The Investigation Committee was represented by an in-house barrister. Mustard was present, as was his solicitor and barrister. The appeal tribunal comprised a practising Queen's Counsel (who took the chair), one chartered accountant and three lay members.

Complaint 1

The appeal tribunal regretted Mustard's adopted position of non-cooperation

and active confrontation with the Revenue. It also felt that Mustard should have drawn the client's and the Revenue's attention to the fact that Spice was entitled to tax credits, when abroad. It also felt that the outcome could have been achieved much earlier. It felt that the handling of the matter by Mustard had been deficient.

Nevertheless, it did not believe that Mustard's conduct passed the threshold for misconduct and it therefore concluded that the first complaint should not have been upheld.

Complaint 2

It appeared to the appeal tribunal that the complaint was in two parts, namely:-

1. That Mustard had told Spice that if fees had been paid in full, he would recover the majority from the Revenue; and
2. Mustard failed to tell Spice that if he was unable to recover the full amount, then Spice would be responsible for the balance.

In opening the case for the Investigation Committee, the prosecutor (or case presenter) who had not been involved before the disciplinary tribunal, conceded that the first element of the complaint was unsustainable. However, she argued that the second element to the complaint had been substantiated.

The appeal tribunal disagreed with this argument and concluded that following the concession on the first part of the second complaint, the second part simply fell away. It concluded that the second complaint should not have been upheld by the disciplinary tribunal.

Accordingly, the findings of misconduct and orders with regard to reprimand, fine, costs and publicity, should all be set aside.

Costs awarded

Counsel for Mustard argued that, in the circumstances, Mustard was entitled to his full costs of £24,740. The appeal tribunal agreed and concluded that the sum claimed was reasonable. The Institute was therefore ordered to pay Mustard the sum of £24,740.

The appeal tribunal also said that it had been appropriate for Mustard to be represented by a solicitor/counsel before it and went on to say that it was unlikely that the appeal would have prospered, without their involvement.

Although the Investigation Committee had incurred costs with regard to the appeal, it was not entitled to be awarded any costs.

The lawyers

Kenneth Hamer of Henderson Chambers, instructed by ANCS Ltd, our Sister Company, represented Mr. Mustard.

The moral of the story

- However confident in your abilities as an advocate and particularly where you, the defendant accountant are giving evidence and the Investigation Committee is calling the complainant, it is best to be legally represented at the disciplinary tribunal.

- It is certainly very important (if not essential) to be represented (or at the very least guided) by lawyers on your appeal.
- All members in practice who find themselves on their way to the Disciplinary Committee, should carefully consider their PII policy and/or general office insurance policy and check whether they may be covered in respect of disciplinary and appeal proceedings.
- One should also remember that the choice of lawyer under the Insurance Regulations 1990 is a matter for the insured. Naturally, the lawyer appointed must have specific experience in dealing with disciplinary proceedings and his fees must be reasonable. Accountants should not be fobbed off by PII insurers. It is often the case that whereas PII lawyers on insurance panels are highly experienced in dealing with negligence claims, their experience of handling disciplinary proceedings is very limited.

Major change to disciplinary byelaws

At the AGM of the ICAEW held in June 2018, a number of resolutions were put to the membership with regard to changes in the disciplinary byelaws. The most important and significant change was proposed under Resolution 3.

Concern has been expressed for some time that there is no current cut-off for the investigation of complaints. What this has meant is that a complainant is entitled to make allegations against a chartered accountant, at any time. In many instances, the allegations date back years. As there has been no limitation in the byelaws for the consideration of complaints, investigations have been conducted, which have placed members at considerable disadvantage. There is a risk that members, subject to an investigation for work carried out many years ago, may find that documents have not been retained. In any event, memories are impaired after a considerable period of time. This creates a risk to a fair hearing. It can also be extremely difficult to investigate such complaints in relation to conduct which occurred years before. This can take up a lot of staff time at the Institute. The resolution proposed a cut-off which brings the Institute into line with the policies adopted by other regulators.

It was proposed that Byelaw 9.6 be amended, now to read as follows:-

> If a referrer brings facts or matters to the attention of the head of staff in accordance with paragraph 1 and more than three years has elapsed since (a) the date on which those facts or matters first occurred; or, if later (b) the date on which those facts or matters first came, or ought reasonably to have come, to the attention of that person, the head of staff shall take no further action with respect to those facts or matters unless he considers, despite the expiry of the time limits in (a) and (b) above that an investigation is necessary for the protection of the public or otherwise necessary in the public interest, in which case the facts or matters shall constitute a complaint or complaints under paragraph 3 (namely for investigation).

There is provision that if the head of staff exercises his discretion that a complaint should not be investigated, the complainant has the right to ask the Investigation Committee to review that decision.

The resolution was duly passed and will come into force on 1st October 2018.

Comment: This is likely to become a thorny matter. One can expect that if the head of staff (namely the principal of the Professional Standards Office) decides that the complaint should not be investigated, the complainant will undoubtedly exercise the right that the matter be considered by the Investigation Committee on the basis that an investigation is necessary for the protection of the public or in the public interest.

Equally, it will be interesting to see the extent to which the head of staff decides that an investigation should be conducted, despite the fact that more than three years have elapsed since the date of the events complained about.

Whereas the complainant (referrer) has the right to challenge the decision of the head of staff insisting that the matter go before the Investigation Committee, the member has no such rights in the event that it is decided to conduct an investigation.

One can anticipate a host of arguments as to why Professional Standards should conduct an investigation, despite the fact that more than three years have elapsed. It may well be that the complainant has been involved in litigation with the member which has only just been concluded and that it would not have been appropriate for the matter to be investigated by the Institute, whilst those proceedings were conducted. Equally, the member may have been under investigation by another regulator, which could explain the delay in the issue being reported to the ICAEW.

Illness may be a factor

The complainant may have been ill and unable to make his complaint until after three years had elapsed. But, clearly, the complainant must do more than simply say it has taken some years to assemble all the relevant documentation.

Accountants are required to retain their client files for a period of six years. Accordingly, if a complaint is made between three and six years from the date of the event in question, the member should still have his papers. Where he is going to be at a disadvantage is with regard to his ability to recall the events of three or more years ago.

Presently, I am involved in a complaint against a member of CIMA, concerning advice given to clients over 15 years ago. The member no longer has his papers, which were shredded years ago, arguably, in accordance with the recommendations of CIMA. Nevertheless, the complainants have argued that the member should have retained his papers and not destroyed them after six years. Ironically, the complainants kept the attendance notes of the advice given by the member at a meeting dating back to 2003, but, of course, the member does not have his own attendance note as to what he believes he said at that time.

CIMA has a similar regulation to that which will shortly be coming into force at the ICAEW, with regard to historic complaints. However, the complainants are arguing that it is only within the last couple of years that they have discovered that the advice given by the member, was wrong.

GDPR

Members of Accountants' Defence will be aware of the new regulations which came into force at the end of May. Accountants' Defence does not need the consent of its members for continuing to send out the regular newsletter of which this is the latest example. It is one of the terms of membership, namely that all subscribing members are entitled to receive the newsletter, by post. We do not presently send the newsletter by email.

We do, though, need to communicate with our members on a regular basis, both by post and email (and occasionally by telephone too). We presently maintain contact details for all our subscribing members. All that we would ask is that if there are any changes, these changes should be notified to us as soon as possible.

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