Accountants' Defence & Advisory Services Ltd
The professional lifeline

Should every conviction result in disciplinary proceedings?

You may, already, have read about the former Council member of the ICAEW who was excluded from membership by the Disciplinary Committee, following conviction at the Crown Court of various road traffic offences which resulted in a 16-year-old boy suffering a multitude of life-changing injuries and his sentence to three years' imprisonment.

Let's firstly consider the facts. The defendant was attending a dinner, in respect of an organisation of which he was the president. We do not know the name of the organisation or what it represented. The defendant was observed to consume a large amount of alcohol during the evening and was almost unable to stand. At the end of the evening, the defendant got in his car to drive home. He was unaccompanied.

The victim was working at a local restaurant. He finished work just after 11pm and proceeded to cycle home. The defendant was observed driving at speed. Although the victim was cycling with appropriate lighting, the defendant drove into the back of the bicycle, which was destroyed. The victim impacted the defendant's windscreen. The defendant did not stop and drove off leaving the victim seriously injured on an unlit country road.

The defendant then drove 130 miles to his mother's home in Birmingham where he was subsequently arrested. He denied all involvement in the accident and alleged that a brick had hit his windscreen. However, hair particles of the victim were found in the shattered windscreen. When presented with this evidence, the defendant admitted that he had been driving and had caused the accident. It was also found that he had twice the legal limit of alcohol in his system.

Injuries

The 16-year-old victim suffered a broken scull, fractured spine, spinal cord injuries and major internal injuries. He underwent surgical treatment including complex, permanent neurosurgery and the removal of part of his scull. He remained in hospital for nine months. He was left paralysed down his right side.

He suffered a brain injury resulting in neurological and cognitive impairments.

The defendant was charged with four offences, namely:-

- Causing serious injury by dangerous driving.
- Failing to stop after a road accident.
- Being involved in a road accident and failing to report that accident.
- Driving a motor vehicle with an alcohol level above the legal limit.

The defendant was convicted on all four charges.

Sentence

The defendant was sentenced to three years' imprisonment and disqualified from driving for 11½ years. He was also required to pass an extended driving test before he could regain his licence.

The judge said that this was an exceptionally serious case. He considered that the defendant's behaviour was shameful and his cowardice in leaving his victim maimed in the roadway whilst he made off in an effort to avoid justice was breathtaking. The victim had had his life permanently sabotaged by the defendant's appalling criminal conduct.

The judge also said that the high level of alcohol in the defendant's system and the fact that he drove a considerable distance in an inebriated state, were aggravating features. He considered that the defendant's conduct was of a high culpability and he also referred to the fact that the defendant had attempted to evade justice. He did though give the defendant credit for his previous good character and plea of guilty.

Resignation (1)

Shortly prior to the Crown Court hearing, the defendant resigned from the Council of the Institute.

The disciplinary hearing at the ICAEW took place in the absence of the defendant as he was serving the term of imprisonment. With a sentence of three years, one would normally serve 18 months.

The first offence, namely causing serious injury by dangerous driving was an indictable offence. Conviction of such an offence rendered the defendant liable to disciplinary action under Disciplinary Byelaw 4(1)(e).

The second, third and fourth complaints were summary only offences. Accordingly, the tribunal had to consider whether those complaints rendered the defendant liable to disciplinary action under Disciplinary Byelaw 4(1)(a) namely whether they brought discredit on the defendant, the Institute or the profession.

The tribunal was satisfied that all four complaints resulted in a breach of the Disciplinary Byelaws.

Resignation (2)

The defendant was not represented before the tribunal. However, there was an interesting feature of the case when the tribunal commented that the defendant's solicitors' attempt to avoid disciplinary proceedings by submitting their client's resignation from membership, was misconceived.

Mitigation was put before the tribunal, in writing. The defendant had served on the Institute's Council and various committees for a period of 12 years. The solicitors also submitted that the defendant had already been severely punished for his out-of-character conduct.

The guidance on sanctions said that a conviction for an offence which resulted in a sentence of imprisonment should normally result in an order of exclusion. The tribunal found no reason to depart from the guideline. The tribunal also considered that criminal behaviour of this nature was fundamentally incompatible with membership of any professional association. Furthermore, the public interest could not be met by any sanction other than exclusion.

Costs

In addition to excluding the defendant from membership, the tribunal also ordered the defendant to pay costs in the sum of £2500. In fact, the Investigation Committee (which brings the case against the defendant) had applied for costs in the sum of £5274. Although the length of hearing had been less than the original estimate, it is surprising that the tribunal only ordered the defendant to pay 47% of the costs sought. Perhaps the tribunal took a pragmatic view bearing in mind that the defendant had no income and was serving a prison sentence. The defendant was given 12 months in which to pay the costs from the date that he was released from prison.

All in all, a particularly sad, but equally appalling case. Furthermore, although it was clear to his colleagues that the defendant had consumed an excessive amount of alcohol, none of them saw fit to stop the defendant from driving home. To some extent, they were equally culpable.

Byelaws

Let us examine Disciplinary Byelaws 4(1)(e) and 4(1)(a).

In order to avoid any confusion, we will refer to the new Disciplinary Byelaws which came into effect from 15th October 2018. Nevertheless, the new Byelaws do not differ from the old Byelaws in respect of the definition of misconduct. Byelaw 4(1)(e) refers to the circumstances which are set out in 4.2. 4.2(g) refers to whether the defendant has before a court of competent jurisdiction, been convicted of an indictable offence.

4.1(a) which defines misconduct, says that that would occur if the defendant had committed any act or default, whether in the course of carrying out professional work or otherwise, and was likely to bring discredit on himself, the ICAEW or the profession of accountancy. The reader will note, in particular, the key words "or otherwise". This enables the Institute to take action against one of its members if the member's conduct does not relate to the carrying out of professional work.

The Byelaws of the Institute make provision that a conviction in respect of an indictable offence is specifically defined as an act of misconduct. An indictable offence is one that can only be tried by a Crown Court. Summary offences are dealt with by Magistrates' Courts. However, with regard to complaints 2, 3 and 4, the Investigation Committee had to satisfy the disciplinary tribunal that these convictions were likely to bring discredit on the defendant, the Institute or the profession of accountancy and that this would amount to an act of misconduct. As I mentioned earlier, the key words are "whether in the course of carrying out professional work or otherwise".

Double punishment

There are those that question the inclusion of the words "or otherwise". They take the view that a disciplinary tribunal should only be concerned with whether the carrying out of professional work is likely to bring discredit. Why should the committal of an act or default outside professional work be likely to bring discredit on the defendant, the Institute or the accountancy profession?

Those that argue that disciplinary proceedings should only be concerned with the carrying out of professional work, point out that where there has been a conviction, the defendant has already been punished by the court. They argue that he should not be punished again by way of disciplinary proceedings.

Nevertheless, disciplinary proceedings are not simply there to punish accountants, but to maintain the highest of professional standards and to protect the public.

Legal authorities

The definition of misconduct requires careful consideration of a number of legal authorities. The chapter on misconduct in Kenneth Hamer's masterly Professional Conduct Casebook (which covers all professions) runs to nearly 40 pages.

In the case of Sharp v The Law Society of Scotland 1984, it was held that certain standards of conduct are to be expected of competent and reputable professionals. A departure from those standards which would be regarded by competent and reputable professionals as serious and reprehensible, may properly be categorised as professional misconduct.

In R v Statutory Committee of the Pharmaceutical Society of Great Britain ex parte Sokoh 1986, the judge said that if misconduct was to be defined at all it would be "incorrect or erroneous conduct of any kind provided that it is of a serious nature".

In the leading case of Roylance v GMC 2000, in his judgment, Lord Clyde said that misconduct was qualified in two respects. Firstly, it is qualified by the word "professional" which links the misconduct to the particular profession. Secondly, the misconduct is qualified by the word "serious". It is not any professional conduct which will qualify. The professional conduct must be serious.

In the case of Nandi v GMC 2004 there was reference to conduct which would be regarded as deplorable by fellow practitioners. The court went on to say that conduct can constitute serious professional misconduct if it falls short of the standard that is considered appropriate by the profession.

In Calhaem v GMC 2007, it was said that a single negligent act or omission was less likely to cross the threshold of misconduct, than multiple acts or omissions.

In Spencer v General Osteopathic Council 2013 the court said that there had to be an implication of moral blameworthiness and a degree of opprobrium which was likely to be conveyed to the ordinary intelligent citizen.

In Johnson and Maggs v Nursing and Midwifery Council 2013, the judge said that it was common ground that simple negligence was not sufficient for the purpose of finding misconduct and that gross professional negligence or conduct that would be seen as deplorable by fellow practitioners was required. The court went on to say that the failure had to be such as would be seen as deplorable by fellow practitioners and as involving a serious departure from acceptable standards.

Guidelines

With regard to the Guidance on Sanctions, the starting point for a conviction involving dishonesty, would be exclusion. Where the conviction does not involve dishonesty but where the member receives a custodial sentence, the starting point would be exclusion.

Where the conviction did not include dishonesty and where the member did not receive a custodial sentence, the starting point would be a reprimand.

In respect of a police caution, again, the starting point would be a reprimand.

If in this particular case, the defendant had not been convicted of causing serious injury by dangerous driving, but had been convicted of the other three offences and had not been given a custodial sentence, the outcome before the disciplinary tribunal is likely to have been a reprimand.

Conclusion

It would be impossible for a defendant to argue before a disciplinary tribunal that his conviction in respect of an indictable offence could not amount to misconduct.

Where the defendant may have an argument is in respect of summary convictions as to whether these would amount to misconduct. However, he is likely to face an uphill struggle trying to persuade a tribunal that such a conviction was unlikely to bring discredit on himself, the Institute or the profession of accountancy.

Second Case

In another case involving alleged misconduct, which took place about a year ago, the defendant was alleged to have acted in an unprofessional manner in breach of Section 150.1 of the Code of Ethics when he used offensive language towards two people outside a public house. I will describe these individuals as Mr B and his partner, Mrs A. The defendant had previously undertaken accountancy work for Mr B. He had also acted as an expert witness in Mrs A's divorce proceedings. The fees charged by the defendant as expert witness had become the subject of a dispute. The defendant alleged that Mr B had agreed to pay his fees, but had failed to do so.

Bad language

On the evening in question, Mrs A and Mr B were standing outside a public house having a drink with friends. The defendant is alleged to have said to Mr B, "I'm going to f*** have you." He then turned to Mrs A and said, "And you can f*** off and all." He also went on to say to her, "I'm also suing that f*** solicitor in Xfield."

Mrs A made a complaint to the ICAEW and as a result the defendant appeared before the disciplinary tribunal. Section 150.1 of the Code of Ethics imposes an obligation on a member to avoid any action which he knows or should know may discredit the profession.

The defendant denied the complaint. He admitted using the language referred to above. However, he denied that his conduct was in breach of Section 150.1 or that it could amount to professional misconduct rendering him liable to disciplinary action.

Unpaid fees

The circumstances behind the incident were that the defendant had been instructed as a single joint expert. After preparing his report, Mrs A's solicitors instructed him to do further work which he agreed to do on an hourly basis. Six months after submitting his invoice, Mrs A's solicitors challenged the defendant's fees for the first time alleging that they were too high and requesting a detailed breakdown. Later, the defendant received a telephone call from Mr B. During that call, Mr B alleged that the defendant's report had been inaccurate and accused the defendant of inflating his time. The defendant was utterly incensed by the accusations made by Mr B.

At a later date, the defendant had sued Mrs A's solicitors and had not only been successful, but had also obtained a costs order against the solicitors on the grounds that they had behaved unreasonably.

Witnesses

The tribunal heard evidence from Mr B, Mrs A and the defendant, together with a character witness on the defendant's behalf.

There was no issue between the parties about the specific language that had been used by the defendant towards both Mr B and Mrs A.

The tribunal had to consider whether the behaviour of the defendant amounted to a breach of the principle of professional behaviour. To find that there had been a breach, the tribunal had to be satisfied that the defendant knew or should have known that his actions may discredit the profession. It was accepted that actions which discredit the profession may occur both within and outside the context of an accountant's professional work.

The tribunal was in no doubt that the defendant's actions brought discredit on the profession and that he should have known that they would. It found that the defendant had used offensive words in a threatening manner towards Mr B. He had also used offensive language to Mrs A in the context of a dispute over fees. The incident took place outside a public house and was witnessed by members of the public. The defendant had accepted in his oral evidence that he was both angry and that a red mist had descended.

Genuine grievance

Although the tribunal accepted that the defendant undoubtedly considered that he had a genuine grievance against Mr B, that could not possibly justify or excuse his behaviour. The appropriate remedy was recourse to the courts.

Section 150.1 makes it clear that an action will discredit the profession if a reasonable and informed party, weighing all the specific facts and circumstances available to the professional accountant, would conclude that the action would adversely affect the good reputation of the profession. The tribunal found that what the defendant had done was discreditable behaviour. It found the complaint proved.

The matter was concluded on the basis of a reprimand and fine.

As can be seen, therefore, an accountant, whether or not he is in practice and whether his conduct takes place within or outside the context of professional work, may be liable to disciplinary action. It is for the tribunal to decide, having considered all the facts and circumstances, whether the defendant's conduct has breached the Code of Ethics and, as a result, whether he or she has breached the Byelaws of the Institute.

If you have views on the above cases, please write to me at lifeline@accountantsdefence.co.uk.

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