Accountants' Defence & Advisory Services Ltd
The professional lifeline

Welcome to the spring newsletter. It's been a while since the last one, for which I apologise. We have been busy with disciplinary cases through our sister-company, Accountants National Complaint Services Limited (ANCS). Clients of ANCS pay for the service, which is free to those who are members of ADAS.

Regulatory changes

Chair of the Disciplinary Committee

The transition from lay chairman of the Disciplinary Committee to Queen's Counsel is now largely in place. The ICAEW has a pool of three 'Silks', any one of whom can be chairing a hearing of the DC. The panel continues to consist of three members, namely the chair, a member of the ICAEW and a lay member. There is no longer a requirement for the DC to sit with a legal assessor, as any legal advice will now be directed from the chair.

The change from a lay chairman to a QC is in keeping with similar changes being introduced within other professions and regulators. However, the ACCA has yet to implement such a change. ACCA Disciplinary Committees will continue to sit with a legal assessor.

Although the changes at the ICAEW are largely to be welcomed, there is one consequence which is less than satisfactory. Many accountants decide to attend the disciplinary hearing, without representation. Before the introduction of these changes, the legal assessor would give guidance to the accountant, prior to the hearing. This will no longer be possible. Of course, the lawyer representing the ICAEW before the Disciplinary Committee (invariably, someone on the Institute's staff) will assist the accountant and give guidance. However, this is less than satisfactory, bearing in mind that the lawyer presenting the case on behalf of the Investigation Committee is, effectively, the prosecutor. The accountant is attending as the defendant.

I am also somewhat uncomfortable about a hearing involving accountancy issues being decided by a panel in which the accountant member is in the minority. Of course, this has been the position for quite some time, with two lay members, one of whom was in the chair. That situation continues, in that the majority will comprise two lay members, of whom one is a QC.

In a recent case, I was disappointed to hear the chair (a practising QC) remark at the conclusion of the case, when the matter of the Investigation Committee's costs came to be considered, that he was fairly comfortable with the amount of costs the case presenter was seeking. This was before he had heard submissions. The Investigation Committee was seeking some £15,000, a tidy sum. Queen's Counsel (practising in the High Court) will doubtless be comfortable with costs of that magnitude. Accountants in practise will not.

Costs

Under the old system, if you were acquitted by the Disciplinary Committee, it was almost impossible to secure a costs order against the Institute. At last, the system has changed.

Now, if the Disciplinary Committee dismisses all complaints, it may order the Institute to pay to the defendant such sum in respect of the defendant's costs as it may, at its absolute discretion, determine, up to a maximum of £25,000. If the defendant's costs exceed this sum, a higher amount may be ordered, but only if the DC is satisfied that the complaints have been brought in bad faith, or no reasonable person would have brought or pursued such a complaint. As you will readily appreciate, such orders are likely to be rare. Do not be surprised if such an order is never made.

Please note that Byelaw 33.1(a) which introduced this change on 15th October 2018, only applies if all the complaints are found to be unproved. It follows that if a defendant faces six complaints, of which five are serious and yet he is acquitted of those five, but convicted of one lesser offence, he cannot recover his costs, even in part. That does not seem to me to be particularly fair.

There is no change to the former rule that a successful appellant is entitled to his costs before the Appeal Committee. This would now extend to any costs he may have incurred before the DC, provided his appeal was wholly successful.

Fixed penalties

This is a new procedure introduced under Byelaw 14(a).1. The case manager may, having concluded their investigation, decide that the complaint discloses a prima facie case. The member and/or his firm must agree to accept this conclusion before a fixed penalty can be offered. The case manager can then propose a fixed penalty, which will involve a reprimand, fine and publicity. Note that a fixed penalty does not include a costs order. Were the case to be referred to the Investigation Committee, the latter could (and invariably does) offer a consent order, namely a reprimand, fine, publicity and costs. Avoiding costs (which are often significant) is therefore a major factor in assisting the accountant to decide whether to accept the fixed penalty.

A discount in respect of the fine (usually 30%) can be applied if the member has cooperated throughout the investigation, readily admits the complaint and is sufficiently contrite and/or displays insight.

I suspect that fixed penalties will, in time, become as common as consent orders.

Recent fixed penalties

The press release of 3rd April 2019 issued by the Professional Standards Department entitled 'Disciplinary orders and regulatory decisions' discloses no less than six fixed penalties, all in respect of the same offence, namely practising without a practising certificate. All six were offered an identical penalty, namely a reprimand and a penalty of £700, together with publicity of name.

However, it seems strange, to my mind, that there was no variation between the sanctions offered, bearing in mind the considerable differences in the period during which the member was in practice, but had no practising certificate. The six cases are summarised below.

Cases

A – three years

B – one year

C – three years

D – two years

E – one year

F – one year

It is also somewhat remarkable how many accountants are investigated for practising without a practising certificate and the leniency displayed by both case managers when offering fixed penalties and consent orders offered by the Investigation Committee. I wish someone would explain to me why practising without a practising certificate is regarded as such a minor offence.

On the other hand, a client of mine, in his 70s and about to retire, had the book thrown at him for historic breaches of the Money Laundering Regulations – a severe reprimand, a fine of £6,000, costs of £2,600, plus publicity of name.

The big firms

All have incurred disciplinary records in recent years, largely through consent orders. But is the imposing of a minor fine likely to bring about any substantial or lasting changes in the way the big accountancy firms operate? Here's a snapshot of the last 12 months. All these cases involved a breach of Audit Regulations.

June 2018 – Deloitte fined £9,750

August 2018 – Deloitte fined £2,500

November 2018 – BDO fined £2,593

April 2019 – Ernst & Young fined £7,000

April 2019 – KPMG fined £7,000

Time limits on complaints

Under the old system, a complainant could bring matters to the attention of the Institute, at any time, regarding the conduct of an accountant or practice, irrespective of how historic those issues might be.

A time limit has now been imposed in accordance with Disciplinary Byelaw 9.6. That states that if a complainant brings facts or matters to the attention of the head of staff of the Professional Conduct Department, and more than three years has elapsed since the date on which those facts or matters first occurred or 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.

Nevertheless, that is qualified by the following. If the head of staff considers that an investigation is necessary for the protection of the public or in the public interest, he shall direct that the complaint be investigated, despite the fact that more than three years has elapsed.

The words 'protection of the public' or 'in the public interest', is not specifically defined. It is entirely at the discretion of the head of staff as to whether he directs that the complaint be investigated.

The satisfactory feature about this byelaw change is that, apart from exceptional circumstances, PCD is not obliged to investigate historic complaints.

This is good news for the accountant. There is nothing worse than having to deal with a complaint which dates back many years. Firstly, no one is going to be in a position to recall, with any particularity, the events of the past.

Secondly, in the normal course of events, the practitioner's file will have been destroyed after six years. If the complaint dates back more than six years, the practitioner will not have access to his files and would be in great difficulty addressing the issues raised by the complainant. The Institute now accepts that a member should not be placed in such an invidious position.

If the head of staff decides not to investigate such historic matters, the complainant may, within 28 days, request that the matter be referred to the Investigation Committee for review. The decision of the Investigation Committee cannot be challenged.

Consent orders

As this is the most frequent order made by the Investigation Committee, it might be useful just to remind ourselves with regard to the Committee's powers.

If the Investigation Committee considers that there is evidence to support the complaint, it may offer a consent order. This would involve a severe reprimand or a reprimand, a fine, costs and publicity of name.

It is for the accountant to decide whether to accept the consent order. If the consent order is rejected, the Investigation Committee must prefer the complaint to the Disciplinary Committee for consideration.

A consent order can only be offered if the complaint is admitted by the accountant. If the accountant denies the complaint, it would have to be referred to the Disciplinary Committee.

If the complaint is likely to lead to a claim, the accountant should not accept the consent order, without the specific consent of his insurers. For example, the complainant may have alleged that the accountant has unreasonably delayed the submission of tax returns and as a result, the complainant has suffered interest and penalties. Were the Investigation Committee to uphold the complaint, then for the accountant to accept a consent order, this could be regarded as admission of liability. If the complainant brought a claim against the accountant who then informed his insurers, the latter might decide to avoid the claim, on the basis that the accountant having admitted liability, without the consent of insurers, has prejudiced their position.

If in doubt, the accountant should alert his insurers just as soon as the consent order is offered. At the same time, he should be requesting the secretary to the Investigation Committee to grant additional time, whilst he awaits advice from his insurers. If the insurers advise the accountant not to accept the consent order, he should immediately reject the same, following which the complaint will be referred to the Disciplinary Committee. In those circumstances, one would expect the insurers to underwrite the costs of representation before the Disciplinary Committee. Of course, the accountant should always advise insurers when a complaint is made.

Cautions

The Investigation Committee has the power to dispose of a complaint by way of caution. This decision would not be publicised, but the accountant would be expected to pay the Institute's costs.

It should be noted that a caution is a formal decision which can be taken into account by the Investigation Committee or the Disciplinary Committee at a later date, when dealing with a subsequent complaint.

It should be noted that cautions are rarely imposed.

Appeals

An accountant who wishes to challenge a decision of the Disciplinary Committee has the right of appeal either in respect of the finding and/or the order made. The appeal must be lodged within 28 days of the date of service of the written record of decision of the Disciplinary Committee.

The notice of appeal shall be accompanied by a statement of the grounds of appeal, which shall comprise one or more of the following: (a) that the Disciplinary Committee erred in law or in its interpretation of the byelaws; (b) that the hearing was not conducted fairly due to a serious procedural irregularity; (c) that significant new evidence is available which was not available at the disciplinary hearing; (d) that the tribunal based its findings or order on a material mistake of fact and (e) that the order was unreasonable having regard to all the circumstances made known to the tribunal at the hearing itself.

One of the problems in dealing with an appeal, particularly where the lawyers instructed by the accountant were not engaged at the time of the disciplinary proceedings, is that they may not have sufficient information available to draft the grounds of appeal.

Once an appeal has been lodged, the secretary of the Disciplinary Committee will arrange for a transcript of the disciplinary proceedings to be produced and served on the accountant. Nevertheless, this can take time. If the appeal is not accompanied with detailed grounds, the appeal will be considered to be invalid.

The appellant would be well advised to make an application within the 28-day period for an order that the time for the service of grounds shall be extended pending receipt of the transcript or whatever other event is awaited to enable grounds to be settled by counsel.

It is insufficient (and would not be compliant with the byelaws) for an appeal to be lodged within the 28-day period, with an indication that grounds would follow, upon receipt of the transcript.

There is also detailed provision where an appeal is to be served out of time.

Right of appeal of the Investigation Committee

There is now a change in the byelaws which enables the Investigation Committee to appeal against an order of the Disciplinary Committee dismissing a formal complaint. The Investigation Committee can only appeal on three grounds, namely (a) that the tribunal erred in law or its interpretation of the byelaws; (b) that the tribunal based its findings on a material mistake of fact and (c) that there is significant new evidence available which was not available at the time of the hearing.

Composition of the Appeal Committee

The chair of the Appeal Committee will be a barrister who may be a Queen's Counsel. There are four other members of the Appeal Committee, two of whom must be members of the Institute and the other two would be lay members.

Fines and costs

A fine imposed by either the Disciplinary or Appeal Committees must be paid within a period of 35 days beginning with the date of service of the tribunal's written record of decision. A failure to pay a fine within the time limit would result in the automatic cessation of membership. Where notice of appeal is served, the fine is not payable until the appeal itself has been determined.

Both the Disciplinary and Appeal Committees have the power to order that a fine shall be paid by instalments. Nevertheless, if the accountant fails to pay an instalment, by the due date, he would automatically cease to be a member of the Institute.

There is similar provision with regard to the payment of costs, which can also be ordered to be paid by instalments.

There is an additional provision with regard to the costs incurred by the accountant. Where these have been significantly increased as a result of the complaint being 'very poorly handled' by the Professional Conduct Department, the tribunal may order the Institute to pay to the accountant such additional costs which would not have been incurred by the accountant if the matter had been properly handled. The amount payable is entirely at the discretion of the tribunal.

Publicity

Byelaw 35.1 states that where a tribunal makes a finding or order, it shall cause a record of its decision to be published in such manner as it thinks fit.

In the normal course of events, the publicity will include the name of the accountant and/or the name of the firm if it is the firm which is being disciplined.

Understandably, many accountants are anxious to avoid publicity of a decision of the Disciplinary or Appeal Committee.

The principle is that publicity is part of the disciplinary process, in that the Institute has a public duty not only to investigate complaints, but also to publicise the outcome. Accordingly, avoiding publicity is extremely difficult. An accountant would have to show very exceptional circumstances as to why his/her name should not be publicised.

There is, of course, no publicity of a disciplinary decision if the accountant lodges a valid notice of appeal.

ACCA

The changes set out above affect members of the ICAEW. There have been few changes at the ACCA in recent months. The most significant change is that the deadline for the service of a defence, witness statements and documentation in connection with disciplinary proceedings is now extended to 21 from 14 days prior to the hearing. Any late submission will result in the accountant having to seek the permission of the Disciplinary Committee at the outset of the hearing to adduce 'late evidence'. Permission could be refused if there is no reasonable explanation for the delay.

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