Accountants' Defence & Advisory Services Ltd
The professional lifeline

Who regulates the regulators?

I propose to devote the whole of this issue to the conduct of regulators. I do not intend to disclose names. That could be counter-productive. I would not want a regulator to make life difficult for the next client of mine appearing before a disciplinary tribunal.

First case

Let us begin with a case which has recently been concluded. The case itself has been riddled with problems almost from the very beginning. The fact that my client was a student makes the whole situation even worse.

Once a matter has been fully investigated, the facts must be referred to a decision-maker. In the case of the ICAEW, this is the Investigation Committee. In the case of the ACCA, there is no investigation committee. Papers are referred to an Assessor, who remains anonymous and who may be either a lawyer or a member of the ACCA. Other accountancy bodies have similar procedures.

It is customary for a set of papers to be prepared either for the Investigation Committee or the Assessor. This sets out the case against the member/student, together with the specific complaints for consideration. The relevant documentation to support the complaints is attached. The member/student is given an opportunity to make final representations.

Having considered the papers, the Investigation Committee or the Assessor decides whether the matter should be referred to a disciplinary tribunal or should be dealt with in other ways.

Concerns over papers

In this particular case, my client, T, received the papers in advance of the referral. T was concerned about the papers, not least because they contained reference to complaints which had been investigated and where it had been decided that the matter should proceed no further. T did not consider it to be fair that the Committee/Assessor should be informed about these complaints. However, T's objections fell on deaf ears.

The matter was ultimately referred to a disciplinary tribunal.

T was not a member of ADAS (students cannot become members) and came to me as a client of Accountants National Complaint Services Limited. The procedure adopted after

the referral to a disciplinary tribunal is largely the same throughout accountancy regulators. A form is sent to the member/student asking a series of questions with regard to whether the complaints are accepted and if not, the basis upon which they are denied, whether the member/student will be attending the hearing, whether they will be legally represented, dates to avoid and so on.

Generally speaking, papers are served six weeks prior to the hearing. However, one particular regulator (the one that applies here) had changed its regulations and had reduced the period from six to four weeks.

The member/student has to produce its defence, witness statements and documentation either two or three weeks prior to the hearing, depending on the regulator.

Little time to prepare

As you will appreciate, neither system gives the defendant very much time. The regulator would argue that as the complaints and the papers are unlikely to be any different from those referred to the Committee/Assessor, the member/student should not simply await service of the disciplinary papers before getting independent legal and/or professional advice. They should be doing that immediately they have been advised of the Committee's/Assessor's decision that the case is going to the disciplinary tribunal.

What generally happens is that the member/student does not take immediate action and only approaches a lawyer once the formal disciplinary papers have been served. That creates considerable difficulties as it gives very little time for the lawyer to take instructions, prepare the case, together with all the documentation and ensure that it is served before the deadline laid down in the regulations.

In this particular case, T was served with the papers shortly before Christmas for a hearing in mid-January. This gave even less time for the case to be prepared.

I duly received the papers, which ran to some 158 pages.

As I read through the papers, I became more and more confused about the sequence of events. Unfortunately, whoever had put together the disciplinary papers had simply copied the original file. That contained extensive exchanges of emails, which inevitably resulted in the printing-out of the whole email thread. As a result, in copying the file, emails were duplicated and worse.

Duplicates

It appeared to me that a vast number of documents had been duplicated. Indeed, one document appeared in the bundle no less than ten times. Together with email footers (unnecessary) and blank pages (unexplained), I calculated that at least 44% of the bundle had no direct relevance to the complaints or the proceedings.

I was even more concerned to find that there was a substantial amount of documentation in the bundle which was clearly prejudicial to T's position. There were two complaints for the tribunal's consideration. However, the complainant had made a substantial number of complaints, all of which had been investigated. In the event, the case manager had decided that all but two of those complaints had no merit and should not be referred to the Committee/Assessor.

When T received the papers which were to be referred to the Committee/Assessor, she had objected to the inclusion of emails and the content of emails which made reference to the complaints that had not been referred to the disciplinary tribunal. Her objection was dismissed on the basis that all documents had to be included in the bundle because they had been sent to the regulator by the complainant. This was frankly nonsense as there is no requirement in the regulations for all such documentation to be placed before the tribunal.

On the contrary, the only documents which should be placed before the tribunal should be those relevant to the particular complaints the tribunal is being asked to consider and should under no circumstances include material that had no relevance to the complaints or which might be prejudicial to the position of the member/student.

You would, I think, readily accept that it would be wholly wrong for a tribunal to be informed about other complaints, some of which may well have been very serious, but which had not been referred to the tribunal for consideration.

On the same basis, a tribunal is never informed about the member's/student's disciplinary record until it has made its decision on the specific complaints before it.

Weeding the papers

I therefore had to carry out a laborious exercise of trawling through the entire bundle of papers and deciding which documents should be removed entirely and which would need to be redacted in part.

Coupled with the numerous duplicates and documentation which had no relevance, the prejudicial documents simply meant that the entire bundle was contrary to the principles of natural justice. Quite apart from that, I wondered how the tribunal itself would make head or tail about the documentation (not in date order).

I sent a lengthy email to the regulator objecting to the bundle.

Although the regulator agreed to my suggestion that a number of documents should either be removed or redacted, my complaint concerning the duplication of documents was rejected. However, my concern was whether or not the panel had read the bundle prior to the preparation and dispatch of the redacted papers.

At the hearing, it emerged that of the two bundles of papers, two of the three members of the committee had read the unredacted bundle and the third member had simply read the redacted bundle.

Recusal

I submitted that the tribunal should recuse itself either because it could be prejudiced against T by having seen the irrelevant and prejudicial material which could influence the committee's deliberations and decisions. Alternatively, I submitted that a fair-minded and informed observer would find that this could result in an unfair hearing.

The case presenter (a lawyer acting on behalf of the regulator) submitted that the matters contained in the bundle of unredacted material were irrelevant and not sufficiently prejudicial such that the material could easily be disregarded by the tribunal. In her submission, the tribunal was capable of being able to put out of its mind the minimally (her word) prejudicial and irrelevant material it had already read.

In its decision, the tribunal said that it was a professional committee and it was well-versed and capable of disregarding material. All three members considered that they could put out of their minds the redacted material. It did not consider that the extent of the prejudicial material was such that it would not be able to do so.

The tribunal then considered whether or not a fair-minded and informed observer would objectively consider that the tribunal was unbiased or unprejudiced and that it would find the proceedings fair knowing that it had read redacted documentation.

The fair-minded observer

The tribunal decided that such a fair-minded and informed observer would consider that it was unfair that the regulator had put before it material that was irrelevant and prejudicial to T, particularly when the regulator had been asked to redact such material.

A fair-minded and informed observer might well find that the inclusion of the material was unfair because justice should not only be done, but be seen to be done.

The tribunal decided that it would recuse itself and the hearing would proceed no further. The matter would be re-listed before a fresh tribunal. That tribunal should be provided with the redacted material. It should not be provided with a copy of the first tribunal's decision.

And so the matter was adjourned for some two months. At this point, I am sure that you would expect me to go on to say that, at the conclusion of the first hearing, I successfully obtained a costs order against the regulator in view of the regulator's conduct.

Costs against regulators

There is limited scope for obtaining a costs order against a regulator. Until very recently, there was virtually no right under the regulations to obtain a costs order at all, even if the member/student was acquitted on all complaints. In recent years, regulators have softened their position and have amended the regulations to enable the defendant, in limited circumstances, to obtain a costs order. Generally speaking, the new regulation only enables the defendant to obtain a costs order if the defendant has been acquitted on all charges. To be acquitted on some, but not others, gives the defendant no rights at all.

Furthermore, there is nothing in the regulations which makes provision for a successful defendant to obtain a costs order in circumstances where the bundle of documents contained prejudicial material and/or where the tribunal has agreed to recuse itself, because of that material.

For these reasons, we simply could not obtain a costs order at the conclusion of the first hearing. The costs that my client incurred in connection with that hearing were in excess of £3,500. Please bear in mind that my client was a student and not a fully-qualified member of the regulatory body.

We then moved on to the substantive hearing, this one before an entirely separate tribunal. The bundle although still containing a substantial number of duplicates, at least did not contain any prejudicial material.

Witnesses called

The defence called witnesses and they had to be examined, cross-examined and then questioned by members of the tribunal. Unfortunately, although all the evidence was heard, the tribunal simply ran out of time and was unable to make its decision. The case was adjourned.

At the conclusion of the hearing, I made a heart-felt plea for the resumed hearing to take place as soon as possible. The tribunal wholly agreed that my client had undergone a stressful experience on two occasions, namely the two hearings which had taken place. The tribunal wholly agreed with me and said that the hearing would resume as soon as possible.

In the event, due to the unavailability of members of the tribunal, the hearing did not resume for a further seven months.

Try to put yourself in the position of the defendant. You face two complaints before the tribunal. One you admit and the other you deny. The tribunal hears considerable evidence on that complaint from both the prosecution and the defence. The matter is adjourned, so that the tribunal can consider its decision as to whether you are guilty.

And so you wait for no less than seven months not knowing what decision the tribunal would be reaching.

It is difficult to imagine a more stressful situation for any professional person, not least a student of a regulatory body.

In all fairness to the tribunal, at the final hearing, the costs sought by the regulator were reduced, taking into account all the circumstances. However, they were not reduced by as much as I had hoped.

There can be no appeal on the matter of costs alone.

Second case

The second case concerns the other leading accountancy regulator. My client on this occasion (again not a member of ADAS) we will call R. R faced a multiplicity of complaints. A number of these complaints alleged that R had been dishonest. As you will appreciate, a complaint of dishonesty is the most serious that a member/student can face before a disciplinary tribunal. Generally speaking, where there is a finding of dishonesty, the member will be excluded from membership or the student will be removed from the register of students. There have been some exceptional cases in recent years where a lesser sanction has been imposed. However, these are rare occasions.

Accordingly, a finding of dishonesty generally means the end of one's professional career.

After a hard-fought case, R was found guilty on two counts of dishonesty. However, all the other complaints were either withdrawn or found not proved.

The tribunal then had to consider the matter of sanction. In the circumstances, exclusion seemed inevitable and that was the sanction duly imposed.

Exclusion and fine

Nevertheless, the tribunal decided to go further than simply to exclude R from membership. It decided to impose a fine of £5,000, in addition, together with costs and publicity of name.

You would be forgiven for believing that exclusion from membership is punishment enough.

The first point to make is that the principal purpose of the imposing of sanctions is not to punish. The four principles can be summarised as follows:

- Protecting the public
- Maintaining the reputation of the profession
- Upholding proper standards of conduct within the profession
- Correction and deterrence of misconduct

In applying the principle of protecting the public, the tribunal should consider not only the clients of the defendant, or third parties who may have suffered as a result of his conduct, but also the wider public who might be put at risk by the defendant's future conduct.

Lord Bingham

We need to remind ourselves of the judgment of Lord Bingham in Bolton v The Law Society, a case dating from 1994:

> *To maintain this reputation and sustain public confidence in the integrity of the profession, it is often necessary that those guilty of serious lapses are not only expelled, but denied readmission. 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. 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.*

Of the two principle accountancy bodies, one invariably imposes a fine in addition to a severe reprimand or reprimand. The other regulatory body rarely imposes a fine, at all. Both will seek an order for costs and, inevitably, the decision will be publicised. The starting points for financial sanctions are set in six separate categories. These are as follows – Category A £20,000, Category B £15,000, Category C £10,000, Category D £5,000, Category E £3,000 and Category F £1,000.

Apart from a fine, the powers of one regulator's disciplinary tribunal are limited in that there are only three categories of non-financial sanction, namely exclusion, severe reprimand or reprimand.

There is an element of logic imposing a double sanction against an individual or firm such as a severe reprimand and a fine of £20,000 or at the opposite end of the scale a reprimand and a fine of £1,000.

At least the individual has managed to retain his/her membership. One must, though, assume that the individual is in a position to pay the fine, together with the costs. In the event of failure to pay, membership lapses automatically.

Where it is much more difficult to understand the reason behind a double sanction is when the tribunal decides upon the ultimate penalty of exclusion and, in addition, imposes a fine.

Fine of £5,000

In the case of R, not only was he excluded from membership, but he was also fined £5,000. Naturally, there was publicity of name and there were some hefty costs to pay as well.

The tribunal was fully aware of R's financial situation, which was far from good. He was a sole practitioner with modest earnings. Perhaps the most significant factor was that although

he was insured and his insurance company were covering the costs of the disciplinary proceedings, there was clause in the insurance policy that, in the event of a finding of dishonesty, the insurers had the right to recover the full amount of costs (which had been paid) directly from the insured. This was likely to be crippling.

Exclusion is likely to have a devastating impact upon the individual's ability to earn a living. If you are a sole practitioner and have been practising as a qualified accountant, to lose your qualification means that you can no longer attract quality work. You are no different from dozens of other local unqualified accountants. Furthermore, the publicity is likely to be extensive and could result in the loss of many of your clients.

So the consequence of exclusion is, inevitably, going to have an impact upon the practice and the level of income for the foreseeable future. Why therefore impose a fine in addition to the order of exclusion? It is perplexing as to why this practice continues.

Third case

The third case concerns a firm whom we will call Q. They were regulated by the same body as referred to above, in the first example relating to T.

What had happened was that Q had received a number of monitoring visits and in recent years, the quality of audit work had simply not improved. The matter went before a licensing committee as to whether Q's audit registration should continue. The regulator urged the tribunal to withdraw the firm's audit registration, together with the RI status of the partners.

Despite the fact that the tribunal agreed that there were serious deficiencies, it decided not to withdraw audit registration. Instead, it ordered that audit registration should be suspended. Before the suspension could be lifted, the firm was required to submit a plan setting out how it intended to improve standards. Secondly, there was to be a further monitoring visit in order to examine audit files, so that a report could be prepared as to whether the quality of audits had improved. However, with the order of suspension continuing, the firm was not authorised to do any audit work. This meant that there was no point in a further monitoring visit and indeed even if one had taken place, the inspector would have had no audit files to examine.

Contradictory decision

The licensing committee's decision appeared to be contradictory. The firm exercised its right to invite the committee to reconsider its decision, which meant inviting the committee to reassemble and reconsider matters.

Indeed, the regulator agreed that the matter would have to return to the committee for consideration.

You would think that the matter would be dealt with as a priority with an early hearing date. However, due to the non-availability of the committee of three, it will be seven months before the committee will be in a position to reassemble and reconsider its decision. In the meantime, the firm has the problem as to how audit work will be handled and will almost certainly have to arrange for other firms to do such work on its behalf. The chances are that Q will lose the work, in that the client will not want to be chopping and changing auditors.

It seems extraordinary, to my mind, that it has not been possible for the tribunal to reassemble in less than seven months.

Conclusion

These three cases are simply a snapshot of the problems that members of accountancy regulators have to contend with, when facing either disciplinary or regulatory proceedings. It also makes life difficult for the lawyers representing the defendant. A lot of these problems are inevitably increasing the level of legal costs. Furthermore, there seems to be an increasing level of inefficiency and incompetence on the part of staff working for the regulator. More worrying is the perception that the attitude of regulatory staff is not simply unsympathetic to the member, but often downright unhelpful. There also seems to be an inability to learn from experience and to change the system in order to introduce necessary improvements.

It seems to be that regulator's attitude is very much let matters continue as before. This somewhat begs the question as to what is the purpose of the ultimate regulator, the Financial Conduct Authority?

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