THE DISCIPLINARY TRIBUNAL
OF THE TAXATION DISCIPLINARY BOARD **TDB/2020/38**

TAXATION DISCIPLINARY BOARD

- and -

Mr JOHN O'LEARY CTA ATT
(ATT and CIOT Membership Number 127190)

DECISION
(Hearing 7.4.22)

INTRODUCTION:

1. The Disciplinary Tribunal ('the Tribunal') sat on 7 April 2022 to hear charges brought by the Taxation Disciplinary Board ('TDB') against Mr John O'Leary. The hearing was conducted remotely by video conferencing. The Tribunal was chaired by Mr Andrew Granville Stafford (barrister) who was sitting with Ms Manuela Grayson (lay member) and Mr Ian Luder (CIOT member).

2. The case presenter for the TDB was Ms Stricklin-Coutinho. Mr O'Leary was not present and was not represented. The Clerk to the Tribunal was Mr Nigel Bremner.

3. The Tribunal had read and considered the case papers (pages 1 to 198). In addition, Ms Stricklin-Coutinho provided the Tribunal with written submissions.

4. The following abbreviations are used in this determination.

   The CIOT means the Chartered Institute of Taxation;

   The ATT means the Association of Taxation Technicians;

The Disciplinary Regulations means the Taxation Disciplinary Scheme Regulations 2014 (as amended November 2016) and references to a regulation are to these Regulations;

PRPG 2018 means the Professional Rules and Practice Guidelines effective from 9 November 2018 and references to a rule are to these Rules;

Dr O is the complainant.

PROCEEDING IN ABSENCE:

5. Regulation 17.3 of the Disciplinary Regulations permits a hearing to proceed in the absence of the respondent if the Tribunal is satisfied that notice of the hearing has been served on him in accordance with the regulations.

6. Regulation 14.1 of the Disciplinary Regulations requires the Clerk to send to the Defendant a notice setting out the charge against him and notifying him of the date, time and place of hearing. The notice must be sent at least 28 days before the hearing.

7. Regulation 31.3 of the Disciplinary Regulations sets out the method of service. Any notice or document may be served on the Defendant personally or by registered or recorded delivery post addressed to his last known place of business or abode.

8. An email was sent by the Clerk to Mr O'Leary on 14 February 2022 informing him of the hearing date. It said:

> 'The case papers, including your written representations, are currently with the TDB's counsel for advice on the appropriate charges, and a hearing date has been scheduled for 7 April. I will let you have a copy of the charges as soon as possible. You will also receive a formal Response Form in which you can address these, and a copy of the papers that will be before the panel that will be considering your case. The point of this email is just to advise you of the date of the hearing should you wish to attend or provide any further written representations when you know what specific charges are being pursued.'

9. This did not, therefore, constitute a formal notice of the hearing as required by Regulation 14.1.

10. On 8 March 2022, 30 days before the hearing, the Clerk to the Tribunal sent Mr O'Leary a hearing bundle, which included the charges, and a Response Form. He was invited to provide his response to the charges by 25 March 2022.

11. On 23 March 2022 Mr O'Leary emailed the TDB saying [redacted]

12. The Clerk to the Tribunal replied, informing Mr O'Leary that he could attend the hearing if he wished but that he should feel under no pressure to do so and that any further written representations he provided would be taken into account. Mr O'Leary completed his Response Form the same day and submitted it to the TDB along with written representations. On his Response Form he ticked a box to say that, in the event he did not attend the hearing, he agreed to it taking place in his absence.

13. In a statement attached to the Response Form, Mr O'Leary said:

‘I would again like to apologise to the TDB for not being able to attend the hearing in person.

[redacted]

14. On 6 April 2022, the day before the hearing, the Clerk sent Mr O’Leary an email containing the link to join the hearing remotely and giving the time of the hearing. No response was received from Mr O’Leary.

15. The Tribunal was not satisfied that service had been effected in accordance with the Disciplinary Regulations. Although Mr O’Leary had been sent an email informing him of the date of the hearing more than 28 days in advance, he had not been given 28 days’ notice of the time or of the venue for the hearing. As this hearing is taking place remotely by video link, rather than at a physical location, the Tribunal considered that compliance with the Regulation 14.1 requires provision of the link to the virtual platform. This had not been provided to Mr O’Leary until the day before the hearing.

16. The requirement in Regulation 31.3 for notice of the hearing to been sent by registered or recorded delivery post had not been met. Although Mr O’Leary had been informed of the date of the hearing and the charges he faced more than 28 days prior to the hearing, these communications had been by email.

17. Ms Stricklin-Coutinho, on behalf of the TDB, accepted that the rules as to service had not been followed and, moreover, that it would have been possible for them to have been complied with. However, she submitted that the Tribunal should exercise its discretion under Regulation 33.1 to dispense with the requirements of the Disciplinary Regulations as to notice and service of documents. This power may be exercised in exceptional circumstances if the Tribunal consider that it would be just to do so. Ms Stricklin-Coutinho contended that the pandemic, which had necessitated virtual rather than in-person hearings, was an exceptional circumstance justifying a departure from the rules.

18. The Tribunal did not accept that submission. Whilst the pandemic had resulted in a different way of working for many regulatory tribunals, it could not explain why the rules on service had not been followed in this case. The country was no longer in lockdown. No explanation had been provided to the Tribunal as to why a notice of hearing complying with the requirements of the rules could not have been sent by registered or recorded delivery post at least 28 days in advance of the hearing.

19. The Tribunal considered the Court of Appeal authority of *R (Hill) v Institute of Chartered Accountants in England and Wales* [2013] EWCA Civ 555. It follows from this decision that a respondent to disciplinary proceedings may waive a defect in process by the prosecuting authority if he wishes to do so. The Tribunal considered that in this case Mr O'Leary had, impliedly if not expressly, waived any failure to comply with the rules on service in light of the following factors. He was clearly aware of today's hearing and had taken a decision, for reasons he explained in correspondence, not to take part in it. He had provided written representations on the basis that those would form his case before the Tribunal. He had clearly been happy throughout the process to communicate with the TDB by email. Adjourning simply so that service could be effected by post would, in the Tribunal's view, be an entirely artificial exercise. [redacted] it would not, in the Tribunal's view, be likely to result in him attending on a future date.

20. The Tribunal was reminded that any decision to proceed in the absence of a respondent should be taken with the utmost care and caution. It was also reminded that if it determined not to proceed in the respondent's absence, the only alternative course was to adjourn the hearing. For the reasons already set out, the Tribunal did not consider that adjourning the case would be appropriate. Indeed, Mr O'Leary had ticked a box on his Response Form to say that, in the event he did not attend, he would consent to the Tribunal proceeding in his absence. Further, although he had submitted medical evidence, Mr O'Leary had not applied for an adjournment or suggested that an adjournment should be granted on medical grounds.

21. The Tribunal was satisfied that Mr O'Leary had made a conscious decision not to take part in this hearing, that adjourning it would serve no useful purpose, and that there was

a public interest in proceeding today. The Tribunal therefore acceded to Ms Stricklin-Coutinho's application to proceed in Mr O'Leary's absence.

22. The Tribunal bore in mind that it should draw no conclusions adverse to Mr O'Leary from the fact he was not taking part in the hearing.

CHARGES:

23. The charges brought against Mr O'Leary were as follows.

1.1 In breach of rules 2.4.1 and 5.1.1 of PRPG 2018, the Defendant:

(a) carried out his work without proper regard for the technical and professional standards expected, and

(b) failed to exercise reasonable skill and care when acting for his client, Dr O.

1.2 The TDB's case is as follows:

(a) The Defendant is a tax agent and a member of the CIOT and the ATT. The Defendant provided professional services to Dr O in the period 2010 to 2020.

(b) The Defendant's company sent an email to Dr O, which had not been accurately updated, resulting in a figure for the balancing payment for the earlier year (2016/2017) not being updated when a similar email (dated 17 December 2019) was sent to Dr O containing his balancing payment for 2017/2018. The effect of this error was that Dr O underpaid HMRC by £14,600 and incurred interest (of £136 by June 2020) as a result of the underpayment. The Defendant was aware that the figures in the email were of considerable import as they were plainly going to be acted upon by Dr O in a way that could potentially lead to him incurring HMRC penalties and charges.

(c) In March and June 2020 letters from HMRC setting out Dr O's outstandingincome tax balance were sent to the Defendant's professional postal address at Medic-Tax. Those letters were not sent on to Dr O,

which caused Dr O to incur interest charges and reputational damage with HMRC. The Defendantfailed to collect the letters, or to arrange for them to be forwarded, or to have checked Dr O's tax position on the HMRC portal.

(d) The Defendant failed to take into account the Class 1 National Insurance Contributions (NICs) paid by Dr O whilst employed by the NHS, when calculating his Class 2 and Class 4 NICs. The Defendant also failed to take active steps to reclaim the overpayment of NICs from HMRC, despite several requests for him to do so by Dr O.

24. Charge 1.1 refers to the following rules in the RPRG 2018:

> 2.4.1 Professional competence and due care: A member must carry out their professional work with proper regard for the technical and professional standards expected. In particular, a member must not undertake professional work which a member is not competent to perform, whether because of lack of experience or the necessary technical or other skills, unless appropriate advice, training or assistance is obtained to ensure that the work is properly completed.
>
> 5.1.1 Duty of care: A member has a duty of care to their client which is recognised in law. A member must exercise reasonable skill and care when acting for a client. An engagement letter or other correspondence with the client may limit or define a member's duty of care.

RESPONSE TO CHARGES

25. In his Response Form dated 23 March 2022, Mr O'Leary disputed the charges.

BACKGROUND:

26. Mr O'Leary is a member of the CIOT and the ATT. At all relevant times he was a partner in a firm trading as Medic-Tax ('the Firm'), which advertised itself as being a specialist in medical taxation.

27. The Firm provided professional services to Dr O, which included the provision of tax advice, from 2010 until on or around 31 July 2020, when it received a professional clearance letter from a different firm of accountants that Dr O had engaged.

28. The TDB's case in summary was that Mr O'Leary had provided incorrect information to Dr O resulting in him underpaying tax for the 2018/19 tax year (charge 1.2(b)); that he failed to pass on statements from HMRC to Dr O showing that tax payments were overdue (charge 1.2(c)); and that he failed to properly calculate National Insurance Contributions ('NIC') payable by Dr O (charge 1.2(d)).

29. The TDB alleged those three charges, either collectively or individually, demonstrated a failure of professional competence and/or due care (charge 1.1).

30. The TDB relied on correspondence from Dr O and documents supplied by him. That evidence, and Mr O'Leary's responses to the allegations, can be summarised as follows.

Charge 1.2(b)

31. On 17 December 2019, Mr O'Leary sent an email to Dr O enclosing his 2018/19 tax return, which had been prepared by the Firm. In the email Mr O'Leary said:

> 'Your forthcoming tax payments will be:
>
> | | | |
> |---|---|---|
> | 2018/19 Balancing Payment | £4,694.10 | |
> | 2019/20 First Payment on Account | £33,689.14 | |
> | | £38,383.24 | Due 31st January 2020' |

32. Mr O'Leary concluded the email by telling Dr O to sign the tax return and to 'Make the payments shown above'.

33. The TDB's case was that the balancing payment figure, namely £4,694.10, was incorrect. It alleged that this had been cut-and-pasted from an email sent in relation to the previous year's return, and the balancing payment figure had not been updated. The true figure for the year in question was £29,982.53. As a result, after some credits to his account had been taken into account, Dr O had underpaid his tax in January 2020 by some £14,600. He therefore incurred HMRC interest charges on late payment which were said by the TDB to be £136 as at June 2020.

34. On 24 November 2020, Dr O wrote to Mr O'Leary making a formal complaint. This had been prompted by Dr O receiving a statement from HMRC informing him that he had to pay tax of £14,615.91, and that interest on this figure was continuing to accrue. He complained that this had arisen due to Mr O'Leary giving him the wrong figure for the balancing payment in his 17 December 2019 email.

35. Mr O'Leary did not dispute that the figure for the balancing payment in this email was incorrect. He accepted that the previous year's figure had been included in error. He disputed, however, that this amounted to a failure to act with professional competence and due care. He said in the statement accompanying his Response Form:

> 'It has been suggested there may have been a failure to exercise professional competence and due care over the preparation of the 2018/19 tax return. This was definitely not the case.
>
> The 2018/19 tax return and calculations were perfect. These have been reviewed by my partner and Dr O's new accountants, and everything found to be in order.
>
> All aspects of the tax return had no failings whatsoever, so there was not a failure to take reasonable care, and I can confirm that the PRPG 2.4.1 and 5.1.1 guidelines have been fully adhered to.
>
> There was however a failing in communication, with a single typing error regarding a tax payment in an email to Dr O. While the technical side of the tax return was faultless, one of the sums to be paid by Dr O was not conveyed to him correctly. I would suggest that a single typing error should not constitute a disciplinary offence.
>
> This was the first error of this kind in more than thirty years of practice. As you will be aware, I have no previous complaints against me whatsoever, and have never had to refer any matters to my professional indemnity carriers.
>
> In the normal course of events, the discrepancy would have been identified when a review of the HMRC statement of account was undertaken prior to the payment due date. However this was not possible due to Dr O returning his signed tax return very close to the January filing deadline/tax payment due date.

> The client's tardiness did not give HMRC time to process the return and to issue a January statement of account, therefore an important final check on the payment required was not possible. Had the return been prepared in good time, the error would have been apparent when the normal January payment reviews were undertaken.
>
> The basis of the complaint involves no more than a typing error, with a previous year's balancing payment figure not being overwritten. This was clearly an honest administration error that was not worthy of referral to a Tribunal.
>
> The practice of using earlier years' letters or emails as templates has ceased, so it is impossible for such an error to occur again.
>
> As to the question of significant consequences, there were none whatsoever. Apart from the inconvenience of making an additional transfer, there were no other issues for Dr O.'

36. Mr O'Leary went on to claim that Dr O would not have suffered financially, as he would have been able to apply the underpaid tax to his borrowings, and the rate of interest charged by HMRC was less than the interest he would have paid on those borrowings.

Charge 1.2(c)

37. The TDB's case was that in March and June 2020 statements were sent by HMRC concerning Dr O's outstanding income tax balance. These were sent to the Firm's address. This was around the period of the first Covid-19 lockdown. The TDB alleged that either Mr O'Leary failed to collect these letters or he received them but failed to forward them on to Dr O. In consequence, Dr O did not appreciate that he had underpaid tax and was incurring interest charges. In the alternative, the TDB alleged that Mr O'Leary should have checked Dr O's tax position on the HMRC portal, which would have also revealed that tax had been underpaid and interest was accruing.

38. Mr O'Leary disputed receiving these statements from HMRC and disputed that he was, in any event, under a duty to pass them on. His response was as follows.

> 'There were two statements of account for Dr O shown as being issued by HMRC, but which were absolutely not received by me or my firm.

There are two explanations for the non-receipt of the statements.

The first involves the upheaval caused by the first covid lockdown. Under normal circumstances the non-receipt of two statements might seem strange, but May/June of 2020 was a very unusual period. With the first covid lockdown, the business centre in which we are located was closed to all tenants without notice. We were required to make weekly appointments to go to the building to collect the firm's post. Just about all areas of life were affected by covid, including no doubt the Royal Mail and HMRC. Such turbulent times were bound to cause extraordinary problems, and I would suggest that the non-receipt of two HMRC statements during the first lockdown and at the height of the pandemic must be treated as an issue beyond anyone's reasonable control.

The lockdown issues are behind us. The centre reception is open every weekday, and there is full access to postal deliveries each day. No future postal issues are envisaged and I have the utmost confidence in the postal section of our centre. If there were any concerns as to the performance of the centre, my firm would relocate without hesitation.

The second reason for doubt over the posting of the statements lies in the actions of HMRC. Dr O has confirmed on many occasions that he did not receive any demands for the outstanding balance until September 2020. It would be unheard of for HMRC not to issue numerous demands direct to the taxpayer in a nine month period for a tax underpayment of more than £14,000. It is clear there was a serious failing in HMRC's system which lead to no demands being sent out to the taxpayer, and it is likely the same issue affected the statements that should have been sent to me as the agent. Dr O and his new agent were asked to question this issue with HMRC, but have continually refused to do so.

It seems quite unfair for a serious complaint such as this to have been made, but then to refuse to assist in identifying the clear failings of the HMRC system.

In any event, I would never ignore any HMRC statements. At the time that the statements were said to have been issued I was still acting for Dr O and there was no suggestion that he would change accountants a few month's later (purely in order to obtain a cheaper service). Had the statements been received, they

would have been acted upon immediately. I have an unblemished relationship with my clients, and would not have survived with such a good reputation if I failed to deal with such issues. . .

I would suggest there must be serious doubt as to whether any statements were ever posted by HMRC. I would also submit that it would be quite unfair to hold someone responsible for the unexpected closure of an office due to the covid lockdown. Finally I would remind the TDB that there have never been issues with any post not been acted upon in a very efficient manner, and there would have been no reason to have done so in May/June 2020.'

39. In respect of the allegation that he should have checked Dr O's tax position on the online portal, Mr O'Leary said:

'I disagree with the allegation there was a 2.4.1 failing in the requirement to have checked on Dr O's tax position on the HMRC portal.

It is my practice to check all statements of account shortly before the next tax payment becomes due. The statements were simply not available in January 2020 due to the lateness of Dr O's tax return (the return was not returned by Dr O until January 2020 despite regular requests for information early in the tax cycle), and it was believed Dr O had been asked to make the appropriate payment that month. The next scheduled check on HMRC's system for Dr O was in July 2020, but by that time he was no longer a client so I had no access to HMRC's portal.

It was impossible to check the tax position via the portal in January as a statement of account could not be produced by HMRC before 31st January, and there was no requirement to have checked again until July.'

Charge 1.2(d)

40. Charge 1.2(d) alleged two failings on the part of Mr O'Leary. First, it alleged that he failed to take into account the Class 1 NIC that Dr O had paid when calculating his liability to pay Class 2 and 4 NIC. The consequence of this, it was alleged, was that Dr O overpaid NIC for several years between 2010 and 2020 whilst Mr O'Leary was his

tax adviser. Second, it alleged he had failed to take steps to reclaim the overpayment of NICs, despite several requests from Dr O to do so.

41. In his letter of complaint to Mr O'Leary dated 24 November 2020, Dr O said:

> 'You will also recall that we have had previous email and verbal conversations about NI overpayments from when I received an HMRC Self Assessment Document in January 2019 (Appendix 5)
>
> I have frequently asked you whether this overpayment could be 'offset' against tax payments and you explained that it could not (Appendix 6). I have also frequently asked you to chase up with the HMRC to get this paid back to me. At the time when I left Medic Tax you had not done this and nor had you provided this information in a 'handover' to Sandison Lang.
>
> However, it now seems that this NI overpayment has been set against my 2018/2019 Income Tax underpayment – or else I would have owed even more that the £14,615 bill that I have been asked to pay.
>
> I would ask you to clarify if you prepared my 2017/2018 tax return on the basis of paying full Class 4 self employment NIC and therefore whether HMRC subsequently amended the return to reflect this?'

42. Dr O appended to his letter a train of email correspondence, which included the following.

> Email from Mr O'Leary to Dr O dated 31 January 2019, in response to an email from Dr O querying a computation he had received from HMRC: 'The difference is due to national insurance. The tax figures are identical, but they have taken the NI refund due to you (on leaving the NHS) and offset it against the NI on the private practice profits. This is fine - I will ask them to make the refund of the excess NI direct to you.'
>
> Email from Mr O'Leary to Dr O dated 16 March 2019, in reply to an email from Dr O querying why he had received no payment from HMRC: 'Unfortunately it is normal with NI refunds - sometimes they take a year to be processed. I will

send them a reminder, but realistically they will do it when we reach the top of the pile!'

Email from Mr O'Leary to Dr O dated 23 December 2019, in response to a query about whether it was possible to offset the NIC overpayment against tax: 'Not with this type of NIC I am afraid - it is dealt with through a different department (quite nonsensical I know!)'.

43. Dr O also provided the TDB with a copy of his email to the Firm dated 10 March 2020 in which he wrote 'John [O'Leary] was due to chase up HMRC for me on outstanding overpayments for NI contributions. This has been ongoing for a very long time period. Pls can he inform me of the exact amount owing and when that is lightly [sic] to be paid.'

44. The Firm responded to Dr O's letter of complaint on 8 December 2020. The Firm pointed out that, as Dr O had changed accountant, it no longer had access to his tax details on the online portal. It stated:

'Regarding National Insurance contributions, again we cannot access the HMRC system or discuss the matter with them, so it is not possible to give a full response, but there were errors on the earlier HMRC calculations that we had appealed. This would lead to differences between the HMRC figures and our calculations. Your new accountant will be able to confirm that the NI issues have been brought up to date.'

45. Dr O replied to the Firm's letter on 24 December 2020 saying:

'With regard to the NI payments, you calculated my Class 4 NIC to be £4,273.40 in 2018. I was entitled to pay 2% NIC on my self employment that year, which would have been around £1,800 after the allowance is deducted, which ties in with HMRC's adjustment.

Therefore, it would seem that you may have consistently not taken into account my Class 1 NIC when calculating the Class 4 NIC, so that I paid too much over several years which is why HMRC then adjusted downwards when they processed the returns.

This would appear to explain why I 'overpaid' in past years and thus the underpayment was less than it could have been, due to the overpayments made in prior years.'

46. The Firm replied to that letter on 4 January 2021:

'With regards to National Insurance, you stopped work in that year so would initially not have benefited from the full exemption (as you would not have paid the maximum Class 1 NIC). As such we would have needed to include the full rates for self-employment and then made adjustments later on (with early tax returns we can do this well before the payment deadlines, but this was not an option due to the lateness of your forms). As the adjustments now seem to have been made, it appears that the matter has been dealt with.'

47. Dr O wrote back on 9 January 2021 and said:

'The problem related to NI overpayments was not unique to the year that I stopped NHS work (2017/18), it was also the case in the earlier year (2016/17) and likely other years too. In essence the NI overpayments do not appear to have been a 'one off issue' and have occurred in successive years.'

48. In his statement accompanying his Response Form, Mr O'Leary replied to this charge as follows.

'The National Insurance Contributions have been handled perfectly, and as such there can be no possible breach of PRPG 2.4.1 or 5.1.1.1 have supplied the TDB with the final four years tax calculations, from which you will have seen that reduced rates of Class 4 NIC have been correctly applied for the years where Dr O had paid the maximum Class 1 NIC via his NHS salary, and higher rates in the years where there were no/insufficient Class 1 payments.

There was particular concern over the 2017/18 tax year, however Dr O's new accountants had confirmed the refund due for the year was in fact safely received (page 3 of Dr O's letter to me of 26th November 2020). 2017/18 required a more complicated approach to National Insurance as Dr O left employment part way through the year and had not achieved the maximum Class

1 contributions, so the Class 4 contributions needed to reflect this (and this they did). As this was normal in the circumstances, and he has confirmed that he received the refund, I cannot see how there can be any question of anything being handled other than correctly.

Dr O failed to supply any P45/P60 or payslips for the year, so we needed to obtain the relant [sic] figures for his Class 1 payments from HMRC after the tax return had been submitted (otherwise Dr O would have received late filing penalties due to his tardiness). The tax return calculations were originally prepared without including details of the Class 1 payments simply because they were not available at that time.

Once the information was available, the calculations were updated and the Nl was reduced to the correct amount and the refund claimed. Had the tax return been started earlier in the cycle, I would have waited until the full Class 1 figures were available before producing the calculations. However due to Dr O's lateness in submitting his details (and omitting the requested employment records), this meant it was preferable to submit the return and then adjust the Nl figures when possible rather than missing the January tax return/payment deadlines.

This was a textbook handling of the National Insurance matters, and I cannot see how this has been questioned.

Dr O appears worried over the refund, but his new firm have confirmed that the final Nl position was quite in order, with the Class 2/4 Nl being reduced following submission of the Class 1 details. Nl refunds may be made by direct refund or by a reduction in the self- assessment figures, and this is precisely what happened for 2017/18.

It had been assumed that Dr O's new accountant had found some discrepancy in the handling of the NIC matter, and had relayed this to their client. Following my firm's complaint to the ICAEW they have now confirmed they did not in fact prepare any computations, but had simply noted that the Nl charges had been reduced (which was of course exactly as should have happened in the

circumstances). This is yet another case of Dr O looking for fault where none ever existed.

I have rechecked my figures for all years, and there have been no errors at all - the Class 1 contributions have been fully accounted for. I would stress that you will see from my calculations that National Insurance has been dealt with perfectly.'

EVIDENCE:

49. Neither party called any witnesses to give oral evidence. The evidence before the Tribunal was contained in the documents in the hearing bundle.

SUBMISSIONS:

50. Ms Stricklin-Coutinho on behalf of the TDB made oral and written submissions to the Tribunal. Mr O'Leary made written representations to the Tribunal, which are summarised in 'Background' above.

DECISION:

51. The Tribunal bore in mind that the burden of proof was on the TDB and the standard was the civil standard which is proof on the balance of probabilities.

52. The Tribunal also bore in mind that the evidence of Dr O and Mr O'Leary, contained in various letters and emails in the hearing bundle, was hearsay as neither had given oral evidence at the hearing. The Tribunal therefore had, as part of its consideration, to determine what weight to give to the statements made by them in those documents.

53. The Tribunal first considered the factual allegations set out in charges 1.2(a) to 1.2(d). In light of its findings on those matters, it went on to consider whether Mr O'Leary's actions demonstrated a lack of professional competence, as alleged in charge 1.1(a), or a failure to act with reasonable skill and care, as alleged in charge 1.1(b).

Charge 1.2(a)

54. This charge sets out the factual background, namely that Mr O'Leary is a tax agent and provided professional services to Dr O between 2010 and 2020, none of which is in

dispute. This charge could not of itself amount to a breach of rule 2.4.1 or 5.1.1 of the PRPG.

Charge 1.2(b)

55. It was not in dispute that Mr O'Leary had, as a result of cutting and pasting from an old email, given Dr O the wrong figure for the balancing payment for his 2017/18 tax year. It was also clear to the Tribunal that, as a result, Dr O had made an underpayment of tax in January 2020 and had incurred penalty interest charges as a result. Indeed, Mr O'Leary accepted in his letter to the TDB dated 8 July 2021 that this had been the consequence of what he described as a 'poor error' on his behalf.

56. It was irrelevant, in the Tribunal's view, that the tax return accompanying the email in question was correct. It was also irrelevant whether Dr O had made any saving on the interest paid on his borrowings as a result of underpaying his tax. The key factor was that Mr O'Leary's firm had undertaken to act for Dr O in respect of tax matters and Mr O'Leary had, in the email of 17 December 2019, given him advice about how much tax he needed to pay. Indeed, the email concluded with an instruction to Dr O to make 'the tax payments shown above', which included the incorrect figure. The simple fact is that wrong advice was given.

57. The Tribunal noted that it was alleged in this charge that, in consequence of the error, Dr O incurred interest of £136 by June 2020. In fact, it was clear to the Tribunal that the amount of interest which had actually accrued as at June 2020 was £213.87. This was made up of a £77.28 interest charge on the March 2020 statement of account and a further interest charge of £136.59 on the June 2020 statement. Although charge 1.2(b) only referred to an interest liability of £136, the Tribunal noted that the June charge was additional to the March interest charge. It was therefore satisfied that the first two sentences in charge 1.2(b) were proved, namely:

> 'The Defendant's company sent an email to Dr O, which had not been accurately updated, resulting in a figure for the balancing payment for the earlier year (2016/2017) not being updated when a similar email (dated 17 December 2019) was sent to Dr O containing his balancing payment for 2017/2018. The effect of this error was that Dr O underpaid HMRC by £14,600 and incurred interest (of £136 by June 2020) as a result of the underpayment.'

58. The Tribunal went on to consider whether it was satisfied that the TDB had proved the final sentence of this charge, namely:

> 'The Defendant was aware that the figures in the email were of considerable import as they were plainly going to be acted upon by Dr O in a way that could potentially lead to him incurring HMRC penalties and charges.'

59. Had the allegation been that Mr O'Leary 'should have been aware' the figures in the email were going to be acted on in a way that could be to Dr O's detriment, the Tribunal would have found it proved. However, in the Tribunal's view, Mr O'Leary was not aware that the figure he put in the email could lead to Dr O incurring penalties and charges for the simple reason that he was not aware that he had included the wrong figure for the balancing payment.

60. It would, in the Tribunal's opinion, require a strained use of language for it to be able to find this sentence proved. Further, it was not in the Tribunal's view significant, because the mischief was captured in the first two sentences of the charge, which said in terms that as a result of Mr O'Leary's error, Dr O had underpaid his tax and incurred an interest penalty.

61. The Tribunal therefore found charge 1.2(b) proved in part.

Charge 1.2(c)

62. This charge required the TDB to prove, firstly, that letters were sent from HMRC to the Firm regarding Dr O's outstanding tax balance.

63. When Dr O made his complaint to the TDB he provided copies of two statements issued by HMRC in respect of his account. One was dated March 2020 and the other June 2020, and therefore were issued whilst the Firm was still acting as Dr O's accountant. Both showed that the account was overdue and interest was being incurred. Both were addressed to the Firm at its business address in Aldershot.

64. The Tribunal considered it was a proper inference to draw that these statements had been sent to the Firm. Although Mr O'Leary disputed receipt of the statements, the Tribunal was satisfied on the balance of probabilities that the statements had been produced by HMRC, and therefore in all likelihood had been posted to the Firm. It was

unlikely that both would have gone missing in the post. The Tribunal was therefore satisfied on the balance of probabilities that the statements had been delivered to the Firm at its business address.

65. The Tribunal next had to consider whether Mr O'Leary failed to send those statements on to Dr O, which caused him to incur interest charges and reputational damage with HMRC. It noted that it was not suggested by Mr O'Leary that he had forwarded the statements. His case, which the Tribunal had rejected, was that his firm had never received them from HMRC. Therefore, as a matter of fact, it was not in dispute that Mr O'Leary had not sent the statements on to his client.

66. However, the Tribunal did not consider that this failing was responsible for Dr O incurring interest charges and reputational damage.

67. Mr O'Leary had consistently said in response to the allegations that, irrespective of the self-assessment statements, if Dr O had owed money to HMRC it would have sent demands directly to him. In his formal response to the charges he said that it would be 'unheard of' for HMRC not to issue demands to the taxpayer.

68. The Tribunal noted that Dr O disputed that he had received anything from HMRC prior to September 2020. However, the Tribunal preferred Mr O'Leary's evidence on this issue. As an experienced tax agent, Mr O'Leary would undoubtedly know what HMRC's approach to chasing unpaid tax was. Further, as a matter of both common sense and experience, the Tribunal was prepared to accept that it was unlikely that HMRC would have waited until September to contact Dr O about a debt that had been owing since the end of January.

69. The Tribunal also noted that, irrespective of the balancing payment error, Dr O was aware that he had to make a further tax payment by 31 July 2020. The October 2020 statement showed that he did not make this payment until nearly a month late.

70. In light of these factors, the Tribunal was not satisfied that the failure to send the statements to Dr O was the cause either of him incurring interest charges or suffering reputational damage with HMRC. Thus, the Tribunal found the second sentence of charge 1.2(c) proved only up to and including Dr O's name.

71. Finally in respect of this charge, the Tribunal had to consider whether Mr O'Leary failed to collect the letters, or to arrange for them to be forwarded, or to check the online portal. Given that Mr O'Leary's case was that he had never seen these statements, it followed that he must have failed to collect them from the Firm's office and that he did not arrange for them to be forwarded to his client. Nor was it in dispute that Mr O'Leary had not checked Dr O's account on the online portal between the return being filed in January 2020 and Dr O switching to a new firm in July 2020. Whether these failings were culpable was a matter for the Tribunal to consider when it considered charge 1.1.

72. Therefore the Tribunal found charge 1.2(c) proved save for the words 'which caused Dr O to incur interest charges and reputational damage with HMRC'.

Charge 1.2(d)

73. The allegation that Mr O'Leary had failed to take into account Class 1 NICs paid by Dr O was vague. It did not state in which year or years it was alleged that Class 1 contributions had not been taken into account.

74. It appeared to the Tribunal that the only evidence in support of the allegation were assertions by Dr O. Ms Stricklin-Coutinho placed some reliance on a schedule contained in Dr O's original letter of complaint which indicated that tax had been overpaid in 2018 and 2019. She invited the Tribunal to draw the inference that this must have been as a result of Class 1 contributions not being taken into account. The Tribunal did not accept that this was an appropriate inference to draw. There could be more than one reason why tax had been overpaid and there was no independent evidence demonstrating that it was due to failure of Mr O'Leary to calculate NIC properly.

75. The Tribunal noted that Mr O'Leary had repeatedly stated that his NIC calculations were correct. There was no expert evidence before the Tribunal demonstrating that his opinion about the correctness of his calculations was wrong. It also noted that, in respect of the tax year 2017/18, the Self Assessment Tax Calculation produced by HMRC said:

> 'The Class 2/4 National Insurance has been calculated taking into account Class 1 information held on HMRC's systems from your NI record'.

76. Therefore, not only was the Tribunal unable to find any independent evidence that Mr O'Leary's calculations had been incorrect, but there was evidence from HMRC that Class 1 contributions had in fact been taken into account.

77. The Tribunal therefore found the first sentence in charge 1.2(d) not proved.

78. The second part of this charge alleged that Mr O'Leary had failed to take active steps to reclaim an NIC overpayment from HMRC.

79. The Tribunal noted that on 31 January 2019, Mr O'Leary emailed Dr O stating he would ask HMRC to make a refund. In a further email on 16 March 2019 he explained to Dr O that refunds sometimes take a year to process but that he would send HMRC a reminder. Ms Stricklin-Coutinho accepted in her submissions that a proper inference to draw was that Mr O'Leary had applied to HMRC for a NI refund on his client's behalf. The Tribunal was not provided with correspondence between the Firm and HMRC, but it noted that Mr O'Leary told his client he was going to chase up the refund.

80. Whilst there is no evidence that a refund was made in the form of a payment from HMRC, there is evidence to suggest it was made by way of an offset against Dr O's tax liabilities.

81. In these circumstances, the Tribunal was not satisfied that the TDB had proved that Mr O'Leary failed to take active steps to obtain a refund. Indeed, the evidence suggested he had taken steps to obtain a refund. The Tribunal therefore found the second sentence of charge 1.2(d) not proved.

Charge 1.1(a)

82. Charge 1.1(a) alleged that Mr O'Leary had carried out his work without proper regard for the technical and professional standards expected, in breach of rule 2.4.1 of the RPRG 2018. The Tribunal considered this in light of the matters found proved in charges 1.2(b) and 1.2(c)

83. The Tribunal was not satisfied that the mistake regarding the balancing payment (charge 1.2(b)) amounted to a breach of rule 2.4.1. The Tribunal noted that rule 2.4.1 makes reference to members carrying out work they are not competent to do. Mr O'Leary was clearly competent to provide advice to his client about his tax payments. Indeed, it

appeared to the Tribunal that he had had regard to the standards expected of him because he gave advice of a nature that a tax agent would be expected to give. The fact that he got a figure wrong did not mean, in the Tribunal view, that he had ignored technical and professional standards. It simply meant he had made a mistake. The Tribunal did not think it was appropriate to categorise an error of this nature as a breach of rule 2.4.1 of the PRPG 2018.

84. In respect of Mr O'Leary's failure to collect and forward the HMRC statements and to check the online portal (charge 1.2(c)), the Tribunal was satisfied this amounted to a breach of rule 2.4.1. The Tribunal accepted Ms Stricklin-Coutinho's submission that, as tax specialists, Mr O'Leary and his Firm had an obligation to adapt their practices to accommodate the difficulties caused by the pandemic, in order to ensure their clients were provided with the service they were entitled to expect. The Tribunal did not think it unreasonable to expect Mr O'Leary to have forwarded the statements to Dr O, given that they showed tax was overdue, or alternatively to have checked his client's account on the online portal. These were therefore standards that would have been expected of him as a professional tax adviser and he had failed to meet them.

85. Therefore the Tribunal found charge 1.1(a) proved in relation to those parts of charge 1.2(c) that had been proved, but not in relation to charge 1.2(b).

Charge 1.1(b)

86. Charge 1.1(b) alleged that Mr O'Leary had failed to exercise reasonable skill and care when acting for Dr O. The Tribunal considered this in light of the matters found proved in charges 1.2(b) and 1.2(c).

87. In respect of the mistake regarding the balancing payment (charge 1.2(b)), the Tribunal was satisfied this amounted to a breach of rule 5.1.1. The Tribunal was satisfied that the exercise of reasonable skill and care required Mr O'Leary to ensure that, when he gave advice to his client as to the tax he needed to pay, that advice should not be based on an erroneous figure. Mr O'Leary told the Tribunal that the practice of cutting and pasting from old emails had now changed. That, in the Tribunal's view, was at least tacit acceptance that the previous practice had the potential for creating just the sort of error that had occurred in this case, and was therefore a bad practice.

88. The Tribunal also found that the failure to collect and forward the HMRC statements and to check the online portal (charge 1.2(c)) constituted a breach of rule 5.1.1 of the PRPG 2018. The Tribunal was satisfied that a tax professional, acting with reasonable skill and care, would have made his client aware that tax was outstanding and interest was being charged, either by forwarding on statements received from HMRC or by checking his client's account on the HMRC portal.

89. The Tribunal therefore found charge 1.1(b) proved in relation to those parts of charges 1.2(b) and 1.2(c) that had been proved.

SANCTION:

90. In determining what, if any, sanction to impose, the Tribunal had regard to the Indicative Sanctions Guidance ('ISG'), all the evidence in the case and the submissions that had been made.

91. The Tribunal bore in mind the purpose of a sanction is not to punish a member, albeit it may have that effect. The purpose is to promote the public interest which includes not only protecting the public but upholding the proper standards of conduct in the profession and maintaining its reputation.

92. Any sanction imposed by the Tribunal must be appropriate and proportionate, taking into account the member's own interests and should be the least onerous measure that adequately meets the facts of the charges found proved.

93. The Tribunal identified the following as mitigating factors. Mr O'Leary has enjoyed a long career as a tax specialist, stretching back some 30-odd years, during which he has had a previously unblemished record. This includes a period of around 10 years of service provided to the complainant in this case, Dr O. Mr O'Leary has promptly and fully co-operated with the TDB and its requests for information.

94. The Tribunal identified the following aggravating factors. Mr O'Leary had demonstrated in his correspondence a poor attitude towards the complaints made against him, which manifested in attempts to minimise his shortcomings and deflect blame onto others, in particular Dr O and also Dr O's new accountants. In general he

had shown a lack of insight into his failings and had not demonstrated any regret or apology for them.

95. Against that, the Tribunal kept strongly in mind that the matters it had to deal with were very much at the bottom end of the scale of professional wrongdoing. They amounted to a failure on one occasion to give correct advice about the amount of tax to be paid and a failure to have adequate systems in place to deal with the problems caused in the early stages of the pandemic.

96. The Tribunal considered whether it would be appropriate to conclude the case by taking no further action. Although the two errors in this case were minor in nature, Mr O'Leary's failure to demonstrate insight into his actions and the effect they had, or potentially could have had, persuaded the Tribunal that imposing no penalty would not be the appropriate course to take.

97. The Tribunal next considered whether it would be appropriate to order this matter rests on file. The effect of such an order is that no action will be taken unless, during a specified period which can be up to three years, there is a further complaint which results in a disciplinary finding. The ISG suggests this will be an appropriate sanction where the misconduct is minor and is unlikely to be repeated. In the Tribunal's view, both of those criteria were met.

98. The Tribunal considered more severe sanctions, such as a warning. However, because the failings in this case were so low on the scale of seriousness, the Tribunal considered that any sanction more severe than an order to rest on file would be disproportionate.

99. The Tribunal therefore determined that the appropriate and proportionate sanction was an order that the charges rest on file and the appropriate period was two years.

100. The Tribunal considered whether it should combine that with an order that Mr O'Leary pay compensation. The ISG says that where a charge of inadequate professional service has been found proved, as it has here, the Tribunal may order the member to pay compensation to the complainant to reflect any loss caused by the member's failure to observe proper standards.

101. In respect of the erroneous balancing payment figure, the Tribunal had found that it amounted to a want of reasonable skill and care on the part of Mr O'Leary. It had also found that this caused Dr O to incur interest charges, up to June 2020, of £213.87. It appears that further interest was incurred after the June 2020 statement, but the Tribunal was not provided with the material from which that figure could be calculated.

102. The Tribunal was satisfied that it was appropriate to order Mr O'Leary to pay compensation to Dr O in the sum of £213.87.

COSTS:

103. The Tribunal has the power under Regulation 20.6(f)(xii) of the Disciplinary Regulations to make an award of costs.

104. Ms Stricklin-Coutinho applied for costs on behalf of the TDB. She reminded the Tribunal that the presumption is that a respondent will pay the costs, on the principle that the majority of members should not subsidise the minority who have brought disciplinary proceedings upon themselves. The ISG says that it is only in exceptional circumstances that costs should not be awarded against an unsuccessful respondent.

105. Ms Stricklin-Coutinho also reminded the Tribunal that the overriding principle governing a costs award is that it should only reflect those costs which are appropriate and have been reasonably incurred.

106. Mr O'Leary had been sent a costs schedule by email at 12.17pm on the day of the hearing, some two or so hours after it had commenced. The sum claimed in the schedule was £5,622. Mr O'Leary had replied by email saying that he would not be able to pay that sum without suffering hardship.

107. Ms Stricklin-Coutinho made an application for costs in the sum of £5,982. She explained that the schedule had been prepared on the basis that the hearing would not go beyond lunchtime. The additional £360 was in respect of the extra time spent at the hearing by the case presenter, over and above that which was allowed for in the costs schedule.

108. The Tribunal found that there were no exceptional circumstances which would justify making no order of costs against Mr O'Leary. The Tribunal accepted that, in accordance with normal principles, Mr O'Leary should pay the costs of the proceedings.

109. The majority of the costs claimed by the TDB were in the nature of fixed costs. Therefore they were incurred in consequence of Mr O'Leary disputing the charges and there was no basis, in the Tribunal's view, on which to reduce them as being either inappropriately incurred or unreasonable in amount.

110. The Tribunal noted the claim for additional costs to cover the case presenter's time. However the Tribunal also noted that the hearing would have concluded more expeditiously had not service of the notice of hearing been defective and had Mr O'Leary not faced a charge relating to NIC, which was not proved.

111. The Tribunal considered that the costs reasonably and appropriately incurred were £5,622.

112. However, the Tribunal was concerned that Mr O'Leary may not have had a proper opportunity to argue that the costs should be reduced because of his financial circumstances. Although Mr O'Leary had not provided any information as to his means, that was in the Tribunal's view potentially explicable on the basis he had not received the costs schedule until after the hearing had started. Further, he did not appear to have been specifically warned in correspondence that he was at risk of a costs order being made against him. Receiving the costs schedule on the day of the hearing may have come as something of a shock and he may not have had time to respond to it as fully as he otherwise might have done.

113. In the Tribunal's view, to be fair to Mr O'Leary, he ought to be afforded an opportunity to make submissions and provide evidence in respect of his financial circumstances to support his contention that paying these costs would cause him financial hardship.

114. The Tribunal therefore directed that Mr O'Leary may if he wishes, within 14 days of service of this written decision, ask the Tribunal to reduce the amount of costs it has provisionally awarded on the grounds it would cause him financial hardship. Mr O'Leary should be aware that if he makes any such application, he should provide

sufficient evidence to support any assertions he makes about his financial circumstances.

115. If Mr O'Leary makes such an application, the TDB may submit written submissions in response within 7 days. The Tribunal will then consider the application on the papers and will determine the amount of costs payable without a further hearing.

116. If no application is made by Mr O'Leary, then pursuant to Regulation 27.1 of the Disciplinary Regulations, costs of £5,622 will be payable within 28 days of the service of this order.

PUBLICITY:

117. The Tribunal made an order under regulation 28.1 of the Disciplinary Regulations for publication of this order made and the written reasons, naming the member.

118. The Guidance on the Publication of Disciplinary and Appeal Findings sets out the general principle that a disciplinary finding made against a member will be published and the member named in the publication. The Tribunal found no reason to depart from that principle.

119. In accordance with the Guidance, the Tribunal directed that the decision will be published in in the Tax Adviser Journal and on the TDB website naming Mr O'Leary.

120. Pursuant to regulation 28.4 of the Disciplinary Regulations, publication will be made after the expiry of the appeal period, namely within 21 days of the effective date of this order, provided no valid notice of appeal is served within that period.

EFFECTIVE DATE:

121. Pursuant to regulation 20.9, this decision will be treated as effective from the date on which it is deemed served on Mr O'Leary.

ORDER:

1. The following charges are found proved:

   Charge 1.1(a) in relation to charge 1.2(c);

Charge 1.1(b) in relation to charge 1.2(b) and 1.2(c);

Charge 1.2(a);

Charge 1.2(b) in part;

Charge 1.2(c) in part.

2. These charges are ordered to rest on file for a period of two years.

3. Mr O'Leary is ordered to pay compensation to the complainant, Dr O, in the sum of £213.87.

4. Mr O'Leary is ordered to pay costs of £5,622 within 28 days of the service of this decision on him unless, within 14 days of the service of this decision on him, he makes an application for the costs to be reduced on the grounds of his financial circumstances, in which case:

    (a) the TDB will have 7 days from the date of receipt of the application to make written submissions in response to the application; and

    (b) the Tribunal will consider the application and any response from the TDB on the papers and will issue an addendum to this decision either confirming or varying the costs order, as it deems appropriate.

ADDENDUM:

122. By letter dated 13 April 2022, Mr O'Leary sought a reduction in the costs award on the basis that paying £5,622 in his current financial situation would be very onerous. Mr O'Leary provided details of his means supported by two bank statements, a credit card statement and his 2020/21 partnership tax statement.

123. The TDB provided written submissions dated 21 April 2022 opposing the application. The Tribunal noted that these were provided outside the seven-day time period allowed for submissions in reply. No explanation was given for their lateness. However, the Tribunal took account of the fact that the Easter weekend had fallen within this period and considered that, in the circumstances, it would be unreasonable to disregard the

TDB's submissions on the grounds they were a day late. The points made in them were all matters that the Tribunal would have considered in any event.

124. Having found that the costs of £5,622 were reasonably incurred in the circumstances of the case (see paragraph 109 above), the only issue the Tribunal had to additionally consider was whether to reduce the amount payable in the light of the information provided by Mr O'Leary regarding his means. The Tribunal bore in mind that financial circumstances can be a ground for reducing the amount a respondent is required to contribute towards costs (*Merrick v Law Society* [2007] EWHC 2997).

125. The Tribunal considered that the documentary information provided by Mr O'Leary was somewhat limited. For example, the bank and credit cards statements produced were for one day only, which gave a snapshot of the position rather than the full picture. However, the Tribunal was prepared to accept from the information it did have that Mr O'Leary's means were limited and that it was appropriate in light of them to reduce the amount of costs payable. It determined that the appropriate costs award was £4,000.

126. The Tribunal also considered, for the same reasons, that it was appropriate to exercise its discretion under Regulation 27.1 of the Disciplinary Regulations to allow payment by instalments of £400 per month over a ten month period. The first payment will be due on 1 June 2022 to allow for the appeal period.

127. Therefore the Order set out above is revised by deleting paragraph 4 and substituting the following:

> 4. Mr O'Leary is ordered to pay costs of £4,000. Those costs may be paid by instalments of £400 per month with the first payment due on or before 1 June 2022 and with each subsequent payment due on or before the first day of each subsequent month.

128. The effective date of the Order (see paragraph 121 above) shall be the date on which this addendum decision is deemed served on Mr O'Leary.

Andrew Granville Stafford
(Chair)
Hearing: 7th April 2022
Written decision: 11th April 2022
Addendum: 25th April 2022