

HEARING ON 31 August 2023

B E T W E E N

TAXATION DISCIPLINARY BOARD (“TDB”)

– and –

MR PAUL O’BRIEN
(CIOT membership No. 101981)

DECISION AND REASONS

Present:

Tanveer Rakhim (Chair, Lay member)

Mac McCulley (Lay member)

Michael Kaltz (Tax Panel member)

Nigel Bremner (Clerk to the TDB)

The Committee met via Microsoft Teams

INTRODUCTION

1. The Disciplinary Tribunal (‘the Tribunal’) sat on 31 August 2023 to hear charges brought by the Taxation Disciplinary Board (‘TDB’) against Mr O’Brien. The hearing was conducted remotely by video conferencing.
2. Mr O’Brien attended and was represented by Mr Matthew Corrie. The TDB Case Presenter was Ms Aleksandra Manning Rees.

3. Mr O'Brien faced a single charge, as set out at Appendix 1. This includes the corrected date, for which the amendment application was granted (see further below).
4. As Mr O'Brien had admitted the charges against him in writing (on 10 May 2023), the matter was heard pursuant to the simplified procedure in regulation 15 of the Taxation Disciplinary Scheme Regulations 2014 ('Regulations').
5. The Tribunal was provided with the following documents:
 - a. Case summary, document index and schedule;
 - b. The papers that were placed before the TDB's Investigatory Committee, which included:
 - HMRC referral, ICAEW Disciplinary Committee decision dated 15 March 2022, ICAEW Appeal Committee decision dated 13 September 2022, Mr O'Brien's notification to CIOT 16 September 2022, email from CIOT, TDB's initial letter to Mr O'Brien, emails between Mr O'Brien and TDB;
 - Mr O'Brien's response dated 10 May 2023 inclusive of his correspondence with the HMRC and the Primary Care Trust ('PCT') as well as his response to the ICAEW, bundle of evidence relied upon at the ICAEW Appeal Committee hearing, and testimonials.
 - c. Mr O'Brien's Response Form and bundle for today's hearing which included:
 - Witness statements from Mr O'Brien, his business partner and wife;
 - Testimonials;
 - Company documents – inclusive of a note on his company's financial circumstances, financial statements and accounts for the companies;
 - Personal financial documents - expenditure details and email in relation to a loan.

BACKGROUND TO THE CHARGES

6. Mr O'Brien was the engagement partner for a firm of dentists. Mr O'Brien dealt with the accountancy and taxation requirements of the dentists and subsequently their companies and with the compliance check by HMRC in relation the dental practice's 2013 CT Return.
7. Since prior to July 1971, the dentists, who were at that time trading as sole traders, operated an Expense Sharing Agreement (ESA). The dentists were not operating as a partnership as each dentist had his own contractual arrangements in place to provide dental care to NHS patients. As such the dentists were considered to be self-employed but shared the expenses of the practice.
8. Following the retirement of a partner in June 2010, Mr O'Brien's firm was engaged by the remaining three dentists to prepare a Tax Planning report which discussed the possibility of incorporating their respective sole traders into a single corporate body. The report included consideration of the requirements in relation to the transfer of the contracts between each individual dentist and the PCTs and recommended that formal written approval be obtained from the respective PCTs rather than each dentist simply assigning his contract with the PCT to the new single corporate body. The partners subsequently decided to incorporate the company as the single corporate vehicle to carry out all of their NHS dental activities. The company was incorporated on 3 October 2011. The company's first financial statements were prepared by Mr O'Brien's firm. HMRC opened a compliance check into the company's accounts. The check included questions relating to the goodwill acquired and the contractual relationships between the company and the PCTs.
9. To address one of the questions raised by HMRC, Mr O'Brien was alleged to have dishonestly created and sent a letter to HMRC, on or before 19 January 2016 that purportedly showed that the PCT had been notified of the transfer to the company in 2012.
10. Mr O'Brien notified HMRC on 5 April 2017 that an incorrect representation of the facts had been made in the letter he created. Mr O'Brien explained that he and his

clients believed that the PCT had been notified in 2012 but they were unable to find the notifying letter and therefore a letter was created to show the notification.

11. Subsequently, HMRC completed the compliance check and the HMRC inspector agreed that the individual dentists did transfer their businesses to the company. HMRC stated that Mr O'Brien's letter *'has not proven to be in any way determinative of the technical conclusions we are still to agree (or not).'*
12. The complaint investigated by ICAEW was heard by the Disciplinary Committee of the ICAEW on 15 March 2022, which determined exclusion. This was appealed and the matter went before the Appeal Committee of the ICAEW on 31 August 2022, which determined a Severe Reprimand and a £5,000 fine. The decision dated 13 September 2022 confirmed the level of fine accounted for *'a discount of 30% for his full and unequivocal admission'*.
13. On 16 September 2022, Mr O'Brien notified CIOT that he had been subject to a disciplinary finding by ICAEW. On 30 September 2022 Mr O'Brien was informed by CIOT that no further action would be taken at this time.
14. On 13 April 2023 the TDB were informed by CIOT that Mr O'Brien had made the disclosure of the disciplinary matter within 2 months in accordance with Rule 2.14.2, and *'were satisfied with that'*.
15. The TDB wrote to Mr O'Brien on 19 April 2023 setting out the potential breach and he replied on 2 May 2023 to acknowledge the complaint and provided further particulars on 10 May 2023. Mr O'Brien provided a full response to the complaint including the disclosure of the decisions by the ICAEW Disciplinary Committee and Appeal Committee.
16. Mr O'Brien has taken full responsibility for his conduct in his dealings with HMRC, ICAEW, his notification to CIOT and his response to TDB.

17. Mr O'Brien had no previous disciplinary matters against him. Mr O'Brien had also put forth evidence in relation to his personal and professional pressures at the time that the conduct to which the complaint relates occurred.

PRELIMINARY ISSUES

Application to admit emails

18. Mr Corrie applied for permission to rely on two emails, which were not contained within the TDB bundle:

- a. Email from the same HMRC's Senior Technical Manager dated 18 December 2020 confirming that in his career of over 30 years this was the first time he had seen an accountant self refer for such a matter, the letter had no impact on the issues in dispute and he commended Mr O'Brien for the manner in which he conducted himself with the tax enquiry.; and
- b. Email of 7 July 2021 from the HMRC's Senior Technical Manager confirming that the HMRC only became aware of the '*problematic letter*' when Mr O'Brien had informed them.

19. Mr Corrie submitted that both emails are important to the representations made on behalf of Mr O'Brien, they have been missed out from the bundle in error, they are not lengthy, they are referred to in the TDB response, their admission causes no unfairness to the TDB and it would be unfair to Mr O'Brien if they were not admitted.

20. Ms Manning Rees confirmed that the application is not contested as the documents are within the bundle. She submitted that it would be right and proper for the Panel to have sight of the original emails.

21. The Tribunal had regard to Regulation 30 of the Taxation Disciplinary Scheme Regulations 2014 (Regulations). The Tribunal noted the parties were in agreement of the emails being admitted. The Tribunal considered the principles of natural justice, including fairness, and that strict rules of evidence did not apply. The Tribunal determined it would be fair to admit the emails.

Application to amend charge

22. Ms Manning Rees applied to amend the date at the start of the charge from 31 September 2022 to 13 September 2022, which was in reference to the ICAEW's Appeal Committee's written decision. She submitted that the Regulations are silent on amendments, Mr Corrie had brought it to her attention, and thus she made the application and that this was a minor amendment.
23. Mr Corrie submitted that he had noted the error, there was an inherent power to amend the charge and confirmed that there was no unfairness caused to Mr O'Brien.
24. The Tribunal noted Regulation 17.6 stated that; *'No objection shall be upheld due to any technical fault in the Charge or in the procedure of the Disciplinary Tribunal, provided that the proceedings are fair to the Defendant'*. The Tribunal considered the date of the ICAEW Committee's written decision was not disputed as being 13 September 2023, the error on the charge was typographical as 31 September is a date that does not exist, the application was made at the outset of the hearing, the parties were in agreement with the amendment and no unfairness was caused as it was a minor amendment as opposed to a substantive change. The Tribunal allowed the amendment as it would allow the charge to be more accurately put to Mr O'Brien.

DECISION ON THE CHARGES

The relevant paragraphs from the Professional Rules and Practice Guidelines 2018 are included at Appendix 2.

Charge 1

25. The Charge was brought under Rule 2.6.3 of the PRPG. This requires a member not to conduct themselves in an unbecoming manner which tends to bring discredit upon a member and/or may harm the standing of the profession and/or the CIOT. The

TDB's case was that by reason of his sanction from the ICAEW for dishonesty in respect of his tax practice he had conducted himself in a manner unbecoming a member.

26. The Tribunal noted that Mr O'Brien had admitted the charge within his Response Form, as well as within his Written Representations. He also made an admission at the hearing.

27. The Tribunal was satisfied that Mr O'Brien had made a clear and unequivocal admission to the charge and this was appropriate in light of the evidence before the Tribunal. It therefore found the Charge 1 is proved on the basis of Mr O'Brien's admissions

SANCTION

28. In determining what, if any, sanction to impose, the Tribunal had regard to the Indicative Sanctions Guidance ('ISG').

29. 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.

30. 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.

31. The Tribunal took into account the admission and Mr O'Brien's lack of any previous disciplinary matters before this regulator.

32. Ms Manning Rees submitted that the matter was serious given it involved dishonesty and given the detailed letter produced on a letterhead and was submitted to the HMRC. She accepted that it was the Mr O'Brien who had brought the letter to the

attention of the HMRC, he had provided early admissions and he had engaged with all regulators. She left it for the Tribunal to determine the appropriate sanction.

33. Mr Corrie provided the background to put the matter into context and submitted the letter had been created in conjunction with the client. He reminded the Tribunal on the evidence in support of the admissions and remorse. He acknowledged that expulsion is the start point given the dishonesty, but submitted this was not appropriate in this case. He submitted there had been no abuse of trust over and above when acting as a Chartered Tax Advisor.
34. Mr Corrie relied upon the previous good character in an otherwise long unblemished career, testimonials to evidence Mr O'Brien's integrity and the stress he was under at the time, the personal and health factors outlined in Mr O'Brien's statement, his own notification to the HMRC being the trigger, the lack of impact of the letter on the HMRC investigation/decision, a lack of loss intended or caused, the admissions and cooperation, the considerable insight displayed and the reduced prospects of repetition as evidenced by the 7.5 years that had passed without incident.
35. Mr Corrie submitted that there would be an adverse impact on the business and clients if Mr O'Brien was no longer able to practice. He submitted that Mr O'Brien has now done everything expected of him. He submitted that this was an isolated incident, there had been no client loss and no risk to the public. He submitted the reputation of the profession would be maintained by a Censure to mark the misconduct.
36. The Tribunal took all the above matters into consideration. The Tribunal considered the fact that the misconduct was committed in a professional capacity and whilst Mr O'Brien occupied a position of trust and responsibility as a partner in an accountancy firm was an aggravating feature. However, the position of trust was considered in its context and the conduct was no more than in the ordinary course of the professional role and there was no specific factor to show an abuse of trust, especially given that the letter was created in conjunction with the client. Whilst Mr O'Brien was directly

involved, the Tribunal did not consider that there was any evidence that this was calculated/planned over a period of time, as it was an isolated incident. It was not disputed that the letter created was to replace a misplaced letter, which was later found. Thus the dishonesty, which remains serious, was on the lower end of the scale.

37. The Tribunal considered there was considerable mitigation present:

- a. Mr O'Brien has been a man of good character prior to the index incident, with a long unblemished career;
- b. He was a man of good standing in the profession as demonstrated by the many positive testimonials, which the Panel had considered;
- c. The conduct was a single act in an otherwise long and distinguished career and thus accepted to be out of character;
- d. The conduct took place at a time when Mr O'Brien was experiencing what was described by the DC as *'substantial factors in his personal life, which brought significant stress and anxiety upon him'*. The Tribunal had considered the details of these within Mr O'Brien's statement as well as the statement of his wife. It accepted these factors did exist and were likely to have affected his behaviour;
- e. Mr O'Brien brought his conduct to HMRC's attention notwithstanding that it may well otherwise never have come to light. The Panel considered this to be one of the main mitigating factors. The Panel noted Mr O'Brien's view on standing by this decision to inform the HMRC, despite the consequences, as he believed it remained the right thing to do;
- f. The positive account from HMRC's Tax Inspector that it was only due to Mr O'Brien raising the issue that they became aware of it, not having

encountered an accountant self-reporting such an issue in his own career and that the letter no impact on the outcome of the enquiry;

- g. The fabricated letter was a replacement for a genuine original letter and so although false, the underlying facts it purported to evidence were not. The letter had been unavailable due to the author of the letter being unwell;
- h. Mr O'Brien's conduct was motivated by a desire (albeit this was an ill placed desire) to act in his client's best interests and there was no personal gain;
- i. The degree of regret, remorse and insight displayed. Mr O'Brien showed insight in relation to the effect on himself, his colleagues and the profession. The Tribunal also noted the evidence in relation to Mr O'Brien's efforts to resolve the issues in his personal life and his plan if faced with a similar situation in the future;
- j. The admissions he has made and his co-operation with the disciplinary processes;
- k. The lack of risk of repetition. The Tribunal had regard to the 7.5 years that had passed without any further incident or concern.

38. The Tribunal had regard to the guidance in the ISG. Where there has been an adverse finding by another professional body and the underlying conduct involves dishonesty, the guideline sanction is expulsion. The Tribunal bore in mind that, in accordance with its duty to only impose a sanction which was appropriate and proportionate in all the circumstances of the case, it was not bound to impose the guideline sanction. It therefore considered the available options from the bottom upwards.

39. The Tribunal considered that imposing no sanction or allowing the matter to rest on file would not appropriately mark the nature of Mr O'Brien's misconduct. The Tribunal did not consider this would address the aims of upholding the proper standards of conduct in the profession and maintaining its reputation.

40. The Tribunal did not consider a warning was appropriate given this was dishonest misconduct, which is always treated as serious. An apology was not appropriate as the misconduct did not affect any client or members of the public.
41. The Tribunal next considered a Censure and had regard to the relevant part of the ISG. There was no loss caused to any client, despite this being dishonest misconduct and thus serious. Mr O'Brien understood and appreciated his failings as demonstrated by his self-reporting to the HMRC. It had already been accepted this was an isolated incident, there had been no repetition in the 7.5 years since it occurred and the risk of repetition was thus low. Mr O'Brien continued to work with clients and was held in high regard by his clients, colleagues and members of the profession. The Tribunal accepted the insight and regret displayed and was also able to take account of Mr O'Brien's previous unblemished professional record.
42. The Tribunal thus concluded that a Censure was the appropriate sanction. With respect of the period of the Censure, the Tribunal considered the standard period of three years was appropriate and there were no reason to vary this.
43. The Tribunal also considered if a fine would be appropriate. The ICAEW had already fined Mr O'Brien £5,000 and the Tribunal were mindful that its role was not to punish and the Tribunal considered a financial penalty would be punitive. The Tribunal took into account that the misconduct did not result in any gain by Mr O'Brien and thus the Tribunal did not consider a fine would suit any appropriate purpose. The Tribunal determined that the sanction of the Censure would serve as an appropriate deterrent and mark the misconduct.
44. The Tribunal did not consider a suspension was appropriate as there was a low risk of repetition, 7.5 years had passed without incident, and a Suspension would thus be disproportionate. The Tribunal thus determined that a Censure of three years was the appropriate sanction.

COSTS:

45. The TDB applied for costs in the sum of £3,306. Mr Corrie submitted that he did not take issue with the principle that costs were payable, no issue was taken on the amount sought and he submitted that there were no exceptional circumstances on why Mr O'Brien should not pay costs. He relied upon the financial information provided within the bundle as to Mr O'Brien's means.

46. The Tribunal had regard to the Guidance on Awarding Costs. The presumption is that the Defendant 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 Tribunal found no reason to depart from that presumption. The Tribunal noted the breakdown of Mr O'Brien's expenditure but did not consider this should result in the costs incurred by the TDB to be reduced as they were rightly incurred. The Tribunal considered the breakdown of the costs claimed in the schedule and was satisfied that those costs were reasonable and had been appropriately incurred.

PUBLICITY:

47. 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.

48. The Guidance on the Publication of Disciplinary and Appeal Decisions 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 and directed that this decision be published in accordance with the Guidance.

49. 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

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

A handwritten signature in black ink, appearing to read 'TR', with a long horizontal flourish extending to the right.

Tanveer Rakhim
(Chair)
20 September 2023

APPENDIX 1

IN THE DISCIPLINARY TRIBUNAL OF
THE TAXATION DISCIPLINARY BOARD

(TDB/2019/26)

B E T W E E N

THE TAXATION DISCIPLINARY BOARD (“TDB”)

– and –

MR PAUL O’BRIEN
(CIOT membership No. 101981)

SCHEDULE OF CHARGES

The charges set out below refer to the following rules of the Professional Rules and Practice Guidelines 2018 of the Chartered Institute of Taxation (the “CIOT”) and the Association of Taxation Technicians (the “ATT”) (the “PRPG 2018”), in force from 1 January 2021:

2.6.3 (professional behaviour)

Charge 1 -

1.1. On 13 September 2022, Mr. O’Brien was made subject to a finding by another disciplinary body, namely the Disciplinary Committee of The Institute of Chartered Accountants in England and Wales (“ICAEW”), in that he was severely reprimanded and ordered to pay a fine of £5,000 in relation to the following admitted factual particular:

On or around 19 January 2016, Mr Paul G O’Brien sent to HMRC a letter dated 28 September 2012 addressed to [edited] Primary Care Trust purportedly written by [edited], advising that the rights and duties of its ‘GDS Contract’ had been subcontracted to [edited] when that letter had been created by Mr Paul G O’Brien. This conduct was dishonest because he knew that letter to be false and he sent it to HMRC with the intention that they would believe it to be true.

1.2. By reason of Charge 1.1 the Defendant has conducted himself in an unbecoming manner which tends to bring discredit upon himself and/or may harm the standing of the profession and/or the CIOT contrary to rule 2.6.3 of the PRPG.

END OF CHARGES

APPENDIX 2

RULE 2.6.3 OF THE PROFESSIONAL RULES AND PRACTICE GUIDELINES 2018

2.6 Professional Behaviour

2.6.3 A member must not:

- Perform their professional work, or conduct their practice or business relationships, or perform the duties of their employment improperly, inefficiently, negligently or incompletely to such an extent or on such number of occasions as to be likely to bring discredit to themselves, to the CIOT or ATT or to the tax profession;*
- Breach the Laws of the CIOT or ATT;*
- Conduct themselves in an unbecoming, unlawful or illegal manner, including in a personal, private capacity, which tends to bring discredit upon a member and/or may harm the standing of the profession and/or the CIOT or ATT (as the case may be).*

PROFESSIONAL COMPETENCE AND DUE CARE

This is defined within the PRPG 2011 at paragraph 2.1 in the following terms:

To maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional services based on current developments in practice, legislation, techniques and act diligently and in accordance with applicable technical and professional standards.