

PUBLIC NOTICE

Enforcement Action

IRISH AUDITING AND ACCOUNTING SUPERVISORY AUTHORITY (IAASA)

IN THE MATTER OF THE INSTITUTE OF CHARTERED ACCOUNTANTS IN IRELAND T/A CHARTERED ACCOUNTANTS IRELAND (ICAI)

1. Following an enquiry by the Irish Auditing and Accounting Supervisory Authority ('the Authority') a Settlement Agreement has been agreed and the Authority has decided to admonish ICAI by way of sanction.
2. The contraventions were admitted by ICAI.

Background

3. ICAI received a formal complaint regarding one of its members on 9 June 2014. It was alleged that the Member had not made his clients aware of the fact that he was in receipt of commission in respect of a pension investment amounting to €150,000. The matter was investigated internally by ICAI in accordance with its regulations, and an investigation report dated 14 October 2015 found that the Member may have a case to answer and it contained a draft formal allegation. That report was sent to the Member in accordance with ICAI's Disciplinary Regulation 22.2(that was in force at that time).
4. On 30 November 2015 the Member as he was permitted under the rules, made submissions in relation to that report. The investigation report and the Members submissions were then sent to the Conduct Committee for consideration. The Conduct Committee considered the investigation report and the Member's submissions and on 19 April 2016, it determined that the facts did not give rise to a prima facie case for disciplinary action. The minutes recording the decision of the Conduct Committee in referred to the incorrect regulations. This forms the subject of Allegation 1.
5. That decision was notified to the Member and the Complainant by letter on 5 May 2016.
6. In accordance with Regulation 25.1 of ICAI's Disciplinary Regulations 2015, the Complainant had a right to an independent review of that decision. A request by the

Complainant for an independent review of the Conduct Committee's decision, that there is no case to answer, was to be made within 21 days of being notified of the decision.

7. On 27 May 2016, one day after the expiry of the 21 day period, the Member enquired from ICAI as to whether the Complainant had requested an independent review. He was informed that ICAI had not received a request for an independent review from the Complainant.
8. However, on 3 June 2016 the Complainant requested an independent review of the Conduct Committee's decision. This request was eight days outside of the 21 day period stipulated in the ICAI Disciplinary Regulation 25.1 (in force from 5 October 2015). The Complainant was granted an extension of time and the decision of the Conduct Committee was sent to an independent reviewer for consideration. The circumstances of this extension form the subject matter of Allegation 2.
9. On 1 July 2016 an independent reviewer was appointed and he issued his report on 14 August 2016 which concluded that the Member had a case to answer and that the matter should be referred to the Independent Review Committee (IRC). The matter was referred to the IRC on 19 August 2016 and the Member was requested to provide submissions by 21 September 2016 to the IRC. Ultimately this IRC never met and was suspended. The manner in which the independent reviewer considered this matter is the subject of Allegation 3.
10. On 18 November 2016 ICAI informed the Member in writing that it intended to remit the matter for a fresh independent review having declared the independent review a nullity. The circumstances surrounding this matter concern Allegation 4.
11. The case became protracted within the ICAI disciplinary process and the matter finally came to a conclusion with ICAI withdrawing the case.

Allegations concerning non-compliance with approved investigation and/or disciplinary procedures

(The relevant regulations in force at the time were the Regulations effective from 5 October 2015 save for where specifically stated)

Allegation 1

Failure by the Conduct Committee to consider the case in accordance with the correct Regulations.

12. The Conduct Committee minutes of 19 April 2016, set out that they had considered the case in accordance with Disciplinary Bye-Law 8 (Disciplinary Bye-Laws 2015). The Conduct Committee should have had regard to Disciplinary Bye-Law 6 (Disciplinary Bye-Laws 2011). Although the Conduct Committee found that there was no case to answer, this was a procedural irregularity.

Allegation 2

The Institute exercised a discretion to grant an extension of time in accordance with Disciplinary Regulation 6.3, without demonstrating in the reasons letter dated 21 June 2016 that they had considered factors relevant to the Member before exercising that discretion.

Disciplinary regulation 6.3 states that there is:

‘...a general discretion to grant extensions of time, where [it is considered] fair and proper to do so, during the assessment of Complaints, the investigation and consideration of Disciplinary Matters by the Head of Professional Conduct and the Conduct Committee, the independent review of decisions in respect of Disciplinary Matters, the Consent Order process and during the conduct settlement discussions.

13. The Complainant requested an independent review of the decision that there was no case to answer outside the 21 day timeframe under Disciplinary Regulation 25.1.

14. On 5 May 2016, the Complainant was notified in writing of the Conduct Committee’s decision that there was no case to answer. He was also advised that he could within 21 days request an independent review of that decision. The Member was notified of the outcome on the same date.

15. On 27 May 2016, one day after the expiry of the 21 day period, the Member enquired as to whether the Complainant had requested an independent review. He was informed in an email that ICAI had not received a request for an independent review from the Complainant.

16. On 3 June 2016, eight days after the expiry of the 21 day period, the Complainant requested a review of the decision of the Conduct Committee. On 14 June 2016 the Complainant was advised by email as follows: “... However in circumstances where a decision on my part to allow an extension of time within which to receive your request for review is likely to be challenged, I would be grateful if you would provide documentary evidence to the effect that you were away during the period 5 to 27 May which is the approximate timeframe within which your request ought to have been made”. That email goes on to state “...however I regret to advise that any such decision on my part to grant an extension will need to be validated with documentary evidence”.

17. The only documentary evidence received from the Complainant was flight details for the evening of Thursday 19 May 2016 with a return flight on the 23 May 2016. This documentary evidence only covered a period of 2 working days. The Complainant in his email of 21 June 2016 stated “ Had I known to expect your letter...I would have sought it out and responded quicker, However I did not receive any prompt that a letter had been sent”. This correspondence contrasts with the Complainant’s earlier email where he stated that he was expecting a letter “to arrive on teh(sic) 6th and was waiting for it to arrive”.

18. On 21 June 2016, the Complainant and the Member were informed of the decision to exercise the discretion available and allow the independent review request. In the reasons given

to the Complainant for granting the exercise of a discretion it was stated in an email date 21 June 2016: *“in light of the reasons provided by you and specifically your assertion that you were travelling and therefore not in receipt of CARB’s correspondence, I have decided to exercise my discretion to grant, what is in this case a very short extension to you....”* the email went on to state; *“A secondary factor which I have taken into account in exercising my discretion to allow your request for an independent review is that when you first brought this matter to CARB’s attention, the timeframe within which to request an independent review was 3 months rather than the current 21days....I believe it would be unfairly prejudicial to you not to allow such request....”*

19. A letter confirming the above reasons was sent to the Member. The letter makes no reference to any factors relevant to the Member, that had been taken into account, weighing against the exercise of that discretion.

Allegation 3

Failure by the Independent Reviewer to follow Disciplinary Regulation 25.7

20. The first Independent Reviewer in a report dated 14 August 2016 failed to review the complaint in accordance with Regulation 25.7. Regulation 25.7 sets out the grounds upon which the Independent Reviewer could conclude that a Conduct Committee decision was unsafe or wrong.

Regulation 25.7

The circumstances referred to in Regulation 25.6 are that in the Independent Reviewer’s opinion:

25.7.1 fresh evidence has been received since the date of the decision which is of a nature that if it had been considered by the Conduct Committee or the Head of Professional Conduct it might reasonably have caused the Conduct Committee or the Head of Professional Conduct to reach a different decision;

25.7.2 there has been a material failure on the part of the Conduct Committee or the Head of Professional Conduct to follow applicable procedures and the consideration of the Disciplinary Matter by the Conduct Committee or the Head of Professional Conduct was significantly prejudiced by that failure;

25.7.3 there is reason to suspect a lack of independence on the part of the Head of Professional Conduct or any member of the Conduct Committee who took part in the consideration of the Disciplinary Matter and the consideration of the Disciplinary Matter by the Head of Professional Conduct or the Conduct Committee was prejudiced by that lack;

25.7.4 the decision was not one which could reasonably have been arrived at by the Conduct Committee or the Head of Professional Conduct upon due consideration of the facts and the matters before it; or

25.7.5 there is any other matter which casts doubt on the correctness or safety of the decision.

21. The Independent Reviewer's report dated 14 August 2016 concluded that there was a case to answer and that the matter should be referred to the Independent Review Committee. He stated that he was of the view that '*...the Member does have a case to answer*', and that he '*...must disagree with the Conduct Committee*' and that he was '*free to reach [his] own independent conclusion...*'. This reason provided by the Independent Reviewer was not an option that was open to him under the regulations.

22. The Independent Reviewer in concluding that there was a case to answer, for the reasons set out above failed to follow Regulation 25.7.

Allegation 4

Declaring the first Independent Review decision a nullity and appointing a second Independent Reviewer without a specific power in the Regulations to do so.

23. On the 18 November 2016 a decision was made by ICAI to declare the first Independent Review decision a nullity. The relevant applicable Disciplinary Regulations which came into effect from 30 September 2016, set out the process by which a complaint was to be considered. That process allows for a Conduct Committee to consider a complaint and determine if there is a case to answer. If the Committee determines that there is no case to answer, it shall give reasons for its decision. In this case the Member was informed and provided with the Conduct Committees decision that there was no case to answer. The Complainant has a right to request an independent review of that decision. The Independent Reviewer is an individual appointed by ICAI to act independently. If the Independent Reviewer is of the opinion that because of one or more of the circumstances outlined in Regulation 25.7, the decision of the conduct committee is wrong or unsafe, he or she shall remit (through the Head of Professional Conduct) the matter in writing to an Independent Review Committee.

24. The Complainant exercised the right to request a review of the Conduct Committee's decision, albeit outside of the 21 day time frame allowed by the regulations (see allegation 2). The independent reviewer for reasons outside his remit as set down in the regulations (see allegation 3) stated that there was a case to answer. That decision was subject to critical discussion by the Member and his legal representative with ICAI at the time. ICAI decided to set aside the decision of the Independent Reviewer, declare it a nullity and appoint a second independent reviewer. The Member did not acquiesce to this course of action.

ICAI sought to rely on Disciplinary Regulation 6.2 to set aside the first independent Reviewers decision and to appoint a second independent reviewer.

Disciplinary Regulation 6.2 states:

The Council, CARB, the Disciplinary Bodies, the Head of Professional Conduct, the Executive and any lawful delegate of the foregoing are empowered to do all such lawful things as are incidental to or conducive to the attainment of the objective set out in Bye Law 6.1

25. There is no regulation that permits ICAI to set aside the decision of the Independent Reviewer. Further, ICAI's Disciplinary regulations have no provision for the appointment of a second Independent Reviewer or the process by which a second Independent Review should be conducted. The Member was entitled to expect that the process to be followed would be that which was allowed for and permitted under the regulations.

Sanction

26. In coming to the appropriate and proportionate sanction the Authority took into account matters in mitigation and any aggravating factors.

27. In respect of Allegation 1, ICAI's draft "Formal Allegation" in respect of the matter before the Conduct Committee correctly referred to the *"Institute's Ethical Guide (1999 and 2003) and the Institute's Code of Ethics for Members (2006-2011) Fundamental Principles..."*.

28. The Authority also took into account that the letter issued by ICAI to the Member in advance of the Conduct Committee set out the correct position. In this letter dated 15 October 2015, it was confirmed that:

"CARB commenced its current disciplinary procedures, as set out in the enclosed Disciplinary Bye-Laws and Regulations on 5 October 2015. The disciplinary matters the subject of this complaint are being dealt with in accordance with these Bye-Laws and Disciplinary Regulations.

However, please note that in respect of the consideration of liability to disciplinary action this will be considered in accordance with Bye-Law 6 of the Disciplinary Bye-Laws (December 2012 – also enclosed) as this was the applicable Bye-Law giving rise to disciplinary action when the event occurred."

29. ICAI confirmed to the Authority that to ensure that the same error does not arise in any future case each individual investigation report laid before the Conduct Committee, now sets out the applicable grounds for liability to disciplinary action. Furthermore, ICAI confirmed that closer scrutiny is paid to the minutes so that any potential errors are identified and addressed.

30. In respect of Allegation 2, both the Complainant and the Member were informed by letter of the 21day timeline to request an independent review of the Conduct Committee's decision. ICAI accepts that the Head of Professional Conduct should have referenced in their decision factors relevant to the Member.

31. In respect of Allegation 3, the Independent Reviewer had received training with ICAI in relation to what were at that time, recently introduced Disciplinary Bye-Laws and Regulations. The flaw in the decision of the Independent Reviewer was a matter over which ICAI had no direct control. Since this matter has occurred ICAI now issues a *pro forma* letter to Independent Reviewers which includes a summary of the requirements set out in Disciplinary Regulation 25 as a further reminder to ensure that the provision is at the forefront of the Independent Reviewer's mind when conducting reviews.

32. In respect of Allegation 4, ICAI accepts that there was no specific power in the Disciplinary Regulations to declare the decision a nullity and appoint a second Independent Reviewer. The actions were taken after very careful consideration following external legal advice and in good faith.

33. In respect of more general mitigation the Authority had regard to the following:

- ICAI fully cooperated with the Authority during the course of the enquiry.
- ICAI has demonstrated a commitment to dealing with cases in accordance with its procedures and where possible has remedied any failings that were identified in this case.
- The issues that arose in this case were unusual and are highly unlikely to be repeated.
- ICAI at all times endeavoured to act within its Bye-Laws and Regulations and decisions made were made in good faith.
- ICAI had sought external legal advice.
- This was a protracted matter
- A significant period of time has elapsed since the events in question.

34. Having regard to all the circumstances in this case the Authority considers that the appropriate and proportionate sanction is to admonish ICAI.