

IN THE MATTER OF

A Complaint made under section 34(1) of the Professional Accountants Ordinance (Cap. 50) ("the PAO")

BETWEEN

The Practice Review Committee of the Hong Kong Institute of Certified Public Accountants COMPLAINANT

AND

Respondent RESPONDENT

Date of Hearing: 13 August 2015

Date of Written Decision: 11 September 2015

ORDER & REASONS FOR DECISION

1. This is a complaint filed by the Practice Review Committee ("PRC") of the Hong Kong Institute of Certified Public Accountants ("the Institute") as Complainant against the Respondent, a certified public accountant. Section 34(1)(a)(v) of the PAO applies to the Respondent.

2. Particulars of the complaint ("the Complaint") were set out in a letter dated 7 June 2013 from the PRC requesting the Registrar of the Institute ("the Registrar") to submit the Complaint to the Council of the Institute ("the Council") for consideration of the Complaint to be referred to the Disciplinary Panels. The Complaint was as follows:-

The Respondent, without reasonable excuse, failed or neglected to comply with a direction issued by the Practice Review Committee under section 32F(2) of the PAO and which he was required by the Practice Review Committee to comply (section 34(1)(a)(v) of the PAO

applies).

Background

3. The Respondent was at all material times a certified public accountant and practicing member of the Institute. Further, the Respondent was practicing as a sole proprietor under the name of Company K.
4. On 30 November 2010, the Court of Appeal handed down its decision (“the CA case”) dismissing the Respondent’s appeal against a Disciplinary Committee’s decision and order in 2009 (Disciplinary Proceedings No. D-05-121C whereby the Respondent was found in breach of section 34(1)(a)(vi) of the PAO (“the 1st case”)).
5. After the CA case, the Institute’s Quality Assurance Department (“the QAD”) and the PRC made several requests to Company K asking for the completion and return of its 2011 and 2012 practice review self-assessment questionnaires but in vain. All practicing members of the Institute are required to complete such a questionnaire annually.
6. Subsequently, Company K was selected for a practice review by the Council of the Institute under section 32B(1)(b) of the PAO. On 21 February 2013, Company K was notified by Mr. Chris Joy (“CJ”), Executive Director of the Institute, in writing that an on-site practice review visit to Company K would be scheduled on 13 May 2013 and a list of the materials to be made available to the practice review team prior to the visit was provided to Company K.
7. On 8 March 2013, Company K replied to the Institute (for the attention of CJ) refusing to accommodate the practice review for reasons mainly that :
 - (a) the practice review notification was issued not in accordance with normal procedure ; and
 - (b) there was no satisfactory reply to his request for a clarification of the Institute’s stance in its submission to the CA case in relation to paragraph 290.171 of the Code of Ethics for Professional Accountants and to make the Institute’s stance known to its members (“the Concern”).

8. The PRC on 18 April 2013 considered Company K's refusal to accommodate the practice review. On 26 April 2013, the PRC issued its decision by way of a letter to Company K stating that it had come to the view that proper procedures and due process were followed in selecting Company K for a practice review. The PRC also considered that the reasons provided by Company K for not accommodating the practice review were not relevant and they should not be good reasons for preventing the scheduled practice review from taking place. The PRC therefore gave a direction under section 32F(2)(b) of the PAO that Company K must cooperate with the QAD to ensure that a practice review visit be carried out from 13 to 15 May 2013 as scheduled.
9. Company K continued to refuse to cooperate with the practice review and reiterated its reasons in the Respondent's email to the QAD on 7 May 2013. Company K also claimed that such practice review was a fault finding mission rather than an education tool to promote standards.
10. On 27 May 2013, the PRC concluded that no reasonable excuse was provided by Company K for not complying with its direction. Accordingly, on 7 June 2013, CJ on behalf of the PRC (and as the Executive director of the Institute) submitted a complaint to the Registrar pursuant to section 32F of the PAO. On the same day, the Registrar submitted the complaint to the Council pursuant to section 34(1) of the PAO. The Complainant submitted that any direction issued to Company K under section 32F(2) of the PAO was effectively issued to the Respondent, who was and is the sole proprietor of Company K.
11. On 11 June 2013, Company K wrote to the Council (after being invited to make submissions under Rule 5 of the Disciplinary Committee Proceedings Rules) stating mainly that if the Concern was addressed, it would comply with the practice review. On 25 June 2013, the Council referred the Complaint to the Disciplinary Panels.
12. It is an agreed fact that the PRC had given direction on 26 April 2013 and the scheduled practice review from 13 to 15 May 2013 was refused by Company K.

Statutory Provisions

13. Section 32B(1)(b) of the PAO provides that :

- “(1) *The Council may-*
- (a) *specify the particular professional standards in relation to which practice reviews are to be carried out;*
 - (b) *issue directions to the Practice Review Committee requiring an examination or a review, to determine whether professional standards specified under paragraph (a) are being, or when so specified, have been observed, maintained or applied, to be carried out as regards-*
 - (i) *every practice unit; or*
 - (ii) *such practice units as specified by it;* - (c).....”

Section 32F(2) and (3) of the PAO provides that :

- “(2) *Where a dispute is referred under subsection(1), after considering any submissions or representations (which shall be in writing) made by the relevant practice unit or the relevant reviewer, the Practice Review Committee-*

 - (a) *shall determine the dispute and communicate such determination to each of the parties to the dispute; and*
 - (b) *may issue directions relating to the matter in dispute to such practice unit or the reviewer concerned and require such unit or reviewer to comply with them.*

- (3) *Where a practice unit or a reviewer is required to comply with a direction under subsection (2)(b) and fails to comply with the requirement, the Practice Review Committee may make a complaint to the Registrar regarding any corporate practice or any certified public accountant concerned, and in case such a complaint is made it shall, for the purpose of Part V, be deemed to have been made under section 34(1).”*

Section 34(1)(a)(v) of the PAO provides that :

- “(1) *A complaint that-*
- (a) *a certified public accountant-*
-
- (v) *without reasonable excuse, failed or neglected to comply with any direction issued under section 32F(2) and with which he was required by the Practice Review Committee to comply;*

.....”

Section 35(1) of the PAO provides that :

- “(1) If a Disciplinary Committee is satisfied that a complaint referred to it under section 34 is proved, the Disciplinary Committee may, in its discretion make any one or more of the following orders-
- (a) an order that the name of the certified public accountant be removed from the register, either permanently or for such period as it may think fit;
 - (b) an order that the certified public accountant be reprimanded;
 - (c) an order that the certified public accountant pay a penalty not exceeding \$500,000 to the Institute;
 - (d)
 - (da) an order that the practicing certificate issued to the certified public accountant be cancelled;
 - (db) an order that a practising certificate shall not be issued to the certified public accountant either permanently or for such period as the Disciplinary Committee may think fit,
- and the Disciplinary Committee may in any case-
- (i) provide for an order to take effect on such date as the Disciplinary Committee thinks fit;
 - (ii) provide for an order to take effect only upon the happening or non-happening of such event within such period as may be specified by the Disciplinary Committee;
 - (iii) make such order as the Disciplinary Committee thinks fit with regard to the payment of costs and expenses of and incidental to the proceedings, whether of the Institute (including the costs and expenses of the Disciplinary Committee) or of any complainant or of the certified public accountant, and any costs and expenses or penalty ordered to be paid may be recovered as a civil debt.

Issues and Findings

14. The Respondent raised several issues in this case and the Committee decides to discuss initially the issues of procedural impropriety and conflicts of interest. The Respondent objected that the practice review notification was issued not in accordance with normal procedure. He considered that his refusal to comply with the direction of the PRC should be regarded as a dispute under section 40

of Statement 1.401 “Practice Review – Review Procedures and Conduct of Members”.

Referral of disputes

40. Where a dispute arises over the powers of reviewers as regards section 32E (access to documents etc.), the practice unit, the reviewer or both may refer the dispute to the Practice Review Committee (section 32F(1)). A practice unit should refer a dispute to the Practice Review Committee in writing via the Registrar.

41. Normally, the Practice Review Committee will delegate the determination of such a dispute to a sub-committee chaired by the Chairman of the Practice Review Committee.

15. As can be seen from the heading of Statement 1.401, the statement actually relates to matters of actual review steps and procedures which are irrelevant to the Respondent’s present refusal to reject the scheduled visit as a whole. Upon examination of the said section 40, one can easily find out that it only relates to “dispute over the powers of reviewers as regards section 32E of the PAO (access to documents etc.)”. It is simply a different dispute. Moreover, even if the present dispute applies (to which the Committee disagrees), section 41 of the said Statement 1.401 still provides discretion to the PRC as to whether the determination of such dispute (under the said section 40) would be delegated to a sub-committee chaired by the Chairman of the PRC. Clearly, the PRC could not be held erroneous in any circumstances for not establishing a sub-committee to determine the Respondent’s refusal of the scheduled visit. The Respondent’s argument in this respect must fail.
16. The Respondent considered that CJ had played a very important role in bringing about this disciplinary action. He submitted that CJ was the only person corresponding with him on clarification and disciplinary matters and the latter’s acting as representatives of the former Registrar, the QAD, the PRC and the Registrar was in conflicting roles. The Respondent’s submission was a serious one as no one would like to see that the decision to discipline a professional came from one single person. The Chairman of the Committee therefore directed the Complainant during the Direction Hearing on 14 October 2014, inter alia, to provide further details regarding the position and capacity of CJ in the several meetings and to exhibit evidence of inter-department correspondence regarding the present Complaint. Having considered the

Complainant's Further Submission and the Respondent's Reply to the Complainant's Further Submission, the Committee is satisfied that as CJ had not been a member of the PRC or the Council, he had no right to vote in any matter. CJ might have played an important role in referring the Respondent's case to the Disciplinary Panels but his role was purely administrative in nature. The Committee agrees that due process in bringing the case to the Council had been followed and that procedures under section 34 of the PAO had been complied with.

17. The Respondent has instructed two legal representatives for a short period of time and he has acted substantively in person for the whole proceedings. The Respondent had all along, before and after the Direction Hearing, requested the Committee to exercise its power to look into matters concerning the decision process of the several committees and/or administrative units of the Institute in referring the Complaint to the Disciplinary Panels. Besides the apparent allegation that CJ decided everything for this case as discussed above, the Committee cannot find any justification or legal basis to look further into the queries raised by the Respondent regarding procedural propriety of the Institute's administrative processes. The Committee is aware that its jurisdiction is confined to hearing and determining the substantive disciplinary matters before it in accordance with the PAO and the Disciplinary Committee Proceedings Rules.
18. The Respondent had raised an issue of conflict of interest in relation to CJ, members of the several committees and/or administrative units of the Institute as well as members of this Disciplinary Committee. CJ's case had already been discussed. The background of members of the several committees and/or administrative units is, however, a matter of the Institute's administrative processes which the Committee has no legal jurisdiction to inquire into or intervene. Appointment of members to this Disciplinary Committee was made by the Disciplinary Committee Convenor who is not a personnel of the Institute. Further, it should be noted that any resignation and re-appointment of members of this Disciplinary Committee should not be construed as arising out of a conflict of interest. The resignation of members might have arisen from a number of reasons. On 17 June 2015, this Committee replied to the Respondent that it "has re-examined the issue of conflict of interest and considered that all five members and the Clerk are fit and proper to handle the present case". Throughout the proceedings, the Respondent was advised repeatedly to seek

independent legal advice if he still had any questions on the procedural matters of this case.

19. Having considered all the relevant information and documents, the Committee is of the view that the issues of procedural impropriety and conflicts of interest were matters unrelated to the subject of the Complaint and would not be taken into any account in determining whether the Complaint could be proved or not.
20. The Respondent's key submission was that he had good reason for not complying with the PRC's direction. He further considered that the Institute through the conduct of the QAD and PRC failed to clarify the inconsistency between the Code of Ethics for Professional Accountants (revised in June 2010 and effective on 1 January 2011) ("the CoE") promulgated by the Institute and the Institute's counsel submissions in the CA case which has a significant impact on the way practice reviews are being conducted on small and medium practitioners and, in particular, the groups of even smaller practices and sole practitioners.
21. The Respondent emphasized the inconsistency, being part of the Concern, was that : paragraph 290.171 of the CoE allows firms to provide "*services related to the preparation of accounting records and financial statements to an audit client that is not a public interest entity where the services are of a routine or mechanical nature, so long as any self-review threat created is reduced to an acceptable level....*" WHEREAS the Institute's counsel submitted in the CA case that "*Insofar as it is suggested that (the Respondent) had subsequently reviewed the audit work performed by Mr. R and therefore had rendered the process independent and objective, such a suggestion is wrong because (the Respondent) would be checking the work of his staff rather than going through all the financial information of his client and therefore not performing a true audit"* (underlining added) ("the Inconsistency"). The Respondent's query to the Inconsistency was later expanded to include and demand an answer to the three scenarios raised by Mr. Paul Chan Mo Bo whom the Respondent was seeking assistance from. The Respondent had made a very great effort to seek clarification of the Inconsistency and to raise the Concern with the Institute but he was dissatisfied with the result.
22. The Respondent submitted that he had no alternative but to continue to refuse any practice review visit otherwise he would be prejudiced under the shadow of

the aforesaid submission statement by the Institute's counsel. In short, the Respondent's position was that if the Inconsistency was clarified or the Concern was addressed, he would comply with the practice review.

23. It is now clear that the main issue of this case lies in whether "the dissatisfaction of the Respondent to the clarification or reply by the Institute regarding the Inconsistency or the Concern" is considered as a reasonable excuse to refuse cooperation in a practice review visit under section 34(1)(a)(v) of the PAO.
24. The Committee understands that the Respondent relied heavily on the guideline set out in paragraph 290.171 of the CoE to provide services to his private clients. The Committee shows sympathy to the Respondent's appeal being dismissed in the CA case but, at the same time, bears in mind that it is not appropriate to make any comment or to discuss the CA case. The Committee only considers that any submission made by the Institute's counsel under a court case was a mere submission only and should not be treated as an order or judgment or findings of the court. Submissions put forwarded by lawyers are aimed at assisting the court in making a decision. Further, if the said counsel's submission was incorrect, inappropriate or misleading, the Respondent's counsel should have sufficient opportunity to rebut, clarify or distinguish it during court proceedings. Nevertheless, paragraph 290.171 of the CoE should in any event be in an authoritative position rather than a mere submission in court proceedings.
25. The Committee considers that the reply letter from CJ, acting as Executive Director of the Institute, to Company K on 15 May 2012 had sufficiently answered the Respondent's queries and grievances. The said reply letter had also stated an expectation that both the Institute and the Respondent should move on from the impasse and urged the Respondent to put his dissatisfaction to one side and reconsider to cooperate with the PRC's directions with regard to completion of the annual questionnaires and the carrying out of a practice review. Henceforth, the Committee finds difficult to decipher the Respondent's insistence on requesting further replies from the Institute regarding the Inconsistency or the Concern. The Respondent's subsequent pursuits after the said reply letter had rendered his reason in refusing to cooperate with the PRC all the more unreasonable. Further, it is also beyond the understanding of the Committee for the Respondent to refuse to cooperate with the PRC when his

counsel had stated the following submission on his behalf in the 1st case : “*the Respondent now takes up his entire firm’s professional work and hence is unlikely to commit similar breach in the future* (underlining added)“.

26. The Committee is of the view that the 1st case and the CA case should serve as a warning to the Respondent’s subsequent audit services. The Respondent should review his practice to ascertain that “...any self-review threat created is reduced to an acceptable level” under paragraph 290.171 of the CoE would be complied with. The Committee believes that the reason why the Council selected Company K for a practice review might be due to the latter’s failure to return its 2011 and 2012 practice review self-assessment questionnaires. Having said that, the Committee believes that the selection of Company K for a practice review and the referral of the Respondent’s case to the Disciplinary Panels were not aimed at punishing the Respondent but was for an upholding of the professional standards and the protection of public interests. As revealed from the Practice Review Notification dated 21 February 2013 that “*The outcome of the review should be the agreement of an action plan that is relevant and appropriate to the issues identified and that will help the practice raise its standard of quality control and audit work* “. Anyway, there is no evidence to suggest that there was deficiency in the Respondent’s practice in complying with paragraph 290.171 of the CoE. The Respondent should not over-react in the sense that he thought he was penalized because he had raised queries or challenged the Institute. Having considered all the circumstances of the case, the Committee considers that the dissatisfaction of the Respondent to the replies of the Institute regarding the Inconsistency or the Concern was not a reasonable excuse under the Complaint.
27. Having considered all the facts and materials presented to the Committee, including submissions and correspondence from the Respondent and the Complainant and matters discussed aforesaid, the Committee concludes that the Complaint was proved.

SANCTION

28. For sanction, the Committee bears in mind the need to strike a fair balance between the general interest of the public and the impact upon the Respondent's personal and business situation. Aside from the element of public interest, it is of equal importance to consider the Respondent's personal circumstances, the circumstances in which the said refusal or failure occurred and the seriousness or consequence of such non-compliance. Lord Collins said in an appeal case concerning disciplinary proceedings in the UK accountancy profession: "The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain public confidence in the integrity of the profession, and to uphold proper standards of behaviour."
29. The Committee considers that the Respondent's failure to cooperate in a review of his practice as well as his continued refusal to complete and file the annual practice review self-assessment questionnaires since 2011 were serious breaches. Simply reprimand is regarded as insufficient and inappropriate. The sanction should reflect the necessity of the mandatory obligation or responsibility of a member to cooperate with a practice review so as to maintain the standard and quality of audit services. This is the only way in which the interest of the public can be protected and the regulatory function of the Institute be sustained. Having considered recent disciplinary decisions, the Guideline to Disciplinary Committees for Determining Disciplinary Orders and the Respondent's previous record of disciplinary action that was imposed, the Committee concurs that the sanction which includes an order of a conditional removal from the register and a penalty of HK\$ 60,000.00 would be appropriate in all the circumstances of the case. Further, as costs follow the event, the costs of the Clerk and that of the Complainant should be borne by the Respondent on a party-to-party basis subject to the following consideration.
30. This case has been proceeded for more than two years within which many queries and applications had been raised by the Respondent such that all parties concerned had contributed an enormous amount of time to handle the case. The workload generated was much more than other disciplinary cases and so the costs incurred on all parties are expected to be high.
31. The time spent by the Clerk in this case is reasonable. The costs and disbursements submitted in the sum of HK\$78,646.00 should, in a certain extent, be recoverable from the Respondent. However, given the fact that the Clerk is a full-time staff and the rate or method chargeable should not employ

the same scheme as that of practicing lawyers who earn their living on a job basis. The Committee therefore decides to curtail the costs and disbursements of the Clerk to HK\$30,000.00.

32. The costs of the Complainant necessitate discussion. The professional rate of the handling partner and solicitor of Messrs. Reed Smith Richards Butler (“RSRB”) charged at HK\$5,500.00 and HK\$3,800.00 per hour respectively are on the high side of the High Court scale. In view of the nature of the case which is not complicated and the solicitors were not exercising particular expertise or taking unusual responsibility, a rate of HK\$2,500.00 per hour is allowed. RSRB being one of the panel solicitors of the Institute should be conversant with these disciplinary cases all along. In view of the simple nature of the case, the level of work and the fact that they only assisted the case up to the Checklist stage with, unfortunately, discrepancy in the Complainant’s case and the Complainant’s Reply that required further submissions by the parties which costs should be treated as wasted, the reasonable and necessary hours of work should not be more than 35 hours. The disbursements of photocopying, postage and travel expenses in the sum of HK\$5,968.00 is allowed. In short, the costs and disbursements of the Complainant as assisted by RSRB in the total sum of HK\$93,468.00 is allowed.
33. The costs of the Complainant as represented by Mr. Donald Leo, General Counsel, (an in-house lawyer) after the Checklist stage should be recovered from the Respondent in the similar approach as the Clerk as discussed above. The time spent by Mr. Leo and those assisting him in this case are reasonable except for the overlapping of the work of perusal of papers due to change of solicitors that should be deducted. The costs and disbursements submitted for this part was HK\$138,575.00 but the Committee decides to curtail that to HK\$100,000.00. In summary, the costs and disbursements of the Complainant in the total sum of HK\$193,468.00 is allowed.
34. The Committee orders that:-
 - a) the Respondent do pay a penalty of HK\$60,000.00 to the Institute under section 35(1)(c) of the PAO;
 - b) subject to Order (c) below, the name of the Respondent be removed from the Register for six (6) months starting from the expiry of four (4)

months from the date of this Order under section 35(1)(a) of the PAO;

- c) Order (b) above shall take effect only if the Respondent still fails to :
 - (i) complete and file the annual practice review self-assessment questionnaires from 2011 up to the current year; or
 - (ii) cooperate with the practice review to the effect that the “Practice Review Program Reviewer’s Report” could not be issued by the Practice Review Committee,
on or before the expiry of four (4) months from the date of this Order under section 35(1)(ii) of the PAO;
- d) the Respondent do pay the costs and expenses of and incidental to the proceedings of the Complainant in the sum of HK\$193,468.00 and that of the Clerk in the sum of HK\$30,000.00 under section 35(1)(iii) of the PAO.