

HEARING

DISCIPLINARY COMMITTEE OF THE ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS

REASONS FOR DECISION

In the matter of: Mr Tung Luu

Heard on: Thursday, 23 and Friday 24 February 2023

Location: ACCA, The Adelphi, 1-11 John Adam Street,
London, WC2N 6AU. Virtual hearing using Microsoft
Teams.

Committee: Mr Martin Winter (Chair)
Dr David Horne (Accountant)
Mr Nigel Pilkington (Lay)

Legal Adviser: Mr David Marshall

**Persons present
and capacity:** Mr Benjamin Jowett (Case Presenter)
Ms Anna Packowska (Hearings Officer)

Summary: Severe Reprimand.
Referral to ALC with immediate effect, order under
Regulation 13(9)(b)

Costs: £12,244.50

1. The Committee heard an allegation of misconduct against Mr Luu. Mr Jowett appeared for ACCA. Mr Luu was not present.

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2. The Committee had a main bundle of papers containing 249 pages, a service bundle containing 17 pages, and three tabled additional bundles of 4, 2 and 10 pages respectively.

PROCEEDING IN ABSENCE

3. The Committee was satisfied that Mr Luu had been served with the documents required by Regulation 10(7) of The Chartered Certified Accountants' Complaints and Disciplinary Regulations 2014 in accordance with Regulation 22. The required documents were contained in the papers before the Committee. There was evidence that they were sent by email on 26 January 2023 to an email address notified by him to ACCA as an address for all correspondence. That was 28 days before the hearing.
4. The Committee saw email correspondence with Mr Luu which showed that he was aware of today's hearing but did not intend to be present. ACCA had reminded him that he could attend by video since this was a remote hearing and that he had a right to ask for an adjournment. However, Mr Luu stated that he wanted the hearing to take place without further delay and he wanted it to proceed in his absence. He sent written submissions on the issues in the case. The Committee concluded that Mr Luu did not wish to exercise his right to be present and that it would be fair to proceed in his absence as well as being in the public interest. No purpose would be served by an adjournment since Mr Luu had rejected that option.
5. The Committee determined to proceed in Mr Luu's absence. It would take into account all relevant written representations from him.

PRELIMINARY APPLICATIONS

6. In the Case Management Form which Mr Luu completed on 20 June 2022 he answered yes to the question whether he wished all of his case to be heard in private and the Committee treated that as a formal application.
7. Mr Luu's stated reason was '*These allegations will affect the company whether proven or not if in public domain. We are a small company and would lose all our clients.*' Mr Jowett submitted that this was not a sufficient reason to depart from the principle that hearings of this Committee are to be held in public. The

Legal Adviser gave advice on the Committee's powers under Regulation 11 which the Committee accepted.

8. The Committee considered that the requirement for a public hearing should not be departed from unless there were strong and particular reasons for doing so, and then only to the minimum extent necessary. The reasons put forward by Mr Luu were not peculiar to him but would apply to most registrants facing disciplinary allegations. There was nothing in the reasons given by Mr Luu to displace the presumption that this hearing should be conducted in public.
9. The Committee determined to proceed in public.

ALLEGATION(S)/BRIEF BACKGROUND

10. Mr Luu has been a member of ACCA since 2001 and a Fellow since 2006. He has held a practising certificate since 2006. He is a director of Company A ('the Firm') which provides a range of accountancy, taxation and business advisory services. There is another director who is not a member of ACCA. The business of Company A includes payroll services. In an email dated 7 June 2019 to the Pensions Regulator Mr Luu said that he had 251 clients (i.e. businesses or other employers) on the payroll system at that time.
11. In 2018 the Pensions Regulator commenced an investigation into Company B, which was a client of the Firm for payroll services. At that time automatic enrolment under the Pensions Act 2008 was being phased in. The employees of Company B should have been automatically enrolled in pensions schemes by the end of 2017. However, in 2018 the Regulator noted that no pension payments had been made by employees of Company B. It commenced an investigation and ultimately issued a compliance notice against Company B, which was complied with.
12. In the course of its investigation the Regulator found that that the Firm was itself in breach of the pensions legislation and issued a compliance notice. The investigation into the Firm was completed in about April 2019 having found failures. The Regulator widened its investigation to cover a sample of 10 client firms of the Firm. It found further failures to comply. At the conclusion of all investigations in December 2020 the Regulator submitted a complaint to ACCA.

13. At this hearing Mr Luu faced the following allegations:

Allegation 1

It is alleged that between February 2016 and December 2020 Mr Luu on behalf of his firm:

(a) *Failed to automatically enrol the employees of Company A and/or Company A's clients in a pension scheme in accordance with the Pensions Act 2008 contrary to Section 130.1(b) of the FP of Professional Competence and Due Care (as applicable in 2016 to 2018) and Section 113.1(b) of the FP of Professional Competence and Due Care (as applicable in 2019 to 2020);*

(b) *Failed to comply with the Automatic Enrolment employer duties namely:*

i. *Assessment of employees prior to completing annual declaration of compliance*

ii. *Opt-out notices*

iii. *AE communications to be issued within 6 weeks of staging date*

as set out in the Pensions Regulator Automatic Enrolment detailed guidance contrary to Section 130.1(b) of the FP of Professional Competence and Due Care (as applicable in 2016 to 2018) and Section 113.1(b) of the FP of Professional Competence and Due Care (as applicable in 2019 to 2020);

(c) *By reason of any or all of the above Mr Luu is:*

i. *Guilty of misconduct pursuant to byelaw 8(a)(i); or in the alternative*

ii. *Liable to disciplinary action pursuant to byelaw 8(a)(iii).*

Allegation 2

(a) *Between February 2016 and December 2020, Mr Luu failed to comply with Section B9(5) of ACCA's Code of Ethics and Conduct (as applicable in 2016 to 2020) in that he failed to issue a new engagement letter to 251*

of his clients which included any reference to the pensions services his firm had agreed respectively to provide to them.

- i. By reason of the conduct at 2(a) above, Mr Luu is guilty of misconduct pursuant to byelaw 8(a)(i); or in the alternative*
- ii. Liable to disciplinary action pursuant to byelaw 8(a)(iii).*

DECISION ON FACTS/ALLEGATION(S) AND REASONS

14. As already stated, Mr Luu completed ACCA's Case Management Form on 20 June 2022. In that form he admitted the facts of the allegations, i.e. paragraphs 1(a) and (b) and paragraph 2(a) above (but not subparagraphs (i) and (ii)). **The Committee found those allegations proved.**
15. The Committee went on to consider whether Mr Luu was liable to misconduct or disciplinary action as alleged.

Misconduct

16. Mr Jowett made it clear that ACCA did not allege that Mr Luu's actions were dishonest, or even deliberate in the sense that he took a decision not to comply with the automatic enrolment provisions. Mr Jowett submitted that this was incompetence, albeit serious incompetence.
17. In his written submissions, Mr Luu relied on an email from 'the Pension Regulator's investigator *'who concluded the initial investigation and was satisfied at the time and indeed was grateful and happy for our assistance. ... The initial conclusion by the pension team giving us clearance meant that we were led to partly a false sense of security and indeed the wrong direction taken.'* The Committee considered this email. It was dated 26 September 2018 and related only to the investigation concerning Company B's employees. Subsequently, the Regulator widened its investigation to include the Firm and other clients of the Firm. The email contained this: *'Please be aware that, should any additional breaches be reported, we do reserve the right to reconsider this decision.'* Subsequently the Regulator issued a compliance notice to Mr Luu in respect of his own employees. If Mr Luu did treat this email as giving him 'clearance' that was not the effect of the warning contained in the letter and did not reduce the seriousness of his conduct.

Allegation 1

18. The Committee accepted that this was a case of incompetence rather than deliberate disregard of professional obligations. However, it was undoubtedly serious. In relation to his own employees, none had had the benefit of automatic enrolment. The Committee was struck by how much support the Regulator offered and how Mr Luu seemed unable to benefit from it. The Regulator offered every possible assistance, but it still had to issue a compliance notice and then impose a financial penalty.
19. The Regulator investigated a sample of 10 entities who were clients of the Firm and found many serious deficiencies. It is reasonable to infer that most, or all, of Mr Luu's 251 clients had been put in breach of the pensions legislation by Mr Luu's failures.
20. The Committee was satisfied that the matters found proved under Allegation 1 constituted misconduct. They brought discredit to Mr Luu and the Firm, to the Association and to the accountancy profession.

Allegation 2

21. Mr Luu issued engagement letters to the 251 clients but wholly failed to include any reference to the key service he was supplying in relation to pensions. The requirement for a letter of engagement is one of the most basic obligations on a member of ACCA and for it to be breached on this scale was a serious matter.
22. The Committee was satisfied that the matters found proved under Allegation 2 independently constituted misconduct.

Liability to disciplinary action

23. Since these allegations were made in the alternative to the allegations of misconduct, they did not have to be considered.

SANCTION(S) AND REASONS

24. Having found the allegations proved, the Committee went on to consider what sanction, if any, to impose. In doing so it took into account ACCA's Guidance for Disciplinary Sanctions and bore in mind the principle of proportionality.

25. The Committee first sought to identify aggravating and mitigating factors.
26. Mitigating factors included the fact that, as Mr Jowett confirmed, Mr Luu was of previous good character. Mr Luu said in his written submissions that he had not had a complaint since becoming a member of ACCA and the Committee accepted this. In addition, he had cooperated with the investigation. The Committee took into account that the Allegations only concerned one aspect of his practice as an accountant.
27. Aggravating factors included the prolonged period over which the misconduct was committed: from about 2016 to 2020. Other important factors were Mr Luu's inability to benefit from the guidance given by the Regulator and inability to rectify his errors within a reasonable time. This was combined with a serious lack of insight into the seriousness of his misconduct which remained apparent in his most recent submissions.
28. In view of the seriousness of the case, the Committee was satisfied that it was necessary to impose a sanction. It considered the available sanctions in order of seriousness.
29. In relation to the sanction of admonishment few, if any, of the suggested factors were present.
30. In relation to the next sanction, reprimand, the Guidance stated that the sanction of reprimand would usually be applied in situations where the conduct is of a minor nature. That was not the case here. None of the suggested factors applied except C3.1c 'Conduct was not in deliberate disregard of professional obligations'.
31. The Guidance stated that the next sanction, severe reprimand could be applied to severe misconduct where *'there are particular circumstances of the case or mitigation advanced which satisfy the Committee that there is no continuing risk to the public, and there is evidence of the individual's understanding and appreciation of the conduct found proved.'* Several of the suggested factors were present. The Committee also took into account that the misconduct was confined to only one aspect of Mr Luu's practice. Before taking a final decision the Committee looked at the next sanction, exclusion from membership. A

number of the factors in the Guidance were present. There had been a serious departure from professional standards. No actual loss had been proved but there was the potential for loss to employees from not being automatically enrolled at the proper time. That could have affected a number of people. The misconduct continued over a long period, although the Pensions Regulator is now satisfied. The other factors, mainly involving deliberately improper conduct were not present. For example, although Mr Luu had let people down it could not be said that there was an abuse of trust or position. There was no dishonesty, cover up, or collusion.

32. Stepping back, the Committee considered that the sanction of exclusion would be a disproportionate response to the misconduct in this case. It concluded that the appropriate sanction was severe reprimand.
33. Although the Pensions Regulator had closed its case on Mr Luu, the Committee considered that there may be concerns about Mr Luu's continuing fitness to conduct pensions work. It decided that this matter should be referred to the Admissions and Licensing Committee ('ALC') and that Mr Luu should be restricted from carrying out such work pending that referral. It noted that he was under an Interim Order not to carry out such work and decided to make an order in the same terms under Regulation 13(9)(b).

COSTS AND REASONS

34. Mr Jowett presented a revised schedule of costs to take account of the fact that this hearing would conclude earlier than expected. He applied for costs of £12,244.50.
35. The Committee considered that the proceedings had been properly brought and that ACCA was entitled, in principle, to a contribution to its costs. The Committee considered the amount claimed for costs. This did not appear unreasonable based on the work required. The Committee considered whether Mr Luu had the means to meet such an order but since he had not provided any information as to his means it could not consider whether a reduction was appropriate.

EFFECTIVE DATE OF ORDER

36. The Committee considered that for the protection of the public, the referral to the ALC should not be delayed and that order will have immediate effect, pursuant to Regulation 20(1)(b).

ORDER

37. The Committee **ordered** as follows:
- (a) Mr Tung Luu be severely reprimanded;
 - (b) The Interim Order against Mr Luu is hereby rescinded;
 - (c) The matter of Mr Luu's fitness to hold a certificate issued by the Association be considered by the Admissions and Licensing Committee within three months;
 - (d) Until an order of the Admissions and Licensing Committee has been made, Mr Luu's practising certificate shall be subject to the following condition:

Mr Luu and any firm controlled by him must not provide pension services (including but not limited to

- (a) any involvement in the production/submission of any clients' Declarations of Compliance regarding auto-enrolment and*
- (b) any involvement in any clients' administration of auto enrolment).*

Mr Martin Winter
Chair
24 February 2023