IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2018] EWHC 3666 (Admin)

CO/721/2018

Royal Courts of Justice

Wednesday, 10 October 2018

Before:

LORD JUSTICE HOLROYDE
MRS JUSTICE MCGOWAN

B E T W E E N :

SOLICITORS REGULATION AUTHORITY — Appellant

- and -

ALASTAIR MAIN — Respondent

MISS C. CARPENTER (of Solicitors Regulation Authority) appeared on behalf of the Appellant.
MR P. CADMAN (instructed by Russell Cooke LLP) appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE HOLROYDE:

1 On 3 January 2017 the respondent, Mr Alastair Main, was convicted in a magistrates' court of offences of sexual assault contrary to s.3 of the Sexual Offences Act 2003, and racially aggravated assault by beating contrary to s.29 of the Crime and Disorder Act 1998. Sentencing was adjourned until 26 January 2017. On that date, the respondent was made subject to a community order with a requirement that he complete 200 hours of unpaid work within 12 months. He was made subject to a restraining order pursuant to s.5 of the Protection From Harassment Act 1997 to prevent him from having contact with the victim of his offences.

2 As a consequence of his conviction of sexual assault and the sentence imposed, he was also required to comply with the notification requirements under the Sexual Offences Act 2003, commonly referred to as being on the sex offenders register, for a period of five years.

3 In the exercise of statutory powers, and with the approval of the Legal Services Board, the Solicitors Regulation Authority Board has made the SRA Principles 2011. The Solicitors Regulation Authority ("SRA") brought disciplinary proceedings against the respondent, alleging breaches of three of those Principles. The disciplinary proceedings culminated in a hearing before a panel of the Solicitors Disciplinary Tribunal ("SDT") on 23 January 2018. The respondent admitted that he had breached two of the mandatory Principles: Principle 2, "you must act with integrity", and Principle 6, "you must behave in a way that maintains the trust the public places in you and in the provision of legal services". The third allegation, that he had breached Principle 1, was disputed and was found by the Tribunal not to have been proved.

4 In their decision, for which detailed written reasons were given on 20 January 2018, the Tribunal ordered that the respondent "be suspended from practice as a solicitor for the period up to and including 4 January 2019, to commence on 23 January 2018". The Tribunal further made an order for costs against the respondent.

5 The SRA now appeals against that decision as to sanction, contending that it was unduly lenient and was clearly inappropriate. The grounds of appeal contend that the Tribunal made one or more of three errors of principle, in that: (1) they wrongly concluded that there was no need to consider the protection of the public; (2) they failed to ask themselves an essential question, namely, "Will it harm the reputation of the profession and the trust the public places in the provision of legal services, if a person who has recent convictions for sexual assault and racially aggravated battery and who is on the sex offenders register and is subject to a restraining order as a result, is allowed to continue to practice?"; (3) although they took the view that the appropriate sanction in order to protect the reputation of the profession was a 2-year suspension, they wrongly decided that since the respondent had not worked as a solicitor since his conviction some 12-and-a-half months previously, they would deduct that period and only order that he be suspended for just over 11 months.

The Facts

6 It is sufficient for present purposes to summarise briefly the circumstances which gave rise to the criminal convictions of the respondent. On 16 December 2015, he attended the Christmas dinner of a rowing club of which he was a member. Also present was the complainant in the criminal proceedings who, as I understand it, was a former girlfriend of the respondent. The respondent has admitted that he became drunk. He appears to have become angry with the complainant when she refused his request for a hug. He poured the contents of his glass of beer over her. He followed her to the ladies' lavatory, where he more than once called her an "Aussie slut" and asked if she was wearing any knickers. He lifted her skirt and smacked her bottom repeatedly. At trial, he admitted that he had been drunk and angry, admitted that he had called the complainant a slut and admitted that he had slapped her bottom, but denied that he had referred to her as "Aussie" and denied that there was any sexual aspect to his actions. The District Judge (Magistrates' Courts) before whom the trial was heard found both charges proved.

7 These events attracted the attention of the tabloid press and the name of the respondent's employer was published in at least one newspaper. Following his conviction, the respondent was summarily dismissed from his employment as a solicitor and had not found other work as a solicitor by the time of the proceedings before the Tribunal. As a professional man with no previous convictions, he clearly suffered a heavy fall from grace and brought upon himself serious consequences in addition to the penalty imposed by the criminal court.

8 In relation to the sentence of the criminal court, it should be noted that an offender becomes subject to the notification requirements under Part 2 of the Sexual Offences Act 2003 upon conviction of an offence listed in Schedule 3 to that Act. In the case of an adult offender whose victim is also an adult, an offence under s.3 of the Act is only included if the offender is sentenced to a term of imprisonment, detained in a hospital or made the subject of a community order of at least 12 months. The notification requirements applied to this respondent because his community order was for a period of 12 months. In such circumstances, s.82 of the Act prescribes that the notification requirements apply for a period of 5 years from the date of conviction.

9 The respondent appealed against his sentence to the Crown Court, with the aim of persuading that court to reduce the term of the community order, which would have the effect of taking the offence outside the notification requirements. His appeal was, however, dismissed.

The Tribunal's Decision

10 At the hearing on 23 January 2018, the Tribunal considered the appropriate sanction for the two breaches of the Principles which the respondent had admitted. Detailed submissions were made to the tribunal on his behalf. Mr Cadman, then as now appearing for the respondent, referred amongst other things to the fact that the respondent had completed his unpaid work requirement within about four months from the date of the sentence. He relied on a number of supportive references from people who knew the respondent well and who described his offending as wholly out of character. He pointed to the fact that the police had assessed the respondent as a low risk of reoffending.

11 The Tribunal specifically invited submissions "in respect of the compatibility of the respondent practicing as a member of the profession whilst he was on the sex offenders register". In this regard, Mr Cadman submitted that the period of five years was specified

by Parliament, having regard to the nature of the offence and the sentence imposed, and did not indicate that the District Judge had specifically viewed the respondent as presenting a risk for the next five years. He pointed to the fact that the District Judge had made a restraining order relating specifically to the complainant but had not made a sexual harm prevention order, which could have been made if the court was satisfied that it was necessary to protect the public generally.

12 Counsel then appearing for the appellant referred to the decision in *Council for the Regulation of Healthcare Professionals v General Dental Council & Fleischmann* [2005] EWHC 87 (Admin) as authority for the proposition that a professional person should not normally be allowed to practise unrestricted whilst still serving a sentence.

13 At paragraph 23 of their written reasons, the Tribunal indicated that they did not consider that protection of the general public was an ongoing issue. They continued as follows:

> "In terms of maintaining the reputation of the profession, the Tribunal felt that this matter was far too serious for either no order or a reprimand and was also too serious for a fine. The conduct merited some interference with the respondent's ability to practise. Public confidence in the legal profession demanded no lesser sanction than suspension, but the Tribunal did not consider that the protection of the reputation of the legal profession justified striking off the roll. The Tribunal considered whether it was necessary and/or appropriate for a fixed period of suspension to coincide exactly with the requirement for the respondent to remain on the sex offenders register. The Tribunal had in mind that the respondent had appealed unsuccessfully against the length of his community order, which in turn automatically generated the period of his registration. However, it felt that in all the circumstances a period of suspension, which would have to be around four years, would be longer than was merited. There was no evidence that the respondent continued to present any kind of risk to the general public and the criminal court had not chosen to impose any additional restriction orders upon him, aside from that in respect of the complainant. The respondent had effectively been unable to practice from the date of his summary dismissal from his last position as a solicitor, which occurred on 4 January 2017, the day following his conviction. He had taken a lower paid job outside the legal profession in order to contribute to the support of his young family. The Tribunal determined that it would be appropriate to suspend the respondent until the expiry of a 2-year period from the date he had ceased to practise, that is up to and including 4 January 2019."

The Appeal

14 I have already indicated the grounds of the appeal against that decision as to sanction. The appeal is brought pursuant to s.49 of the Solicitors Act 1974. This court has the power to make such order on the appeal as it may think fit, having, for this purpose, all the powers of the Tribunal. Part 52 of the Civil Procedure Rules applies, with the result that this appeal is a review rather than a rehearing.

15 The relevant legal principles are not in doubt and can be stated briefly. It is well-established that in a case where a solicitor has been convicted of and sentenced for a criminal offence, the disciplinary sanction of the tribunal is not punitive in intention but rather is concerned with the protection of the public and the maintenance of the reputation of the profession and public confidence in the integrity of the profession: see *Bolton v The Law Society* [1994] 1 WLR 512, in which Sir Thomas Bingham, Master of the Rolls, emphasised that:

> "Because the sanction imposed by the tribunal needs to maintain the reputation of the profession as a whole, matters of personal mitigation will carry less weight than they might in a criminal case."

16 It is further well-established that the SDT is an expert and informed professional disciplinary tribunal and is particularly well-placed to assess what measures are required to deal with defaulting solicitors and to protect the public interest,: see *Salsbury v The Law Societ*y [2009] 1 WLR 1286. At para.30 of that case Jackson LJ put the point in these terms:

> "Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the tribunal. Nevertheless, if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere."

It is, therefore, common ground between the parties that in this appeal the burden is on the appellant to show that the sanction imposed by the Tribunal was clearly inappropriate and requires the interference of this court.

The Submissions

17 I am grateful to Miss Carpenter and Mr Cadman for their written and oral submissions on behalf of the appellant and the respondent respectively. The overall submission of Miss Carpenter, on behalf of the appellant, is that the Tribunal's decision as to sanction was clearly inappropriate because of the errors of principle which are alleged. She has provided the court with a table setting out the sanctions imposed by the SDT in other cases in which a solicitor has been convicted of one or more criminal offences. She contends that the usual sanction in a conviction case is an order for striking off. She does not contend that the Tribunal in this case should necessarily have made an order for striking off, but she does submit that the minimum appropriate sanction would have been a suspension for four years.

18 In response, Mr Cadman submits that such a table of potentially comparable cases is of little or no value because each case is fact-sensitive. He relies, in this regard, on the decisions in *Maistry v Solicitors Regulation Authority* [2012] EWHC 3041 (Admin) and *Solicitors Regulation Authority v Kadurugamuwa* [2017] EWHC 2245 (Admin). His overall submission is that the Tribunal applied correct principles of law and made a careful assessment of the relevant facts, and that there is no ground on which their determination should be disturbed.

19 As to the first of the three grounds of appeal, the appellant submits that the Tribunal wrongly concluded that it did not need to consider the protection of the public because the police had assessed that there was a low risk of any reputation of the misconduct. Miss Carpenter submits that low risk is not the same as no risk, that the Tribunal was wrong to

conclude that there was no evidence of any continuing risk to the general public and that protection of the public incudes the need to protect the public not only from the risk of reoffending, but also from the concern they would feel and the damage to their trust in the solicitors' profession if a solicitor convicted of serious sexual and racially aggravated assault is suspended for only 11 months.

20 In response, the respondent submits that the Tribunal did not conclude that there was no risk. Rather, they considered the issue and rightly accepted the evidence that the risk of any further offending was low.

21 Mr Cadman argues that there is a distinction to be drawn between the present case and cases such as *Fleischmann* in which a defaulting medical or dental practitioner would, in the normal course of practice, come into physical contact with his or her patients.

22 As to Ground 2, Miss Carpenter acknowledges that in *Obukofe v The General Medical Council* [2014] EWHC 408 Popplewell J held that being on the sex offenders register is not to be regarded as part of the criminal penalty for the purposes of the principle in *Fleischmann*. She therefore accepts that there is no presumption that a solicitor who is subject to the notification requirements cannot practise. She does, however, say that being subject to the notification requirements and being subject to a restraining order are relevant and important factors. She points out that the effect of the Tribunal's order is that the respondent will be permitted to practise from 4 January 2019, even though he will continue to be subject to both the notification requirements and the restraining order for another 3 years. She submits that if the Tribunal had rightly asked themselves the essential question, they would surely have answered it by saying that it would harm the reputation of the profession and would harm public confidence in the profession for a solicitor with recent convictions for offences such as these, who is subject to the notification requirements and to a restraining order, to be allowed to continue to practise after a short period of suspension. She submits that the error of principle into which the Tribunal fell was or may have been contributed to by their giving undue weight to the argument that the length of the period of the notification requirements was prescribed by statute rather than an assessment in the individual case and to the fact that no sexual harm prevention order was made.

23 In response, it is submitted on behalf of the respondent that his offending was a one-off incident against an ex-partner which could clearly be regarded as out of character. The complainant is protected by the restraining order and the risk of reoffending is low. In such circumstances, Mr Cadman submits the ability of the respondent to work and to interact with clients of both genders and all races and to be in a position of trust and confidence with his clients is not impacted.

24 As to the third ground of appeal, Miss Carpenter submits that the approach adopted by the Tribunal was wrong in principle and cannot be reconciled with the purpose for which the period of suspension was ordered. Even if, contrary to her primary submissions, a suspension of 2 years was appropriate, she argues that it should not have been further reduced in its effect. She contends that the logical consequence of the approach taken by the tribunal is that if the hearing before the tribunal had, for any reason, been delayed until January 2019, there would have been no sanction of suspension at all. She relies on the decisions in *Ujam v The General Medical Council* [2012] EWHC 684 (Admin) and, particularly, *Abdul-Razzak v The General Pharmaceutical Council* [2016] EWHC 1204 (Admin) as showing that it is incorrect to draw any analogy between a period of interim

suspension imposed by a professional disciplinary body and a period of remand in custody imposed by a criminal court. It follows, she submits, that it is wrong to take into account in the defaulting solicitor's favour a period of time when he did not in fact practise, not because of any interim suspension but because as a result of his crimes he had been dismissed from his employment and unable to find other professional work.

25 Mr Cadman submits in response that each case must depend on its own facts and that the Tribunal was entitled to take into account the substantial period of time when the respondent had been unable to practise professionally and had relied on low paid employment to support himself and his family. That is part of the factual matrix which, he submits, the informed member of the public would take into account in considering whether the length of the suspension diminished his or her confidence in the legal profession.

26 I have reflected on these competing submissions. I do not find the first ground of appeal at all persuasive. In all the circumstances of this case, and in the light of the information before the criminal court, the Tribunal were, in my judgment, plainly entitled to conclude that the risk of reoffending was low and did not, in itself, require a sanction of suspension for a significant period. I am not convinced by Miss Carpenter's submission that the Tribunal assessed there to be no risk at all. Rather, it seems to me that on a fair reading of their written reasons they simply regarded the risk as so low as to be insignificant to the determination of the appropriate sanction.

27 Further, and with respect to Miss Carpenter, I am unable to accept her submission that in this context the need to protect the public includes protecting the public from damage to their trust in the solicitors' profession. The authority cited by Miss Carpenter in support of that submission did not, in my view, assist her at all.

28 Nor do I think the appellant's case is assisted by the table showing sanctions which have been imposed by the SDT in other conviction cases. Even if the table were accurate, which in at least one respect it is not, it does not, in my view, assist this court in considering the circumstances of this case.

29 I do, however, find much greater force in the second and third grounds of appeal. Although the Tribunal were, as I have indicated, entitled to regard the risk of reoffending as low, it was plainly necessary for them to consider the maintenance of public confidence and public trust in the solicitors' profession. In the passage which I have quoted from paragraph 23 of their written reasons, which is the only passage in which this aspect of the case was considered, the Tribunal rightly identified the need to have regard to that aspect of the case. They also rightly reflected on whether it was necessary and/or appropriate for the period of suspension to coincide with the period during which the respondent would be subject to the orders of the criminal court.

30 Having identified those important issues, however, it seems to me, with all respect to the Tribunal, that they then lost sight of them in the remainder of that paragraph of their reasons. Instead of focusing upon what period of suspension was necessary for the protection of the reputation of the profession and for the maintenance of public confidence in the profession, they referred only to the risk of reoffending, the fact that no sexual harm prevention order was made and the fact that the respondent had not practised professionally since his summary dismissal. What they failed to consider, in my judgment, was the simple but vital point made by Miss Carpenter: "Would public confidence in the profession be

harmed if they found that a man recently convicted of offences such as these and still subject to the notification requirements as well as to a restraining order specifically directed to protect the complainant was currently practising as a solicitor?" If the Tribunal had focused on that question, I agree with Miss Carpenter's submission that there could only have been one answer to it. In reaching that conclusion, I bear very much in mind that the public, for this purpose, must be assumed to have knowledge of the relevant facts. It does not follow from that conclusion, and I do not suggest, that a period of suspension must always be coterminous with the term of orders imposed by a criminal court. Everything must depend on the circumstances of the individual case. In the present case, however, the Tribunal did, in my view, make an error of principle in failing properly to consider the issue and in therefore failing to conclude that a significantly longer period of suspension was necessary to allay public concern.

31 Again with respect to the Tribunal, in my judgment they also fell into error in deciding to reduce the period of suspension which they had found to be appropriate by deducting from it the lengthy period during which the respondent had not, in fact, been practising as a solicitor. It is important to remember that he was not prevented by any order of the Tribunal from practising if he could find an employer willing to take him on. Nor did any order of the Tribunal limit the areas of work in which he could practise as a solicitor or restrict him to seeking alternative employment in exactly the same field as his previous practice. Moreover, the length of time during which this state of affairs continued, a matter to which the Tribunal appeared to give significant weight, was to a substantial extent brought about by the fact that for a period of some 18 months the respondent was unsuccessfully contesting charges of which he was ultimately found guilty, and unsuccessfully pursuing an appeal which was dismissed. Insofar as it is suggested that the SRA was guilty of some delay in commencing the disciplinary proceedings, that does not seem to me to be a significant factor in the overall assessment of the case.

32 The flaw in the Tribunal's approach is, in my view, plainly exposed by Miss Carpenter's submission that if the date of the criminal trial had, for any reason, been further postponed, all or most of the 2-year term of suspension would have elapsed before any decision as to sanction was made. Again, I do not suggest that there is an inflexible rule prohibiting a professional disciplinary tribunal from ever taking into account when determining an appropriate period of suspension the fact that a defaulting member of the profession had, for a substantial time, been unable to practise or had not, in fact, practised. Depending on the circumstances, that might be a factor in the defaulting member's favour. In the serious circumstances of this case, however, it is not in my view possible to justify the end result achieved by the Tribunal's decision, namely a term of suspension of less than 12 months.

33 I am very conscious of the need to give appropriate respect to the decision of a specialist disciplinary tribunal. For the reasons I have given, however, this, in my judgment, is a proper case for this court to interfere with the decision made by the Tribunal.

34 In all the circumstances of this case, including the fact that the respondent will remain subject to the notification requirements and the restraining order until January 2022, the sanction of a period of suspension of less than one year was clearly inappropriate. I do not see that the need to protect the reputation of the profession and public confidence in the profession could be achieved by anything less than suspension for a period of 4 years from the date of the Tribunal's decision. I would therefore quash the decision of the Tribunal and

substitute for it an order that he be suspended from practising as a solicitor until 23 January 2022.

MRS JUSTICE MCGOWAN:

I agree.

LORD JUSTICE HOLROYDE: Are there any consequential applications?

MISS CARPENTER: Thank you. Yes, I have an application for costs and a costs schedule has been sent but I do not know if it has reached----

LORD JUSTICE HOLROYDE: I have certainly got a schedule. Let me see whose it is. Yes, dated 9 October.

MISS CARPENTER: That is right. The total is £8,870.05 plus VAT.

LORD JUSTICE HOLROYDE: Yes. Thank you. Mr Cadman?

MR CADMAN: Unlike at the tribunal, when I can pray in aid *Baxendale Walker*, I cannot here. So, I do not. All I would say is you have an element of criticism to the amount of time that the SRA will have spent preparing the schedule of matters which you found of no assistance and also there is also the matter of (inaudible) by other courts before, so I would ask for a reduction to cover that. His financial statements have not changed, have not improved, but they are not relevant matters for you.

LORD JUSTICE HOLROYDE: Thank you. We will just retire and consider that.

(Short break)

LORD JUSTICE HOLROYDE: The respondent must, in principle, pay the appellant's costs. However, in two respects it seems to us that the costs on the appellant's side have been unnecessarily increased: first, in the preparation and presentation of the first ground of appeal, which this court has found to be without merit; secondly, in the preparation of a detailed schedule of other sanctions which we have found to be inaccurate in at least one respect and which, in any event, would have been of no assistance to this court.

We think it right, in those circumstances, to make a reduction in the costs payable by the respondent to the appellant. A precise calculation is not possible. We think it fair in all the circumstances to reduce the amount claimed by £1,000.

In the result, therefore, our order is that the appeal is allowed. The period of suspension imposed below is quashed and we substitute for it an order that the respondent be suspended

from practising as a solicitor until 23 January 2022 and we order the respondent to pay the appellant's costs, summarily assessed in the sum of £9,404.56.

Thank you both.

MISS CARPENTER: Thank you.

CERTIFICATE

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