

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 10686-2010

BETWEEN:

SOLICITORS REGULATION AUTHORITY

Applicant

and

FLORA MUIR

Respondent

Before:

Mr A G Gibson (in the chair)

Mr R B Bamford

Mr S Hill

Date of Hearing: 3rd October 2011

Appearances

Peter Steel, solicitor of Capsticks Solicitors LLP, 1 St George`s Road, Wimbledon, London, SW19 4DR for the Applicant.

Ms Flora Muir, the Respondent, did not appear and was not represented.

JUDGMENT

Allegations

1. The allegations against the Respondent were that she:
 - 1.1 Acted without integrity in breach of Rule 1.02 of the Solicitors Code of Conduct 2007 in that:
 - 1.1.1 She created three letters on 27 January 2009 in relation to her client, Mr C, purporting that she had written and sent them prior to 27 January 2009;
 - 1.1.2 She overstated her billing figures for the period ending November 2008 by raising a number of invoices in the period 29 August to 28 November 2008 which were subsequently cancelled.
 - 1.2 Breached Rule 20.05 of the Solicitors Code of Conduct 2007 in that she failed to deal with the Solicitors Regulation Authority (“SRA”) promptly or co-operatively.

Documents

2. The Tribunal reviewed all the documents submitted by the Applicant and the Respondent, which included:

Applicant:

- Application dated 16 December 2010;
- Rule 5 Statement dated 16 December 2010 and exhibit “PS1”;
- Undated Statement of Jason Hathaway and exhibits “JH1”, “JH2” and “JH3”.
- Bundle of correspondence and emails between Applicant and Respondent;
- Bundle of correspondence and emails sent by the parties to the Tribunal;
- Bundle of Authorities;
- Schedule of Costs for the hearing on 3 October 2011.

Respondent:

- Bundle of correspondence and emails from the Respondent dated 27-30 September 2011 inclusive;
- Letter from Dr Derbyshire at Musters medical practice dated 29 September 2011;
- Unsigned statement;
- Application for re-hearing and adjournment on form 7 with attached documentation.

Preliminary Matter (1)

3. In her email to the Tribunal of 27 September 2011, the Respondent had requested that any aspect of the case dealing with her medical history and condition be heard in private. In her application for a rehearing and postponement, the Respondent had

enclosed some medical records and requested that these remain private and confidential. The Tribunal reminded itself that under Rule 12(6) of the Solicitors (Disciplinary Proceedings) Rules 2007, a direction could be made that the hearing or part of it be held in private.

4. Mr Steel on behalf of the Applicant, submitted that there was no reason why the main application should not be heard in public. He had no objection to matters pertaining to the Respondent's health being dealt with in private and considered that the Tribunal could take the appropriate steps to ensure that details of the Respondent's health remained confidential.

The Tribunal's Determination on Preliminary Matter (1)

5. The Tribunal determined that the hearing should be heard in public, save that any details relating to the Respondent's medical condition should be heard in private.

Preliminary Matter (2)

6. The Respondent had applied for a postponement of the hearing in her email to the Tribunal dated 30 September 2011. A fax was sent to the Tribunal by the Respondent later on the same date which enclosed a copy of a letter from Dr Derbyshire at the Musters medical practice dated 29 September 2011. The Respondent also requested a postponement of the hearing in her application for a rehearing on Form 7 which was also dated 30 September 2011. Mr Steel was aware of the application for a postponement and had indicated in his email to the Tribunal of 30 September 2011 that he objected, on behalf of the Applicant, to any adjournment of the case and believed that the matter should proceed as intended.
7. In his submissions, Mr Steel stated that the letter from Dr Derbyshire was not as helpful as it could be. The letter confirmed that the Respondent was a patient at the practice and referred to a flare-up of two particular medical conditions. Mr Steel referred to the documentation that had been supplied by the Respondent with her application for a rehearing. He was unsure how far the documentation assisted. Mr Steel submitted that the documents confirmed that the Respondent had sought treatment in the past for her medical conditions. The Respondent had supplied a great deal of background information on the conditions themselves.
8. Mr Steel asked the Tribunal to consider its own Practice Note relating to adjournments. In particular, Mr Steel submitted on behalf of the Applicant, that any application for an adjournment on the grounds of ill health should be supported by a "reasoned opinion" of a medical advisor. It was Mr Steel's submission that the letter from Dr Derbyshire could not be viewed as such. The letter did not explain why the Respondent's current condition prevented her from dealing with the case. The letter gave no prognosis as it did not indicate when the Respondent would be sufficiently recovered to be able to attend at a hearing.
9. Mr Steel referred the Tribunal to the case of Yusuf v The Royal Pharmaceutical Society of Great Britain [2009] EWHC 867 (Admin). In that case, the appellant had failed to supply medical evidence to support his previous application for an adjournment. Mr Steel conceded that the Respondent in the present case had supplied

some evidence but he submitted that the evidence was inadequate. The case also referred to the relevant authorities of R v Hayward [2001] EWCA Crim 168 approved on appeal by the House of Lords, sub nom R v Jones (Anthony) [2002] UKHL 5 and applied to the disciplinary proceedings of professional bodies in the case of Tait v The Royal College of Veterinary Surgeons [2003] UKPC 34. In particular, Mr Steel referred the Tribunal to the relevant factors set out in the Hayward case which were considered by the Court when deciding whether to proceed in the defendant's absence.

10. Mr Steel reminded the Tribunal that there had been a successful application for an adjournment by the Respondent on 31 May 2011 and submitted that the current application for an adjournment should not be considered in isolation. The proceedings before this Tribunal had been delayed due to the Respondent's state of health. Mr Steel told the Tribunal that Mr Hathaway had attended today in order to give evidence and would be inconvenienced if he had to return on another day. Mr Steel urged the Tribunal to consider the real extent of any disadvantage to the Respondent if she was not there.
11. Mr Steel submitted that the evidence filed by the Applicant was effectively uncontested as Civil Evidence Act notices had been served on the Respondent back in May and there had been no response. It was the Applicant's case that the Respondent had been given ample opportunity to provide her account and had only very recently filed a statement. Mr Steel referred the Tribunal to the fact that some of the correspondence received from the Respondent contained a partial admission of the allegations against her.
12. It was Mr Steel's submission that the Tribunal should treat the Respondent as having voluntarily absented herself. He submitted that the medical evidence that she had supplied was not sufficient. At the directions hearing on 31 May 2011, the Respondent had been ordered to file a medical report dealing with her capacity or otherwise to conduct the substantive hearing but had failed to do so. It was his view that the Respondent could obtain a fair hearing notwithstanding her absence. The Tribunal would be able to ascertain the full nature of the Respondent's case and would have the opportunity to ask questions of Mr Hathaway. He urged the Tribunal to proceed in the Respondent's absence, having exercised the appropriate degree of caution.

The Tribunal's Determination on Preliminary Matter (2)

13. The Tribunal noted that this was the Respondent's second application for an adjournment. The Tribunal had previously ordered that the Respondent should file a medical report but this had not been forthcoming. It appeared that the Respondent had not appreciated the requirement to do so.
14. These were serious allegations and the Tribunal wished to ensure that the matter should not remain unresolved indefinitely. It was in the public interest to ensure that matters were concluded within a reasonable time.
15. The Tribunal carefully considered the practice direction relating to adjournments and the authorities to which they had been referred. The Tribunal noted that the

Respondent had failed to supply a “reasoned opinion” from her medical advisers which explained her condition in full and how this affected her ability to attend at a hearing and deal with matters. The medical evidence contained no prognosis as to the Respondent’s condition.

16. Having considered all the circumstances, the Tribunal determined that proceedings should go ahead notwithstanding the Respondent’s absence.

Factual Background

17. The Respondent was born on 31 May 1960 and admitted as a solicitor on 16 July 2007. Her name remained on the Roll of Solicitors. The Respondent was employed as an assistant solicitor at Edward Hands & Lewis Solicitors of 3 Rectory Place, Loughborough, Leicestershire, LE11 1UW (the firm) from 24 June 2008 until the date of her resignation on 6 February 2009.
18. On 22 February 2009, Jason Hathaway, a partner at the firm, wrote to the Applicant to report his concerns about the Respondent’s conduct. On 12 June 2009, Mr Hathaway sent his investigation report dated 4 February 2009 with enclosed documentation to the Applicant. The Investigation Report also contained the statements of Rachel Chambers dated 28 January 2009, Jason Waghorne dated 4 February 2009 and Lisa Ward dated 5 February 2009.
19. The Investigation Report, prepared by Mr Hathaway, indicated that on 27 January, Ms Chambers who was a solicitor employed by the firm had raised concerns with Mr Hathaway’s partner, Alan Roberts, that the Respondent had not been maintaining client files or properly conducting client matters.
20. The firm had responsibility for dealing with two property matters for a client Mr C. In Mr Hathaway’s Investigation Report, Ms Chambers had said that as a result of concerns raised by Mrs Ward, who was a secretary at the firm, she had looked at a file named BP where the client was Mr C. The client had telephoned the firm on 21 January 2009 seeking an update on his file. Mrs Ward had asked Ms Chambers for her help in locating a letter that had apparently been sent to Mr C’s tenant. Having checked the firm’s “S-drive” which was the electronic directory in which documents were stored on the firm’s computer system and on checking the file itself, Ms Chambers could not find any letters to the tenant and nor could she find a folder relating to the client Mr C.
21. On 27 January 2009 Ms Chambers spoke to the client Mr C. He indicated that he had not heard from the Respondent. Ms Chambers apologised to him and indicated that she would ask the Respondent to call him as soon as possible. She then emailed the Respondent asking her to call the client. On the same day she asked the Respondent to give her the relevant file as Mr Hathaway had asked her to look after it pending the recruitment of another fee earner. The Respondent indicated that she would be working on the file that evening and would leave it on Ms Chambers’ desk the following morning.
22. When Ms Chambers arrived at work on 28 January 2009, she found the file on her desk and ascertained that various letters had been added to the file since she and Mrs

Ward had looked at it the previous week. With the assistance of Mr Waghorne, who was another solicitor at the firm, Ms Chambers established from looking at the properties of the electronic document that a letter purportedly sent to Mr C's tenant on 16 December 2008 had in fact been created the previous day, ie on 27 January 2009. An examination of the folder on the S-drive also demonstrated that a further letter to Mr C's tenant dated 26 January 2009 and a letter addressed to Mr C of 26 January 2009 had also both been created on 27 January 2009 after Ms Chambers had spoken with the Respondent. Ms Chambers brought this matter to Mr Hathaway's attention and he instigated his investigation.

23. Mr Hathaway produced four screen prints as part of the Investigation Report which he said demonstrated that the folder on the S-Drive for Mr C was created on 27 January 2009 at 19.21.51 and that letters on the file dated 16 December 2008 and 26 January 2009 to the tenant and dated 26 January 2009 to the client were all created on 27 January 2009. The letters were sent to the Applicant on 23 June 2009.
24. On 28 January 2009, Mr Hathaway and his partner Mr Roberts met the Respondent and put to her the allegations that (a) no client file had existed when a colleague had sought to locate it, (b) the client file was subsequently created; and (c) letters which were never received by the client were created on Microsoft Word several weeks after the date on which they were claimed to have been posted.
25. The Respondent explained that she had carried out the work at home and had uploaded and copied across the letters from a "flash disc". She was asked to provide evidence of the documents having been created at home but did not do so. She was suspended on full pay pending further investigation.
26. In a letter dated 19 January 2010, Mr Hathaway supplied the Applicant with an explanation of the bonus system operated by the firm, together with a print-out of the billing record for the Respondent. Mr Hathaway explained that the firm's bonus structure was based on monies received from bills rendered over each three month period. The Respondent's first period of assessment was September to November 2008.
27. The billing record indicated that in the period from the end of August 2008 until the end of November 2008, a significant number of invoices were raised by the Respondent which were subsequently written off. Mr Hathaway asserted that the total number was 31 but Mr Steel, on behalf of the Applicant, stated that examination of the billing records suggested that one of those bills was in fact rendered on 13 January 2009. The other bills fell within the period from the end of August to the end of November 2008. Mr Hathaway stated that when challenged on this, the Respondent conceded that she "felt undue pressure in terms of targets and this led to her distorting the figures". The Respondent resigned from her employment with the firm on 6 November 2009.
28. The Applicant wrote to the Respondent raising the allegations reported by the firm on 1 July 2009. The Respondent replied on 6 July 2009 and disputed the allegations. She alleged misconduct by Mr Hathaway and claimed that she had resigned as a result of constructive dismissal and that she had been harassed and victimized by Mr Hathaway. She provided a further email response dated 16 July 2009.

29. The Respondent asserted that she did write to the person named in the letter of 16 December 2008. In relation to the issue of bonus payments, she said that she did not receive any. She suggested that there were difficulties with her filing reaching the files.
30. The Applicant sought a substantive response to the allegations in an email dated 14 August 2009. The Respondent replied in a fax sent on 28 August 2009 which indicated that her response would follow shortly as a separate letter.
31. The Respondent sent a fax to the Applicant on 3 September 2009 which contained various enclosures, including the Applicant's policy on referrals to the Solicitors Disciplinary Tribunal and various information relating to her health. The Respondent asserted that in accordance with the Applicant's policy on referral, she should not be referred to the Tribunal. She stated on the second page:

“I acknowledge a spur of the moment failure of judgment in recreating to the best of my ability the letter sent on 16 December which was absent from the file when it was returned to me from the complainant on 27 January. My only intent was to fully inform the client as to the progress on this matter by providing the fullest possible information as to the work done to date, the situation with regard to this matter and in order to progress the matter in the client's interest. I do believe that had the client been unaware of the nature of the content of the earlier letter then his subsequent instructions would have been fully informed and would have given rise to potential delay in his matter. I do not believe that my intentions lacked integrity contrary to Rule 1 in relation to this client matter for the reasons given here...”

32. In addition she said:

“It is my belief that at the relevant time I was also suffering from work-related stress as a result of both the complainant's general bullying attitude towards me as a result of my disability and the recent shock regarding the failures relating to my subsequent PIDA complaint, and discovering his stated intent with regard to the firm's Spanish contract and his breach of contract with me, combined with having been advised of a potential threat earlier in the day from the complainant by another member of staff, which on this occasion caused a lack of concentration relating to the dates given on the letters dated 26 January rather than 27 January.

Further in relation to 16 December letter I believe that had a thorough search been undertaken of the assistant's room or elsewhere by the complainant it may have come to light in any event...”

33. The Applicant responded in a letter dated 3 September 2009 asking for direct confirmation from the Respondent that on 27 January 2009, she had created the three letters which were dated prior to their creation date. The Respondent replied by fax on 4 September 2009 and referred the Applicant to certain matters contained in her previous response, saying “*paragraphs 8.2 and 8.4 should I believe generally be assessed as an admission with mitigating circumstances contraindicating a referral*”.

34. The case note that was to be considered by the Adjudicator was sent to the Respondent on 8 October 2009 and invited her comments. No response was received and a further letter was sent to the Respondent on 19 November 2009. A further letter was sent to the Respondent on 5 January 2010 and the Applicant wrote again on 20 January 2010. A further letter was sent on 9 February 2010 seeking a response within eight days.
35. No response was received until the Respondent telephoned the Applicant on 17 May 2010 to indicate that she wished to make further representations but that her medical condition was hampering her from doing so. The Applicant notified the Respondent on 25 May 2010 that the matter had been withdrawn from the Adjudication process and confirmed that she could have an extension of four weeks to make representations. The Respondent telephoned the Applicant on 17 June 2010 seeking an extension of time to submit her representations until 30 June 2010. The Applicant did not receive any representations within this period. In a subsequent telephone conversation on 6 July, the Respondent indicated that she required further time due to her state of health.
36. On 6 July 2010, the Respondent sent an email to the Applicant indicating that she intended to complain about the original decision to refer her case to the Adjudicator. The email indicated that she still intended to make representations to the Applicant. The Applicant provided the Respondent with a leaflet on making a complaint under cover of a letter dated 9 July 2010.
37. On 10 August 2010 the Applicant wrote to the Respondent indicating that although it wished to provide her with an opportunity to provide representations before her matter was referred to adjudication, the Applicant needed a clearer account of her disability and why it was preventing her from providing representations. The letter invited the Respondent to seek an extension of time and to reply within the next 14 days.
38. The Respondent did not reply to this letter and on 30 September 2010 the Adjudicator referred the matter to the Tribunal.

Witnesses

39. No witnesses gave oral evidence. The statement of Jason Hathaway was put before the Tribunal by the Applicant.

Findings of Fact and Law

40. **Allegation 1.1: Acted without integrity in breach of Rule 1.02 of the Solicitors Code of Conduct 2007 in that:**
 - 1.1.1 **She created three letters on 27 January 2009 in relation to her client, Mr C, purporting that she had written and sent them prior to 27 January 2009;**
- 40.1 This allegation related to the creation of three letters on 27 January 2009 in relation to the client Mr C. Mr Steel on behalf of the Applicant told the Tribunal that there should have been two separate files for the client Mr C but only one had been opened

by the Respondent. On 28 January 2009, Ms Chambers had inspected the computer records relating to Mr C's file with the assistance of Mr Waghorne and had established that a letter purportedly sent to Mr C's tenant on 16 December 2008 had in fact been created the previous day, ie 27 January 2009 after Ms Chambers had asked the Respondent to provide her with the file. Furthermore, she established that another letter to the tenant dated 26 January 2009 and a letter to Mr C of 26 January 2009 had both also been created on 27 January 2009. The hard copy correspondence had been sent to the Applicant by Jason Hathaway with his Investigation Report.

40.2 Mr Steel, on behalf of the Applicant, referred the Tribunal's attention to the email from the Respondent dated 18 April 2011 in which she had attached her submissions and a request for consideration of directions. Mr Steel submitted that the Respondent had accepted in that correspondence, that she had recreated the letter to the tenant dated 16 December 2008 on 27 January 2009 by admitting that she had placed the wrong date on a letter.

40.3 The Tribunal considered all of the documentation that had been submitted in this case. In particular, the Tribunal noted the contents of the letter from the Respondent to the Applicant dated 3 September 2009 in which she acknowledged:

“a spur of the moment failure of judgment in recreating to the best of my ability the letter sent on 16 December which was absent from the file when it was returned to me from the complainant on 27 January”.

40.4 In addition, the Tribunal noted the contents of the letter from the Respondent dated 4 September 2009 in response to the Applicant's letter of 3 September. The Respondent had been asked to confirm that the Applicant was correct in interpreting from her previous responses that she did create the letters in question on 27 January 2009 and which were dated prior to their creation date. In her letter of 4 September 2009, the Respondent had included the words: “In concurring with your interpretation...”. The Tribunal considered that this wording did indicate an admission on the part of the Applicant and in any event found the allegation substantiated on the facts and documents before it.

41. **Allegation 1.1.2: She overstated her billing figures for the period ending November 2008 by raising a number of invoices in the period 29 August to 28 November 2008 which were subsequently cancelled.**

41.1 Mr Steel, on behalf of the Applicant, submitted that the Respondent had raised a significant number of invoices during the period from the end of August until the end of November 2008 which were subsequently written off. He claimed that this was the Respondent's attempt to give a misleading impression of her billing. He referred the Tribunal to the letter from Mr Hathaway to the Applicant of 19 January 2010 in which he had stated that when he had challenged the Respondent on the matter, she had conceded that she “felt undue pressure in terms of targets and this led to her distorting the figures”.

41.2 The Tribunal noted that the Respondent had not directly indicated whether or not she admitted the allegation concerning her billing figures. Mr Steel, on behalf of the Applicant, conceded that there had been no clear admission from the Respondent in

relation to this issue.

- 41.3 The Tribunal carefully considered the matter. In particular, they noted that Mr Hathaway had been unable to state that the Respondent had actually inflated her billing figures. In his statement, Mr Hathaway had admitted that he could not recall the specifics of the conversation that he had had with the Respondent but believed her reasoning given was that she felt undue pressure on her to meet her target.
- 41.4 In all the circumstances, the Tribunal could not be absolutely sure that the Respondent herself had written off the bills. This could have been done by someone else. In view of this, the Tribunal did not find the allegation substantiated against the Respondent to the high standard that was required, that is beyond reasonable doubt.
42. **Allegation 1.2: Breached Rule 20.05 of the Solicitors Code of Conduct 2007 in that she failed to deal with the Solicitors Regulation Authority (“SRA”) promptly or co-operatively.**
- 42.1 It was the Applicant’s case that the Respondent had failed to deal promptly and co-operatively with the Applicant. Mr Steel referred the Tribunal to the correspondence passing between the Applicant and Respondent during the investigation, and in particular to correspondence from 9 February 2010 onwards. He submitted that this demonstration of failure on the part of the Respondent to deal promptly and co-operatively with the SRA.
- 42.2 The Tribunal considered that from the date of the Applicant’s letter of 20 January 2010 onwards, the Respondent had failed to engage with the regulator. The Respondent had made promises to provide substantive responses but had failed to do so. The Tribunal considered that the allegation was substantiated on the facts and documents.

Previous Disciplinary Matters

43. None.

Mitigation

44. The Respondent had not submitted any mitigation to the Tribunal. The Tribunal carefully considered all of the documentation that had been supplied by the Respondent and noted all the explanations given by the Respondent in relation to her actions.

Sanction

45. The Tribunal considered the range of sanctions available. The Respondent had various health difficulties and the Tribunal considered that these did affect her ability to practise. The Respondent had acknowledged her ongoing health problems in her correspondence with the Tribunal. The Tribunal had a duty to protect the public and maintain the public’s confidence in the profession. It was essential that the sanction imposed by the Tribunal honoured that duty whilst at the same time being reasonable and proportionate.

46. In all the circumstances, the Tribunal considered that they should impose upon the Respondent an indefinite period of suspension. It was open to the Respondent to make an application to the Tribunal for the period of suspension to be determined when she would be required to show that she was an entirely fit and proper person to practise as a solicitor. The Tribunal had no wish to fetter the discretion of any future Tribunal. However, it recommended that an application by the Respondent for the termination of the indefinite period of suspension should not be granted until she had filed with the Tribunal an appropriate medical report covering her ability to practise.

Costs

47. The Applicant's claim for costs was £15,436.04. The Tribunal considered that the amount of the claim was reasonable and it was appropriate that the Respondent should pay those costs fixed in the sum of £15,436.04.

Statement of Full Order

48. The Tribunal Ordered that the Respondent, Flora Muir of 6 Albert Road, West Bridgford, Nottingham, NG2 5GS, solicitor, be Suspended from practice as a solicitor for an indefinite period to commence on the 3rd day of October 2011 and it further Ordered that she do pay the costs of and incidental to this application and enquiry fixed in the sum of £15,436.04.

Dated this 28th day of October 2011
On behalf of the Tribunal

A G Gibson
Chairman