

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 11406-2015

BETWEEN:

SOLICITORS REGULATION AUTHORITY

Applicant

and

DAVID BENAIM

Respondent

Before:

Mr L. N. Gilford (in the chair)

Mr J. A. Astle

Mr S. Marquez

Date of Hearing: 5 January 2016

Appearances

Mr. Shaun Moran, solicitor advocate employed by the Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham B1 1RN for the Applicant.

The Respondent appeared in person.

JUDGMENT

Allegations

1. The allegations against the Respondent were that by fabricating false documents, creating a false sequence of events and attempting to deceive the First Tier Property Chamber (Residential Property) (“the FTT”), the Respondent:
 - 1.1 failed to uphold the rule of law and the proper administration of justice in breach of Principle 1 of the SRA principles 2011 (“the Principles”); and/or
 - 1.2 in attempting to deceive or knowingly or recklessly mislead the Court, failed to achieve Outcome 5.1 of the SRA Code of Conduct 2011 (“the Code”); and/or
 - 1.3 failed to act with integrity in breach of Principle 2 of the Principles; and/or
 - 1.4 behaved in a way which was likely to diminish the trust the public placed in him and in the legal profession in breach of Principle 6 of the Principles; and
2. In respect of the allegations outlined above, the Respondent was alleged to have acted dishonestly. However, proof of dishonesty was not essential to sustain the respective allegations.

Documents

3. The Tribunal reviewed all the documents submitted by the parties, which included:

Applicant

- Application dated 7 July 2015
- Rule 5 Statement and Exhibit “SM1” dated 3 July 2015
- Applicant’s schedule of costs dated 15 December 2015

Applicant & Respondent

- Statement of Agreed Facts and Admissions

Respondent

- Character References
- Letter from the Respondent dated 3 January 2016

Preliminary Matter

4. The Applicant and Respondent submitted a Statement of Agreed Facts and Admissions dated 8 October 2015, which contained the particulars which were agreed between the parties, and upon which they both intended to rely. It also contained the admissions of the Respondent. Notwithstanding the Statement, the Tribunal required the Applicant to prove the allegations beyond a reasonable doubt.

Factual Background

5. The Respondent was born in 1966, and was admitted as a solicitor in 1990. He did not hold a practising certificate. His name remained on the Roll of Solicitors.
6. The Respondent, whilst a client partner of Clintons (“the Firm”) and acting for a property company (“AHL”), was instructed in connection with lease extensions for 10 residential apartments in a London property.
7. The Respondent was instructed to submit applications to the FTT on behalf of his client, within a six month time limit which was due to expire on 20 August 2014. Those applications had to be submitted within the six month deadline otherwise the relevant leaseholders would lose their right to extend their respective leases for one year. The Respondent thought that he had submitted the applications on time but in error failed to submit them to the FTT within the required time limit.
8. Subsequently the Respondent received a letter from Speechly Bircham (“SB”), the solicitors acting for the landlord in this matter, on 27 August 2014 enquiring whether the applications to the FTT had been made in time.
9. The Respondent responded to SB on 27 August 2014 by email. He attached a copy of a letter purporting to be sent from him to the FTT on 1 August 2014, enclosing the 10 lease extension applications. That letter was in fact prepared by the Respondent on 27 August 2014.
10. On 8 September 2014, the Respondent telephoned SB in relation to this matter. During the conversation he confirmed that he had spoken to the Court whilst he was on holiday and that the Court had confirmed that it had received the applications and would be acknowledging them. In fact no such telephone call to the Court had taken place.
11. SB wrote to the Respondent on the same day confirming that the FTT had advised the parties that it had not received and logged any applications on behalf of AHL. SB indicated therefore, that they considered the applications to have been withdrawn on 21 August 2014.
12. As a consequence, the matter was reported to the Firm’s professional indemnity insurers. New applications were prepared on behalf of AHL by the Respondent and sent to the FTT on 10 October 2014. In the correspondence submitting the new applications the Respondent stated that a letter dated 1 August 2014 had been sent to the FTT attaching the original applications and that following this, he had telephoned the Court on 14 August 2014 and was advised that these applications had been received and an acknowledgement would follow. The Respondent concluded the letter by formally requesting the matter be listed for determination by the FTT.
13. As a result, a preliminary hearing was fixed for 26 November 2014 when the FTT would be required to consider whether it had jurisdiction to hear the new applications.

14. In the interim an internal investigation by the Firm identified the following:
 - 14.1 The Respondent's mobile phone record for 14 August 2014 did not evidence a call made to the Court on that date;
 - 14.2 An attendance note dated 14 August 2014 recording a call made by the Respondent to the Court on that same day, had been electronically created by the Respondent on 3 September 2014;
 - 14.3 The letter to the Court attaching the applications and dated 1 August 2014 had been electronically created by the Respondent on 27 August 2014.
15. In a meeting with the Firm to discuss the outstanding application to the FTT the Respondent admitted that the applications had not been sent to the FTT on 1 August 2014 and no phone call to the Court had taken place on 14 August 2014.
16. The Respondent confirmed that both the letter to the FTT dated 1 August 2014 and the attendance note dated 14 August 2014 had been fabricated by him.

Witnesses

17. None.

Findings of Fact and Law

18. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
19. **Allegation 1 - that by fabricating false documents, creating a false sequence of events and attempting to deceive the FTT, the Respondent:**
 - 1.1 **failed to uphold the rule of law and the proper administration of justice in breach of Principle 1 of the Principles; and/or**
 - 1.2 **in attempting to deceive or knowingly or recklessly mislead the Court, failed to achieve Outcome 5.1 of the Code; and/or**
 - 1.3 **failed to act with integrity in breach of Principle 2 of the Principles; and/or**
 - 1.4 **behaved in a way which was likely to diminish the trust the public placed in him and in the legal profession in breach of Principle 6 of the Principles; and**

Allegation 2 - In so doing, the Respondent acted dishonestly.

- 19.1 The Respondent admitted backdating a letter of application made on 27 August 2014 to the FTT and dating it 1 August 2014.

- 19.2 The Respondent accepted that in a letter to the FTT dated 10 October 2014, he represented that the letter of application had been sent to the FTT on 1 August 2014 and that he had followed up with a telephone call on 14 August 2014 in which the FTT had acknowledged receipt of this letter. The Respondent admitted that on 3 September 2014 he fabricated a note of this telephone conversation with the FTT.
- 19.3 The Respondent confirmed the accuracy of the Statement of Agreed Facts and Admissions, and admitted that he had breached Principles 1, 2 and 6 of the Principles and failed to achieve Outcome 5.1 of the Code.
- 19.4 The Tribunal found all allegations proved beyond reasonable doubt (and indeed they were admitted), on the agreed facts and documents.

Dishonesty

- 19.5 The Respondent further admitted that by adopting this course of conduct and committing each of the breaches cited, he had acted dishonestly.
- 19.6 The Respondent accepted that his actions were dishonest according to the test laid down in the case of Twinsectra v Yardley and Others [2002] UKHL 12 (“Twinsectra”).
- 19.7 The Respondent accepted that by pretending to have sent the letter to the First Tier Tribunal dated 1 August 2014 and by fabricating the attendance note dated 14 August 2014, he acted dishonestly according to the standards of reasonable and honest people (“objective test”).
- 19.8 The Respondent accepted that he was aware when he acted in this manner that by the standards of reasonable and honest people he was acting dishonestly (“subjective test”).
- 19.9 Applying the Twinsectra test, the Tribunal found that there could be no doubt that reasonable and honest people, applying ordinary standards, would consider that a solicitor who fabricated attendance notes and backdated letters in an attempt to mislead the Court and deceive others acted dishonestly, and therefore the objective test was satisfied. The Respondent admitted that he had consciously decided to act in the manner alleged and accepted, and that he was aware at the time of doing so that his actions would be considered dishonest. The Tribunal thus found that the subjective test was also satisfied and that dishonesty was proven beyond a reasonable doubt; indeed it was admitted.

Previous Disciplinary Matters

20. None.

Mitigation

21. The Respondent submitted that in a career of 25 years, he had never had any issues with the SRA or any clients, and that he had always worked hard to uphold the law, treat his clients well, and deal with all matters in an honest manner.

22. At the time of the misconduct, the Respondent was under pressure from work as well as having other compelling external pressures, relating to his family. He submitted that during that time, he had not been sleeping well, and had not felt as in control as he would usually be. He expressed his regret that he simply “brushed it off” and believed that he should have stopped to think about his situation and taken some advice.
23. Whilst vacationing abroad, prior to the deadline, the Respondent continued to deal with work on a daily basis, and was unable to relax and enjoy his holiday. He became so agitated and concerned about work that he cut the holiday short, and returned to the office early. His return to the office was before the deadline for the submission of the application to the FTT, but his erroneous recollection at the time was that the application had already been submitted. He had two other applications pending at the FTT for the same client, and that there was a lot going on at the Property Chamber for that client at that time.
24. The Respondent expressed an overwhelming feeling of deep shame and regret at having let down his clients, the profession and himself, and stated that, even with the benefit of hindsight, he was unable to comprehend why he acted in the way that he did on 27 August 2014 and thereafter.
25. The character references provided to the Tribunal would show that his actions were completely out of character, and further, would demonstrate the high esteem in which he was still held by his previous colleagues and clients.
26. The Respondent highlighted his full co-operation with the Applicant, and further explained that, as soon as he became aware of the seriousness and gravity of his actions, he ceased practice despite being offered a consultancy, as he did not think it would be appropriate to continue to practise in all the circumstances.
27. The Respondent expressed his hope that his mitigation demonstrated that he had taken on board responsibility for his actions, and the effect his actions had on the trust the public places in legal professionals and the reputation of the profession.
28. The Respondent confirmed that he was aware that in cases where dishonesty was alleged and proven, the usual sanction would be a strike off. He asked that the mitigation advanced by him in relation to his personal and work circumstances be considered as exceptional circumstances by the Tribunal when it considered the appropriate sanction.

Sanction

29. The Tribunal had regard to the Guidance Note on Sanctions (4th Edition), and considered carefully the submissions and Agreed Statement of Facts. The Tribunal also took into account the character references provided by the Respondent together with his letter dated 3 January 2016.
30. The Tribunal firstly considered the seriousness of the Respondent’s admitted and proven conduct. The Tribunal found the Respondent to be completely culpable for the breaches; the misconduct having arisen as a direct result of his sole actions. The

Respondent had clearly been motivated by his mistake which he believed would be detrimental to his client; the Respondent was an experienced solicitor, who had taken dishonest steps to, on his submission, protect his clients. The Tribunal found that in acting in the way that he did, the Respondent had caused harm to the profession and the public; as per Coulson J in Solicitors Regulation Authority v Sharma [2010] EWHC 2022 Admin (“Sharma”):

“34. there is harm to the public every time a solicitor behaves dishonestly. It is in the public interest to ensure that, as it was put in Bolton, a solicitor can be “trusted to the ends of the earth”.”

31. The Tribunal found the Respondent’s conduct to be aggravated by his dishonesty which was proven and admitted. The dishonest conduct was deliberate, calculated and repeated. The Tribunal determined that the Respondent knew, or ought to have known, that his conduct was in material breach of his obligation to protect the public and the reputation of the profession.
32. The Tribunal recognised and commended the Respondent on his genuine insight into his misconduct. The Tribunal noted that he had co-operated fully with the Applicant, voluntarily notifying the Applicant of the facts and circumstances giving rise to the misconduct. The Tribunal accepted that the misconduct was of a relatively short duration, and that the Respondent had previously had a successful and unblemished career, and further, that the Respondent was not motivated by personal gain.
33. Given the serious nature of the proven and admitted allegations, the Tribunal considered and rejected the lesser sanctions within its sentencing powers, such as no order, a reprimand or restrictions. The Tribunal had regard to the case of Bolton v Law Society [1994] 2 All ER 486 in which Sir Thomas Bingham stated:

“...Lapses from the required standard (of complete integrity, probity and trustworthiness)...may...be of varying degrees. The most serious involves proven dishonesty....In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced by the solicitor, ordered that he be struck off the roll of solicitors.”
34. The Tribunal was impressed with the mitigation advanced by the Respondent in terms of his genuine insight, his early full and frank admissions and his co-operation with the Applicant. The Tribunal acknowledged that the Respondent was going through a difficult time at the time of the misconduct, however, it did not find that the circumstances of this case were enough to bring it in line with the residual exceptional circumstances category referred to in the case of Sharma. The Tribunal decided that in view of the serious nature of the misconduct, in that it involved admitted dishonesty, the only appropriate and proportionate sanction was to strike the Respondent off the Roll of Solicitors. Whilst the Tribunal accepted that the Respondent had experienced difficult personal circumstances, including health issues (although there was no independent medical report to that effect), the Tribunal did not consider that they constituted exceptional reasons such as to reduce the sanction.

Costs

35. Mr Moran, requested an Order for the Applicant's costs in the total sum of £3,944.50 which had been agreed by the Respondent. Mr Moran provided the Tribunal with a Statement of Costs containing a breakdown of how those costs were incurred. The Respondent confirmed that he agreed the costs.
36. Although the Respondent's livelihood had been removed as a result of the Tribunal's Order, he had not made any submissions in relation to his ability to pay the Applicant's costs or submitted evidence of his means. In the circumstances, the Tribunal did not consider this an appropriate case where there should be any deferment of the costs order. Further, the Respondent had not requested such an Order. The Tribunal Ordered that the Respondent pay costs in the agreed sum of £3,944.50.

Statement of Full Order

37. The Tribunal Ordered that the Respondent, DAVID BENAIM, solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the agreed sum of £3,944.50.

DATED this 28th day of January 2016

On behalf of the Tribunal

L. N Gilford
Chairman