SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11498-2016

BETWEEN:

SOLICITORS REGULATION AUTHORITY	Applicant
and	
MARK BRYON SMEED	Respondent

Before:

Mr E. Nally (in the chair)
Mr P. Booth
Mr S. Hill

Date of Hearing: 5 August 2016

Appearances

Shaun Moran, Solicitor-Advocate, Solicitors Regulation Authority, 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 he:

1.1 On or before 29 January 2014 created and sent correspondence dated 14 November 2013 and 6 January 2014 to the Legal Aid Agency ("LAA") and his client, which was false and/or misleading in breach of any or all of principles 2, 4, 5 and 6 of the SRA Principles 2011 ("the Principles");

1.2 Withdrawn;

1.3 Dishonesty was alleged with respect to allegation 1.1, but dishonesty was not an essential ingredient to prove the allegation.

Documents

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

Applicant

- Application and Statement Pursuant To Rule 5(2) Solicitors (Disciplinary Proceedings) Rules 2007 and Exhibit "LPT" dated 8 April 2016;
- Reply to the Respondent's Answer dated 9 June 2016;
- Applicant's Statement Of Costs As At Date Of Issue On 8 April 2016;
- Email Applicant to Tribunal, cc Respondent, dated 28 July 2016 timed at 17:06;
- Applicant's Statement Of Costs As At Date Of Final Hearing On 5 August 2016.

Respondent

- Respondent's Answer dated 22 May 2016;
- Email Respondent to Tribunal, cc Applicant, dated 27 July 2016 timed at 14:55;
- Respondent's Personal Financial Statement dated 8 July 2016.

Preliminary Matters

3. On 4 August 2016, allegation 1.2 was withdrawn with the consent of the Tribunal given on the papers under the Solicitors (Disciplinary Proceedings) Rules 2007 ("SDPR"), Rule 11(6) on the application of the Applicant by email dated 28 July 2016. The Respondent raised no objection save in respect of costs thrown away.

Factual Background

4. The Respondent was born in 1970 and was admitted to the Roll of Solicitors on 1 November 1994. His name remained on the Roll and his Practising Certificate for the practice year 2015/2016 was free from conditions. From 3 January 2012 until 11 June 2014 he practised as an Assistant Solicitor at Atkins Hope LLP and Atkins Hope Solicitors Ltd ("the Firm") in Croydon.

5. On 7 August 2012, a client obtained legal representation from the Firm. In October 2013 the Respondent applied to the LAA to amend or appeal a public funding certificate refusal in the client's case. He sent an email to the LAA on 29 January 2014 to which he attached a letter dated 14 November 2013 addressed to the LAA in Jarrow. He also attached an email purportedly sent to email address legal.queries@legalaid.gsi.gov.uk on 6 January 2014 timed at 14:22. The Respondent explained in his email of 29 January 2014 that he had previously applied for the certificate to be transferred to his name and this was done but the LAA had requested further information. He said that a response [to the LAA's request for further information] was sent by DX on 14 November 2013, but nothing further had been heard. He further said that he had sent an email to the LAA on 6 January 2014 attaching a copy of the November letter. His letter of 14 November 2013 continued as follows:

> "Understandably dismayed by his contact being frustrated, my client contacted you yesterday only to be told that you have no trace of the aforementioned correspondence. I therefore hasten to reproduce my email to you of 6th January (below) and attach a scan of the November letter and the most recent version of the aforementioned transcript.
>
> In the circumstances, and given the delay that has occurred through no fault of my client, I would be most grateful if this matter could be urgently addressed."

6. The email dated 6 January 2014 included the following statement:

> "We wrote to you on 14th November in response to your request for further information but cannot trace having received a response. We attach that letter along with the updated transcript of communications between the parties…"

7. The email of 29 January 2014 including the email of 6 January 2014 was forwarded to the client with the letter dated 14 November 2013 attached.

8. The client complained to the Firm on 12 May 2014 setting out a chronology of events which, he said, showed that prior to October 2013 little progress had been made in respect of his Legal Aid funding or his case. He stated that when his application was refused by the LAA in October 2013, the Respondent informed him that he would lodge an appeal and he should hear something within 14 days. He said that he did not hear from the Respondent. He ultimately sent an email to the Respondent on 28 January 2014.

9. The Firm investigated the complaint and set out their findings in a letter to the Respondent dated 8 June 2014. The Respondent replied to the Firm on 9 June 2014. He resigned from his employment on 12 June 2014.

10. The Firm reported to the SRA on or about 28 July 2014 that two documents had been falsely created by the Respondent as described above. Both items of correspondence were purportedly sent to the Legal Aid Agency ("LAA") chasing progress on a client matter. On 1 October 2014 the Firm confirmed that the letter dated 14 November 2013 was saved in the Respondent's "Word" folder and was created on 29 January 2014 at 17.32. The Respondent in turn confirmed that he had prepared the

document separately in his “Word” folder. The Firm could not find any record, on its computer system or otherwise, of the 6 January 2014 email having been sent prior to 29 January 2014. The Firm concluded that both documents were created by the Respondent after the client had raised concerns about lack of activity on his case. This conclusion was not disputed by the Respondent. The Firm wrote to the client to apologise and paid compensation.

11. The SRA wrote to the Respondent regarding the allegation on 29 April 2015. In his response dated 9 June 2015, the Respondent stated that he was carrying an increasingly heavy workload at the time and the situation was getting more and more stressful. He was working extremely hard and his caseload, which was primarily public or children work, was starting to come under the strain of court deadlines. He agreed that there had been delay on his part in progressing this client’s matter due to all the other demands on his time. It was against this deteriorating background that he created the letter and email which formed the basis of the allegation. The application was ultimately processed by the LAA and the client’s certificate transferred. The client did not suffer any financial loss and there was no financial impropriety. He had accepted that he had acted wrongly and unprofessionally on that occasion in early 2014 for which he was extremely sorry. The Firm’s thorough internal investigation had not revealed any further cases and no issue arose in terms of the court being misled. His foolish action stemmed from the circumstances in which he found himself at the time and he did not expect the situation to arise again, but if it did he would be able to recognise it and act differently.

12. On 23 September 2015 the SRA decided to refer the Respondent’s conduct to the Tribunal. The proceedings were received at the Tribunal on 11 April 2016.

13. On 9 June 2015 the Respondent admitted the underlying facts and his misconduct as alleged. There was no dispute that:

- The letter dated 14 November 2013 was created by the Respondent on 29 January 2014;

- In writing to the LAA stating that a response was sent by DX on 14 November 2013 he knew that the letter was not created on that date but on 29 January 2014;

- In writing to the LAA on 29 January 2014 the Respondent knew that the LAA would have no trace of the November 2013 correspondence because it had not been sent;

- The Respondent knew when sending the email to the LAA dated 6 January 2014 attaching the November 2013 correspondence that the correspondence had not been sent;

- The Respondent accepted that he created the letter dated 14 November 2013 and the email dated 6 January 2014 as an attempt to avoid a formal complaint by the client and was not thinking sensibly.

14. The Chairman invited the Respondent to respond to the Applicant's submissions. The Respondent confirmed that he had admitted what became allegation 1.1 to the SRA on 9 June 2015 and in his Answer in these proceedings on 22 May 2016. The papers before the Tribunal were correct for those purposes. The Respondent was aware of the relevant two-limb test for dishonesty and did not resile from his admission, being fully aware of the likely consequences.

Witnesses

15. None.

Findings of Fact and Law

16. 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.

17. **Allegation 1.1 - On or before 29 January 2014, the Respondent created and sent correspondence dated 14 November 2013 and 6 January 2014 to the LAA and his client, which was false and/or misleading in breach of any or all of Principles 2, 4, 5 and 6 - dishonesty alleged**

17.1 The Tribunal retired to deliberate. The Respondent admitted the underlying facts and his misconduct as alleged. He admitted that he had breached: Principal 2 in that he had failed to act with integrity; Principle 4 in that he had failed to act in the best interests of his client; Principle 5 in that he had failed to provide a proper standard of service to his client; and, Principle 6 in that he had failed to behave in a way that maintains the trust the public places in him and in the provision of legal services. The Respondent admitted what became allegation 1.1 in his response dated 9 June 2015 to the SRA's letter dated 29 April 2015 informing him of the allegations. In his Answer dated 22 May 2016 the Respondent admitted allegation 1.1 in its entirety and that his conduct in January 2014 met both the objective and subjective limbs of the test for dishonesty (Bultitude v Law Society [2004] EWCA Civ 1853 and Twinsectra Ltd v Yardley and Others [2012] UKHL12). He further confirmed these admissions by email to the Tribunal dated 27 July 2016.

17.2. The underlying facts as pleaded in the Rule 5 Statement and supported by the documentary evidence forming Exhibit "LPT" were found by the Tribunal to be made out.

17.3 The Tribunal applied the facts to the admitted breaches of Principles 2, 4, 5 and 6 and found those breaches proved beyond reasonable doubt.

17.4 Having scrutinised the papers carefully, and in the light of the Respondent's unequivocal admission to allegation 1.1 including the ancillary allegation of dishonesty, the Tribunal accepted those admissions and found the allegation with dishonesty proved beyond reasonable doubt. In these circumstances it was difficult to identify a situation in which the fabrication of documents was not dishonest. The Respondent's admission was entirely realistic and proper.

Previous Disciplinary Matters

18. None.

Mitigation

19. The Chairman invited mitigation from the Respondent, in particular on the residual category of dishonesty cases where exceptional circumstances could be substantiated by the Respondent in mitigation of the otherwise almost inevitable sanction of striking off the Roll.

20. The Respondent felt compelled to mention his frustration at the length of time that it had taken for the Applicant to bring the proceedings. It was more than 9 months after the report to the SRA by the Respondent's former employer before the investigation commenced. It was a further 3½ months following the Respondent's admission on 9 June 2015 before the SRA made the decision that the case should be referred to the Tribunal. It then took over 6 months for the proceedings to be issued by the SRA at the Tribunal. It was now more than 2½ years since the incident and nearly 14 months after the Respondent first made his admission of misconduct. This was in circumstances where it was suggested that the Respondent was a risk to the public and ought to have his name removed from the Roll. One might consider the SRA's likely view when receiving a complaint about a solicitor who had taken that long to progress a case. The delay had added to the significant emotional and financial pressure that the Respondent and his family had laboured under for some time and was a sanction in itself.

21. The Respondent had acknowledged that what he had done was wrong and amounted to dishonest action and he repeated his apology. He accepted that the Tribunal's Guidance Note on Sanctions was clear on the consequence of a dishonesty finding. Strike off seemed a draconian response to what he did given the circumstances and the minimal detrimental effect on anyone else, including his client. All the lawyers he had spoken to had the same reaction. He referred the Tribunal to the mitigation in his 9 June 2015 response to the SRA which covered all the points that he wished to make.

22. The Respondent had provided a "Personal Financial Statement" dated 8 July 2016, the contents of which the Tribunal noted. His financial circumstances had not changed in the interim. The Respondent has been seeking employment since 11 April 2016.

23. The Chairman recorded the Tribunal's appreciation of how difficult it was for the Respondent to make submissions in these circumstances. The Tribunal respected the Respondent for having the courage to do so.

Sanction

24. The Tribunal referred to its Guidance Note on Sanctions (4th edition) December 2015 when considering sanction. It was the function of the Tribunal to protect the public from harm, and to maintain public confidence in the reputation of providers of legal services for honesty, probity, trustworthiness, independence and integrity. The Tribunal was required to assess the seriousness of the misconduct, then to keep in mind the purpose for which sanctions are imposed, and then to choose the sanction

which most appropriately fulfils that purpose for the seriousness of the conduct in question (per Fuglers and Others v Solicitors Regulation Authority [2014] EWHC 179). In deciding what sanction to impose the Tribunal has regard to the principle of proportionality, weighing the interests of the public with those of the practitioner.

25. In the Tribunal's considered opinion, the Respondent's admission was entirely proper and demonstrated that he had reflected on his position, and had insight and understanding of the circumstances of his misconduct.

26. As stated at paragraph 43 of the Tribunal's Guidance Note on Sanctions, a finding of dishonesty will almost inevitably lead to striking off the Roll, save in exceptional circumstances. "Exceptional circumstances" are limited in scope and fact-specific. The Tribunal was required to have regard to the overall facts of the misconduct, and in particular the effect that allowing the Respondent's name to remain on the Roll will have upon the public's confidence in the reputation of the legal profession (per Solicitors Regulation Authority v Emeana and Others [2013] EWHC 2130 (Admin.)). The Tribunal had to assess properly the extent of the dishonesty involved and its impact on the character of the Respondent and the reputation of the profession.

27. The Tribunal read with close attention the Respondent's mitigation in his letter to the SRA dated 9 June 2015. The Respondent had shown insight and courage in his full and frank admission at an early stage and his acceptance that the sanction likely to be imposed by the Tribunal was one of striking off. His mitigation submissions were heartfelt. The misconduct having been committed, the Respondent engaged promptly with the process with his former employers, the SRA, and the Tribunal's administrative office. The Respondent had shown considerable remorse for his actions. He had apologised on more than one occasion. As a matter of personal mitigation, the Respondent appeared to the Tribunal to be acutely aware of the catastrophic impact on his personal life and professional career. His representations to the Tribunal were respectful and dignified. This case involved two separate incidents in an otherwise unblemished long career. These factors weighed heavily upon the Tribunal when considering whether exceptional circumstances applied to the facts of this case.

28. The Chairman had invited the Respondent to make submissions on "exceptional circumstances". It was to the Respondent's credit that his representations were succinct and did not seek to pass blame to others or to exaggerate. He highlighted the delay in the SRA's investigation of the original complaint and in bringing these proceedings before the Tribunal. There was reason for the Tribunal to share his concern, particularly in relation to the length of time taken from his admissions on allegation 1.1 (as it became) to the SRA on 9 June 2015 until 11 April 2016 when proceedings were received at the Tribunal. There was no obvious explanation for the delay from 28 July 2014 when the incident was reported by the Firm to the SRA and 11 April 2016. This understandably increased the pressure and uncertainty on the Respondent and those around him.

29. This was a sad case. The Tribunal had listened carefully to the Respondent's submissions and respected the Respondent for making them. The Respondent's comments about the delay in the proceedings being brought to the Tribunal were dealt with in paragraph 20 above and were well made. It was regrettable that the case had

hung over the Respondent for so long leading to a stressful and difficult time for him and his family. The Tribunal noted, again with respect, that the Respondent had engaged thoroughly and comprehensively with the SRA, the regulator, and with the Tribunal. He attended the hearing supported by his wife. He had not sought to avoid responsibility for his conduct leading to the allegation. The Respondent had made appropriate admissions as promptly and properly as was possible in all the circumstances. He had expressed in his written submissions and to the Tribunal during the hearing what the Tribunal perceived to be genuine remorse, shame, and appropriate apologies for the dishonest acts that had led to his unhappy appearance before the Tribunal. This set the scene for the deliberations.

30. The Respondent had not previously appeared before the Tribunal having practised as a solicitor for 21 years (on the face of the papers). The Tribunal carefully considered whether there was any alternative in the range of potential sanctions open to the Tribunal to the ultimate sanction for dishonesty of striking off the Roll. The Tribunal considered, in particular, whether any exceptional circumstances might apply to the facts of this case that would cause the Tribunal not to determine that strike off was appropriate. However, with some sadness, the Tribunal could not find any such applicable circumstances in this case. The Tribunal's sympathy towards the Respondent, expressed in terms above, had to be counterbalanced against the dishonest conduct found proved against the Respondent which was inexcusable and which went to the core of the trust and confidence that the public are entitled to expect from a solicitor and the solicitors' profession generally. The Tribunal therefore felt that no lesser sanction was demanded than that the Respondent's name be struck off the Roll of Solicitors.

31. The Tribunal's remit and jurisdiction ceased at the point when it made its determination. As stated above, the Tribunal had considered the case overall. Whilst ultimately a matter for the SRA and the Respondent to consider whether there was a place for the Respondent in the legal profession, the Tribunal believed that the risks that had led to the dishonest acts might be capable of control with the implementation of protective measures if an appropriate firm were found to welcome the Respondent into their employment with supervision and other appropriate restrictions and with the approval of the SRA. The Chairman made these remarks on behalf of the Tribunal without any control over the process or any particular expectation that the SRA or the Respondent may choose to go down that path. The Tribunal merely highlighted this as an option for the parties to consider. The Chairman was sure that these remarks would be reflected upon by those with responsibility for those decisions if or whenever the situation arose. Approved employment, albeit not as a solicitor, within a legal entity or law firm was a possibility provided that the Respondent could obtain appropriate support from a potential employer. The Tribunal was mindful that the Respondent was in his mid-40s with long years ahead of him, all being well, when he would wish to explore employment opportunities. It seemed to the Tribunal that he had something to offer to the public and providers of legal services generally subject to there being practical, measured safeguards in place.

Costs

32. The Applicant applied for costs. The Statement of Costs as at the date of the final hearing totalled £5,351.40. Following constructive discussions between Mr Moran and the Respondent, fixed costs had been agreed at £3,500. The Statement of Costs was prepared on a conservative basis to avoid duplication of work between the SRA in-house Solicitor and Mr Moran as the Solicitor-Advocate presenting the case. Allegation 1.2 was withdrawn. The substantive hearing was relatively brief. The Respondent had cooperated fully throughout the investigation and proceedings which had reduced costs overall. In all the circumstances the Applicant considered the agreed figure to be reasonable. The Tribunal was invited to assess the agreed costs summarily at £3,500. The Respondent confirmed that, whilst he had been concerned about the costs total itemised on the Statement, he was content with the agreed figure.

33. The Respondent's engagement with disciplinary process, including in front of the Tribunal, had had an appropriate downward impact on the costs of the proceedings. It was satisfying for the Tribunal to observe that the costs had been downwardly assessed and agreed. On that basis the Tribunal had summarily assessed the costs as agreed at £3,500, to be paid by the Respondent to the Applicant.

Statement of Full Order

34. The Tribunal ORDERED that the Respondent, MARK BRYON SMEED, 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 summarily assessed and fixed in the sum of £3,500.

Dated this 11th day of August 2016
On behalf of the Tribunal

E. Nally
Chairman