SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11504-2016

BETWEEN:

AINUL HOQUE Applicant

and

SOLICITORS REGULATION AUTHORITY Respondent

Before:

Mr R. Hegarty (in the chair)
Mrs C. Evans
Mr S. Howe

Date of Hearing: 1st & 2nd December 2016

Appearances

The Appellant appeared in person and was not represented.

Ms Heather Emmerson, Counsel of 11 King's Bench Walk, Temple, London EC4Y 7EQ instructed by Bevan Brittan LLP, King's Orchard, 1 Queen Street, Bristol BS2 0HQ for the Respondent.

APPEAL/REVIEW JUDGMENT

Documents

1. The Tribunal reviewed all the documents including:

Agreed Hearing Bundle comprising:

- Appellant's Notice of appeal and application for review
- Respondent's Response to notice of appeal and statement in response to an application for a review dated 8 June 2016 with attachments comprising:
- Papers before the Adjudicator
- Exhibit 3 to the Appellant's comments further to disclosure of the Regulatory Supervisor's Report
- Decision of the Adjudicator dated 18 March 2016
- Report of the Regulatory Supervisor dated 1 February 2016 with draft decision and documents appended to the Supervision Report
- Letter from the Regulatory Supervisor to the Appellant dated 23 November 2015

Joint Authorities Bundle

The Tribunal also reviewed:

- CILEx Code of Conduct (relevant principles)

Appellant

- Written submissions handed in on 1 December 2016
- Judgment in the case of Squier v GMC [2015] EWHC 299 (Admin)
- Judgment in the case of Scott v SRA [2016] EWHC 1256 (Admin)

Respondent

- Skeleton argument on behalf of the Respondent drafted by Ms Emmerson dated 21 November 2016
- Respondent's schedule of costs dated 1 December 2016

Introduction

2. The Appellant, Ainul Hoque a clerk:

- appealed under section 44E of the Solicitors Act 1974 (as amended) ("the Act" or "SA1974") against a decision of an Adjudicator of the Solicitors Regulation Authority ("the Respondent") dated 18 March 2016 made pursuant to her powers under section 44 D(2)(a) of the Act; and

- applied for a review under section 43(3)(a) of the Act in respect of an order made by the same Adjudicator on the same date under section 43(2) of the Act.

3. The grounds for appeal/application for review were summarised by the Appellant in his Notice of Appeal and Application for review as follows:

   A. The Adjudicator was wrong to conclude that [the Appellant] created a witness statement without his firm's approval, and to find that he had acted in breach of Principles 1, 2 and 6 of the SRA Principles 2011;

   B. The Adjudicator was wrong to conclude that in failing to give credible evidence [the Appellant] had acted in breach of Principles 1, 2 and 6 of the SRA Principles 2011 and failed to achieve Outcome 5.1 of the SRA Code of Conduct 2011;

   C. The Adjudicator was consequently wrong to issue a rebuke under section 44 D(2)(a) SA1974 based on those conclusions;

   D. The Adjudicator was consequently wrong to issue a section 43(2) SA1974 order based on those conclusions, and it should be quashed;

   E. Alternatively, if the Adjudicator was not wrong to reach those conclusions, the Adjudicator was wrong to issue a section 43(2) SA1974 order in any event, given the nature of the acts or defaults in question.

   For the avoidance of doubt, it is not suggested that the decision of the Adjudicator to issue a rebuke at all was incorrect, as [the Appellant] in his representations made on 16 February 2016, accepted that he had acted in breach of Principles 4 and 6 of the Code, and failed to achieve Outcome 4.1 of the SRA Code of Conduct 2011, consequent to his sending of client information to his personal e-mail account. However the stated conclusions for the rebuke, including the two disputed conclusions, were then repeated verbatim and used as the basis for the decision to issue an order under section 43(2) SA1974. It is those conclusions which are therefore both subject to the appeal against the section 44D(2)(a) SA1974 rebuke, and the basis for the application to review and quash the section 43(2) SA1974 order.

The Legal Framework

4. The relevant sections of the Solicitors Act, the Civil Procedure Rules and other relevant rules and the SRA Code of Conduct are at Appendix 1 to this Appeal Judgment. The procedure for the hearing of the appeal was governed by the Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 11 ("the Appeal Rules") which came into force on 1 October 2011.

5. The Tribunal had power under Section 44E to make such order as it thought fit, and such an order might in particular:

   (a) affirm the decision of the Society;
   (b) revoke the decision of the Society;
   (c) ...
   (d) …
   (e) in the case of an employee of a solicitor, contain provision for any of the matters mentioned in section 47(2E);

(f) make such provision as the Tribunal thinks fit as to payment of costs.

6. The procedure for the review of the section 43 order was governed by section 43(3)(a). On the review of an order under subsection (3) the Tribunal might order:

(a) the quashing of the order;
(b) the variation of the order; or
(c) the confirmation of the order;

and where in the opinion of the Tribunal no prima facie case for quashing or varying the order is shown, the Tribunal might order its confirmation without hearing the applicant. Section 43(4) provided that the Tribunal, on the hearing of any application under this section, might make an order as to the payment of costs by any party to the application.

The Standard of Proof

7. By virtue of the decision of the Administrative Court in the case of SRA v SDT and Arslan and the Law Society (Intervening Party) [2016] EWHC 2862 (Admin) heard on 8 and 9 November 2016, it was not disputed following the comments of Mr Justice Leggatt that the standard of proof to be employed under section 44D was the civil standard: "because the SRA had a statutory obligation to apply that standard…" Similarly it was not disputed that:

> "the same is true when the Tribunal is reviewing an order made by the SRA under section 43. There are no rules which dictate the standard of proof which the SRA must apply when finding facts for the purpose of deciding whether to make such an order. But in my view it is plainly appropriate for the SRA to apply the civil standard for that purpose…"

Preliminary Issues

8. The Chairman drew to the attention of Ms Emmerson for the Respondent that there appeared to be a discrepancy in the Decision of the Adjudicator document. In section 1 Allegation 2 it referred to breach of Principles 1, 2 and 6 of the SRA Principles 2011 while the Findings section referred to breach of SRA Principles 1, 4 and 6. Ms Emmerson submitted that there appeared to be a typographical error in the latter; the reference should been to Principle 2 rather than 4. The mistake had then been replicated in the Respondent's response and Skeleton argument. The Tribunal also drew Ms Emmerson's attention to the Report of the Regulatory Supervisor dated 1 February 2016. It referred in the third allegation to Outcomes 10.1 and 10.4 and Ms Emmerson confirmed that this was also an error. The Adjudicator had correctly referred in her recital of the allegations to Outcome 4.1.

Relevant Background

9. At all material times, the Appellant was employed as a paralegal by Equity Solicitors ("the firm"), a partnership regulated by the Respondent. At the material time the partnership had two partners Mr Z and Miss B.

10. On 30 January 2013, the Appellant made a claim against the firm in the Employment Tribunal for constructive unfair dismissal, unauthorised deduction from wages and holiday pay. The issue to be determined by the Employment Tribunal was whether the parties had reached a concluded agreement in relation to commission and/or referral payments, whether the firm had breached this agreement and if so whether this fundamental breach had led to the Appellant's resignation.

11. The Appellant gave evidence in the course of the Employment Tribunal proceedings in support of his claim. Evidence was filed on behalf of the firm in response to the claim, including evidence relating to allegations about the conduct of the Appellant during the course of his employment.

12. In a judgment dated 30 August 2013, Employment Judge Kearsley dismissed the Appellant's claim, made a number of findings in respect of his conduct and made an order for costs against him. In particular:

- The Judge held that he was not satisfied that the Appellant was an honest witness or that he gave an honest account.

- The Judge relied on five examples of "dishonesty" to support his conclusions including:

    - A document headed "witness testimony" relating to the Appellant's wife sent on behalf of the firm without their knowledge or authority which was drafted, in part, by the Appellant.

    - A document created by the Appellant on headed notepaper belonging to Mr A of A Solicitors.

    - The transfer of witness statements, medical reports and other documents belonging to the firm to the Appellant's personal e-mail account.

    - A statement by the Appellant in a claim form that he had found paid employment whereas in fact he was working on a voluntary basis.

    - An e-mail exchange on 22 October with the Appellant's wife concerning a decision to meet up with another solicitor's firm to set up a PI department.

- The Judge referred to these incidents as "evidence of actions by a dishonest individual".

- The Judge reached the conclusion that the Appellant was "not telling the truth when he asserts that a contract was agreed upon between the parties [on] any of the dates on which he now relies and accordingly his claims fail".

- The Judge made an order for costs against the Appellant on the basis that "the dishonesty of the claimant on the other hand was central to the case. This is not a claim w[h]ere there has been some peripheral dishonesty… He has given dishonest evidence to advance his claim".

- The Judge found that the Appellant had lied to the Tribunal and given dishonest evidence.

13. The Appellant was subject to disciplinary proceedings instituted against him by the Chartered Institute of Legal Executives ("CILEx") arising from the findings of the Employment Tribunal. As set out in the Order of the CILEx Tribunal, the initial charge against the Appellant was:

> "Failing to uphold the rule of law and the impartial administration of justice and/or failing to behave with honesty and integrity. Contrary to Principle 1 and/or Principle 3 of the CILEx Code of Conduct 2010.
>
> The Particulars of the charge were:
>
> Between on or around 30 January 2013 and 2 August 2013 [the Appellant] a Fellow of CILEx, gave dishonest evidence to support a claim he had issued in the Employment Tribunal against his former employer, [the firm] on or around 30 January 2013."
>
> In a "Reasons for Judgment" document dated 30 August 2013, the Employment Tribunal Judge found that during the employment tribunal proceedings [the Appellant] had been a dishonest witness and had given dishonest evidence in support of his claim in that he:
>
> 1. Created or assisted in the creation of a document entitled "Witness Testimony" dated 23 May 2012 purporting to come from [the firm] but which was in fact without their knowledge or authority, and/or asserted in evidence before the said Tribunal that the document was created by his wife [Mrs RB]; further or alternatively;
>
> 2. Asserted in evidence before the said Tribunal that an unsigned letter purporting to come from the firm [A] Solicitors and dated 27 September 2012 was prepared by such firm when in fact it was created by him or alternatively;
>
> 3. Asserted in evidence before the said Tribunal that a number of witness statements, medical reports another client documents belonging to [the firm] had been copied or transferred to his personal e-mail account purely as precedents for his own private use when in fact such documents were confidential, had been copied or transferred without authority and/or for the purposes of business use (or the hope thereof) elsewhere; further or alternatively;
>
> 4. Asserted in evidence before the said Tribunal that he was then working on a voluntary basis when in his Claim Form (in the said proceedings) stated that he had found paid employment; further or alternatively;
>
> 5. Asserted untruthfully in evidence before the said Tribunal that a contract was agreed between the parties to the proceedings."

14. At the hearing on 1 December 2015, CILEx agreed to amend the charge on the basis that it would be admitted by the Appellant. The admitted amended charge was:

> "Failing to uphold the rule of law and the impartial administration of justice and/or failing to maintain high standards of professional and personal conduct, contrary to Principle 1 and/or Principle 2 of the CILEx Code of Conduct 2010"

The particulars of the amended charge, which were admitted by the Appellant, were as follows:

> "1. Assisted without the knowledge or authority of Equity Solicitors/its partners, in the drafting of a document bearing the name of that firm and entitled "witness testimony" in support of his wife [Mrs RB].
>
> 2. Sent witness statements, medical reports and other confidential documents belonging to Equity Solicitors (and/or their clients) from his firm e-mail account to his personal e-mail account, without the permission of Equity Solicitors or such clients.
>
> 3. Submitted an "ET1" form in support of a claim for constructive dismissal against his former employers without clarifying his then current employment and remuneration status, creating a potentially misleading position in the proceedings.
>
> 4. Brought in the Employment Tribunal a claim for constructive dismissal against his former employers, Equity Solicitors, without providing sufficient documentary evidence in support of his claim, in a potentially misleading way."

15. The CILEx Panel imposed a reprimand and a warning on the Appellant together with an order for costs in the sum of £2,000.

16. The Appellant's conduct was reported to the Respondent by the firm on 11 September 2013. The Respondent wrote to the Appellant seeking an explanation of his conduct on 21 February 2014, 28 May 2015 and 23 November 2015. The Appellant initially denied all the allegations.

17. On 1 February 2016, the Appellant was sent a copy of the Regulatory Supervisor's report which formulated five allegations against him:

Allegation 1

That by failing to give honest and credible evidence during an employment hearing which took place on 1 and 2 August 2013, he acted in breach of Principles 1, 2 and 6 of the SRA Principles 2011 and failed to achieve Outcome 5.1 of the SRA Code of Conduct 2011.

Allegation 2

That by assisting in the drafting and/or preparation of a witness statement dated 23 May 2012, purportedly from the firm in support of his wife Mrs RB, without the knowledge of the firm/its partners, the Appellant acted in breach of Principles 1, 2 and 6 of the SRA Principles 2011.

Allegation 3

That by sending witness statements, medical reports and other confidential documents belonging to the firm from his firm e-mail account to his personal e-mail account, without the permission of the firm or the relevant clients, the Appellant acted in breach of Principles 4 and 6 of the SRA Principles 2011 and failed to achieve Outcome 4.1 of the SRA Code of Conduct 2011.

Allegation 4

That by failing to inform the Respondent about the findings made against him by the judgment of Employment Judge Kearsley, he acted in breach of Principle 7 of the SRA Principles 2011 and failed to achieve Outcomes 10.1 and 10.4 of the SRA Code of Conduct 2011.

Allegation 5

That having made certain admissions in relation to the CILEx proceedings against him, he has sought to resile from the same and/or has acted contrary to them. In doing so, the Appellant acted in breach of Principles 1, 2, 6 and 7 of the SRA Principles 2011.

18. By letter dated 16 February 2016, the Appellant set out his formal response to the letter of 1 February 2016.

19. The Adjudicator was additionally asked by the Respondent to make a dishonesty finding against the Appellant. Having considered the report of the Regulatory Supervisor, the Appellant's response to that report and supporting documents, the Adjudicator made the following findings:

> "2. I find that [the Appellant]:
>
> 2.1.1 Failed to give credible evidence during an employment tribunal hearing which took place on 1 and 2 August 2013. This is in breach of SRA Principles 1, 2 and 6 and a failure to achieve Outcome 5.1 of the SRA Code of Conduct.
>
> 2.1.2 Assisted in the drafting and/or preparation of a witness statement dated 23 May 2012, purportedly from [the firm] in support of his wife [Mrs RB], without the knowledge of [the firm]/its partners. He admits this allegation. This is in breach of SRA Principles 1, 4 [2] and 6.

2.1.3 Sent witness statements, medical reports and other confidential documents belonging to [the firm] from his firm's e-mail account to his personal e-mail account, without the permission of [the firm] or the relevant clients. He admits this allegation. This is in breach of SRA Principles 4 [Principle 2] and 6 and a failure to achieve Outcome 4.1 of the SRA Code of Conduct.

2.2 I make no findings regarding [the Appellant's] failure to notify the [Respondent] of the Employment Tribunal outcome or any retraction of his admissions in the CILEx proceedings.

2.3 I find that the [Appellant] who is or was involved in a legal practice (as defined by section 43(1)A) of the Solicitors Act 1974 but is not a solicitor, has occasioned or been a party to, with or without the connivance of a solicitor, an act or default in relation to a legal practice which involved conduct on his part of such a nature that in the opinion of the Society, it would be undesirable for him to be involved in a legal practice in all of the ways set out in paragraph 3.3.below."

Paragraph 3.3 recited the standard terms of a section 43 order as set out below.

20. The Adjudicator recorded her decision as follows:

"I have decided as follows:

3.1 To stand over the decision in relation to the allegation of dishonesty.

3.2 To rebuke [the Appellant] pursuant to rules 3.1(a) to (c) of the SRA Disciplinary Procedure Rules 2011.

3.3 To make a section 43 order that with effect from the date of the letter or e-mail notifying [the Appellant] [address] of this decision:

(i) no solicitor shall employ or remunerate him, in connection with his/her practice as a solicitor,

(ii) no employee of a solicitor shall employ or remunerate him, in connection with the solicitor's practice,

(iii) no recognised body shall employ or remunerate him,

(iv) no manager or employee of a recognised body shall employ or remunerate him in connection with the business of that body,

(v) no recognised body or manager or employee of such a body shall permit him to be a manager of the body; and

(vi) no recognised body or manager or employee of such a body shall permit him to have an interest in the body

except in accordance with a Society permission.

3.4 The section 43 order in respect of [the Appellant] shall be published.

3.5 [The Appellant] is ordered to pay the sum of £600 in relation to the [Respondent's] costs of investigating the matter pursuant to the SRA Cost of Investigations Regulations 2011…"

The Appeal/Application for Review

Submissions by the Appellant

21. The Appellant referred to the chronology of events leading to the Adjudicator's Decision. He had brought a claim for constructive dismissal against his former employers and there had been a finding of dishonesty by the Employment Judge. His former employers reported him to the Respondent and on 1 February 2014 the Respondent wrote to him setting out relevant parts of the judgment and introducing new allegations. He made reference to an issue concerning a letter in respect of Mr A but it was clarified by Ms Emmerson that this did not form part of the allegations. The Appellant submitted that he replied to the allegations and the Respondent wrote back to him on 28 May 2015 informing him that it was now concentrating on the Employment Tribunal judgment rather than the A matter. The Respondent concentrated particularly on that part of the judgment headed "Examples of dishonesty" aside from where it referred to the matter of Mr A. On 23 November 2015, the Respondent had written to the Appellant giving what the Appellant submitted were a new set of allegations based on the remaining examples of dishonesty referred to by Judge Kearsley. On the second page of the letter it was stated:

> "The examples of your dishonest conduct referred to by the Judge are set out below.
>
> Witness testimony for [Mrs RB]
>
> …
>
> E-mails to your personal account
>
> …
>
> Failure to inform SRA
>
> …"

The Appellant submitted that the Respondent concentrated on the first of those two aspects. He submitted that the letter did not contain any allegation about his employment status. The Appellant was concerned about what he regarded as the discrepancy in respect of the allegations he faced and he had pursued the matter with the Respondent. He referred to an email dated 23 November 2015 which he had

produced on the morning of the hearing and which been added to the hearing bundle in which the Regulatory Supervisor stated;

> "I can confirm that the allegations in my letter attached are the only allegations being pursued by the [Respondent].
>
> I look forward to receiving your response to the five allegations and three questions put to you."

The letter to which she referred was the letter of the same date 23 November 2015 quoted above. The Tribunal pointed out that the following page of the letter after the quotation regarding the Judge's list of what he regarded as examples of dishonesty contained a list of the five allegations.

22. The Appellant submitted that in the meantime the matter had come before the CILEx Tribunal on 1 December 2015. He submitted that the case of Squier v GMC [2015] EWHC 299 (Admin) was relevant and quoted from paragraph 43 of the judgment where it was stated:

> "The crucial point about the role of the disciplinary tribunal is that it should be the decision-maker on the issues and evidence before it; it should not adopt the decision of another body, even of several judges, as a substitute for reaching its own decision on the evidence before it, on the different issues before it…"

This was relevant in respect of re-litigating what had been heard in the Employment Tribunal with the addition of an allegation of dishonesty. The Appellant submitted that witnesses attended and on the day of the hearing the prosecution decided that it could not go ahead and sought offers from the Appellant's representatives in this regard with the result that his Counsel drafted a set of admissions to the allegations brought in the CILEx Tribunal. The Appellant referred the Tribunal to the original charges brought against him in the CILEx Tribunal and the amended charges which are set out in the background to this judgment. The Appellant submitted that the original allegations to the CILEx Tribunal were quite different from those which he admitted. That Tribunal imposed a reprimand upon him and a warning in respect of his future conduct based on the spirit of the admissions which he had made. The CILEx Tribunal stated:

> "…there was no evidence to suggest that [the Appellant's] continued practice poses a risk to the public or consumer interests, there was no loss to clients, [the Appellant] had no prior conduct matters recorded against him and made no personal gain from the misconduct."

23. The Appellant submitted that he had written to the Respondent after the hearing seeking an extension of time so he could obtain legal advice about how to proceed. The Respondent gave him an extension and he asked for another one as his Counsel could not undertake the advice by the date set. The Respondent was unable to give him that extension and so he sent in a denial of the allegations including of dishonesty. He then received the Regulatory Supervisor's letter and the bundle which had been forwarded to the Adjudicator. He subsequently received the Adjudicator's decision.

Allegation 1 - Ground B of the Appeal

24. The Appellant submitted that he disagreed that he acted in breach of the relevant SRA Principles 1, 2 and 6. He denied that he intended to deceive the Employment Tribunal and referred the Tribunal to his letter to the Regulatory Supervisor of 16 February 2016 which he confirmed was very similar to the written submissions which he had provided at the commencement of this hearing. He submitted that as he set out in the letter at no stage did the CILEx Tribunal find that he had fabricated or altered documents; there was no fabricated or altered evidence presented by him in support of his claim. The allegation in respect of Mr A was included by Judge Kearsley as one of dishonesty but the Appellant submitted that it was now known that that was no longer true. He submitted that two bodies had investigated that allegation and found that it could not be preceded with. He denied that he attempted to deceive or knowingly mislead the Employment Tribunal.

25. The Tribunal pointed out that Employment Judge Kearsley found the Appellant's account implausible. In both his letter of 16 February 26 and his written submissions to this Tribunal the Respondent asked this Tribunal to take account of the nature of the proceedings in the Employment Tribunal. He was bringing a claim against his former employers for constructive dismissal. He was alleging that they had breached an oral agreement between them. He provided some piecemeal documentary and audio evidence in support of his claim of an oral agreement and the dispute at the Employment Tribunal was regarding the interpretation to be placed upon them. The burden was on him to prove that claim to the requisite standard and it was the finding of the Judge that he failed to do so. The Appellant submitted that it was his case that it could not be that in simply losing a civil case he was in breach of the SRA Principles otherwise, no solicitor or other SRA regulated person could ever make any sort of personal claim for fear that, if they should lose, they would not only be ordered to pay costs etc but would also be the subject of disciplinary action brought by their regulator. The Appellant accepted that if one conducted the proceedings dishonestly, for example by submitting provably fabricated documents, then that would be a proper matter for disciplinary action. However that was simply not the case here.

26. The Appellant disagreed with the findings of the Employment Judge regarding his oral testimony. He submitted that the Judge did not state what legal test if any for dishonesty he applied. In particular he did not state that he had applied the test in the case of Twinsectra Ltd v Yardley [2002] UKHL 12 and did not use any terminology that indicated that he had. Obviously the Employment Judge took a dim view of the Appellant and he submitted that he was not properly represented. He was not an employment law expert and he employed a very junior barrister who could not present his case in the way that he wanted. He felt that he the Appellant had performed poorly in giving evidence; he was under a great deal of stress and underprepared for the hearing and not able properly to answer the allegations that his former employers made against him. He was now able properly to answer the allegations as he submitted he had demonstrated in the CILEx proceedings and in his responses to the Respondent. In the amended charges the allegations of dishonesty was specifically withdrawn regarding the findings of not giving credible evidence. He maintained there was an oral agreement between him and his employers and so he did not act dishonestly in giving evidence to that effect. The Judge found he did not discharge the burden of proof regarding that specific issue mainly because the Judge formed a view

of his credibility based on collateral matters raised by his former employers and his oral testimony when asked about their evidence. He submitted that those matters formed the remainder of the allegations and he did not act dishonestly regarding them; the Judge had been mistaken about that. The Tribunal emphasised to the Appellant that the finding of the Adjudicator did not include any finding of dishonesty. The finding was that he had failed to give credible evidence. The Appellant was concerned that the Adjudicator found that he lacked integrity (breach of SRA Principle 2). He submitted that while lack of integrity and dishonesty were not identical they were clearly related. The CILEx Tribunal did not conclude that his integrity was in question; if it had done so it had other options available to it. The CILEx Code was similar to that of the Respondent and a requirement for integrity formed part of it.

27. The Appellant emphasised that the numbers allocated to the Principles by CILEX differed from those of the Respondent. In the SRA Code Principle 2 related to integrity but Principle 2 in the CILEx Code was a requirement to:

> "Maintain high standards of professional and personal conduct and justify public trust in you, your profession and the provision of legal services."

The original charge in the CILEx proceedings included acting contrary to Principle 3 of the CILEx Code which required the Appellant to "Behave with honesty and integrity" but the amended charge only referred to acting contrary to Principle 1 and/or Principle 2.

28. The Appellant concluded that in the absence of any specific finding of dishonesty either by giving dishonest evidence or by exhibiting false documents, the finding of the Adjudicator was disproportionate and outside the range of reasonable responses. The imposition of a section 43 order meant that he could not work for other firms of solicitors and this was untenable legally and on public policy grounds. He referred the Tribunal to his Grounds of Appeal which he said were more succinct. There he stated that he accepted that he gave evidence in support of his claim for constructive dismissal and failed to prove it to the required standard. He accepted that in doing so his evidence had the potential to mislead but no more. He did not accept that it was in fact misleading. He was in a situation where his recollection of events differed from those of his erstwhile employers. He failed to discharge the burden of proof. He submitted in his Grounds of Appeal that it was a moot point whether bearing in mind the state of the evidence if the onus had been on his former employers to prove their account whether they could have discharged that burden. He submitted that the confidence the public had in the profession's ability to regulate itself would be damaged by the revelation that the solicitors' profession could and would take such punitive action against those involved in claims against their members over and above the cost consequence of losing such claims. In the absence of any specific finding that the Appellant acted dishonestly either by giving lying evidence or exhibiting false documents, the finding of the Adjudicator was disproportionate and outside the range of reasonable responses.

29. The Appellant also referred to the Adjudicator's findings in relation to Allegation 1 where she said at paragraph 6.1.1:

> "[The Appellant] admitted in the CILEx proceedings that in submitting a claim for constructive dismissal without clarifying his current employment and remuneration status he created a potentially misleading position in the proceedings. He also admits that without providing sufficient documentary evidence in support of his claim this was potentially misleading…"

The Appellant submitted that he admitted to relying on an oral contract between himself and the firm. It was a two-partner firm and he was the only employee. What was discussed between them was not in writing. Regarding his employment status his admission at CILEx was made on the basis that the allegation related to a question on the form ET1 to which the Employment Judge referred:

> "…the claimant stating in the claim form that the claimant had found paid employment whereas he now asserts that he was working on a voluntary basis…"

The Appellant submitted that the form contained a question about how much the claimant was earning or would earn. He answered having regard to his future earning capabilities. At the time he was working in voluntary employment and the Employment Tribunal interpreted his answer as saying that he was in paid employment. The Appellant submitted that the question was ambiguous and a reasonable person could interpret the question as relating to what their future earnings were likely to be and he provided a guesstimate. He admitted at the CILEx Tribunal that he should have better explained his position and that there was potential for misleading but nothing more. He had made the admission based on hindsight and legal advice. That part of the question was something that one could not alter or strike out; the form was sent in electronically. He submitted that it was an allegation about which he was never invited by the Respondent to make representations; it was not in the Respondent's 23 November 2015 letter although at allegation 1 the letter referred to failing to give honest and credible evidence during the Employment Tribunal hearing. He interpreted the letter and the e-mail of the same date from the Regulatory Supervisor as meaning that that aspect would not be pursued.

Allegation 2 - Ground A of the Appeal

30. In his written submissions, the Appellant stated that as would be seen from the attached CILEx charges he had accepted that he assisted in drafting a document bearing the name of the firm. He had not admitted at the CILEx hearing that he had drafted or helped in drafting a witness statement without the knowledge of the firm. He did not act dishonestly and while he accepted that he did not behave in a way that maintained the trust the public placed in him and in the provision of legal services he denied that he failed to uphold the rule of law and proper administration of justice or to act with integrity. In his Grounds of Appeal, the Appellant submitted that the witness testimony document was clearly a pro forma created by the Open University which bore the Open University's name and logo and at the bottom of the page, an indication that it was copyrighted 2009 to The Open University VQ Assessment Centre. The stated aim of the document was:

> "To provide a witness testimony or a statement to corroborate that your practice meets the criteria in a particular element or unit"

The Appellant submitted that it was clearly the decision of the Open University to name the document "witness testimony". The purpose of the document was plainly educational in nature and not legal. The Appellant and his wife could have had no control over the decision of his wife's educational establishment to use a phrase like "witness testimony" on the document provided to her. The Grounds of Appeal continued that in the light of the above and bearing in mind that it was not disputed that the Appellant's wife had indeed carried out the described work at the firm and that the document as retrieved by his employers from his e-mail account would not have been the final version submitted, as evidenced for example by the change from the first person to the third person then the Adjudicator was wrong in her analysis of the evidence and the conclusions that she reached. It was a suggested draft which he e-mailed to his wife for consideration. He no longer had the final version but believed that it was amended by him prior to submission to ensure that it was accurate. The Open University did not return it. . The rule of law and the proper administration of justice were not involved, as this was not in any sense a "legal document", nor created for any court of law.

31. The Appellant submitted that the document was a reference for his wife's studies relating to work she had undertaken with the firm. He agreed to provide an assessment/explanation of that work. The Appellant referred to an e-mail from an Employer Relationship Manager at the Department for Work and Pensions which was undated but confirmed that:

> "As a direct result of a discussion/information provided by yourself with regard to the employer [the firm] a vacancy was advertised. Consequently a number of CV's (sic) were received and forwarded on to the employer their consideration."

The Appellant submitted that the firm stated that it was not aware of the document in question but this e-mail referred to CVs being received and a vacancy being advertised. The e-mail confirmed that his wife did carry out the work for the firm. The Appellant believed that he was entitled to provide such a reference. He had previously provided similar references for people who had done work for the firm. He referred the Tribunal to a reference dated on 25 September 2012 which he had provided for a pupil barrister who was applying for a tenancy at his chambers. The Appellant did not obtain specific permission to give the reference and when his employers subsequently gained knowledge of his having done so did not raise any objections. He therefore presumed that it was appropriate for him to provide references in matters within his knowledge and experience in the firm.

32. The Appellant referred the Tribunal to the Respondent's letter of 22 November 2015 which quoted the witness statement to the Employment Tribunal of the firm's partner Mr Z:

> "At no point has [the firm] ever attended such meetings and neither has [the firm] authorised [the Appellant] to attend such meetings or provide such reference/testimony."

The letter stated that the document read as though the firm was providing support in the form of a witness statement for the Appellant's wife and that the firm had attended

meetings with her at a job centre regarding work experience opportunities. The Appellant submitted that Mr Z and the CILEx Tribunal understood the document to be a reference and his admission before CILEx was based on that. He submitted that the Adjudicator was the first person to refer to the document as a witness statement.

33. The Appellant referred to the Employment Tribunal judgment which dealt with the document as follows:

> "… This is a document dated 23 May 2012 which purports to be witness testimony for the claimant's wife [Mrs RB]. The copy exhibited is unsigned but it purports to come from [the firm]… The claimant attempted to persuade me that this was a document created by his wife who had simply made errors in construction when she went from the first of the third person. I read this as a document purporting to emanate from the respondent solicitors providing support for [Mrs RB]. It was prepared without their knowledge or authority. The claimant's account that it was the product of his wife alone ignores the e-mail to him from his wife on 23 May which requests him to "sign and put name on, print and bring home".

The Appellant submitted that the cross-examination at the Employment Tribunal focused on who drafted the document not whether it was accurate or not.

34. The Appellant also submitted that he carried out work independently; he was not supervised by the partners in respect of the hundreds of documents he signed on behalf of the firm while he worked there. Such documents included day-to-day correspondence with clients, court documents, and witness statements in support of applications within court proceedings. He asserted that in the circumstances due to the extent of express/implied consent that he had in signing documents it could not be said that signing a reference for his wife was a document that warranted specific consent from his employer. He was never advised that signing such documents required specific consent. The Appellant submitted that as he did not tell lies in the document and as he did not realise that he was not entitled to provide the reference he did not act dishonestly in doing so and he denied that he breached SRA Principles 1 and 2. On the basis of his submissions the Appellant maintained that the Adjudicator was wrong in her analysis of the evidence and the conclusion that she reached that the document was "misleading and failed to uphold the rule of law and the proper administration of justice". He had accepted with the benefit of legal advice and with the benefit of hindsight that it would have been prudent for him to have sought his employers' permission first, as indicated by his acceptance of the CILEx charge. He had reflected on that and had remediated his behaviour as CILEx found but his conduct was not such that it should prevent him from continuing to work.

Allegation 3

35. The Appellant did not refer to this allegation in his Grounds of Appeal but in his written submissions he stated that as would be seen from the CILEx charges he had accepted that he sent the documents in question to his personal e-mail account and that he breached SRA Principles 4 and 6 (by failing to act in the best interest of each client and failing to act in the way that maintained the trust the public placed in him). He apologised for his actions but sought to put them in what he described as proper

context. He e-mailed the documents in order to have templates and examples of commonly used documents, for example witness statements and letters. Some of the documents related to his previous employment indicating that they were simply templates to which he would refer as needed. The practice of maintaining templates was a relatively common and uncontroversial one among lawyers. He fully accepted however that he should have protected client confidentiality better by anonymising the documents before sending them to his personal e-mail account. He had reflected on his behaviour and remediated it as recognised by CILEx when it did not find that his fitness to practice was impaired. He did not e-mail the documents with any dishonest reason or to "steal" clients. He had letters from the clients in question confirming that at no stage did he approach them asking them to change representation away from the firm. The documents were also not the full case files which he submitted would be necessary for that purpose. The Appellant submitted that although this breach of the SRA Principles 4 and 6 and the failure to achieve Outcome 4.1 of the Code of Conduct was in itself significant he had already been disciplined appropriately by his own regulator and there was no proportionate need for the Respondent to discipline him as well. He submitted that this was so particularly bearing in mind the nature of the sanction passed on him by CILEx, namely to reprimand and warn him as to his future conduct which he submitted was effectively the lowest level of sanction with no ongoing restrictions on his practice. He submitted that the decision of the Adjudicator to issue a rebuke was disproportionate and unnecessary to achieve the aims of the disciplinary scheme; the acts and defaults in this regard were of a level of seriousness adequately dealt with by his own regulator.

Appeal Ground C - The issuing of the rebuke

36. The Appellant made submissions in his Grounds of Appeal as follows: If the above submissions (regarding Grounds A and B) were correct, then the only basis for making the rebuke was in respect of the Appellant sending certain selected electronic documents from different client files to his personal e-mail address. There had been no finding to dispute the Appellant's basis for his acceptance of that misbehaviour. Although this breach of the SRA Principles 4 and 6, and failure to achieve Outcome 4.1 of the Code of Conduct, were in themselves significant, it was submitted that, having already been disciplined appropriately by his own regulator, there was no proportionate need for the SRA to discipline him as well. This was so, particularly bearing in mind the nature of the sanction passed by CILEx, namely to reprimand and warn him as to his future conduct – effectively the lowest level of sanction, with no ongoing restrictions on his practice. He submitted that the decision of the Adjudicator to pursue a rebuke was disproportionate and unnecessary to achieve the aims of the disciplinary scheme. His acts and defaults in this regard were of level of seriousness adequately dealt with by his own regulator.

Ground D – The issuing of the section 43(2) order on the wrong basis

37. The Appellant made submissions in his Grounds of Appeal as follows: For the same reasons as Appeal Ground C, if the above submissions were correct regarding the Adjudicator's reasoning and conclusions on the "Witness Testimony" and the evidence given to the Employment Tribunal, the decision of the Adjudicator to issue a section 43(2) order was a wholly disproportionate and unnecessary step. That

submission was bolstered by what the Appellant described as the draconian consequences of the section 43(2) order, as opposed to the issuing of a rebuke under section 44D(2)(a). A rebuke was a low-level sanction carrying no extra ongoing restriction on practice. Although published, and likely to be taken into consideration by any potential employer, it did not otherwise adversely impact on the affected person's ability to earn money and pursue their chosen profession. However, a section 43(2) order was of dramatic impact. It prevented his ongoing and future employment automatically. The automatic prohibition could only be overcome by a successful application for permission from the employing firm, an application which stood no guarantee of even being made, bearing in mind the regulatory and administrative burdens that it placed on the employing firm. A section 43(2) order had the practical effect of rendering the affected person unemployable for all intents and purposes, as firms willing to take on a person with such an order were rare indeed.

Ground E –The issuing of the section 43(2) order in any event

38. The Appellant made submissions in his Grounds of Appeal as follows: If the disputed conclusions of the Adjudicator at Grounds of Appeal A and B were upheld by the Tribunal, it was submitted that, in any event, the exercise of discretion by the Adjudicator to make a section 43(2) order based on the same set of underlying facts as the disciplinary powers under which it issued the rebuke was inconsistent and should be quashed. In issuing the rebuke, the Adjudicator was utilising her powers to deal with more minor matters of misconduct, whereas the imposition of an order under section 43(2) was reserved under section 43(1)(b) for conduct of "such a nature that in the opinion of the Society it makes it undesirable for him to be involved in legal practice". Both CILEx, in issuing a reprimand and a warning, and the Adjudicator, in issuing a rebuke, implicitly accepted that the Appellant should be allowed to continue his involvement in legal practice, yet the Adjudicator must have simultaneously held a contrary view to make the section 43(2) order. The Appellant submitted that the Tribunal in the Arslan case no. 11356-2015 found:

> "It was inappropriate for the SRA to operate its powers to impose a section 43 Order and make disciplinary decisions under the statutory framework on the same set of underlying facts, when the use of its disciplinary powers was said to be for minor matters, whereas a section 43 Order was for serious matters of misconduct."

As such the Appellant submitted that the Tribunal should review and quash the making of the section 43(2) order in any event as the acts or defaults complained of did not engage the statutory criteria for the making of the order.

39. The Appellant concluded his written submissions by stating that he accepted that his actions that had been criticised were those that should be subject to criticism and were not of a standard that should be those employed by a solicitor. However there was no dishonest intention or purpose on his part and thus the punitive sanction of preventing him from gainful employment, in all the circumstances of the case was disproportionate and much too severe. He submitted that the reality was that in the current market with many lawyers seeking employment he would not be able to gain employment within a legal environment because a potential employer would not wish to be subjected to scrutiny from the Law Society as to his supervision. He asked to be

punished in a manner that was proportionate and allowed him to continue with employment without placing on a potential employer an onerous burden as to his employment. He submitted that it was relevant that in any employment which he gained he would be subject to supervision in the normal course but he would seek greater assistance from a supervisor in future than he had done in the past to avoid conduct that could be subject to criticism.

40. After hearing Ms Emmerson's submissions for the Respondent, the Appellant submitted that the Adjudicator implicitly accepted that the acts and omissions complained of against him were of a minor nature by issuing a rebuke and he also reminded the Tribunal that the CILEx Tribunal had only reprimanded him. He submitted that section 43 was for serious matters and a rebuke was for minor matters. This Tribunal pointed out that in his Grounds of Appeal he submitted that both CILEx and the Adjudicator implicitly accepted that he should be allowed to continue his involvement in legal practice yet the Adjudicator must have simultaneously held a contrary view to make the section 43 order. The Tribunal asked if the Appellant was now advancing a new point. The Appellant responded by referring to the "witness testimony" and contrasting it with the letter he had written in support of the pupil barrister and submitted that the latter was on the firm's headed notepaper as well as having his name on it whereas what he had done for his wife was personal. The firm had not raised any complaint about the letter written for the barrister. To come into the same category the document for his wife should have been on headed notepaper. The Tribunal pointed out that normally in a review it would not consider new points. Ms Emmerson submitted that the letter of 25 September 2012 had been put by the Appellant to the Respondent and it was referred to in the Adjudicator's Decision; she mentioned that the letter was a more conventional reference. Ms Emmerson submitted that the existence of the letter did not undermine the findings which the Adjudicator made about the "witness testimony". She also reminded the Tribunal that the Respondent had admitted that he needed his employer's approval for such a document. The Appellant responded that he had not admitted that in respect of the particular document before the Adjudicator but in respect of the final document.

Submissions for the Respondent

41. For the Respondent, Ms Emmerson submitted that the Appellant's claim was in two parts but the same facts underpinned both aspects. The Respondent asked the Tribunal to dismiss both aspects of the application. Ms Emmerson reminded the Tribunal that it was not embarking on a fact-finding exercise or a rehearing of the case which had been before the Adjudicator. The question was whether the Adjudicator was wrong in the conclusion she reached based on the evidence before her and the Tribunal should not interfere with those conclusions unless they were outside the boundaries in which reasonable disagreement was possible. The starting point for the Tribunal's consideration was the decision reached by the Adjudicator based on the evidence before her. The decision related to three allegations which were either admitted or found proved on the facts. The Adjudicator made no finding in respect of the allegation that the Appellant had failed to notify the Respondent of the outcome of the Employment Tribunal proceedings or any retraction of admissions in the CILEx proceedings. No finding was made in relation to the allegation of dishonesty and this issue was stood over to another occasion by the Adjudicator. No further decision had been taken by the Respondent on the issue of dishonesty and therefore there was no

finding of dishonesty underpinning the factual findings, breach of the Principles or sanction imposed by the Adjudicator.

42. Ms Emmerson submitted that in respect of allegation 1, the Appellant had disputed throughout that he was in breach of SRA Principles 1, 2 and 6 and failed to achieve Outcome 5.1 "You do not attempt to deceive or knowingly or recklessly mislead the court". In respect of allegation 2, the Appellant admitted that his conduct constituted a breach of Principle 6 "Behave in a way that maintains the trust the public places in you and in the provision of legal services". In respect of allegation 3 the Applicant admitted that his conduct constituted a breach of Principles 4 and 6 but it was less clear if he admitted failing to achieve Outcome 4.1 "You keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents".

43. The CILEx Tribunal and the Adjudicator had worked on the basis of very similar if not identical facts. The Appellant had admitted breaches of Principles 1 and 2 of the CILEx Code of Conduct. Principle 1 of the SRA Code was a requirement to uphold the rule of law and the proper administration of justice whereas CILEx required an individual to uphold the rule of law and the impartial administration of justice. Principle 2 of the SRA Code related to acting with integrity. Principle 3 of CILEx required one to "Behave with honesty and integrity". Principle 2 of CILEx Code reflected SRA Principle 6 to some extent. It required that an individual should "maintain high standards of professional and personal conduct and justify public trust in you, your profession and the provision of legal services. Principle 6 of the SRA Code required one should "Behave in a way that maintains the trust the public places in you and in the provision of legal services".

44. Ms Emmerson divided the five Grounds of Appeal into three categories.

- First, the Appellant sought to challenge the Adjudicator's conclusions that he had acted in breach of the relevant provisions of the SRA Code. The impugned conclusions relate to the First and Second allegations only.

- Second, the Appellant sought to challenge the regulatory and disciplinary measures imposed having regard those conclusions.

- Third, the Appellant submitted in the alternative that even if the Adjudicator's conclusions on the Code were correct, she was wrong to impose a section 43 order.

Ms Emmerson submitted that in respect of Grounds A and B the Adjudicator was entitled to reach her conclusions based on contemporaneous material and the admissions the Appellant made in the CILEx proceedings. She further submitted that the Adjudicator's conclusions came nowhere near falling outside the boundaries of reasonable disagreement. Grounds C and D of the appeal were parasitic on Grounds A and B. Ms Emmerson submitted that a rebuke was an entirely proportionate response to the Appellant's conduct. He did not seem to argue with the rebuke of itself in the light of his admissions. The section 43 order had not been made on the wrong basis and it was not Draconian or disproportionate. The Adjudicator reached the opinion that it was not acceptable for the Appellant to be involved in legal practice (without permission) and the Tribunal should not interfere with that conclusion. In respect of Ground E of the appeal,

Ms Emmerson submitted that the Appellant misunderstood the position and there was no reason why the Adjudicator could not impose a disciplinary order and a section 43 order provided the criteria for each were independently met.

Legal Framework

45. Ms Emmerson submitted that this was a relatively new jurisdiction and that this was only the third case of an appeal under section 44E to come before the Tribunal. A section 43 order could be imposed:

> "Where a person who is or was involved in legal practice but is not a solicitor–
>
> ...
>
> (b) has, in the opinion of the Society occasioned or being a party to, with or without the connivance of the solicitor, an act or default in relation to a legal practice which involved conduct on his part of such a nature that in the opinion of the Society it would be undesirable for him to be involved in a legal practice in one or more of the ways mentioned in subsection (1A)."

The case of Arslan placed emphasis on the words "in the opinion of the Society". The Tribunal should afford a degree of weight or deference to the conclusions of the Adjudicator. There was no question that she had the power to make this order as provided under section 43(2). Section 43 was a vehicle of regulatory control and was not penal. It resulted in the requirement of the Respondent's permission for the individual to be involved in legal practice but it was not a blanket ban on working. It had been repeatedly emphasised in the courts but it was not a penal sanction but a regulatory matter. In this regard Ms Emmerson referred to the case of Gregory v The Law Society [2007] EWHC 1724 (Admin):

> "Section 43 is not punitive in nature. It is there to protect the public, to provide safeguards and to exercise control over those who work for solicitors, in circumstances where there is necessity for such control shown by their past conduct. Its purpose is to maintain the good reputation of, and maintain confidence in, the solicitors' profession. An order made under section 43 does not prohibit a person from working for a solicitor. The requirement is that the Law Society's permission should be obtained so that they can scrutinise the circumstances in which such a person is to be employed…"

The purpose of the order was to allow some degree of supervision and control to protect the public. This was also set out in the cases of SRA v Ali [2013] EWHC 2584 (Admin):

> "The prohibition in section 43 is not an absolute prohibition upon employment by a solicitor, but is one which applies where a person is engaged otherwise than in accordance with a Society permission. Thus the structure of the section reflected the fact that this is a structure which is intended to be protective of the public interest and the reputation of the Society…"

Ojelade v The Law Society [2006] EWHC 2210 (Admin) set out that a section 43 order should not be viewed as a punishment. Under the Disciplinary Procedure Rules 2011 an individual could request the revocation of a section 43 order at any time.

46. The Respondent's powers under section 44D of the Solicitors Act were brought in by the Legal Services Act 2007. The Administration of Justice Act 1985 at schedule 2, 14B(2) provided that the Law Society might (a) give an individual a written rebuke and (b) direct the person to pay a penalty not exceeding £2,000. The Law Society was obliged to make rules in connection with the exercise of its powers and had made the SRA Disciplinary Procedure Rules 2011. They set out what the Respondent must consider and the process it must go through including the right of an individual to make representations. Ms Emmerson submitted that Rule 3 was important because it sets out the three conditions which must be met before the Respondent might make a disciplinary decision to give a regulated person a written rebuke or to direct them to pay a penalty. The first condition required the Respondent to be satisfied that the act or omission by the regulated person which gave rise to the Respondent's finding fulfilled one or more of nine elements. These included:

> "(i) was deliberate or reckless;
>
> (iii) was or was related to a failure or refusal to ascertain, recognise or comply with the regulated person's professional regulatory obligations…
>
> (vi) misled or had the potential to mislead clients, the court or other persons, whether or not that was appreciated by the regulated person;
>
> (ix) formed or forms part of a pattern of misconduct or other regulatory failure by the regulated person;"

The second condition was that a proportionate outcome in the public interest was one or both of a written rebuke and a direction to pay a penalty and:

> "(c) The third condition is that the act or omission by the regulated person which gives rise to the SRA finding was neither trivial nor justifiably inadvertent."

Ms Emmerson submitted that the third condition imposed a minimum level of seriousness before a written rebuke or financial penalty could be imposed. There was no suggestion that the Respondent failed to comply with its procedures regarding allowing the Appellant to give an explanation. The Respondent had a choice under Rule 10 of making an application to the Tribunal or dealing with the matter itself. Section 44E of the Solicitors Act provided a right of appeal to the Tribunal which was covered by the Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011.

47. In this case there were two claims being made under two sets of rules but that made no difference to the procedure the Tribunal should follow. In the Arslan judgment the Court considered the nature of a review by the Tribunal and stated as follows:

"38. I turn to the nature of the Tribunal's task in conducting a review under section 43(3) and an appeal under section 44E. It is not in dispute that the Tribunal was correct to hold that, in both cases, the proper approach was to proceed by way of a review and not a re-hearing. As for what such a review involves, the Tribunal accepted submissions made to it by Ms Emmerson that its function was analogous to that of a court dealing with an appeal from another court or from a tribunal and that it should apply by analogy the standard of review applicable to such appeals which is set out in rule 52.11 of the Civil Procedure Rules. Rule 52.11 makes it clear that a court or tribunal conducting a review should not generally receive new evidence that was not before the original decision-maker, although it may do so if justice requires it; and it should interfere with a decision under review only if satisfied that the decision was wrong or that the decision was unjust because of a serious procedural or other irregularity in the proceedings.

39. It follows that the Tribunal should not embark on an exercise of finding the relevant facts afresh. On matters of fact the proper starting point for the Tribunal in this case was the findings made by the adjudicator and the evidence before the adjudicator. The Tribunal had to consider whether, on that evidence, the adjudicator was justified in making the factual findings that he did.

40. More guidance on the proper approach to a review is given in the judgment of Clarke LJ in Assicurazioni Generali Spa v Arab Insurance Group [2003] 1 WLR 577, which Mr Arslan cited in his skeleton argument. The passage at paras 14-17 of the judgment was approved by the House of Lords in Datec Electronics Holdings Ltd v UPS Ltd [2007] 1 WLR 1325 at para 46 (Lord Mance). In that passage the point is made that the approach to any particular case will depend upon the nature of the issues under review. Where a challenge is made to conclusions of primary fact, the weight to be attached to the findings of the original decision-maker will depend upon the extent to which that decision-maker had an advantage over the reviewing body; the greater that advantage, the more reluctant the reviewing body should be to interfere. Another important factor is the extent to which the original decision involved an evaluation of the facts on which there is room for reasonable disagreement. In such a case the reviewing body ought not generally to interfere unless it is satisfied that the conclusion reached lay outside the bounds within which reasonable disagreement is possible.

41. In the present case the SRA adjudicator did not hear any oral evidence. His decision was based entirely on written evidence and submissions, all of which were available to the Tribunal. In that respect, the Tribunal was in as good a position as the adjudicator to assess the evidence and draw appropriate inferences from it; and there was nothing to prevent the Tribunal, if satisfied for good reason that a finding of the adjudicator was wrong, from reaching a different conclusion."

48. Ms Emmerson submitted that in terms of breach of regulatory rules and principles the Respondent was the ultimate arbiter and so the Tribunal should not interfere with the Adjudicator's decision unless the reasonable disagreement boundary had been exceeded. The decision of an Adjudicator was not unassailable and if the Tribunal was satisfied that the Adjudicator was wrong it could come to a different conclusion but she emphasised what the court had said about the weight to be attached to the opinion of the Adjudicator:

> "42. I do, however, see force in the point made by Mr Dutton that in the case of a finding made under section 43(1)(b) the language of that provision requires the Tribunal to afford some independent weight to the opinion of the adjudicator if there is scope for reasonable differences of view. The statutory test is not simply whether the person concerned has "occasioned or been party to … an act or default in relation to a legal practice", but whether that is so "in the opinion of the Society". It seems to me that this wording requires the Tribunal on a review to treat the adjudicator's opinion as an evaluation with which it should not readily interfere."

Ms Emmerson also mentioned the Tribunal's Guidance Note on Sanctions which covered the topic of application for review and revocation of a section 43 order which she suggested might now require reconsideration after the Arslan decision.

49. Ms Emmerson also addressed the definition of integrity. Previously the Tribunal had found useful the case of Hoodless and Blackwell v FSA [2003] UKFTT FSM 007 (3 October 2003) which referred to moral soundness, rectitude and steady adherence to an ethical code. The Appellant had provided the decision of the Administrative Court in the case of Scott v SRA [2016] EWHC 1256 (Admin). Paragraph 40 of the judgment quoted the case of SRA v Chan and Ors [2015] EWHC 2659 (Admin):

> "As to want of integrity, there have been a number of decisions commenting on the import [of] this word as used in various regulations. In my view, it serves no purpose to expatiate on its meaning. Want of integrity is capable of being identified as present or not, as the case may be, by an informed tribunal or court by reference to the fact of a particular case."

Ms Emmerson suggested that the Tribunal could bring to bear its considerable experience in determining what integrity meant.

Evidence before the Tribunal and decision of the Adjudicator

50. In respect of the Appellant sending confidential documents to his home email, Ms Emmerson submitted that it was clear that an e-mail before the Tribunal dated 22 October 2012 had been sent by the Appellant from his work e-mail address to his private email address and that the documents which followed were plainly related to individuals and were documents in the possession of the firm for the purpose of the proceedings for which they had been prepared. The Appellant sent these to his personal e-mail account without the firm's knowledge and took no steps to protect client confidentiality or any other confidential material in the documents. There had been a debate before the Employment Judge about his purpose and whether it related

to poaching clients or creating a bank of templates. The Employment Judge rejected the Appellant's explanation that he had not transferred the documents for his own use. The Adjudicator's concern was not the purpose to which the Appellant would put the documents in the future but that the firm had no knowledge of the transfer and did not consent and that it was confidential information belonging to clients.

51. Ms Emmerson addressed the evidence presented to the Adjudicator in terms of the background facts and what happened in the Employment Tribunal. The Employment Judge heard evidence from the Appellant and from the partners in the firm. The Judge described the issues for determination as follows:

> "5. It had been agreed that there were four issues to be determined and they appeared in the documents (sic) headed "issues" dated 26 June 2013, namely:
>
> (1) What was agreed between the respondent, the claimant
>
> (a) Commission being backdated payment;
>
> (b) Backdated payment
>
> (2) Were (respondent) (sic) in breach of agreement or contract of employment;
>
> (3) Fundamental breach;
>
> (4) Did the claimant resign as a consequence of such breach?
>
> 6. Accordingly, it was for me to determine whether the parties had reached a concluded agreement which the respondent (the firm) had breached and whether that breach led to the claimant's resignation"

Ms Emmerson submitted that it was agreed that the claim would stand or fall on the Appellant's evidence as the Judge set out:

> "As was agreed at the outset, in the absence of a concluded written agreement, this claim is determined by whose evidence I accept. To succeed, I would need to be satisfied that the claimant was an honest witness or, that although he was dishonest in other aspects, he was giving an honest account of the conversations which he asserts led to the three concluded agreements on which he relies. The Respondents deny that any conversation took place which evidenced a concluded agreement.
>
> I am not so satisfied that the claimant was an honest witness or that he gave an honest account for the following reasons…."

The Judge then gave his "Examples of dishonesty" including the paragraph about the "witness testimony" already quoted by the Appellant above. The Judge then went on

to discuss the matter involving Mr A upon which no finding had been made by the Adjudicator and continued:

> "19. The third area of credibility involves the documents which are exhibited as pages 34 to 76 to Mr [Z's] statement. These are witness statements, medical reports and other documents belonging to the respondent which the claimant was transferring to his personal e-mail account from his professional account during late October 2012. The claimant's explanation was that he was preparing precedents for his own use rather than transferring confidential information which would be of value to him elsewhere. The explanation is implausible when one looks at the documents themselves and I reject it.
>
> 20. There are other examples such as the claimant stating in the claim form that the claimant had found paid employment whereas he now asserts that he was working on a voluntary basis… I reject his explanation for these inconsistencies as implausible."

In respect of paragraph 20 of the Judge's findings, Ms Emmerson submitted that the Appellant had given a new explanation at this hearing for what he had put on the form. Strictly that was new evidence and should not be considered in a review. The Appellant could have made these points to the Adjudicator but bearing in mind that the Appellant was in person Ms Emmerson had given him some latitude. The Judge reached his general conclusion including:

> "28. …that the claimant is not telling the truth when he asserts that a contract was agreed upon between the parties [on] any of the dates on which he now relies and accordingly his claims fall.
>
> 29. After giving judgement with oral reasons I then heard cross applications for costs. The respondent's application was on the basis of my findings that the claimant was a dishonest witness who had given dishonest evidence in support of his claim. Their costs exceed the increased limit and they seek an Order that costs be assessed in the County Court."

The judge made an order for costs in favour of the respondent to be assessed.

52. Ms Emmerson submitted that the matter then went to CILEx. The Appellant was represented there by Counsel and was in receipt of legal advice when he agreed to and made admissions. He suggested that his Counsel had been involved in redrafting the charges. Ms Emmerson submitted that the nature and scope of the admissions he made by admitting the amended charges which are set out in the background to this judgment involved him admitting breach of Principle 1 and Principle 2 of the CILEx Code which mirrored Principles 1 and 6 of the SRA Code. She submitted that he now sought to go behind those admissions. The Adjudicator based her findings on the Appellant drafting witness testimony without leave of the firm (as set out in the amended charge number 1 before the CILEx Tribunal). Ms Emmerson accepted that the way the charge was drafted did not allege that the Employment Tribunal had been misled but the Appellant admitted an amended charge that he submitted an ET1 form

in support of the claim for constructive dismissal against his former employers without clarifying his then current employment and remuneration status, creating a potentially misleading position in the proceedings. The outcome was a reprimand and a warning and an order to pay some of the costs.

53. Ms Emmerson submitted that the Respondent gave the Appellant several opportunities to respond to the allegations. He replied on 16 February 2016 to the Respondent's substantive letter of 23 November 2015. He denied allegation 1, acting in breach of Principles 1, 2 and 6 of the SRA Principles 2011. The substantive part of his submissions was directed at dishonesty which was not an issue here. He did not cover his admission of "potentially misleading". In the same letter the Appellant dealt with the second allegation relating to the witness testimony document sent in support of his wife. He denied breach of Principles 1 and 2 but admitted that he should have sought permission from the firm and admitted breach of Principle 6. (The substance of his denial was similar to that in his written submissions provided on the day of the hearing.) In respect of allegation 3 the Appellant accepted breach of Principles 4 and 6 but denied that his purpose was to poach clients or misuse the information. The Appellant provided some supporting documentation attached to this letter which constituted the material upon which the adjudicator made her decision.

The Adjudicator's Decision

54. Ms Emmerson went through the Adjudicator's decision document in some detail. The Adjudicator set out the allegations at section 1 and her findings at section 2. She upheld allegations 1, 2 and 3 regarding the Appellant's evidence to the Employment Tribunal, the drafting of the witness testimony document and the sending of confidential information to a home e-mail but she made no finding regarding the allegation of failure to notify the Respondent of the Employment Tribunal proceedings or upon the allegation of dishonesty which therefore fell away. It was stood over but never resurrected by the Respondent which had confirmed to the Appellant that the dishonesty allegation was not to be pursued. The Adjudicator rebuked the Appellant but imposed no financial penalty. She made a section 43 order and ordered payment of costs. Ms Emmerson submitted that the Adjudicator had summarised the facts and issues setting out how the matter had come to the Respondent. She also summarised at paragraph 4.10 the Appellant's representations which showed that she had in mind his position regarding each of the allegations. At paragraph 5 she set out the legal and regulatory framework. She referred to the allegation of dishonesty which fell away. She also dealt with section 43 and set out:

> "In making my decision I have to take into account the regulatory objectives, in particular promoting and protecting the public interest and the interests of consumers."

The Adjudicator also recorded the standard of proof as being the balance of probabilities. At paragraph 6 of her decision document the Adjudicator gave detailed reasons for her findings in paragraphs 6.1- 6.5 of the document. The reasons could be summarised as follows.

Allegation 1 – Breach of Principles 1, 2 and 6 and Outcome 5.1 in relation to the Appellant's conduct in proceedings before the Employment Tribunal.

55. The Adjudicator's reasons for the conclusion that the Appellant had acted in breach of Principles 1, 2 and 6 and Outcome 5.1 in relation to the first allegation were as follows:

> "6.1.1 [The Appellant] admitted in the CILEx proceedings that in submitting a claim for constructive dismissal without clarifying his [then] current employment and remuneration status he created a potentially misleading position in the proceedings. He also admits that without providing sufficient documentary evidence in support of his claim, this was potentially misleading."

Ms Emmerson submitted that the Appellant was aware of the need to provide accurate information to support any claim being brought to a Court or Tribunal. At paragraph 6.1.2 the Adjudicator reflected the authorities when she said;

> "…The Employment Judge said he was dishonest and whilst this is admissible as evidence, it is not conclusive evidence of his dishonesty."

At paragraph 6.1.3 the Adjudicator gave her reasoning and thinking about the Appellant's role and his experience:

> "[The Appellant] is a Chartered Legal Executive. He has undergone legal training and he has worked in firms providing legal advice and assistance. He says in his reference for the pupil barrister that he ran "the Civil Litigation Department for Equity Solicitors". He was in a position of responsibility and trust. He was a litigator. He is well aware of the need and the requirement to provide accurate information to support any claim being brought to a court or tribunal. I accept that losing a case is not an indicator of dishonesty. However Judge Kearsley made specific comments about the appellant's credibility, honesty and integrity. The evidence he presented to the Tribunal was not credible. He has admitted that his evidence could potentially mislead and therefore such evidence could not have been credible. Judge Kearsley said dishonesty was central to the case and called [the Appellant] a dishonest individual. The public places trust in the ability of lawyers and legal professionals to give honest and reliable information and evidence in court proceedings. That did not happen in this case."

The Adjudicator also stated at paragraph 6.1.4:

> "[The Appellant's] argument that he was underprepared is not credible. He was legally represented at the Tribunal. In admitting to potentially misleading the Tribunal his actions lacked integrity. He failed to uphold the rule of law and the proper administration of justice. He also failed to maintain the trust placed in him."

Ms Emmerson submitted that the Adjudicator referred to the Judge's findings and acknowledged that losing a case was not an indicator of dishonesty. She rejected the argument that the Appellant was underprepared and pointed out that he was represented. She had also referred to his admissions in the CILEx proceedings and his breach of CILEx Principles 1 and 2 relating to the rule of law and maintaining public trust.

Allegation 2 - Breach of Principles 1, 2 and 6 in relation to the preparation of a "witness testimony"

56. The Adjudicator's reasons for the conclusion that the Appellant had acted in breach of Principles 1, 2 and 6 in relation to the second allegation were summarised by Ms Emmerson as follows:

- The Appellant had admitted to assisting in the drafting and preparation of a witness statement and breaching Principle 6 (paragraph 6.2.1).

- The Appellant created a document headed "witness testimony" on behalf of the firm without their approval (paragraph 6.2.2).

- The Appellant knew that this document was more than a reference and understood the term "witness testimony" being used on the document because he was "a legally qualified litigator who knows the difference between a reference and a witness testimony. He has provided an example of another reference he has provided and that is not titled "witness testimony"… (paragraph 6.2.2). Ms Emmerson submitted that the Adjudicator noted that the example that the Appellant gave did not help him. She continued that "He knew what he was doing when he created it."

- Further, the document was misleading and the Appellant failed to uphold the rule of law and proper administration of justice (paragraph 6.2.2).

- In not obtaining his employers' consent he did not act with integrity. In constructing this document without the firm's approval he breached SRA Principles 1 and 2 (paragraph 6.2.2).

Ms Emmerson submitted that the Adjudicator referred to and accurately summarised the Appellant's admissions of Principles 4 and 6 and she found that he had failed to achieve Outcome 4.1.

Allegation 3: Breach of Principles 4 and 6 and Outcome 4.1 in relation to sending confidential documents to his personal email account

57. The Adjudicator's reasons for the conclusion that the Appellant had acted in breach of Principles 4 and 6 in relation to the second allegation were summarised by Ms Emmerson as follows:

- The Appellant admitted to sending witness statements, medical reports and other confidential documents to his personal email address and to breaching Principles 4 and 6 in respect of this conduct (paragraph 6.2.1).

- By sending confidential documents to his personal email account without the proper consent, he failed to act in his clients' best interests, failed to keep their information confidential and did not behave in a way that maintains the trust placed in him (paragraph 6.2.3).

- He had breached client confidentiality and failed to achieve Outcome 4.1

58. Ms Emmerson submitted that the Adjudicator referred to the SRA Disciplinary Procedure Rules 2011 (as setting out her powers) and the three conditions they contained which are quoted above. She continued:

> "6.7 In relation to rule 3.1 (8) I find that [the Appellant's] conduct in e-mailing to himself confidential information without authority was deliberate. He failed to recognise the need to keep clients' information confidential.
>
> 6.8 I also find that [the Appellant's] conduct was a failure to comply with his professional obligations because he potentially misled the tribunal and created a document without the firm's authority. His actions had the potential to mislead others. It also forms a pattern of behaviour.
>
> 6.9 Given the seriousness of the conduct and the fact it breached SRA principles 1, 2, 4 and 6, I do not consider that [the Appellant's] conduct was trivial or justifiably inadvertent.
>
> 6.10 I find that a rebuke is a proportionate outcome in the public interest because it is imperative that those who hold positions in law firms such as [the Appellant] appreciate the importance of client confidentiality, integrity and upholding the rule of law.
>
> 6.11 In view of the above reasons, I am satisfied that my decision to rebuke [the Appellant] is an effective regulatory and disciplinary outcome, which is sufficient to benefit and protect clients and the public. It will also act as a deterrent to others who may be considering such conduct."

In respect of section 43, at paragraph 6.15 the Adjudicator quoted the case of Ali about the function of a section 43 order. At paragraphs 6.16 onwards she stated:

> "6.16 The conduct in question was serious. It involved [the Appellant] potentially misleading the Tribunal, drafting documents without the consent of the firm and sending confidential documents to his personal e-mail account.
>
> 6.17 I have found the conduct breached SRA Principles 1, 2, 4 and 6. It involved a lack of integrity on his part. Integrity is central to one's role as an employee of a firm providing legal services. It is required of all those involved in the provision of legal services and [the Appellant] has demonstrated that he was capable of acting without integrity. A finding of failing to act with integrity is a very serious and significant issue in a profession whose reputation depends on trust.

> 6.18 In view of the above reasons I have decided that it is undesirable for [the Appellant] to be involved in a legal practice in any of the ways referred to in paragraph 3.3 above.
>
> 6.19 I am satisfied that the decision to make a section 43 order is an effective regulatory outcome which is sufficient to benefit and protect clients and the public given [the Appellant's] conduct. The order gives the [Respondent] the opportunity to properly consider the working environment of [the Appellant] and the degree of support and supervision he may need in any future role."

59. Ms Emmerson submitted that the Adjudicator covered integrity and referred to its importance. She then went on to deal with costs. Her decision was a model of clarity with cogent reasons for all the conclusions she reached. She properly directed herself in relation to the criteria for giving a rebuke under the Disciplinary Procedure Rules at paragraph 6.6 of the decision and recited how the Appellant had met the various requirements for a rebuke; she mentioned that his conduct was not trivial or justifiably inadvertent and that a rebuke was a proportionate outcome in the public interest and an effective regulatory and disciplinary outcome given the seriousness of the conduct and breach of SRA Principles 1, 2, 4 and 6.

60. In respect of the section 43 order, Ms Emmerson submitted that the Adjudicator properly directed herself in relation to: the correct criteria for making a section 43 Order (paragraph 5.3), the regulatory objectives to be taken into account (paragraph 5.4) and the standard of proof (paragraph 5.5), the purpose of a section 43 order (paragraph 6.13), and relevant High Court authority (paragraph 6.15). The Adjudicator concluded that the Appellant was or had been involved in a legal practice (as defined by section 43(1A) of the Solicitors Act 1974) and had occasioned or been a party to, with or without the connivance of a solicitor, an act or default in relation to a legal practice which involved conduct on his part of such a nature that in the opinion of the Society it would be undesirable for him to be involved in a legal practice in any of the ways mentioned in paragraph 3.3 of the Decision (paragraph 2.3). Further, the Adjudicator considered that the conduct in question was serious (as it involved potentially misleading the Employment Tribunal, drafting documents without the consent of the firm, and sending confidential emails to his personal email account). Further, the findings involved a finding of lack of integrity, which was very serious in the context of a profession whose reputation depends on trust (paragraph 6.16 - 6.17). In these circumstances, the Adjudicator concluded that it would be undesirable for the Appellant to be involved in a legal practice and that a section 43 order was an effective regulatory outcome which was sufficient to benefit and protect clients and the public and gave the Respondent the opportunity properly to consider the working environment of the Appellant and the degree of support and supervision he might need in any future role (paragraph 6.19)

The Respondent's Response to the Grounds of Appeal/Review

61. The full response was set out in a document dated 8 June 2016. Ms Emmerson provided a summary in her Skeleton and at the hearing:

Ground A/Allegation 2 - creation of witness testimony and breach of Principles 1 and 2 (breach of Principle 6 was admitted)

62. The issue for the Tribunal was whether the admitted facts constituted a breach of Principles 1 and 2 as well as of the admitted Principle 6. Ms Emmerson clarified that there was no dispute that the document in question was not a final document which was subject to some amendment. She submitted that this Ground of Appeal was without merit. The Adjudicator was plainly entitled to find based on the evidence before her that the Appellant's conduct breached Principles 1 and 2 in the following circumstances:

- The Appellant admitted that he "Assisted without the knowledge or authority of [the firm]/its partners, in the drafting of a document bearing the name of that firm and entitled 'witness testimony' in support of his wife [Mrs RB]". It was clearly headed "witness testimony" and that was reflected in the sentence below the heading. It would be clear to a paralegal that this was not just a reference. The Appellant admitted breach of CILEx Principles 1 and 2.

- The Appellant drafted a document on behalf of a regulated partnership providing legal services, in circumstances where:

    - the partnership had no knowledge of that document and had not consented to its creation,

    - the Appellant knew that the partnership was unaware of the document and had not consented to its creation,

    - the Appellant intended that a third party would rely on the document and its contents as representative of the position of the partnership. Ms Emmerson submitted that the document was clearly shown to be provided by the firm and not in a purely personal capacity. In his submissions the Appellant said that he would not necessarily expect express approval of the firm for a document such as this but Ms Emmerson submitted that this was inconsistent with the admissions that he made and that it was inappropriate to produce it without the knowledge of firm. The Adjudicator was plainly entitled to find that the Appellant's conduct in this respect constituted breach of Principle 2 and called into question his integrity as the Adjudicator set out at paragraph 6.2.2 of her decision.

- The Appellant drafted a document entitled "witness testimony" in circumstances where, with experience of litigation, he knew that the term "witness testimony" had a specific meaning and was something more than a reference irrespective of whether he drafted that term. He endorsed the use of the document by returning it in that form and nevertheless assisted in the preparation of the document on behalf of the partnership. The Adjudicator was plainly entitled to find that the Appellant's conduct in this respect constituted a breach of Principle 1.

Ground B - Allegation 1 - Failure to give credible evidence to the Employment Tribunal

63. Ms Emmerson submitted that the Appellant asserted that the Adjudicator's findings in respect of Allegation 1 fell outside the range of reasonable responses open to her. In order to succeed in relation to Ground B, the Appellant must show the Adjudicator was wrong to conclude that the Appellant failed to give credible evidence to the Employment Tribunal and that the Appellant acted in breach of Principles 1, 2 and 6. The Appellant's case fell far below this threshold. The Appellant had already admitted that he:

- Submitted an 'ET1' form in support of a claim for constructive dismissal against his former employers without clarifying his then current employment and remuneration status, creating a potentially misleading position in the proceedings.

- Brought in the Employment Tribunal a claim for constructive dismissal against his former employers, the firm, without providing sufficient documentary evidence in support of his claim, in a potentially misleading way.

Ms Emmerson submitted that whilst no finding of dishonesty was made by the Adjudicator, she was plainly entitled to conclude that the claim advanced by the Appellant and the evidence relied on in support of such a claim were not credible in circumstances where the Appellant had admitted that the evidence presented had the potential to mislead the Tribunal. Further, the Adjudicator was entitled to find that the conduct in question constituted a breach of SRA Principles 1, 2 and 6. The Adjudicator's findings did not, contrary to the Appellant's case, amount to a conclusion that any solicitor who lost a claim would be guilty of professional misconduct. She distanced herself from the proposition that losing amounted to professional misconduct. The Adjudicator properly and carefully identified the particular factors in this case which led to the findings of misconduct including the fact that the Appellant admitted putting forward material which could have mislead the Tribunal (at paragraph 6.1.1 of her decision) and evidence which could have mislead the Tribunal and was not credible (at paragraph 6.1.3). In circumstances where the Appellant had already admitting to putting forward a case which could have misled the Tribunal, it was plainly within the range of reasonable responses for the Adjudicator to find the Appellant was in breach of Principles 1, 2 and 6.

Ground C – The issuing of a rebuke

64. The Appellant expressly did not suggest that the decision to issue a rebuke was of itself incorrect, having regard to the admissions made by the Appellant in his Ground of appeal that he had acted in breach of Principles 4 and 6 of the SRA Code and failed to achieve Outcome 4.1. Rather, Ground C proceeded on the basis that it was wrong for the Adjudicator to issue a rebuke based on the conclusions reached in relation to the first and second allegations. The Appellant's case proceeded on the basis that he was only guilty of the misconduct admitted under Allegation 3, namely that he sent confidential client information to his personal email address without permission in breach of Principles 4 and 6 and Outcome 4.1 of the Code of Conduct. In these circumstances it was said that a decision to rebuke the Appellant was disproportionate and unnecessary having regard to the fact that CILEx had imposed a reprimand and warning in respect of this conduct. Ms Emmerson submitted that Ground C failed on

the basis that the Appellant could not establish that the Adjudicator was "wrong" to rebuke him pursuant to the Disciplinary Rules either by reference to Allegation 3 alone, or Allegations 1, 2 and/or 3 taken together.

65. Ms Emmerson submitted that first, for the reasons set out above in relation to Grounds A and B, the Adjudicator was entitled to make the findings she did in relation to Allegations 1 and 2. The misconduct of the Appellant, in respect of each and/or all of the three allegations was plainly sufficient to justify the imposition of a rebuke under section 44D and the Disciplinary Rules. The Adjudicator correctly concluded:

- given the seriousness of the conduct and the fact that it breached SRA Principles 1, 2, 4 and 6 the conduct was not trivial or justifiably inadvertent (see paragraph 6.9 quoted above).

- A rebuke was a proportionate outcome in the public interest because it was imperative that those who held positions in law firms understood the importance of client confidentiality, integrity and upholding the rule of law (see paragraph 6.10 quoted above).

- A decision to rebuke the Appellant was an effective regulatory and disciplinary outcome (see paragraph 6.11 quoted above)

Ms Emmerson submitted that none of these conclusions were outside the range of reasonable conclusions the Adjudicator could have reached on the evidence in front of her.

66. Second, even if the Appellant was successful in establishing, in whole or in part, his case on Allegations 1 and 2, it remained the position that the Appellant has admitted misconduct relating to the drafting of a witness testimony without his employer's knowledge or consent in support of his wife and sent confidential client documents to his personal email address and that he had acted in breach of Principles 4 and 6 and a rebuke was justified by reference to this misconduct in any event.

67. Third, the fact that CILEx has imposed a penalty in the form of a reprimand and warning did not render the Adjudicator's decision unreasonable:

- CILEx and the Respondent were different regulatory bodies. Whilst both regulated the conduct of the Appellant, the regulatory regimes were different in nature and, as the Appellant accepted, the scope of the allegations made by the Respondent did not precisely mirror those put by CILEx.

- The Adjudicator was plainly aware of and took into account the admissions made by the Appellant in the context of the CILEx proceedings and the penalties imposed by CILEx. Those proceedings clearly operated on her mind which was relevant to considerations of proportionality. Having taken these matters which were referred to in the documents placed before the Adjudicator into account, it could not be said that to impose a rebuke was disproportionate or unnecessary to mark the seriousness and gravity of the misconduct.

Ground D – The issuing of a section 43(2) order on the wrong basis

68. Ms Emmerson submitted that the Appellant argued that the section 43(2) order was made on the wrong basis and was disproportionate and unnecessary. This ground of challenge should be dismissed because the Adjudicator was plainly entitled to find based on the evidence before her that a section 43 order was justified and it could not be said that her conclusion was "wrong" in particular in circumstances where her opinion that it would be undesirable for the Appellant to be involved in a legal practice must carry some weight. This ground relied on the Appellant's earlier grounds of challenge (which, for the reasons set out above, Ms Emmerson submitted were without merit). Further, even if the Tribunal accepted, in whole or in part, the Appellant's case on Allegations 1 and 2, it remained the position that the Appellant has admitted misconduct relating to the drafting of a witness testimony without his employer's knowledge or consent in support of his wife and sent confidential client documents to his personal email address and that he had acted in breach of Principles 4 and 6 and in these circumstances a section 43 order was justified.

69. Ms Emmerson submitted that the Appellant's case focused on what were said to be the "draconian" and "dramatic" consequences of a section 43(2) order. This position was overstated. The Appellant produced no evidence that "a section 43(2) order has the practical effect of rendering the affected person unemployable for all intents and purposes". It did impose a regulatory burden and might make the Appellant unattractive in the employment market, but it overstated the position to say he was unemployable. In fact, it was the Respondent's experience that applications for permission to be involved in a legal practice were made relatively frequently to the Respondent, and a number of these were granted. The section 43 order was not penal in nature and not an absolute bar to employment. It gave the Respondent control. Further, the order remained necessary to protect the public interest and/or the reputation of and confidence in the profession and those that provided legal services and where in all the circumstances the level of regulatory control imposed upon the Appellant was necessary.

Ground E - The issuing of a section 43(2) order in any event

70. Ms Emmerson submitted that by Ground E of his appeal, the Appellant sought to challenge the simultaneous exercise by the Respondent of its powers under section 43 and section 44D of the Act. He alleged that to exercise both statutory powers was inconsistent and inappropriate (in reliance on the decision of this Tribunal in Arslan v SRA (case number: 11356-2015)). The Appellant's case appeared to be that the section 44D power to rebuke the Appellant was in relation to a relatively "minor matter" and therefore the criteria for making a section 43 order were not met. Ms Emmerson submitted that this ground of challenge was both legally and factually misconceived.

71. First, there was no reason in principle why the Respondent could not seek simultaneously to exercise its statutory powers under section 43 and section 44D, provided that the relevant statutory criteria for each were satisfied:

- Parliament had conferred on the Respondent a range of statutory powers to regulate both individuals and entities. These powers included disciplinary powers (namely to impose sanctions to penalise misconduct) and regulatory powers (namely to subject individuals or entities to regulatory control and supervision). There was no express provision in the statutory scheme which restricted the Respondent's powers in the manner contended for by the Appellant, nor any basis for any such implied limitation. There was no reason in principle or on the face of the statutory scheme that indicated that the powers in section 44D and section 43 could not be exercised simultaneously.

- The Appellant's case failed to recognise that the statutory powers in section 43 and section 44D were performing different functions. A section 43 order had a regulatory function, not a penal function as set out in the Ali case. By contrast, section 44D conferred power to impose disciplinary sanctions on individuals in respect of misconduct. This power enabled specific and general deterrence to be provided by the Respondent to improve the conduct of those providing legal services.

- Therefore, there was no inherent inconsistency arising from the Respondent's desire to penalise misconduct with a penalty and simultaneously exercise future control over a person's involvement in legal practice.

72. Second, the statement of this Tribunal in the Arslan case to the contrary was neither persuasive nor binding. Ms Emmerson submitted that this was not a matter upon which the Tribunal heard any argument, nor was the Respondent invited to make submissions on this point and it was obiter in that it was not determinative of the outcome in that case. Further, for the reasons above it was wrong and not binding. In any event, the Tribunal's view on this point was not endorsed by the Administrative Court and the reasoning of the Court was inconsistent with the proposition that the Respondent could not lawfully exercise its powers under sections 43 and 44D in respect of the same individual. Those powers could not be exercised simultaneously in the Arslan case because Mr Arslan was not susceptible to section 44D as he was not an employee of the firm.

73. Third, the Appellant's argument that section 44D powers would necessarily only be exercised in respect of conduct which was insufficiently serious to justify the imposition of a section 43 order was also wrong.

- The statutory tests for the imposition of a section 43 order and exercising section 44D powers were distinct, reflecting the different objectives that they served. A section 43 order could lawfully be made where the Respondent was satisfied that it would be undesirable for a person to be involved in a legal practice without a degree of control by the Respondent (in the form of approval being required and perhaps conditions being imposed). Section 44D powers could be exercised where the conditions in the Disciplinary Rules were met including a minimum level of seriousness and that a disciplinary sanction was proportionate in the public interest.

- By reason of Rule 3.1(c) of the Disciplinary Rules, a disciplinary sanction might not be imposed where the misconduct in question was trivial or justifiability inadvertent. The statutory scheme therefore expressly imposed a threshold for a certain level of seriousness before misconduct could be the subject of a disciplinary sanction.

- Whether a section 43 order was justified on any given facts would depend on the misconduct in question and the findings an Adjudicator made on the facts: the fact that a rebuke or fine under section 44D was also being contemplated by the Adjudicator could not automatically rule out a section 43 order being made as a matter of principle.

74. Ms Emmerson submitted that ordinarily the Respondent would deal with more minor matters itself and more serious matters meriting sanction such as strike off (in the case of a solicitor) or a substantial fine would be referred to the Tribunal. The purpose of the Disciplinary Rules was to give the Respondent power to deal with more minor cases but that did not mean that only minor or non-serious cases were dealt with by the Respondent.

75. Fourth, on the facts of this case, the Appellant was wrong to suggest that his misconduct was correctly characterised as minor and therefore could not justify a section 43 order. The Adjudicator expressly found that his misconduct was serious (see paragraph 6.16 quoted above). Further, the Adjudicator found that the Appellant had breached SRA Principles 1, 2, 4 and 6 and made a finding of lack of integrity. In the case of a solicitor a finding of lack of integrity under Principle 2 could justify removing that solicitor from the Roll which showed how seriously the Tribunal regarded it. In these circumstances the Adjudicator was satisfied that the section 43 order was an effective regulatory outcome to protect clients and the public as the Respondent would be given the opportunity to consider the working environment of the Appellant and the degree of support and supervision he might need (see paragraph 6.19 of the Adjudicator's Decision). For any or all of these reasons Ground E was without merit. In these circumstances, the Respondent invited the Tribunal to:

- dismiss the application for a review of the section 43 order and confirm the section 43 order on the basis that the opinion formed by the Adjudicator was neither wrong nor unjust because of a serious procedural or other irregularity;

- dismiss the appeal against the disciplinary decisions on the basis they were neither wrong nor unjust; and

- make an order for the costs of these proceedings in favour of the Respondent.

Tribunal's Decision on the Appeal and Application for Review

76. The Tribunal was assisted by the recent confirmation of the High Court in the Arslan case as to the correct approach to an application for a review under section 43(3) and an appeal under section 44E with particular regard to paragraphs 38-42 of the Arslan judgment quoted under Ms Emmerson's submissions above. The Tribunal applied the civil standard of proof to the appeal, the balance of probabilities. The Tribunal had to consider first what standard the Adjudicator as the primary fact finder ought to have

applied and second whether the Adjudicator had properly applied that standard. She expressly stated that she applied the civil standard and this had not been disputed before this Tribunal nor had this Tribunal found any evidence to the contrary. In both the appeal against the section 44D decision and the review of the section 43 order, the Tribunal reviewed the decision of the Adjudicator. The Tribunal considered the Appellant's Grounds of Appeal and his oral and written submissions. The Tribunal also had regard to the oral and written submissions for the Respondent and the authorities to which it was referred by both parties. The Appellant referred to dishonesty during the hearing but the Adjudicator made no finding of dishonesty and accordingly there was no determination in that respect for the Tribunal to review.

77. The evidence before the Adjudicator included:

- A report of a regulatory supervisor which set out in detail
    - the allegations against the Appellant (paragraphs 1.1 – 1.4),
    - the facts relied on to support the allegations (together with supporting documents) (paragraphs 2.1 -2.17),
    - an assessment of conduct issues (paragraphs 3.1 – 3.7),
    - the need for controls (paragraph 4.1),
    - the applicable law and rules (paragraph 5),
    - detailed analysis of conduct (paragraphs 6.1 – 6.4);
    - proposed controls and recommendations (paragraphs 6.5 – 7.2);
    - a summary of the Appellant's comments in response.
- The Appellant's responses to the allegations namely an initial response dated 15 January 2016 and a further detailed response dated 16 February 2016.

78. No permission was sought by either party before this Tribunal to adduce new evidence which in any event could only have been admitted in the interests of justice. The Appellant referred to several possible new points including what he alleged to be the poor quality of his representation before the Employment Tribunal but this Tribunal noted that it was the quality of his oral evidence that had been found wanting. The Appellant had also made submissions about his inability to alter the online ET1 form to provide an explanation that he was referring to estimated future rather than current earnings but the Tribunal did not attach any weight to this because he had admitted before the CILEx Tribunal that he had created a potential misleading position. The Appellant asserted that the witness testimony document in question was not the final version sent the Open University but the Tribunal noted that he did not assert that it was substantively different.

Ground A - Creation of a "witness testimony"

79. This Ground related to a document entitled "witness testimony". It was the subject of allegation 2 before the Adjudicator:

> "By assisting in the drafting and/or preparation of a witness statement dated 23 May 2012, purportedly from [the firm] in support of his wife [Mrs RB], without the knowledge of [the firm]/its partners, [the Appellant] acted in breach of Principles 1, 2 and 6 of the SRA Principles 2011."

In his letter of 16 February 2016, at paragraph 8 the Appellant stated:

> "As will be seen from the attached CILEx charges, I have accepted I did assist in the drafting of a document bearing the name of Equity Solicitors. However, I did not act dishonestly in doing that, and I deny some of the alleged breaches of the SRA Principles, namely that I failed to uphold the rule of law and proper administration of justice, to act with integrity. I accept I did not behave in a way that maintains the trust the public places in me and in the provision of legal services."

The facts were not substantially disputed. The Appellant admitted breach of Principle 6 of the SRA Principles. The appeal therefore related only to the Adjudicator's Findings in respect of SRA Principles 1 and 2. The Appellant admitted before CILEx that contrary to CILEx Principles 1 and /or 2 that he:

> "Assisted without the knowledge or authority of Equity Solicitors/its partners, in the drafting of a document bearing the name of that firm and entitled "witness testimony" in support of his wife [Mrs RB]"

CILEx Principles 1 and/or 2 were in almost identical wording to that of the Respondent's Principles 1 and 6 respectively. CILEx Principle 2 required the Appellant to:

> "Maintain high standards of professional and personal conduct and justify public trust in you, your profession and the provision of legal services."

In his letter dated 16 February 2016 to the Regulatory Supervisor at paragraph 8 the Appellant stated:

> "I accept that I did not behave in a way that maintains the trust the public places in me and in the provision of legal services."

The Appellant repeated that admission in his written submissions for this hearing. The amended CILEx charges did not include any reference to lack of integrity. The Tribunal noted that the Appellant was represented in those proceedings and had informed the Tribunal that it was his Counsel who had drafted the amended charge. The Tribunal noted that the Adjudicator had the evidence which was before the Employment Tribunal and the Appellant's admissions to CILEx. This Tribunal considered that she was entitled to take that into account. It considered that based on the Appellant's admission at CILEx it was justifiable for the Adjudicator to find breach of the SRA Principle 1 proved against the Appellant.

80. The only issue outstanding on which the Adjudicator felt she could form a view was whether the Appellant lacked integrity (SRA Principle 2) which in the redrafted CILEx charge had fallen away. Breach of CILEx Principle 3 was originally alleged; it encompassed behaving with honesty and integrity. In his letter of 16 February at paragraph 12 the Appellant stated:

> "I accept that my conduct in providing the (accurate) reference was inappropriate and that I should have sought my employers' permission first, as indicated by my acceptance of the CILEx charge. I have reflected on that and have remediated my behaviour, as CILEx found."

At paragraph 6.2.2 of her decision, the Adjudicator stated:

> "I also find that he has breached SRA Principles 1 and 2 because I do not accept his explanation that the document entitled "witness testimony" was in fact a reference. [The Appellant] is a legally qualified litigator who knows the difference between a reference and a witness testimony. He has provided an example of another reference he has provided and that is not titled "witness testimony". [The Appellant] created this document. He knew what he was doing when he created it. In constructing such a document without his employers' approval, he breached SRA Principles 1 and 2. The document was misleading and failed to uphold the rule of law and the proper administration of justice. In not obtaining his employers' consent, he did not act with integrity. Integrity should characterise all of [the Appellant's] professional dealings with his employers."

The Tribunal determined that the Adjudicator was entitled to form the view that the document before her was a witness testimony rather than a reference because it constituted evidence as was evident from the format of the document provided by the Open University. The Appellant stated on behalf of the firm that he had witnessed tasks described in the testimony. The Tribunal also noted that there was evidence before the Employment Tribunal that some of the detail in the "witness testimony" was incorrect. For example the Respondent in its letter to the Appellant dated 23 November 2015 stated:

> "The first example of dishonest behaviour that Judge Kearsley identified was in relation to a document dated 23 May 2012, which purports to be a witness statement for your wife, [Mrs RB]. The document is unsigned but "Equity Solicitors" is printed at the bottom of the page, making it appear as though the firm have written it. The document reads as though the firm are providing support in the form of a witness statement for [Mrs RB] and have attended meetings with her at a Jobcentre regarding work experience opportunities.
>
> In his witness statement to the Employment Tribunal, [Mr Z] stated "at no point has Equity Solicitors ever attended such meetings and neither has Equity Solicitors authorised [the Appellant] to attend such meetings or provide such reference/testimony."

The Tribunal considered that the Adjudicator was justified in making the factual findings that she did in circumstances based on the evidence before her which demonstrated that the Appellant assisted in the creation of a witness testimony for his wife which came as from the firm and in respect of which the firm had not been consulted and which was misleading because it contained inaccurate information and in which he stated that he had witnessed tasks being carried out. The Tribunal had to attach considerable weight to her findings of fact about the nature of the document. The Tribunal found no good reason that her conclusions were wrong. Her conclusions

that the document was misleading based on her evaluation of the facts did not lie outside the bounds within which reasonable disagreement was possible. Based on her evaluation the Adjudicator was also justified in concluding that the Appellant lacked integrity and was in breach of SRA Principle 2.

Ground B - Failure to give credible evidence

81. In the CILEx proceedings the Appellant admitted that he acted contrary to Principle 1 and/or Principle 2 of the CILEx Code of Conduct 2010. The particulars of the amended charge which he admitted included at paragraphs 3 and 4 respectively:

> "Submitted an 'ET1' form in support of a claim for constructive dismissal against his former employers without clarifying his then current employment and remuneration status, creating a potentially misleading position in the proceedings.
>
> Brought in the Employment Tribunal a claim for constructive dismissal against his former employers, Equity Solicitors, without providing sufficient documentary evidence in support of his claim, in a potentially misleading way."

However in his 16 February 2016 letter and in the submissions for this hearing the Appellant denied breaching those Principles. At paragraph 11 of his notice of appeal the Respondent stated that he accepted that he gave evidence in support of his claim for constructive dismissal and failed to prove his claim to the required standard and crucially accepted that in doing so his evidence had the potential to mislead, although he denied that it was actually misleading. The Appellant had brought his claim to the Employment Tribunal and he was a represented party whose case fell to pieces in cross examination. The Employment Judge concluded that he was a dishonest witness. The Adjudicator based her decision on the Appellant's own admissions as she set out in paragraph 6.1.1. At paragraphs 6.1.3 and 6.1.4 of her decision, already quoted above, the Adjudicator referred to the Appellant's legal training and experience and awareness of the need to provide accurate information and referred to his being represented at the CILEx Tribunal. She indicated that she was well aware that the Employment Judge's statement was "admissible as evidence" but "it is not conclusive evidence of dishonesty" and she made no finding about the allegation of dishonesty. This Tribunal considered that on the balance of probabilities test which the Adjudicator had to apply and did apply, she was justified in concluding that in admitting to potentially misleading the Employment Tribunal the Appellant's actions lacked integrity and that it constituted a breach of SRA Principle 2 and a failure to achieve Outcome 5.1 "You do not attempt to deceive or knowingly or recklessly mislead the court." She was also entitled to conclude that he breached SRA Principle 6 which he also denied.

Ground C - The issuing of the rebuke

82. In his Grounds of Appeal the Appellant set out that if his grounds A and B were accepted that left the allegation about sending confidential documents to his home e-mail as the basis for the rebuke and he submitted that a rebuke was disproportionate and unnecessary in the circumstances. He acknowledged that breaches of SRA

Principles 4 and 6 and failure to achieve Outcome 4.1 of the Code of Conduct were in themselves significant. He had also made admissions in the CILEx proceeding that his conduct constituted breaches of their Principle 1 and/or Principle 2. This Tribunal had found that Grounds A and B failed and so his submission of disproportionality based on the breach of confidentiality alone was irrelevant.

83. The roles of the Respondent and of CILEx were different as regulators and this Tribunal did not accept based on the submissions it had received that just because one regulator had issued a rebuke another fulfilling a different role was prevented from doing so. The Appellant had also relied on the rebuke as an indication that what he had done was not serious but the Tribunal considered that in addition to the Adjudicator expressly finding that the Appellant's misconduct was serious her decision had to be seen in the context of what she said at paragraph 6.12 of her decision where she referred to having:

> "seen no evidence of a statement of means being sent to [the Appellant]. On that basis, I have not ordered a financial penalty as I cannot be satisfied that it would be proportionate to do so."

This statement reinforced her understanding of the conditions in Rule 3.1 set out at her paragraph 6.6.3 that the Appellant's acts or omissions were neither trivial nor justifiably inadvertent.

84. The Tribunal reviewed the Adjudicator's findings. She stated at her paragraph 6.6 that she might give a regulated person a rebuke where the three following conditions were met as she set out:

> "6.6.1 That [the Appellant's] acts or omissions, which breached the SRA Principles and the SRA Code of Conduct…, fulfil one or more of the conditions specified in Rule 3.1 (a) which include;
>
> 6.6.1.1 that the act was deliberate;
>
> 6.6.1.2 was or was related to a failure or refusal to ascertain, recognise or comply with the regulated person's professional regulatory obligations as such, but not limited to, compliance with requirements imposed by legislation or rules made pursuant to legislation, the SRA, the Law Society, the Legal Ombudsman, the Tribunal or the court;
>
> 6.6.1.3 misled or had the potential to mislead clients, the court or other persons, whether or not that was appreciated by the regulated person; and
>
> 6.6.1.4 formed or formed part of a pattern of misconduct or other regulatory failure by the regulated person.
>
> 6.6.2 that it is a proportionate outcome in the public interest to rebuke [the Appellant]; and

> 6.6.3 that [the Appellant's] acts or omissions, which breached the SRA Principles and the SRA Code of Conduct, referred to above are not trivial nor justifiably inadvertent."

The Adjudicator then went on at paragraph 6.7 to 6.10 of her decision to analyse the Appellant's conduct and at 6.11 to set out that she was satisfied about the rebuke and its nature and purpose. Having carried out its review the Tribunal was satisfied to the required standard of proof the civil standard that there was no procedural or other irregularity in the way the Adjudicator had carried out her analysis and evaluation let alone one which was serious. The Tribunal concluded that the Adjudicator was justified in administering a rebuke to the Appellant.

Ground D – The issuing of the section 43 (2) order on the wrong basis

85. The Tribunal noted from the Grounds of Appeal that this Ground was parasitic and relied on the Appellant succeeding in respect of Grounds A and B for the same reasons as he gave in respect of Ground C. He submitted that the decision of the Adjudicator to issue a section 43 order was a wholly disproportionate and unnecessary step. This Tribunal rejected the Appellant's argument that a section 43 order was wholly disproportionate and unnecessary. The Tribunal was satisfied having regard to the Rule 3.1 of the SRA Disciplinary Rules that the fact the Adjudicator decided to administer a rebuke could not be taken to indicate that what the Appellant had done was not a serious matter. It had gone beyond being trivial or inadvertent; not least because the Appellant had been found to have lacked integrity and created a potentially misleading situation for the court and assisted without authority in the creation of a document purportedly on behalf of his firm.

86. Furthermore the Tribunal was also not satisfied that the imposition of such an order led to draconian consequences or was disproportionate. It was not designed of itself to prevent an individual from working. It was well established law that a section 43 order was a regulatory device to control where an individual was permitted to work and to permit the regulator to exercise supervision. The Tribunal concluded that the Adjudicator was justified based on the evidence before her and her findings in imposing the order to fulfil the purposes set out in the case of Ali which she quoted at paragraph 6.15 of her decision:

> "As they themselves [the Solicitors Disciplinary Tribunal] acknowledge, the section 43 order has a regulatory function, not a penal function. That is why the order is of indefinite duration, subject to revocation upon review. The purpose of the order is to safeguard the public and the [Law] Society's reputation by ensuring that a person is currently only employed where a satisfactory level of supervision has been organised and for as long as that person requires such level of supervision before being permitted to work effectively under his own steam. That cannot, in the absence of specific evidence, be established merely by someone attempting, unsuccessfully, to obtain the necessary experience of working directly under supervision."

Ground E- Issuing the section 43 order in any event

87. Ground E came into play because this Tribunal had rejected the Appellant's grounds A and B. The Appellant argued that a rebuke was designed to deal with more minor matters of misconduct whereas a section 43 order was designed for more serious matters because it was for conduct of "such a nature that in the opinion of the Society it makes it undesirable for him to be involved in legal practice." The Tribunal considered that the Appellant was wrong in this analysis. As set out under Ground D above the distinction that he made was unsound; misconduct had to be of a certain level of seriousness as set out in Rule 3.1 of the SRA Disciplinary Rules 2011 before the Adjudicator's powers under section 44D came into play. This Tribunal had already noted in respect of Ground D that the Adjudicator expressly stated that she could not consider a fine because the Appellant had not been provided with a means form. The Appellant also relied on comments made by an earlier division of the Tribunal when it dealt with the Arslan case to the effect that it was inappropriate for the Respondent to operate its powers under section 43 and make disciplinary decisions under section 44 on the same underlying facts when the use of disciplinary powers were said to be for minor matters where a section 43 was a serious matters. The Tribunal was not bound by the views of the earlier division of the Tribunal and had already set out above that it found this to be an unsound distinction. The point had not been addressed by the High Court specifically but the Court had overturned the Tribunal's decision in the Arslan case. Overall there was no inconsistency between the imposition of a rebuke by the Adjudicator and her decision to impose a section 43 order based on her opinion that the Appellant's conduct made it undesirable for him to be involved in a legal practice without the Respondent's permission and supervision.

88. Furthermore the Tribunal agreed with Ms Emmerson's arguments that there was no reason why the Respondent could not seek simultaneously to exercise its statutory powers under section 43 and section 44D provided that the relevant statutory criteria for each, were satisfied; to make the two orders simultaneously was not incompatible. The power under section 43 was regulatory as explored in respect of Ground D above while that under section 44D was disciplinary and enabled the Respondent to impose disciplinary sanctions on individuals in respect of misconduct. The Tribunal also rejected the Appellant's assertion that the Adjudicator's findings equated losing a claim to the inevitability of there being a section 43 order; it was clear from the decision that the Adjudicator had considered the particular circumstances and did not blindly accept the findings of the Employment Judge.

Tribunal's Determination - Summary

89. In general the facts underlying this matter were not disputed and so the Tribunal only had to look at the way in which the Adjudicator had reached her conclusions and those conclusions themselves. In summary this was an application by the Appellant for a review of an order made under section 43 and an appeal against a rebuke made by the Respondent through its Adjudicator on 18 March 2016. The Tribunal had been mindful of the case of Arslan in which the High Court set out the approach this Tribunal had to follow in conducting a review under section 43(3) and the hearing of an appeal under section 44E. The Arslan case made it clear that with regard to both section 43 reviews and appeals under section 44 E that the Tribunal must review the decision of the Adjudicator and not conduct a rehearing. The Tribunal was

empowered to quash, vary or confirm the section 43 order and to affirm or revoke the order made under section 44. The Appellant's appeal was set out in his notice of appeal under Grounds A-E. There were two allegations 4 and 5 which the Tribunal did not have to be concerned with because in respect of them the Adjudicator made no finding and in respect of the dishonesty allegation the matter had not been proceeded with. Having reviewed the documents that were before the Adjudicator and heard the representations made by the Appellant and for the Respondent the Tribunal concluded:

- The Adjudicator used the correct standard of proof, that is the civil standard
- The Adjudicator properly applied the standard
- The decision and conclusions of the Adjudicator were not outside the bounds within which reasonable disagreement was possible.

The Tribunal was not satisfied that the Adjudicator's decision in respect of the section 43 order or the disciplinary sanction made under section 44D was wrong or unjust. The Tribunal therefore confirmed the section 43 order and affirmed the order made under section 44D.

Costs

90. For the Respondent, Ms Emmerson applied for costs against the Appellant. She submitted that there had been two separate applications; that under section 44E where she submitted that costs should follow the event and in respect of section 43 where the situation was somewhat more complex but she submitted that in any event the Tribunal should make an order in the Respondent's favour. There had been a question as to whether a section 43 order should have been issued but the Tribunal had confirmed it and she submitted that the Respondent should therefore receive its costs in that respect as well. The costs claim totalled £19,215 and related to both applications. Work been undertaken at different levels of fee earner and Ms Emmerson submitted that the sums claimed were reasonable for work of this nature and the hourly rates were such as were regularly accepted by the Tribunal. Some time had been spent liaising about the preparation of the documents and preparation for the hearing and as the Appellant was in person her instructing solicitors had tried to be as helpful as possible. She pointed out that an earlier case management hearing had been attended by solicitors without Counsel in order to save costs. There was a claim for "Attendance on others" and this related to internal discussions within her instructing solicitors' firm concerning strategy and how the matter should be dealt with in the light of the Arslan case. There had also been a handover where one fee earner had gone on maternity leave. The amount claimed for the hearing could be reduced somewhat because it had only lasted one and a half instead of the full two days estimated. She submitted that her own fees were justified because the matter had involved reasonably complex points of law especially in respect of the Arslan case and she had prepared a Skeleton argument.

91. The Appellant indicated that the hourly rates claimed were much as he had expected but he submitted that Counsel's fees claimed for the hearing were quite substantial; £8,000 was more than he had expected. The amount claimed by the solicitors was reasonable but he felt that the hours claimed were somewhat excessive. The Appellant submitted that he had no assets and did not own a property. He had received a

statutory demand in respect of earlier costs. He was presently reliant on family and friends and had not wished to apply for state benefits pending the outcome of this hearing. It was possible that he would become bankrupt.

92. The Tribunal considered the rates claimed to be reasonable but that the costs claimed for the hearing were rather high and as Ms Emmerson had indicated the time claimed needed to be reduced. The Tribunal did not consider it reasonable to allow costs for attendance on others within the firm and made a reduction for the inevitable duplication incurred by a handover when one of the fee earners departed on maternity leave. The Tribunal also felt that the claim for attendance by solicitors at the hearing was not justifiable as Counsel had been involved in Arslan matter. The Tribunal summarily assessed costs in the total sum of £12,000. The Appellant stated that he had no assets but had not provided any evidence in support. He had decided to bring this application and the Tribunal determine that an immediately enforceable order would be appropriate. It would be open to the Appellant to negotiate payment of the costs with the Respondent.

Statement of Full Order

93. The Tribunal Ordered that the Decision of the Adjudicator in respect of the Appellant Ainul Hoque, clerk, dated 18 March 2016 made under section 43(2) of the Solicitors Act 1974 (as amended) ("the Act") is Confirmed and the Tribunal confirms the Order made by the Adjudicator in respect of the said appellant under section 44D of the Act. The Tribunal further Ordered that the Appellant do pay the costs of and incidental to his applications fixed in the total sum of £12,000.00.

Dated this 9th day of January 2017
On behalf of the Tribunal

R. Hegarty
Chairman

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11504-2016

BETWEEN:

AINUL HOQUE Appellant

and

SOLICITORS REGULATION AUTHORITY Respondent

Before:

Mr R. Hegarty (in the chair)
Mrs C. Evans
Mr S. Howe

Date of Hearing: 1st & 2nd December 2016

APPENDIX 1

The Solicitors Act 1974 (as amended)

Section 43 Order

The statutory scheme provide as follows:

"Section 43 Control of solicitors' employees and consultants

(1) Where a person who is or was involved in a legal practice but is not a solicitor—

…

(b) has, in the opinion of the Society, occasioned or been a party to, with or without the connivance of a solicitor, an act or default in relation to a legal practice which involved conduct on his part of such a nature that in the opinion of the Society it would be undesirable for him to be involved in a legal practice in one or more of the ways mentioned in subsection (1A), the Society

may either make, or make an application to the Tribunal for it to make, an order under subsection (2) with respect to that person.

(1A) A person is involved in a legal practice for the purposes of this section if the person—

(a) is employed or remunerated by a solicitor in connection with the solicitor's practice;

(b) is undertaking work in the name of, or under the direction or supervision of, a solicitor;

…

(2) An order made by the Society or the Tribunal under this subsection is an order which states one or more of the following—

(a) that as from the specified date—

(i) no solicitor shall employ or remunerate, in connection with his practice as a solicitor, the person with respect to whom the order is made,

(ii) no employee of a solicitor shall employ or remunerate, in connection with the solicitor's practice, the person with respect to whom the order is made,

(iii) no recognised body shall employ or remunerate that person, and

(iv) no manager or employee of a recognised body shall employ or remunerate that person in connection with the business of that body,

except in accordance with a Society permission;

(b) that as from the specified date no recognised body or manager or employee of such a body shall, except in accordance with a Society permission, permit the person with respect to whom the order is made to be a manager of the body;

(c) that as from the specified date no recognised body or manager or employee of such a body shall, except in accordance with a Society permission, permit the person with respect to whom the order is made to have an interest in the body.

…

(3) Where an order has been made under subsection (2) with respect to a person by the Society or the Tribunal—

(a) that person or the Society may make an application to the Tribunal for it to be reviewed, and

(b) whichever of the Society and the Tribunal made it may at any time revoke it.

(3A) On the review of an order under subsection (3) the Tribunal may order—

(a) the quashing of the order;

(b) the variation of the order; or

(c) the confirmation of the order;

and where in the opinion of the Tribunal no prima facie case for quashing or varying the order is shown, the Tribunal may order its confirmation without hearing the applicant.

(4) The Tribunal, on the hearing of any application under this section, may make an order as to the payment of costs by any party to the application.

Section 44D

Disciplinary powers of the Society

(1) This section applies where the Society is satisfied—

(a) that a solicitor or an employee of a solicitor has failed to comply with a requirement imposed by or by virtue of this Act or any rules made by the Society, or

(b) that there has been professional misconduct by a solicitor.

(2) The Society may do one or both of the following—

(a) give the person a written rebuke;

(b) direct the person to pay a penalty not exceeding £2,000.

(3) The Society may publish details of any action it has taken under subsection (2)(a) or (b), if it considers it to be in the public interest to do so.

(4) Where the Society takes action against a person under subsection (2)(b), or decides to publish under subsection (3) details of any action taken under subsection (2)(a) or (b), it must notify the person in writing that it has done so.

…

(7) The Society must make rules—

(a) prescribing the circumstances in which the Society may decide to take action under subsection (2)(a) or (b);

(b) about the practice and procedure to be followed by the Society in relation to such action;

(c) governing the publication under subsection (3) of details of action taken under subsection (2)(a) or (b);

and the Society may make such other rules in connection with the exercise of its powers under this section as it considers appropriate.

(8) Before making rules under subsection (7), the Society must consult the Tribunal.

…

Section 44E

Appeals against disciplinary action under section 44D

(1) A person may appeal against—

(a) a decision by the Society to rebuke that person under section 44D(2)(a) if a decision is also made to publish details of the rebuke;

(b) a decision by the Society to impose a penalty on that person under section 44D(2)(b) or the amount of that penalty;

(c) a decision by the Society to publish under section 44D(3) details of any action taken against that person under section 44D(2)(a) or (b).

…

(4) On an appeal under this section, the Tribunal has power to make such order as it thinks fit, and such an order may in particular—

(a) affirm the decision of the Society;

(b) revoke the decision of the Society;

(c) in the case of a penalty imposed under section 44D(2)(b), vary the amount of the penalty;

(d) …

(e) in the case of an employee of a solicitor, contain provision for any of the matters mentioned in section 47(2E);

(f) make such provision as the Tribunal thinks fit as to payment of costs.

…

Civil Procedure Rules 52.11

Hearing of appeals

(1) Every appeal will be limited to a review of the decision of the lower court unless-

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

(2) …

(3) The appeal court will allow an appeal where the decision of the lower court was-

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

(4) The appeal court may draw any inference of fact which it considers justified on the evidence.

…

Solicitors Disciplinary Procedure Rules 2011

Part 1 Rule 3 Disciplinary Powers

3.1 The circumstances in which the SRA may make a disciplinary decision to give a regulated person a written rebuke or to direct a regulated person to pay a penalty are when the following three conditions are met:

(a) the first condition is that the SRA is satisfied that the act or omission by the regulated person which gives rise to the SRA finding fulfils one or more of the following in that it:

(i) was deliberate or reckless;
(ii) …
(iii) was or was related to a failure or refusal to ascertain, recognise or comply with the regulated person's professional or regulatory obligations such as, but not limited to, compliance with requirements imposed by legislation or rules made pursuant to legislation, the SRA, the Law Society, the Legal Ombudsman, the Tribunal or the court;

(iv) – (v)

(vi) misled or had the potential to mislead clients, the court or other persons, whether or not that was appreciated by the regulated person;

(vii) – (viii)

(ix) formed or forms part of a pattern of misconduct or other regulatory failure by the regulated person;

(b) the second condition is that a proportionate outcome in the public interest is one or both of the following:

(i) a written rebuke;

(ii) a direction to pay a penalty; and

(c) the third condition is that the act or omission by the regulated person which gives rise to the SRA finding was neither trivial nor justifiably inadvertent.

3.2 – 3.4 …

3.5 The SRA may make a disciplinary decision to publish details of a written rebuke or a direction to pay a penalty when it considers it to be in the public interest to do so in accordance with the publication criteria in appendix 2 to these rules.

3.6 Nothing in this rule shall prevent the SRA making an application to the Tribunal in accordance with rule 10.

Part 3 Rule 7 Decisions

7.7 The Standard of Proof shall be the civil standard.

SRA Code of Conduct 2011

These are mandatory principles which apply to all.

Principle 1

Uphold the rule of law and the proper administration of justice.

Principle 2

Act with integrity.

Principle 4

Act in the best interests of each client.

Principle 6

Behave in a way that maintains the trust the public places in you and in the provision of legal services.

Outcomes

You must achieve these outcomes:

Outcome (4.1)

You keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents.

Outcome (5.1)

You do not attempt to deceive or knowingly or recklessly mislead the court.