SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 11965-2019

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

SUSAN HELEN ORTON Respondent

Before:

Mr J C Chesterton (in the chair)
Mr D Green
Mr R Slack

Date of Hearing: 12 to 15 October 2020

Appearances

Andrew Bullock, counsel, of The Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham, B1 1RN, for the Applicant

Geoffrey Williams QC, counsel, of Farrar's Building, Temple, London EC4Y 7BD, for the Respondent

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JUDGMENT

Allegations

1. The allegations against the Respondent made by the Applicant were made in a Rule 5 Statement dated 28 May 2019 and were that:

1.1 On 29 August 2018 she provided misleading information to her supervisor (TG) at her firm concerning receipt of a hearing notification for a preliminary hearing before the Employment Tribunal in London on 29 August 2018 regarding her client IFM. She thereby breached any or all of Principles 2 and 6 of the SRA Principles 2011 ("the Principles").

1.2 On 29 August 2018 she provided misleading information to the Employment Tribunal by sending an email stating that the firm had not received a hearing notification for a preliminary hearing in respect of her client IFM, when she knew that this was untrue. She thereby breached any or all of Principles 2 and 6 and failed to achieve Outcome 5.1 of the SRA Code of Conduct 2011 ("the Code").

1.3 On 29 August 2018 she attempted to conceal her firm's receipt of a notification of hearing on the IMF matter, by removing at least 1 copy of the hearing notification document from the client files and placing it in the confidential waste bin. She thereby breached any or all of Principles 2 and 6.

2. Dishonesty was alleged with respect to the allegation at paragraphs 1.1, 1.2 and 1.3, however proof of dishonesty was submitted not to be an essential ingredient for proof of those allegations.

Documents

3. The Tribunal considered all of the documents in the case which comprised an electronic trial bundle containing:

Applicant

- The originating Application, Rule 5 Statement and exhibits
- A report dated 1 August 2018
- Witness statement of Tim Gofton dated 26 February 2020
- Witness statement of Ellie Forsyth dated 22 September 2020
- Witness statement of AC dated 17 September 2020
- Civil Evidence Act Notice dated 21 September 2020
- Statement of costs for hearing dated 6 October 2020
- Medical reports of Dr Susan Bradbury dated October and November 2019

Respondent

- Respondent's Answer dated 30 August 2019
- Respondent's undated witness statement with exhibits
- Medical report of Dr Mala Singh dated 4 August 2019
- Letter from Dr Mala Singh dated 20 November 2019

Preliminary Matters

'Hybrid' hearing

4. Pursuant to previous directions, case management decisions taken by the Tribunal's Senior Deputy Clerk and the Tribunal's Practice Direction for Remote and Hybrid Hearings, the case was heard on a 'hybrid' basis. The Tribunal Panel and the parties attended Gate House in London in person whilst all witnesses and other observers attended remotely via video-link.

Documents relating to 30 August 2018

5. Mr Williams, for the Respondent, sought the exclusion of material relating to events on 30 August 2018 which he submitted were prejudicial to the Respondent and probative of nothing. All the allegations related to around an hour on the afternoon of 29 August 2018. The material the Respondent sought to exclude comprised a witness statement from the head of HR at the firm and an attendance note she had taken of a meeting involving the Respondent on 30 August 2018. Whilst the Applicant contended that the Respondent had been misleading or untruthful in that meeting, there were no allegations made in respect of it and Mr Williams submitted that it should be excluded. He described reliance on the events of the following day as an attempt to introduce an element of misconduct 'through the back door'.

6. In reply Mr Bullock, for the Applicant, acknowledged there was no allegation focused on the events of 30 August 2018. He stated that the events of that day were nevertheless relevant to the allegations of dishonesty brought for two reasons. Firstly, as what was alleged to have occurred on 30 August was part of a continuing course of concealment. Secondly, it was alleged that not 'coming clean' the following day demonstrated cognisance that what she had done was wrong. He directed the Tribunal to a passage in the Rule 5 Statement in which the events of 30 August were described as "crucial in enquiring as to the Respondent understanding of the facts [sic]". It was submitted that the events on 30 August 2018 helped put the events of the previous day into context.

7. The Tribunal accepted that the Applicant's pleaded case had, since the outset, stressed the importance of events on 30 August 2018 to the determination of the allegations of dishonesty brought in relation to the previous day. The Respondent had been aware of the case she faced throughout. Procedural fairness applied, of course, to both parties. The Tribunal was fully aware that no allegations were brought in respect of 30 August 2018 and accordingly considered that great care must be taken when considering those events. However, the Tribunal considered that the possibility of a course of conduct continuing into that day, which was said to cast light on the Respondent's understanding the previous day, was potentially something which may assist the Tribunal's understanding of the matters it was required to determine when applying the test for dishonest conduct. Accordingly the Tribunal directed that the material relating to 30 August 2018 should remain before the Tribunal and that reference may be made to it.

Hearing in private and reporting restrictions

8. The Tribunal directed, pursuant to rule 12(5) of The Solicitors (Disciplinary Proceedings) Rules 2007, that the evidence of the two medical witnesses should be heard in private session. The Tribunal also directed that for the duration of the hearing details of the Respondent's medical condition and history should not be reported. Both directions were made on the basis of the prejudice, hardship, and intrusion into confidential personal matters, which would otherwise be caused.

Factual Background

9. The Respondent was admitted as a solicitor on 15 March 2016. At the date of the hearing her name remained on the Roll but she did not hold a Practising Certificate. At all material times the Respondent was a solicitor at BPE Solicitors LLP ("the Firm"). The Respondent was dismissed by the Firm on 30 August 2018. In a report dated 31 August 2018 the Firm notified the Applicant of the Respondent's conduct giving rise to the allegations set out above. On 2 September 2018 the Respondent self-reported the same matters.

10. There was a large measure of agreement between the parties as to the key facts. Shortly after 2 p.m. on 29 August 2018 the Respondent received a telephone call from the Employment Tribunal ("the ET") informing her that a preliminary hearing for her matter of IMF had been missed. The hearing had been listed at 2 p.m. that day and the ET was enquiring why the Firm had not attended. There was a dispute between the parties about how many people were present in the office when the call was received by the Respondent. The Respondent reviewed her electronic file and found no notification of the hearing. Shortly thereafter she found a notification of hearing document within a paper bundle. In what she described in her self-report to the Applicant of 2 September 2018 as "a moment of sheer panic" she placed the notification in the confidential waste bin. From the outset of the hearing there remained a dispute between the parties about whether the Respondent had placed two copies of the notification into confidential waste bins or one.

11. It was common ground between the parties that within minutes of having taken the call from the ET, the Respondent spoke with her supervisor, Mr Gofton. It was also common ground that whilst she apologised for missing the hearing, she did not mention the fact that following the call from the ET (and before speaking to Mr Gofton) she had found a notification of the hearing.

12. The Respondent was advised by Mr Gofton to write to the ET and apologise for the non-attendance. Having produced a draft, which was reviewed and amended by Mr Gofton, the Respondent sent such an email to the ET at 2.56 p.m. on 29 August 2018. The email included the words "unfortunately we did not have notification of this hearing". Mr Gofton subsequently found an electronic copy of the notification from the ET and the Respondent agreed to write to the ET again to correct the position.

13. At around 4 p.m. on 29 August 2018 Ms Forsyth, then a secretary in the Firm's Employment Team, informed Mr Gofton that she had seen the Respondent take documents from two paper files and put them into separate confidential waste bins. That evening, after working hours, Mr Gofton and AC, the Firm's head of HR, located copies of the ET hearing notification letters in the confidential waste bins.

14. On the following day, 30 August 2018, the Respondent attended a meeting with Mr Gofton and AC, which the Respondent said she was expecting to be informal. The discovery of the ET hearing notification documents in the confidential waste bins was put to the Respondent and she accepted (after a disputed amount of time) that she had removed a copy from the files and put it in the waste bin. Having initially been informed that she would receive a final written warning for her conduct the Respondent was dismissed by the Firm on grounds of gross misconduct later that day.

Witnesses

15. The written and oral evidence of witnesses is quoted or summarised in the Findings of Fact and Law below. The evidence referred to will be that which was relevant to the findings of the Tribunal, and to facts or issues in dispute between the parties. For the avoidance of doubt, the Tribunal read all of the documents in the case and made notes of the oral evidence of all witnesses. The absence of any reference to particular evidence should not be taken as an indication that the Tribunal did not read, hear or consider that evidence. The following witnesses gave oral evidence:

- Tim Gofton, former partner at the Firm and a supervisor of the Respondent
- Ellie Forsyth, former secretary within the Firm's employment law team
- Dr Susan Bradbury, consultant psychiatrist (instructed by the Applicant)
- The Respondent
- Dr Mala Singh, consultant psychiatrist (instructed by the Respondent)

Ms AC, the Firm's head of HR, was not required by the Respondent to attend but the Tribunal was invited to, and did, read her written statement.

Findings of Fact and Law

16. Due to the date on which the originating application was made, before The Solicitors (Disciplinary Proceedings) Rules 2019 came into effect, the Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for their private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

17. **Allegation 1.1: On 29 August 2018 the Respondent provided misleading information to her supervisor (TG) at her firm concerning receipt of a hearing notification for a preliminary hearing before the Employment Tribunal in London on 29 August 2018 regarding her client IFM. She thereby breached any or all of Principles 2 and 6 of the Principles.**

The Applicant's Case

17.1 It was accepted by the Applicant that the preliminary hearing was missed due to a genuine mistake on the part of the Respondent and/or perhaps others at the Firm. By her own admission (in her self-report to the Applicant) the Respondent became aware that the Firm was on notice of the preliminary hearing when she discovered the notification of hearing document on the paper file. She had found the hearing notification letter from the ET before she brought the missed hearing to her supervisor's attention.

17.2 When informing Mr Gofton about the missed hearing, the Respondent apologised to him but was alleged to have said, knowing it not to be true, that the Firm had not been given advance notice of the hearing and that was the reason why it had been missed. This was misleading as the Firm had a notification letter on two paper files (and as it transpired subsequently, also on the electronic client file). It was alleged that the Respondent did not inform Mr Gofton of this fact and instead informed him that she had checked the physical client file and the Firm's case management system but could find no notice of the preliminary hearing. The Applicant relied upon the Respondent's self- report in which she stated that she thereby *"... misled him into thinking the Firm didn't know about the hearing as I did not tell him that I subsequently found the notice of hearing in the bundle"*. Mr Gofton's evidence was that during their conversation the Respondent had been coherent and had told him what had happened and that together they had dealt with the situation.

17.3 It was submitted that a solicitor acting with integrity, responding to circumstances in which a mistake had been made and a hearing missed, would not provide misleading information to her firm. The correct approach was said to be to have explained to her supervisor that there was a letter on the client file which had put the firm on notice of the preliminary hearing but that she had not reviewed the file sufficiently and was unaware of it. It was alleged that the Respondent instead sought to evade culpability for her error and provided false information to her supervisor about having checked the physical file and the electronic case management system and found no notice of the preliminary hearing. It was submitted that the Respondent thereby failed to act with integrity contrary to Principle 2 and failed to behave in a way that maintained the trust the public placed in her and in the provision of legal services contrary to Principle 6.

The Respondent's Case

17.4 In her Answer to the allegations the Respondent admitted that she misled her supervisor Mr Gofton by omission and thereby breached Principles 2 and 6. Via her solicitors the Respondent provided a detailed response to the allegations by letter dated 14 November 2019. Her account is not set out in detail as the alleged breaches of the Principles were admitted, but certain contentions are noted as they were relevant to the aggravating allegation of dishonesty.

17.5 The Respondent's account of the conversation with Mr Gofton was that she told him, truthfully, that she had missed the hearing because she had not known about it. Contrary to Mr Gofton's evidence, the Respondent's position was that at no point did she tell him that she had checked the physical files or that she had fully checked the

electronic case management system (something which she stated would have been impossible in the available time). The Respondent stated in her oral evidence that the fact she had found, and placed in the confidential waste, copies of the notification of the preliminary hearing "did not come up" in her discussion with Mr Gofton. Her focus was the missed hearing and the fact she needed help to deal with the situation.

17.6 The Respondent's position was that her account to Mr Gofton, which she acknowledged with hindsight was misleading, was misleading due to the omission of relevant information rather than as a result of saying something untrue in itself. The Respondent stated that what she thought was important at the time was that she had not known about the hearing and it was this upon which she focused in her account to Mr Gofton. Both Mr Gofton and the Respondent agreed that his advice had been to write to the ET immediately and apologise for the missed hearing.

17.7 In her oral evidence the Respondent stated that Mr Gofton was at his desk (next to the Respondent's) when the call from the ET was received. She stated that several people were present in the office, it being after lunch. Mr Gofton's evidence was also that he was at his desk when the Respondent took the call from the ET and he recalled outline details of the conversation. In contrast, Ms Forsyth's evidence was that at the time of the call only she and the Respondent were present in the office.

17.8 The full basis of the Respondent's denial of the aggravating allegation of dishonesty in relation to all three allegations is set out below.

The Tribunal's Decision

17.9 The Respondent had admitted the alleged breaches of Principles 2 and 6. She had thereby admitted that the account she provided to Mr Gofton was misleading, based on what she acknowledged she did not tell him.

17.10 The Tribunal could not be sure about the precise content of the conversation between the Respondent and Mr Gofton; the Tribunal was presented with two contrasting accounts. That it was misleading was accepted by the Respondent, both in the self-report produced very shortly after the incidents in question and since, including in her oral evidence at the hearing. Mr Williams did not make submissions to the contrary. The Tribunal considered that, assessed objectively, the account was misleading, even on the Respondent's case and account of the conversation. The Tribunal found that the Respondent and Mr Gofton discussed the fact that the hearing had been missed and it was agreed that an email apologising for this fact should be drafted by the Respondent as quickly as possible. The Respondent did not convey to Mr Gofton the crucial detail that before speaking to him she had found a copy of the notification of the hearing (and so the error had been the Firm's and not the ET's). This much was agreed by both Mr Gofton and the Respondent. It was not necessary for the Tribunal to go beyond these findings which were proved to the requisite standard.

17.11 The Tribunal noted the inconsistency between the evidence of Ms Forsyth and Mr Gofton about who had been present when the call from the ET had been received. Mr Gofton's evidence on this point, that he had been present and heard the call from the ET, was consistent with the Respondent's account rather than Ms Forsyth's. The

Tribunal considered that Ms Forsyth was mistaken in her recollection about who was present. Both Mr Gofton and Ms Forsyth were considered to be truthful and credible witnesses but the Tribunal found that Mr Gofton and others were present in the office with the Respondent at the time of the call.

17.12 The Tribunal considered the admission of the breaches of Principles 2 and 6 were properly made. The allegations were proved beyond reasonable doubt. The Tribunal's findings in relation to the Respondent's state of mind at the time of the conversation with Mr Gofton are set out in the findings on dishonesty below.

18. **Allegation 1.2: On 29 August 2018 the Respondent provided misleading information to the Employment Tribunal by sending an email stating that the firm had not received a hearing notification for a preliminary hearing in respect of her client IFM, when she knew that this was untrue. She thereby breached any or all of Principles 2 and 6 and failed to achieve Outcome 5.1 of the Code.**

The Applicant's Case

18.1 Having brought the missed hearing to her supervisor's attention, but misleading him as to the Firm having been on prior notice of the hearing, Mr Gofton advised the Respondent to write to the ET to apologise and inform them of the reason for the missed hearing. The Respondent duly sent an email to the ET at 14:56 on 29 August 2018 which stated:

> *"We have just been informed by the Tribunal that there was a preliminary hearing listed for this matter today.*
>
> *We apologise for not attending but unfortunately we did not have notification of this hearing."*

18.2 The Respondent had located the notice of hearing letter on the physical client file prior to speaking with Mr Gofton. It was alleged that she would therefore have been aware when she sent the email to the ET at 2.56 p.m. that the contents of the email were untrue and misleading (by saying that the Firm did not have notification of the hearing rather than the true reason being that it was an oversight by the Firm). In his oral evidence Mr Gofton accepted that it may have been he who suggested the phrasing in the email be amended, so that it referred to the Firm not having had notice (which he stated would have been based on the account of events conveyed to him by the Respondent).

18.3 It was submitted that a solicitor acting with integrity would not knowingly provide misleading information to the court. By doing so as part of a what was described as a wider enterprise designed to evade culpability for her mistake in failing to identify the notification of hearing document and missing the preliminary hearing, the Respondent was alleged to have failed to uphold the ethical standards of the profession and failed to act with integrity contrary to Principle 2. The Respondent was also alleged to have failed to achieve Outcome 5.1 of the Code which requires that solicitors do not attempt to deceive or knowingly or recklessly mislead the court. It was further submitted that the public would expect a solicitor to be honest and truthful when communicating with the court and that by providing misleading information to the

ET, the Respondent failed to behave in a way that maintained the trust the public placed in her and in the provision of legal services contrary to Principle 6.

The Respondent's Case

18.4 In her Answer, the Respondent admitted that the email in question was "apt to mislead" and she admitted breaches of Principles 2 and 6 accordingly. The Respondent denied breaching Outcome 5.1 on the basis that she maintained she acted neither deliberately nor recklessly.

18.5 The Respondent again provided further detail by letter from her solicitors dated 14 November 2019. She had originally drafted an email to send to the ET which stated (truthfully) that the preliminary hearing was missed as she had been unaware of it. She had made changes to the text at Mr Gofton's suggestion prior to sending the email. Her case was that Mr Gofton was a very experienced employment lawyer who would have known that it would be unusual for a notice of preliminary hearing not to be sent out by the ET, particularly when notice of the final hearing had been received. In addition, he knew that in the minutes which had elapsed between the call from the ET (which the Respondent maintained he would have heard as he sat next to her) and their conversation it would have been impossible to conduct an exhaustive search to verify that the Firm had not received the notice. That being the case, in part because of the pressure of another court deadline that day, the Respondent made the changes marked up by Mr Gofton as quickly as possible and sent the email to the ET. Her account was that she did not "engage her brain" with the changes he had made to her draft and simply made them and sent the email. The Respondent expanded upon this account in her oral evidence and stated that she wished the misleading words in the email had struck her at the time but she said she did not really process the amendments whilst entering them into the draft email and sending it.

18.6 With hindsight the Respondent accepted that she should have challenged the misleading line in the email about the Firm not having received the notification of the preliminary hearing. It was on this basis that the breaches of Principles 2 and 6 were accepted. However, she denied that, considered in context, she had failed to achieve Outcome 5.1 (that she had deliberately or recklessly misled the court). At the time, the Respondent was two years' qualified and stated that Mr Gofton typically made quite a lot of changes to her work. He was an experienced partner of the Firm and the Respondent's account was that she was not in the habit of challenging what a partner asked her to write. In addition, she was worried about the court deadline on another matter in respect of which substantial work was still required. The Respondent's case was that she was not trying to deceive or mislead the court; she was simply seeking to apologise and explain the Firm's non-attendance at the preliminary hearing.

18.7 In her oral evidence the Respondent accepted that Mr Gofton may have formed the view, based on what she had said to him, that the Firm had not been informed about the hearing but this was not something she considered at the time. At the time the Respondent accepted the amendments to her draft email and did not consider the possibility that they were informed by a mistaken view of events.

18.8 In her oral evidence the Respondent gave her account of the timeline involved. The preliminary hearing had been scheduled for 2 p.m. She stated that the telephone call from the ET was received at 2.10 p.m. Her conversation with Mr Gofton (the focus of allegation 1.1) took place at 2.15 p.m. In the intervening five minutes the Respondent described initially quickly checking on her computer whether the notification document was present, then checking the two paper files (one of which was in a file on a bookcase and one of which was in a file on her desk), and placing the two copies of the notification of the preliminary hearing in two separate confidential waste bins (the bins closest to the bookcase and her desk respectively). In response to a question from the Tribunal, the Respondent estimated that it would have taken her around fifteen minutes to draft the email for Mr Gofton's approval, which she estimated she had begun drafting at 2.20 p.m. after her discussion with him. Accordingly, her recollection was that having completed her draft at around 2.35 p.m. Mr Gofton subsequently reviewed it and she made his amendments before sending the email to the ET at 2.56 p.m.

18.9 The Respondent's evidence was also that she had begun to panic from when she received the phone call from the ET (at 2.10 p.m.) She described her panic heightening when she found the hard copy of the notification of hearing. This evidence, and the corroborating medical evidence, is summarised more fully below in the summary of the Respondent's case on allegation 1.3 and the aggravating allegation of dishonesty. For now, it is noted that the Respondent stated her panic only passed as she began to calm down having sent the email at 2.56 p.m. and subsequently when Mr Gofton commented that everyone makes mistakes and encouraged her not to let it get to her.

The Tribunal's Decision

18.10 That the email was misleading was admitted. Breaches of Principles 2 and 6 were admitted.

18.11 On the facts accepted by the Respondent, the email was plainly misleading. It stated that the Firm had not received notification of the hearing, which was manifestly not accurate. The Tribunal accepted that a solicitor acting with integrity would not send such an email when the inaccuracy was known to them (and was not known to the senior colleague who may have proposed the amendment about notification not being received). The Tribunal also accepted that public trust in the Respondent and in the provision of legal services would be undermined by solicitors sending such inaccurate communications to a court or tribunal. Neither the Respondent nor Mr Williams had sought to suggest that the Respondent's mental state or understanding as to the facts had any bearing on the admitted breaches of these Principles (whereas such submissions were made in relation to the aggravating allegation of dishonesty and are summarised below under the relevant heading). The Tribunal considered the admissions to be properly made and found the alleged breaches of Principles 2 and 6 proved beyond reasonable doubt.

18.12 The Respondent denied failing to achieve Outcome 5.1 and either deliberately or recklessly misleading the Court. She accepted that the ET had been misled but denied acting deliberately or recklessly. She did so on grounds that she lacked intent and did not perceive any risk of misleading the Court. These submissions overlapped

substantially with the denial of the aggravating allegation of dishonesty in respect of allegation 1.2. The Tribunal's findings on the alleged failure to achieve Outcome 5.1 in respect of allegation 1.2 are set out below with the findings on the allegation of dishonesty.

19. **Allegation 1.3: On 29 August 2018 the Respondent attempted to conceal her Firm's receipt of a notification of hearing on the IMF matter, by removing at least 1 copy of the hearing notification document from the client file's and placing it in the confidential waste bin. She thereby breached any or all of Principles 2 and 6.**

The Applicant's Case

19.1 As set out above, having been informed by the ET that the preliminary hearing had been missed, the Respondent checked the physical client file and found the notification of hearing document. The Applicant relied upon the account included in the Respondent's self-report to the Applicant:

> *"There was no record of a preliminary hearing in the diary. I then looked in the paper bundle of documents which consisted of documents that had been sent to us from the client. The notification of hearing was included within the paper bundle. In a moment of sheer panic and feeling deeply stressed and embarrassed that I had missed such a key date, I took this notification out of the file and placed it in the confidential waste bin."*

19.2 It was alleged that when considered in context, this act could be regarded as part of a wider enterprise to conceal a mistake for which the Respondent was worried about being held accountable, and one in respect of which she actively sought to evade culpability. Again, the Applicant relied upon the Respondent's own account (in her self-report):

> *"The only thing I was thinking about at the time was my supervisor's reaction that I had missed such a key date".*

19.3 This concealment of the hearing notification document by the Respondent took place immediately upon her discovery of the document and just prior to her speaking with her supervisor Mr Gofton in order to bring the missed hearing to his attention. It was alleged that the concealment of the notification document in the confidential waste bin could be regarded as part of a series of acts towards the goal of concealing evidence of her mistake so as to assist in misleading her supervisor about the Firm's prior notice of the preliminary hearing.

19.4 As stated above, the Respondent's act in concealing this document in the confidential waste bins was observed by a secretary within the team. Mr Gofton and AC located the ET hearing notification after working hours on 29 August 2018, after the Respondent had left the office.

19.5 The Applicant described a meeting that took place the following morning, on 30 August 2018, as a disciplinary meeting. At this meeting, the original version of events that the Respondent had presented to Mr Gofton the previous afternoon (that

she had been unaware of the hearing, had checked the paper and electronic files and not found any hearing notification letter) was put to the Respondent and Mr Gofton asked her if she would like to change or add anything to the sequence of events. According to the evidence of Mr Gofton and AC, the Respondent stated that there was not. Mr Gofton then informed the Respondent that she had been observed by colleagues putting documents in the confidential waste bins and that the hearing notification documents had been located.

19.6 Mr Gofton asked the Respondent for her views and (after contemplating this for over a minute on the Applicant's case) the Respondent admitted that she had put the hearing notification in the confidential waste bin as alleged. It was submitted to be noteworthy that the Respondent initially repeated the misleading account she had previously given at this meeting the following morning. It was submitted that only when clear evidence of her concealment of the notification and her misleading of her supervisor was put to her did the Respondent change her position and admit the truth.

19.7 It was submitted that by attempting to conceal the Firm's receipt of the hearing notification by removing it from the client files and placing it in the confidential waste bin, the Respondent acted without integrity contrary to Principle 2 and failed to behave in a way that maintained the trust the public placed in her and in the provision of legal services contrary to Principle 6.

<u>The Respondent's Case</u>

19.8 In her Answer the Respondent admitted this allegation in full.

19.9 As stated above, the Respondent described in her evidence panicking when she received the call from the ET at around 2.10 p.m. and this panic being heightened when she found the hard copy of the notification which had been receive from the ET but overlooked. It was very shortly after discovering the hard copies of the notification that the Respondent placed them in the confidential waste bins which was the focus of this allegation.

19.10 The Respondent provided a detailed account of events in a letter from her solicitors dated 23 November 2018. Her formal Answer to the allegations was dated 30 August 2019. Between those dates, and plainly long after the events giving rise to the allegations, the Respondent was diagnosed with Asperger's syndrome. Whilst personal details are omitted from this judgment as far as possible, the medical evidence is set out directly below under this allegation so far as it was relevant to the Tribunal's decision making. It was also relevant to the Respondent's case on the aggravating allegation of dishonesty.

19.11 The consultant psychiatrist who diagnosed this condition when she assessed the Respondent during a two hour consultation on 31 July 2019, Dr Singh, also diagnosed generalised anxiety disorder. Dr Singh gave the opinion that the Respondent's behaviour which gave rise to the incident at work on 29 August 2018 was "*not thought through*" and due to her ways of perceiving and processing information, characteristic of Asperger's syndrome: "*she was preoccupied with the notion of 'making mistakes' rather than paying attention to steps to take to rectify the situation*". Dr Singh gave the opinion that the Respondent "*was overwhelmed with*

anxiety which is significant in individuals with Asperger's and impulsively reacted to it". Dr Singh stated that the Respondent *"ended up throwing the document in the confidential waste bin, momentarily giving her respite from overwhelming anxiety. This action on the balance of probabilities was not planned or thought through, it was an act out of her dissociating due to severe anxiety."* In concluding her report Dr Singh stated that the Respondent "*was unable to think clearly and take appropriate steps to resolve and rectify the situation but rather acted suddenly without thinking. On the balance of probabilities, she was unable to process and act accordingly*".

19.12 Dr Singh gave oral evidence during the hearing. She stated that after the panic caused by the triggering event had arisen, the Respondent's rigidity of thinking, linked to her condition, would cause her to focus on her own mistake; it would be something she could not accept, understand or respond to rationally. She described the debilitating physical symptoms of panic attacks and described the actions taken by the Respondent as seeking to disrupt the pattern of the panic. Dr Singh's evidence was that the Respondent would not have been "*the master of her own mind*" at the time. Dr Singh's opinion was that the panic attack and the Respondent's "*rigidity of thinking*" were responsible for the conduct with which the allegations were concerned. She stated that panic attacks can last up to an hour and described the Respondent as having had an hour of distorted thinking. Dr Singh's opinion was that the Respondent was not thinking about the rights or wrongs of the situation or her part in it, but rather was fixated on her mistake (if indeed it was hers) and did not have the means to remedy it.

19.13 The Applicant had instructed another consultant psychiatrist, Dr Bradbury. Dr Bradbury did not agree with Dr Singh's assessment that there was a history consistent with a generalised anxiety disorder. Dr Bradbury attributed the Respondent's anxiety and depressive symptoms to the loss of her job in August 2018 and diagnosed a mild adjustment disorder which had gradually passed over time, and with help from a psychotherapist. Dr Bradbury agreed with Dr Singh's assessment that the Respondent had autistic spectrum disorder (and described Asperger's syndrome as one end of this spectrum). Dr Bradbury considered that the Respondent's Asperger's was mild on the basis of her broad range of interests, friendships and significant achievements in education and employment.

19.14 Dr Bradbury stated *"In my clinical experience neither autistic spectrum disorder or adjustment disorder interfere with comprehension and understanding"*. She disagreed with Dr Singh's assessment that the Respondent had acted whilst "dissociated" which Dr Bradbury described as being a term usually applying to a severe psychological reaction to a traumatic event which usually involved amnesia for a period of time – something she said was not present for the Respondent as she had given an accurate account to Mr Gofton the following day. Dr Bradbury stated *"It is clear that [the Respondent] acted out of panic, and indeed on impulse. However, after the moment of panic had gone she had the knowledge of what she had done and the opportunity to rectify the situation, but instead, she dug a deeper hole in what she told and did not tell [Mr] Gofton"*. In her oral evidence to the Tribunal Dr Bradbury gave the opinion that a panic attack with a sudden onset would typically reach its peak within minutes after which she would expect it to recede and be extinguished within ten or fifteen minutes. She described panic attacks as being part of normal human experience and not a psychiatric condition. Her view was that a panic attack with a duration of an

hour would involve some form of mental illness, psychosis or severe anxiety disorder. Dr Bradbury gave the opinion that "*there is not a psychiatric explanation for"* the Respondent's actions and stated that "*it is clear that she would know that secreting legal documents is wrong as she is a trained solicitor*". She concluded her report by stating "*it is my opinion that [the Respondent] was not under any mental health impairment that would impede her ability to know what she was doing, to be able to distinguish between right and wrong and to understand the obligations that she is under in her duties as a solicitor.*" In reply to a question from the Tribunal, Dr Bradbury stated that she did not consider that Dr Singh's opinions fell outside the range of reasonable specialist medical opinion on the matters considered.

19.15 The Respondent's more detailed account of events, provided via her solicitors' letter of 14 November 2019, stated that when she found the paper copy of the notification from the ET she:

> *"completely panicked and without thinking put the print out of the notice of hearing in the confidential waste bin right next to where the bundles were stored. She had done this even before she had thought about it. It wasn't a deliberate act at all and she was not trying to conceal the fact that notification had been received by the firm, to do that she would have had to delete the whole file".*

The Respondent's oral evidence during the hearing was consistent with this account.

The Tribunal's Decision

19.16 In her Answer to the allegations the Respondent admitted the alleged breaches of Principles 2 and 6.

19.17 The Tribunal reminded itself that the burden of proof was on the Applicant and that the applicable standard of proof was that that the alleged breaches must be proved beyond reasonable doubt. In light of the medical evidence from both expert witnesses, which despite areas of disagreement also contained areas of substantial agreement consistent with the account the Respondent gave in her evidence, the Tribunal had some doubt that alleged breaches of the Principles were substantiated. Accordingly, the Tribunal did not accept the admissions made by the Respondent and found that allegation 1.3 was not proved.

19.18 The alleged breaches were of Principles 2 and 6. These are the obligations to act with integrity and in a way which maintains the trust placed by the public in the Respondent and the provision of legal services respectively. Whilst the assessment of conduct breaching these Principles is essentially an objective one, the Tribunal considered that the evidence about the motivation for and awareness of the Respondent's actions in placing the copies of the notification document in the confidential waste bins created some doubt about whether when considered in full context she could be said to have failed to adhere to the ethical standards of the profession (Principle 2) or to have undermined public trust (Principle 6). The Respondent was entitled to the benefit of that doubt.

19.19 The Tribunal had regard to the comments of Lord Justice Flaux in paragraph [56] of SRA v Siaw [2019] EWHC 2737 (Admin) that finding the respondent in that case had inadvertently or carelessly misled the regulator *"...would be inconsistent with the SDT's finding that there was a lack of integrity on the part of the respondent"*. The Tribunal could not be sure in light of the medical evidence presented that the Respondent's admitted actions of placing the two notifications of the hearing in the confidential waste bins offended Principles 2 and 6. Both medical experts described the Respondent's actions, which took place directly upon her discovery of the notifications, as being borne out of panic and impulse. Dr Bradbury had given the opinion that *"**after the moment of panic had gone** [the Respondent] had the knowledge of what she had done and the opportunity to rectify the situation" [emphasis added]*. Dr Singh stated that the Respondent *"ended up throwing the document in the confidential waste bin, momentarily giving her respite from overwhelming anxiety"*.

19.20 Whilst the Respondent had accepted in her evidence that she placed two paper copies of the notification in confidential waste bins, this happened so quickly after her discovery of the document in question that the Tribunal could not be sure that she could be said to have known what she was doing. The Tribunal noted that the allegation was that the Respondent "attempted to conceal" the Firm's receipt of the Notification document and the Tribunal could not be sure of that intent. An event which would no doubt be upsetting and stressful for any diligent solicitor was described by Dr Singh as causing the Respondent to be *"overwhelmed with anxiety"* which was said to be *"significant in individuals with Asperger's"*. The Tribunal was mindful that panic was something which could affect anyone and which may not, without more, provide a satisfactory explanation for conduct, and also that in her self-report (which predated her diagnosis) the Respondent had stated that the only thing she was thinking about was her supervisor's reaction. However, for the reasons summarised in this paragraph the Tribunal did not find the alleged breaches of the Principles in allegation 1.3 to be proved to the requisite standard. The Tribunal's findings in relation to dishonesty are set out below.

20. **Allegation of dishonesty in relation to allegations 1.1, 1.2 and 1.3.**

The Applicant's Case

20.1 The Applicant referred the Tribunal to the test for dishonesty set out in paragraph [74] of Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67:

> *"When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest"*.

20.2 It was alleged that the Respondent had falsely stated to her supervisor that she had checked the physical file and the Firm's case management system but could find no notice of the preliminary hearing (allegation 1.1). This was untrue as the Respondent accepted that she had located the notification document on the physical file prior to informing Mr Gofton of the missed hearing. It was submitted that ordinary, decent people would regard it as dishonest for a solicitor to provide her supervisor with information which she knew was false and which she subsequently accepted caused him to be misled.

20.3 The Applicant relied upon the Respondent being aware that she had located the notice of hearing letter on the physical client file before she sent the email to the ET stating *"...We apologise for not attending but unfortunately we did not have notification of this hearing"* (allegation 1.2). It was submitted that she was therefore aware that the Firm was on notice of the preliminary hearing and that the contents of her email were misleading and untrue. It was submitted that ordinary, decent people would regard it as dishonest for a solicitor to send an email to a court which she knew to be misleading and untrue.

20.4 It was alleged that the Respondent attempted to conceal the Firm's receipt of the hearing notification by removing the documents from the client files and placing them in confidential waste bins (allegation 1.3). It was submitted that ordinary, decent people would regard it as dishonest for a solicitor to conceal a document in a confidential waste bin (which was said potentially incriminated her in relation to the missed hearing) only to subsequently deny its existence in discussions with her colleagues.

20.5 The Applicant highlighted specifically the relevance of the *"...actual state of the individual's knowledge or belief as to the facts"* from the Ivey test to the Tribunal's determination. The Applicant's case was that the Respondent accepted the material facts underlying the allegation. In her near contemporaneous self-report, which the Applicant submitted provided the best evidence and insight into the Respondent's understanding of the material facts, the Respondent:

- admitted that she had found the notification of hearing document on the physical file prior to informing her supervisor of the missed hearing and that she *"...misled him into thinking the Firm didn't know about the hearing as I did not tell him that I subsequently found the notice of hearing in the bundle"*. The Applicant submitted that, despite the Respondent's subsequent insistence that she was not trying to deceive Mr Gofton, this act could only have been deliberate and based on a conscious decision to mislead or omit key information. It was submitted that this was part of a deliberate pattern of behaviour which continued into the next day;

- accepted that she sent an email to the ET at 14:56 on 29 August 2018 which stated that *"We apologise for not attending but unfortunately we did not have notification of this hearing"*. It was submitted that in view of the admission in the previous bullet point it inconceivable that the Respondent did not know that this statement was false and misleading; and

- accepted that upon locating the notification of hearing document *"I took this notification out of the file and placed it in the confidential waste bin"*.

It was submitted that applying the objective standards of ordinary decent people the Respondent acted dishonestly when undertaking these acts.

20.6 The Applicant contended that the events occurring during the meeting that took place the following day, on 30 August 2018, were crucial in determining the Respondent's knowledge and belief and applying the Ivey test. The Respondent's understanding of the material facts was submitted to be clear from the fact that when questioned by her supervisor, she initially recounted the false version of events she had allegedly given to Mr Gofton the previous day, before changing her position when confronted with the evidence. It was submitted that the Respondent must have understood the facts clearly to have chosen to adopt a false position initially before admitting the truth subsequently when left with no choice but to make admissions after being made aware of the evidence. Mr Bullock submitted that this demonstrated a continuing course of conduct of concealment which cast light on the events of the previous day.

The Respondent's Case

20.7 Mr Williams stated that the case turned on events from over two years ago lasting an hour at the most. The Tribunal was faced with the task of looking into the mind of the Respondent at that time. The Respondent had produced a range of impeccable testimonials. These included a reference from her former supervisor at the Firm, Mr Gofton, who described the incident in question as a "single aberration". Mr Williams submitted that in this comment Mr Gofton had accurately captured the heart of the Respondent's misconduct: it was an aberration from her otherwise impeccable personal and professional conduct. Mr Williams submitted that the evidence before the Tribunal supported the conclusion that the Respondent had no propensity towards dishonesty and that her record was to her credit and spoke of her credibility. She was entitled to be believed in her evidence unless there was compelling evidence to the contrary.

20.8 Mr Williams submitted that the Tribunal should have regard to the case of Barton v Booth [2020] EWCA Crim 575 when applying the test set out in Ivey. He highlighted in particular the comment that when ascertaining the Respondent's "state of mind as to knowledge or belief as to the facts" all circumstances should be taken into account. He referred the Tribunal to paragraph [108] and the comment from the Lord Chief Justice that "*All matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard*".

20.9 Mr Williams reminded the Tribunal that the burden of proof was on the Applicant, and that the applicable standard of proof was beyond reasonable doubt. In other words, unless the Tribunal was sure that the Respondent had a dishonest state of mind, then she was entitled to be acquitted of dishonesty. If there was another possible explanation, then the Tribunal could not be sure that the Respondent had a dishonest state of mind. Mr Williams submitted that the Respondent's state of mind was determinative on the question of dishonesty. He submitted that the second, objective, element of the Ivey test was not satisfied on the basis that a decent ordinary person would not consider the Respondent's conduct dishonesty if they were in possession of all relevant facts about the Respondent's health and state of mind (as such an objective observer must be).

20.10 The key facts were not in dispute between the parties. Mr Williams described the Respondent's conduct as "bizarre". When she found the hard copy of the notification of the hearing, she did not hide it or take it home to ensure it would not be found. Instead, she posted it into a waste bin in plain sight of others in the office. Mr Williams asked the Tribunal to accept the evidence of Mr Gofton and the Respondent that she did so when her supervisor and a partner at the Firm were in close proximity. She then did the same thing again with the second copy of the notification as she confirmed in her evidence, walking past her colleague Ms Forsyth with the ET crest visible. Knowing that an electronic copy of all documentation was held by the Firm, this being how instructions were received from the relevant client, the Respondent made no effort to tamper with or destroy the electronic copy of the notification. If the Respondent had been seeking to hide the notification of the hearing, Mr Williams described her conduct in placing two paper copies of the notification in the bin as "hopeless".

20.11 Mr Williams summarised the medical evidence before the Tribunal. Only the outline necessary to understand the Respondent's position and the Tribunal decision is included in this judgment. At the time of the relevant events, the Respondent suffered from undiagnosed Asperger's syndrome. As a high achieving individual with a good memory it was not unusual that she had not sought medical help previously. Features of this condition in the Respondent's case included struggling to cope with failure and anxiety when her routine was disrupted. Mr Williams invited the Tribunal to accept the evidence of Dr Singh which included a diagnosis of generalised anxiety disorder. Dr Singh's evidence was that the Respondent's Asperger's was moderate and she stressed the rigidity of the Respondent's thinking patterns. The evidence of Dr Singh summarised above in paragraphs [19.11] and [19.12] above was emphasised by Mr Williams. Dr Singh stated in her oral evidence that panic attacks can be repeated and can last for up to 24 hours overall.

20.12 Both Dr Singh and Dr Bradbury, despite their areas of disagreement, agreed that the Respondent had panicked when she received the call from the ET and even more so when she discovered the paper copy of the notification. Both medical experts had given the opinion that the Respondent acted out of a need for respite from the anxiety and panic caused by the discovery of her mistake (missing the ET hearing). Both agreed that she had Asperger's syndrome. Where the medical experts differed, Mr Williams invited the Tribunal to prefer Dr Singh's evidence. Her opinion was based on a two rather than a one hour assessment. She had confirmed she had read all the paperwork in advance of the assessment whereas the Respondent's evidence was that Dr Bradbury had not read a background document of examples provided by the Respondent. Mr Williams submitted that this was not a case which could be reduced to a contest between doctors and that unless the Tribunal rejected Dr Singh's evidence, the Applicant could not prove dishonesty to the requisite standard. He further submitted there would be no basis to reject Dr Singh's evidence.

20.13 As to the events of 29 August 2018, and the hour with which the allegations were concerned, Dr Singh had described the sequence of events in her report. The Respondent, who had a general fear of making mistakes linked to her condition and a diagnosis of generalised anxiety disorder, learned she had made a significant mistake. This prompted a panic attack. The Respondent had been incapable of rational thought; her rigidity of thinking meant she could not react by solving the problem as others in

good health would. Mr Williams submitted that this expert medical evidence went to the heart of the first limb of the Ivey dishonesty test and the Respondent's subjective mental state.

20.14 The Respondent had given evidence about the effect of the panic attack and used the phrase "brain fog". Mr Williams submitted that she could not form the intent to act in a dishonest fashion in such a state.

20.15 Mr Williams invited the Tribunal to exercise caution when considering the events of the following day, 30 August 2018. He repeated that it had not been alleged that the Respondent had done anything wrong on that date and he submitted that the Tribunal should be exceptionally careful about using events from that day to relate back to the previous day.

The Tribunal's Decision

20.16 The Tribunal accepted the summary of the test for dishonesty provided by the Applicant. When considering the allegation of dishonesty, the Tribunal applied the test in Ivey and accordingly the Tribunal adopted the following approach:

- firstly, the Tribunal established the actual state of the Respondent's knowledge or belief as to the facts, noting that the belief did not have to be reasonable, merely that it had to be genuinely held;

- secondly, once that was established, the Tribunal then considered whether this conduct would be thought to have been dishonest by the standards of ordinary decent people.

The Tribunal accepted the submission made by Mr Williams that as per the comments of the Lord Chief justice in Barton v Booth when applying the test set out in the first limb of Ivey, all circumstances leading the Respondent to act as she did should be taken into account.

Dishonesty in relation to allegation 1.3

20.17 The Tribunal's findings in relation to allegation 1.3 are recorded first as the relevant events were the first chronologically. The dishonesty allegation related to the Respondent placing the hearing notification document in the bin (twice). The Tribunal had found breach of Principles not proved as set out above. Cogent evidence that the Respondent had no intent to conceal (an element of the allegation) had been produced as both medical experts had given the opinion that the Respondent had acted in panic and without thought or awareness (although only initially in the opinion of Dr Bradley), something which was exacerbated by the medical condition they had both diagnosed. The Respondent's relevant actions (the acknowledged placing of the copies of the notification documents into the confidential waste bins) had occurred in the immediate aftermath of the event triggering the panicked response, namely her discovery of the paper copy of the notification of the hearing.

20.18 Applying the first stage of the Ivey test, the Tribunal considered that the Respondent's actual knowledge as to the facts during those initial moments when the notification documents had been discovered, and the panic was at its most pronounced, was very limited. The Tribunal accepted the evidence from Dr Singh that the Respondent was suffering from severe anxiety at that time and acted suddenly and without thought. Her initial actions had been an instinctive reflexive attempt to remove the source of anxiety (which she perceived to be the paper copies of the notification she had found). The Tribunal accepted the submission of Mr Williams that an alleged effort at concealment which had no regard to the electronic copy of the notification document (which, if thinking at all clearly, the Respondent would know must exist as it was the original source of the paper copy) was hopeless and inevitably doomed to fail. No such attempt or intent to interfere with the electronic copy was alleged. The Tribunal found that the Respondent's awareness as to the facts at the time she placed the notification documents in the waste bins was an awareness that she had made a mistake, followed by an overwhelming anxiety, unreflective thought and instinctive efforts to remove the source of the anxiety. For essentially the same reasons that the Tribunal had not found that her conduct breached the Principles as alleged, the Tribunal did not consider that ordinary decent people would regard the Respondent's actions as dishonest based upon her knowledge and belief as to the facts at the time.

Dishonesty in relation to allegation 1.1

20.19 The Respondent's initial panic is described directly above and also in [19.18] in relation to allegation 1.3. The Tribunal's findings were closely linked to the proximity of the conduct (placing the notification documents in the confidential waste bins) to the onset of the panic attack described by both medical experts. The key events for allegation 1.1, the misleading conversation with her supervisor Mr Gofton, happened around 5 minutes after the Respondent took the call from the ET and after her discovery (and disposal) of the paper copies of the notification document.

20.20 Dr Bradbury's evidence was that a panic attack would typically subside within 15 to 20 minutes. Dr Bradbury stated that the Respondent was not under any impairment which would impede her ability to know what she was doing or to distinguish right from wrong (and referred to the Respondent having knowledge of what she had done "*after the moment of panic had gone*"). In contrast, Dr Singh had said that the Respondent was not thinking about right or wrong and was acting in panic and with distorted thinking for the relevant hour.

20.21 The Tribunal carefully reviewed the timeline of the Respondent's actions. The Respondent's evidence was that her conversation with Mr Gofton began around 5 minutes after the call from the ET. By this point therefore, the Respondent engaged in a discussion with her professional supervisor in which she provided an outline of the essential facts of the missed hearing (but for the fact she had found the notification document). She conveyed the relevant information to Mr Gofton and agreed with his suggestion that she should immediately write to the ET by email to apologise for the Firm having missed the hearing. Mr Gofton described the Respondent's demeanour during their conversation as "flustered" and "slightly panicked" but stated that she was coherent.

20.22 Applying the first stage of the Ivey test, the Tribunal found that by the time of the conversation with Mr Gofton the Respondent was aware that the hearing had been missed, that the Firm had received notice of the hearing, and that the missed hearing was something about which she needed to inform a senior member of the employment law team. This much was evidenced by her actions. The Tribunal did not find the events of the following day, when the Respondent was alleged to have initially repeated her misleading account of events before admitting the truth when confronted with evidence, to be of any significant assistance in understanding the state of the Respondent's knowledge or belief when she was speaking to Mr Gofton.

20.23 The Tribunal found both Dr Singh and Dr Bradbury to be helpful and authoritative witnesses. The Tribunal accepted the description of the effect of the diagnosed condition on the Respondent's thought processes, meaning that she was likely to be acting whilst preoccupied with her mistake and not to have been thinking rationally or about the rights or wrong of the situation in the minutes after the phone call from the ET and the discovery of the paper notification of hearing documents. The Tribunal accepted that the Respondent may still have been in a state of some considerable panic and heightened anxiety when she spoke to Mr Gofton and noted the evidence from Dr Singh about the potential duration of panic attacks and her assessment of the Respondent's mental state at the time in question. However, the Respondent had been able to react appropriately by having a conversation with a professional superior during which she imparted much of the relevant information, and agreed remedial steps, but without mentioning her own discovery of the paper copies of the hearing notification. Given her ability to do this, the Tribunal did not consider it credible that the Respondent was so overwhelmed with panic and anxiety the she did not know what she was doing or did not realise she was failing to pass on a key piece of information. The Tribunal noted and carefully considered the positive character references and description by Mr Gofton of these events as a "single aberration". The Tribunal accepted there was no propensity towards dishonest conduct. However, the Respondent knew that she had placed the notices in the confidential waste bins. The information was so clearly relevant, and the Respondent's actions in placing the notices in the confidential waste bin so clearly inappropriate, that the Tribunal considered it inconceivable that the Respondent was not aware that she was presenting a partial and misleading account of the situation to her supervisor.

20.24 Applying the second limb of the Ivey test, the Tribunal had no doubt that an ordinary decent person would regard it as dishonest to present such a partial and misleading account of events to her supervisor. The Tribunal accordingly found the allegation that the Respondent had acted dishonestly when presenting misleading information to her supervisor Mr Gofton proved beyond reasonable doubt.

Dishonesty in relation to allegation 1.2

20.25 Allegation 1.2 related to the sending of the misleading email to the ET. The email was sent approximately 46 minutes after the call from the ET, at 2.56 p.m.

20.26 The email which misled the ET had been the result of work involving the Respondent and her supervisor, Mr Gofton. The Tribunal had found in relation to allegation 1.1 that the Respondent had dishonestly not told Mr Gofton that she had found a paper copy of the notification of hearing. Within five minutes of the phone call from the ET

the Respondent had approached Mr Gofton to discuss how to respond to the missed hearing. It had been agreed during their discussion that the Respondent would write to the ET as soon as possible apologising for the hearing being missed.

20.27 As set out in paragraph [18.8] the Respondent estimated that she had spent around 15 minutes drafting the email which she began drafting at 2.20 p.m. Following her completion of the draft email the Respondent provided a copy to Mr Gofton who had made manuscript amendments to the wording of the email. By the time the Respondent sent the email to the ET, around 46 minutes after the call from the ET had been received, she had made the amendments to the draft email on her system as indicated in hard copy by Mr Gofton. On the Respondent's account she made the changes indicated by her supervisor uncritically and did not consider at the time that they may have been informed by the misleading account she had provided to him. Even allowing for the pressures of other work matters as described by the Respondent, the continuing (although inevitably reduced to some extent given the time which had passed) effects of the panic, and the effects of her diagnosed condition on her thinking, the Tribunal found it inconceivable that the Respondent did not know she was sending a misleading email to the ET. This was not credible when she had been functioning sufficiently well to hold the initial conversation with Mr Gofton about how to respond to the mistake (five minutes after the call from the ET), to draft an email and provide it to Mr Gofton for review, to input his amendments and then to send the email (by which time around 46 minutes had passed since the call). The Respondent was the fee-earner with conduct of the case, she had the knowledge that notification of the hearing had in fact been received, and she had sent the email.

20.28 The Tribunal rejected the Respondent's case based on medical evidence that she lacked knowledge or belief as to the facts which would be regarded as dishonest. As with the findings in relation to allegation 1.1, the information that the Firm had received notification of the hearing was so basic, and so obviously relevant, and the wording of the email so plainly misleading, that the Tribunal did not accept that it was credible that a diligent solicitor with two years' post-qualification experience, albeit one belatedly diagnosed with Asperger's syndrome and suffering with the continuing effects of a panic attack, would be capable of the mostly professional response she displayed without having an awareness that information being sent to the Tribunal in the email she sent was false. In reaching this conclusion the Tribunal again carefully considered the positive character references, description of these events as a "single aberration" and the accepted lack of any propensity towards dishonest conduct. However, for the reasons set out above, applying the first limb of the Ivey test, the Tribunal found beyond reasonable doubt that the Respondent was aware that the Firm had had notice of the hearing and that the email as amended was misleading. She nevertheless sent the email to the ET.

20.29 Applying the second limb of the Ivey test, the Tribunal considered that ordinary decent people would regard such conduct as dishonest, even appreciating the full context and the Respondent's condition and her panicked response beginning with the call from the ET. The Tribunal accordingly found the allegation that the Respondent had acted dishonestly when sending the misleading email to the ET proved beyond reasonable doubt.

Alleged failure to achieve Outcome 5.1 in relation to allegation 1.2

20.30 Having found that the Respondent dishonestly sent a misleading email to the ET for the reasons set out above, the Tribunal also found to the requisite standard that she had thereby failed to achieve Outcome 5.1 of the Code. The Tribunal had found that the Respondent was aware that the contents of the email were misleading when she sent it and accordingly she had failed to ensure that she did not knowingly or recklessly mislead the court as required by Outcome 5.1.

Previous Disciplinary Matters

21. There were no previous Tribunal findings.

Mitigation

22. The case advanced on the Respondent's behalf had included most of the points also advanced in mitigation based on the diagnosed medical condition, her mental state at the time, her testimonials and the lack of any previous disciplinary record or incident.

23. Mr Williams submitted that the Respondent's case was one in which exceptional circumstances existed such that striking off the Roll should not be the sanction applied for the dishonest misconduct found proved. He referred the Tribunal to paragraph [101] of SRA v James et al [2018] EWHC 3058 (Admin) in which it was said that the most significant factor and primary focus when assessing whether exceptional circumstances exist should be "the nature and extent of the dishonesty". Flaux LJ had stressed that the exceptional circumstances must relate in some way to the dishonesty.

24. The dishonesty which had been found proved related to misleading Mr Gofton in their conversation and having sent a misleading email to the ET. Mr Williams described these as the events of around 20 minutes. He submitted that the extent of the dishonesty was therefore very short lived. It was also entirely reactive behaviour, rather than proactive; the Respondent had acted in panic after the discovery of her mistake rather than in any planned way. Mr Williams described the Respondent as having behaved "like a rabbit in the headlights".

25. Mr Williams also stated that at the time the Respondent had an undiagnosed serious condition which he submitted had played a significant part in her behaviour. He referred to paragraph [103] of James in which it was said that 'mind set' issues, such as whether the Respondent was suffering from mental health issues or a specific condition affecting her conduct, should receive less weight in the Tribunal's considerations than other aspects of the dishonesty found "such as the length of time for which it was perpetrated, whether it was repeated and the harm which it caused". Mr Williams submitted that the two dishonest acts had occurred within around 20 minutes, beyond the two acts themselves there had been no repeat of any such conduct and no harm was said to have been caused (something with which Mr Gofton had agreed in his oral evidence). Mr Williams contrasted the Respondent's case with that of the three respondents involved in the conjoined James appeals by the SRA, where none of the dishonest conduct found proved was momentary.

26. Mr Williams referred the Tribunal to paragraphs [110] and [112] of James in which it was said that mental health issues, in that case specifically stress and depression, could not, without more, amount to exceptional circumstances. This would be to widen the category of exceptional circumstances beyond the "narrow residual category of case". Paragraph [114] reiterated again that the most significant factors in the Tribunal's consideration should be the nature and extent of the dishonesty rather than such personal pressures or conditions. Mr Williams submitted that the Respondent's conduct fell squarely within the residual category, on the basis it was an aberration, not repeated outside the twenty minutes on 29 August 2018, involved no plan and was reactive and bound to be ineffective. It was described as a reaction to simple mistake.

27. Mr Williams submitted that the appropriate sanction was accordingly a matter for the Tribunal and that strike off was not inevitable. The Respondent was contrite for her conduct, had admitted the alleged Principle breaches and had already suffered as a result of her conduct for two years. In that time she had applied for 52 jobs without securing an interview on account of the proceedings. She had completed 25 training courses from June 2018 onwards and had also volunteered with the CAB as well as local guide dog and children's hospital charities. Mr Williams submitted that the Respondent could have a positive future in the law and in the right environment any risk perceived by the Tribunal could be effectively managed by way of conditions on her freedom to practise. He suggested that conditions could go beyond a requirement for the Applicant to approve the Respondent's employment and may provide for the Respondent to disclose her mental health condition, treatment received (including potentially an up to date report) and a copy of the Tribunal's Judgment so that any employer would be fully informed.

28. Mr Williams stated that since her diagnosis, the Respondent had developed coping strategies and had become more adept at managing her conditions. Mr Williams also submitted that the Tribunal was permitted to take into account the two years since her dismissal during which Mr Williams described the Respondent as being effectively suspended.

Sanction

29. The Tribunal referred to its Guidance Note on Sanctions (7th Edition) when considering sanction. The Tribunal assessed the seriousness of the misconduct by considering the level of the Respondent's culpability and the harm caused, together with any aggravating or mitigating factors.

30. In assessing culpability, the Tribunal found that the Respondent's motivation for her misleading comments to Mr Gofton and email to the ET was to avoid highlighting her mistake. It was entirely spontaneous and irrational in that it was doomed to fail. The Respondent had control over the circumstances of the misconduct, however the degree of control was to some extent limited by her condition coupled with the continuing effects of her initial panicked response, albeit not to an extent that removed responsibility for her actions. The Respondent was a relatively junior solicitor at the time of the misconduct, having two years' post-qualification experience. She had cooperated with her regulator, having self-referred shortly after

the conduct took place. Overall the Tribunal assessed her culpability as moderately high.

31. The Tribunal considered the risk of harm being caused by the misconduct was foreseeable. Sending misleading communications to a court or tribunal, and misleading a partner at the Firm with responsibility for a practice area, inevitably created a risk of harm although the Tribunal accepted the evidence of Mr Gofton that in this case no harm in fact was caused as the error was identified and the ET informed. However, harm to the reputation of, and public trust in, the profession was also foreseeable. Any finding of dishonesty is capable of causing significant reputational harm. In light of the medical evidence presented about the Respondent's thought processes around the time of the misconduct, the Tribunal considered that the Respondent's awareness of these risks and issues was somewhat limited at the time. Once the full context of the misconduct was understood the Tribunal considered that the scope for reputational harm to the profession would also be somewhat reduced.

32. The Tribunal then considered aggravating factors. A finding that the Respondent had dishonestly misled her supervisor and the ET had been made. The nature of the misconduct was that she had sought to conceal her original error, although she had subsequently been open about and given a detailed account of her actions.

33. The Tribunal also considered mitigating factors. The misconduct was of very brief duration. The two incidents were closely related and arose out of the Respondent's reaction to a single mistake. The Respondent had an otherwise unblemished record and had produced positive testimonials which spoke about her professionalism and integrity. The Tribunal accepted that the Respondent had displayed some degree of genuine insight into her misconduct, and had made an early apology for it in her self-report to the Applicant.

34. The overall seriousness of the misconduct was high; this was inevitable given the dishonesty findings. In addition, the Tribunal had found that the Respondent's conduct had lacked integrity. As the Respondent had been found to have been dishonest, the Tribunal had regard to the case of SRA v Sharma [2010] EWHC 2022 and the comment of Coulson J that, save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck of the Roll.

35. Mr Williams had invited the Tribunal to conclude that such exceptional circumstances existed. The Tribunal had regard to the Guidance Note on Sanctions. Paragraph [53] of the Guidance Note on Sanctions summarised what amounts to exceptional circumstances drawing on the case of Sharma and James:

> *"In considering what amounts to exceptional circumstances: relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary, or over a lengthy period of time; whether it was a benefit to the solicitor, and whether it had an adverse effect on others." (Sharma above).*
>
> *The exceptional circumstances must relate in some way to the dishonesty (James above)"*

36. The nature of the dishonesty was the Respondent presenting an account of her actions which misled by omission in order to cover up her initial error. The essential fact that the hearing was missed because she was unaware of it had been conveyed, whilst the highly relevant detail that she had since found notice of the hearing was not conveyed. The dishonesty was unplanned and reactive. As to scope, this happened twice: in the misleading conversation with Mr Gofton and the misleading email to the ET. The Respondent's evidence was that the conversation with Mr Gofton took place at around 2.20 p.m. The email to the ET was sent at 2.56 p.m. The Tribunal accepted this evidence. The extent of the dishonest conduct was these two linked incidents which took place within a period of 40 minutes.

37. To the extent that the misleading account would conceal the Respondent's error in overlooking the hearing, there could be said to be some potential benefit to her. However, given the electronic copy of the case paperwork retained by the Firm, the Respondent's actions were inevitably going to be ineffective at concealing her mistake. The Tribunal considered the Respondent's actions were caused by spontaneous efforts to assuage the panic she felt rather than by any sober calculation of advantage she may achieve. As recorded above, the effect on others was very limited.

38. The Tribunal considered that the Respondent's dishonest conduct was thus of a very different scope and extent to that which was the subject of the decision in James. Whilst not a 'moment of madness' in that there were two incidents, they took place within 40 minutes of each other. In James, the cases considered involved conduct taking place over a much longer period.

39. The Tribunal reminded itself that issues of personal mitigation, in the Respondent's case her Asperger's syndrome and associated rigid thinking, and also her panicked reaction to her oversight, were less significant factors than the nature, scope and extent of the dishonesty and the degree of culpability. When assessing the medical evidence in the context of exceptional circumstances, the Tribunal reminded itself this must relate to the dishonest conduct itself. In its findings on liability the Tribunal had found that the Respondent knew that her misleading conversation and email were wrong, such that ordinary decent people would regard her conduct as dishonest. However, the Tribunal also accepted that the Respondent's condition, about which two consultant psychiatrists gave evidence which overlapped to a significant degree, contributed to her actions. The Tribunal accepted the evidence that the Respondent's recently diagnosed condition and heightened anxiety impaired her ability to some extent to react to her mistake in the way an individual without such a disability would be likely to do.

40. As stated in paragraph [19.11], Dr Singh had given the opinion that the Respondent "*was unable to think clearly and take appropriate steps to resolve and rectify the situation but rather acted suddenly without thinking.* She also stated that the Respondent "*was overwhelmed with anxiety which is significant in individuals with Asperger's and impulsively reacted to it*". This personal mitigation related to the dishonest conduct as it related directly to the Respondent's reaction to her oversight which was at the root of her misleading conversation and email. The Tribunal accepted that the Respondent's condition reduced her culpability to some extent. The Respondent had described in her evidence the coping strategies that she now adopts to

deal with stressful and challenging situations. The Tribunal noted that this was not simply a case where a young solicitor was unsupported in the work environment, but also, as described by Dr Bradbury, one where the Respondent, due to her Asperger's syndrome, was unlikely to have close friends with whom to confide and seek advice or support. The Tribunal was mindful that at the time of the misconduct her condition was undiagnosed. Mr Williams had invited the Tribunal to consider restrictions on practice as a way to guard against any future risk to clients or the public.

41. The Tribunal took this personal mitigation into account. Uppermost in its mind, however, was that the dishonest conduct consisted of two reactive, unplanned misleading accounts which took place within 40 minutes of one another. The Tribunal was mindful that whilst inevitably a serious matter, the dishonest account was not sustained and could not be described as calculated. The Tribunal accepted Mr Williams' characterisation of it as "bizarre" and, if assessed as an effort at concealment, "hopeless". The Respondent's record was otherwise unblemished. The Tribunal accepted that this 40 minutes was an aberration from the personal and professional standards and conduct of the Respondent. The Tribunal found that the Respondent's case fell within the small residual category of cases where there were exceptional circumstances which meant that strike off from the Roll was not the appropriate sanction. Given the nature, scope and extent of the dishonest conduct the Tribunal did not consider that the protection of the public and reputation of the profession required this ultimate sanction.

42. Having regard to the Sanctions Guidance, the Tribunal did not consider that a reprimand or fine were adequate sanctions. The Tribunal accepted the submission made by Mr Williams that the two years since her dismissal during which the Respondent had been unable to work as a solicitor was something which may be taken into account. However, the Tribunal considered that the seriousness of the misconduct was such that a period of suspension was required. Whilst the Tribunal accepted that a Restriction Order would protect the public from harm, the Tribunal considered that public confidence and the seriousness of the misconduct demanded a period of suspension from practice. Cognisant that the Respondent had been unable to practise for over two years, and that various open-ended restrictions on her ability to practise would also be imposed, the Tribunal considered that a period of suspension of six months was appropriate in all of the circumstances.

43. The Tribunal further considered that it was appropriate to impose restrictions on the Respondent's future practise. Mr Williams, on the Respondent's behalf, had invited the Tribunal to consider making restrictions. The Tribunal accepted and shared the assessment that conditions ensuring her employment was approved by the Applicant, any employer was fully informed as to her condition and the Tribunal's findings in this case, and ensuring as far as possible that the Respondent was not in positions where she had sole responsibility for matters of compliance were appropriate. The Tribunal imposed conditions that the Respondent may not:

- Practise as a sole practitioner or sole manager or sole owner of an authorised or recognised body; or as a freelance solicitor; or as a solicitor in an unregulated organisation;

- Be a Head of Legal Practice/Compliance Officer for Legal Practice or a Head of Finance and Administration/Compliance Officer for Finance and Administration;

- Work as a solicitor other than in employment approved by the Solicitors Regulation Authority.

The Tribunal imposed further conditions requiring that before commencing employment with any employer approved by the Applicant the Respondent shall provide to that prospective employer:

- A copy of the Tribunal's judgment in this case 11965/2019;

- A copy of a medical report prepared by a specialist consultant, which must be not more than 12 months old, addressing her mental health condition, any treatment received and her capacity to manage that condition.

This was in order to protect the public against the risk of similar future conduct.

Costs

44. The total costs claimed in the Applicant's schedule of costs was £25,751.65. Mr Bullock submitted that on the basis that the Tribunal had begun its deliberations part way through the third day, and concluded the hearing in in four days rather than the estimated five, a reduction of the hearing costs claimed would be appropriate. The revised amount claimed was £24,431.53. The parties reached agreement that costs of £20,000 should be paid by the Respondent.

45. The Tribunal assessed the costs for the hearing. In all of the circumstances the Tribunal considered that the figure agreed between the parties was reasonable and ordered the Respondent to pay the Applicant's costs of and incidental to this application fixed in the sum of £20,000.

Statement of Full Order

46. The Tribunal ORDERED that the Respondent, SUSAN HELEN ORTON, solicitor, be suspended from practice as a solicitor for the period of six months to commence on the 15th October 2020 and it further Ordered that she do pay the costs of and incidental to this application and enquiry fixed in the sum of £20,000.

47. Upon the expiry of the fixed term of suspension referred to above, the Respondent shall be subject to conditions imposed by the Tribunal as follows:

47.1 The Respondent may not:

47.1.1 Practise as a sole practitioner or sole manager or sole owner of an authorised or recognised body; or as a freelance solicitor; or as a solicitor in an unregulated organisation;

47.1.2 Be a Head of Legal Practice/Compliance Officer for Legal Practice or a Head of Finance and Administration/Compliance Officer for Finance and Administration;

47.1.3 Work as a solicitor other than in employment approved by the Solicitors Regulation Authority.

47.2 Before commencing employment with any employer approved by the Solicitors Regulation Authority the Respondent shall provide to that prospective employer:

47.2.1 A copy of the Tribunal's judgment in this case 11965/2019;

47.2.2 A copy of a medical report prepared by a specialist consultant, which must be not more than 12 months old, addressing her mental health condition, any treatment received and her capacity to manage that condition.

48. There be liberty to either party to apply to the Tribunal to vary the conditions set out at paragraph 46 above.

Dated this 4th day of January 2021
On behalf of the Tribunal

J C Chesterton
Chair