

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 12056-2020

BETWEEN:

SOLICITORS REGULATION AUTHORITY

Applicant

and

PATRICK ADRIEN FITZGERALD

Respondent

Before:

Mr J. A. Astle (in the chair)

Mrs A. Kellett

Mr M. R. Hallam

Date of Hearing: 27 May 2020

Appearances

Simon Griffiths, solicitor of the Solicitors Regulation Authority, The Cube, 199 Wharfside Street, Birmingham, B1 1RN for the Applicant.

The Respondent did not attend and was not represented.

JUDGMENT

Allegations

1. The allegations against the Respondent made by the Solicitors Regulation Authority (“SRA”) were that while in practice as a solicitor at Roberts Jackson Limited (“the Firm”):
 - 1.1 On or around 14 July 2016, he inappropriately amended the date on the Form of Authority for the Release of Personnel, Training & Occupational Health Records of Client A (“the Form of Authority”), which Client A had signed on 16 March 2014. In doing so he breached Principles 2 and 6 of the SRA Principles 2011 (“the Principles”).
 - 1.2 On 14 July 2016 he inappropriately sent the amended Form of Authority to Client A’s former employer (Employer A), the content of which was untrue. In doing so he breached Principles 2 and 6 of the Principles.
2. In addition, each of the allegations set out above were advanced on the basis that the Respondent’s conduct was dishonest. Dishonesty was alleged as an aggravating feature of the Respondent’s misconduct but was not an essential ingredient in proving the allegations.

Documents

3. The Tribunal reviewed all the documents submitted by the parties, which included:
 - Notice of Application dated 12 February 2020
 - Rule 12 Statement and Exhibit SG1 dated 12 February 2020
 - Respondent’s Answer dated 3 April 2020
 - Applicant’s Schedule of Costs dated 18 May 2020

Preliminary Matters

4. The Respondent did not attend the hearing and was not represented. Mr Griffiths applied for the matter to proceed in the Respondent’s absence pursuant to Rule 36 of the Solicitors (Disciplinary Proceedings) Rules 2019 (“SDPR” or “the Rules”), which provided that:-

“If a party fails to attend and is not represented at the hearing and the Tribunal is satisfied that notice of the hearing was served on the party in accordance with these Rules, the Tribunal may hear and determine any application and make any findings, hand down sanctions, order the payment of costs and make orders as it considers appropriate notwithstanding that the party failed to attend and is not represented at the hearing.”

5. The Respondent had been served in accordance with Rule 44(1)(b) of the Rules on 20 February 2020. On that date he was also provided with notice of the substantive hearing date. It was clear that the Respondent was aware of the hearing and the proceedings; on 3 April 2020, the Respondent provided his Answer to the Rule 12 Statement. The Respondent was required to provide an Answer in accordance with the Tribunal’s Standard Directions. Those Standard Directions also provided the Respondent with notice of the substantive hearing date.

6. On 24 March 2020 the parties received an email from the Tribunal informing them that the Tribunal was considering and testing the feasibility of having remote hearings as a result of Covid-19. On 9 April 2020 the Tribunal confirmed, via email, that the substantive hearing would proceed remotely. This email was not returned to the Tribunal as undeliverable.
7. Thereafter, and from 24 April 2020 at the earliest, the Respondent's email address (from which he had been corresponding) was no longer attainable; all emails sent from that date by the Tribunal and the Applicant were returned as undeliverable. No other email address had been provided by the Respondent to the Applicant or the Tribunal. Further, on 2 February when the Applicant had spoken to the Respondent by telephone, the Respondent had declined to provide a telephone number where he could be contacted,
8. Mr Griffiths referred the Tribunal to the Respondent's Answer, in which the Respondent stated that as he lived abroad, he would not attend the hearing. The reasons for his non-attendance had been negated by the virtual hearing. However the Respondent had still not attended. The Tribunal was referred to R v Jones [2002] UKHL 5 which the Tribunal must have in mind when considering whether to proceed in the absence of a Respondent. Mr Griffiths submitted that the Respondent had plainly waived his right to attend. It was unlikely that an adjournment would secure his attendance. He had had ample opportunity to provide his position both in his Answer and in his response to the EWW letter from the Applicant. It was in the public interest for the matter to proceed notwithstanding his non-attendance. Further, pursuant to Rule 37, the Respondent could, within 14 days of the Tribunal's Order, apply for a re-hearing.
9. The Tribunal determined that the Respondent had been properly served with the proceedings and notice of this hearing. He had made an application to extend the time for service of his Answer and had provided an Answer. The Tribunal had regard to the principles in Jones and GMC v Adeogba [2016] EWCA Civ 162. The Tribunal was satisfied that in this instance the Respondent had chosen voluntarily to absent himself from the hearing. It was in the public interest and in the interests of justice that this case should be heard and determined as promptly as possible. There was nothing to indicate that the Respondent would attend or engage further with the proceedings if the case were adjourned. He had cited lack of financial means and his residence abroad as reasons for his intention not to attend the hearing. The Tribunal agreed with Mr Griffiths that in circumstances where the hearing was taking place virtually, the reasons cited were negated. In light of these circumstances, the Tribunal determined that it was in the interests of justice to proceed with the case, notwithstanding the Respondent's absence.

Factual Background

10. The Respondent was born in 1983 and was admitted to the Roll in 2013. At the material time, the Respondent was an Assistant Solicitor at the Firm, at which he was employed from 26 February 2015 to 10 May 2018. The Respondent did not hold a current Practising Certificate; he last held a Practising Certificate for the practice year 2017/18.

Witnesses

11. None.

Findings of Fact and Law

12. The Applicant was required to prove the allegations on the balance of probabilities. The Tribunal had due regard to the Respondent's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Respondent, in his Answer, had neither admitted nor denied the allegations; he had accepted the factual matrix. In those circumstances, the Tribunal treated the facts as admitted, but the alleged Principle breaches and dishonesty as denied.

Dishonesty

13. The test for dishonesty was that set out in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67 at [74] as follows:-

“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 factfinder 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.”

14. When considering dishonesty the Tribunal firstly 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. It then considered whether that conduct was honest or dishonest by the standards of ordinary decent people.

Integrity

15. The test for integrity was that set out in Wingate and Evans v SRA and SRA v Malins [2018] EWCA Civ 366, as per Jackson LJ:-

“Integrity is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members ... [Professionals] are required to live up to their own professional standards ... Integrity connotes adherence to the ethical standards of one's own profession”.

16. **Allegation 1.1 – On or around 14 July 2016, the Respondent inappropriately amended the date on the Form of Authority, which Client A had signed on 16 March 2014. In doing so he breached Principles 2 and 6 of the Principles.**

- 16.1 Client A instructed the Firm in February 2014 in relation to a work related injury. The Respondent was not initially responsible for the handling of the matter file. In order to progress the matter, the Firm required Client A's employment records. Client A signed and dated the Form of Authority 16 March 2014, enabling the Firm to seek copies of these from Employer A (Client A's previous employer). The Form of Authority was sent to Employer A by letter dated 4 August 2014. Employer A did not respond.
- 16.2 In or around June 2016, the Respondent took over the handling of Client A's matter. He wrote to Client A explaining that he had conduct of the case. The Respondent identified that:
- the limitation deadline was close, so he arranged for protective proceedings to be issued under Part 8 of the Civil Procedure Rules 1999, which he then requested be stayed in accordance with Practice Direction 8B.
 - there had been little communication with Client A throughout the two year lifespan of the file.
 - the last substantive action of the previous file handler had been to resend the Forms of Authority for GP Records and for Occupational Records to Client A for re-signing on 30 January 2015. Client A had not responded.
- 16.3 Further letters had also been sent to Client A on 22 April, 15 July, 17 November 2015 and 9 February 2016. Client A did not respond to any of these letters. The Respondent received no response from Client A following his attempts to contact her. Unbeknown to the Respondent, Client A had died on 28 January 2016.
- 16.4 In order to progress the matter, the Respondent covered the original date on the Form of Authority with a Post-It-Note and added a new date of 14 July 2016, leaving Client A's signature. In notes prepared by the Respondent during the internal investigation by the Firm, the Respondent stated:-
- “I was unable to reach [Client A] by telephone and out of concern that this issue shouldn't cause further file inactivity or prejudice to them, I took the decision to update the existing forms of authority, which had been signed by [Client A], in line with the letters previously sent to them with the intention of informing [Client A] that I had done so and obtaining the consent retrospectively”.
- 16.5 Mr Griffiths submitted that in amending the date on the Form of Authority, the Respondent's conduct was inappropriate as:-
- the Respondent knew that the Form of Authority had not been signed by Client A in July 2016;
 - the Respondent knew that he did not have the client's consent to change the date on the Form of Authority;
 - the Respondent had no reason to believe that the Firm was still instructed by Client A or that the authority given by Client A in 2014 was still valid; and

- in concealing the original date on the Form of Authority, the Respondent created a document which incorrectly gave the impression that it had recently been signed by Client A.
- 16.6 The Respondent's actions amounted to a failure to act with integrity. Whilst it was unclear why the Respondent chose to amend the Form of Authority in this way, a solicitor of integrity did not knowingly amend documentation in the way that the Respondent did. The Respondent therefore breached Principle 2 of the Principles.
- 16.7 The conduct alleged also amounted to a breach by the Respondent of the requirement to behave in a way which maintains the trust placed by the public in him and in the provision of legal services. Members of the public dealing with solicitors, whether as their clients or encountering them as third parties, expect the information and documentation that they are provided with to be accurate and truthful. Members of the public would not expect solicitors, for whatever reason, to change the dates on documentation in order to best suit the narrative the solicitor seeks to portray. Public confidence in the Respondent, in solicitors and in the provision of legal services is likely to be undermined by such behaviour in breach of Principle 6.

Dishonesty

- 16.8 At the time that he changed the date on the Form of Authority, the Respondent knew or believed that:-
- Client A had not contacted the Firm for just under two years (Client A having last written to the Firm, on a document dated 4 September 2014), despite correspondence from the Firm seeking instructions.
 - Other updated forms of authority sent to Client A in relation to her matter had not been returned to the Firm.
 - Client A had not signed the Form of Authority on 14 July 2016, had not given her consent for this and did not know of the Respondent's intention of doing so.
- 16.9 The Respondent stated in a statement he prepared for the police investigations that it was "not uncommon for clients to fail to keep in contact with the firm for long periods only later to contact the firm to establish what has happened with their claim". Mr Griffiths submitted that whether or not this was accurate, the Respondent knew that a lack of activity and/or instruction by the client did not permit a solicitor to create or amend documentation to ensure the case progresses as if the client was providing instruction. Additionally, the Respondent could not have had an honest belief that his conduct was necessary to protect his client as any reasonable solicitor would have known that there was a difference between: (a) waiting extended periods between updates; and (b) repeatedly failing to respond to correspondence from the Firm, not providing instructions and not signing the documentation (such as the Form of Authority) requested.
- 16.10 An honest solicitor would have known that changing the date on the Form of Authority, for the purposes of advancing Client A's matter or otherwise, was neither honest nor acceptable. In those circumstances the Respondent, by both inappropriately amending

the date on the Form of Authority and doing so in a way which obscured the original date and gave the impression that the document had been signed in July 2016, was dishonest by the standards of ordinary decent people.

The Tribunal's Findings

- 16.11 The Respondent, both in his Answer and in his statements that were prepared for his police interview, did not dispute the facts as detailed above. Accordingly, and as detailed above, the Tribunal considered whether, given the admitted factual matrix, the Respondent's conduct amounted to a breach of the Principles as alleged.
- 16.12 The Tribunal considered that members of the public would not expect a solicitor to unilaterally amend a document so that the attestation was no longer accurate and would expect that they could rely on a document as being truthful. By changing the date on the Form of Authority in the way that he did, the Respondent misrepresented the date on which it was signed and rendered the document inaccurate and untruthful. Accordingly, the Tribunal was satisfied that the Respondent's conduct was in breach of Principle 6 as alleged.
- 16.13 The Tribunal found that a solicitor acting with integrity would not amend the date on a Form of Authority to a date that he knew that Form had not been signed. The Respondent knew that there had been limited contact from the client, and that recent correspondence had remained unanswered. The Tribunal accepted that the Respondent did not know whether the Firm, in all the circumstances, was still instructed. By amending the date in the way that he did, the Respondent had failed to adhere to the ethical standards of the profession expected of him. The Tribunal was satisfied that the Respondent's conduct was in breach of Principle 2 as alleged.

Dishonesty

- 16.14 The Respondent was aware that the client had not been in touch with the Firm for some time. Further, she had not responded to any requests for updated instructions, nor had she returned documents that had been sent to her. The Respondent also knew that he had no authority from the client to amend any documents that had been previously signed by her.
- 16.15 The Tribunal did not accept that a belief that retrospective consent would be granted was a defence to the allegation of dishonesty. Even if the client had consented to the date change, the Respondent knew that the document had not been signed on that date, and thus even in those circumstances, would have known that the document was inaccurate. Retrospective consent would not have ameliorated the Respondent's state of knowledge at the time that he amended the Form in the way that he did.
- 16.16 The Tribunal found that at the time that he amended the Form of Authority, the Respondent knew that:
- the Form of Authority had not been signed on that date;
 - the Form of Authority was not accurate or truthful;

- the Form of Authority purported, on its face, to be a new Form of Authority recently signed by the client.
- 16.17 The Tribunal was satisfied that ordinary decent people would regard amending the Form of Authority in the way that the Respondent did, with the knowledge he had at the time, to be dishonest.
- 16.18 Accordingly, the Tribunal found allegation 1.1 proved on the balance of probabilities, including that the Respondent's conduct was dishonest.
17. **Allegation 1.2 – On 14 July 2016 the Respondent inappropriately sent the amended Form of Authority to Employer A, the content of which was untrue. In doing so he breached Principles 2 and 6 of the Principles.**
- 17.1 The Respondent sent the amended Form of Authority to Employer A under cover of a letter dated 14 July 2016 which stated “[w]e enclose our client’s signed form of authority”.
- 17.2 On 25 July 2016, Employer A telephoned the Respondent and informed him of the death of Client A. The Respondent then closed the file and wrote to Client A’s family to express his condolences.
- 17.3 Mr Griffiths submitted that the Respondent sent the Form of Authority to Employer A for the purposes of obtaining information from them, namely Client A’s employment records. The Respondent did not inform Employer A about the period of time since the Form of Authority had actually been signed and held out the amended date as the correct one. Such conduct, it was submitted, was inappropriate as the Respondent:-
- knew that the limitation period for issuing proceedings would soon expire;
 - believed that the documentation requested in the Form of Authority would be relevant to bringing proceedings;
 - knew that Client A had not been in contact for the Firm for a significant period;
 - knew, or ought reasonably to have known, that the use of a Form of Authority with a recent date would avoid any doubt Employer A may otherwise have had about the Firm’s ongoing instructions (which, in turn, may have delayed the provision of any relevant documents Employer A held).
- 17.4 Mr Griffiths submitted that a solicitor of integrity did not rely on documentation which they knew to be incorrect, in particular when the inaccuracies relied on were as a result of their own action and/or were intended to further either their position or that of their client. The Respondent therefore breached Principle 2 of the Principles.
- 17.5 Such conduct also amounted to a breach of Principle 6. In addition to the reasons set out at allegation 1.1 above, it was submitted that members of the public would not expect solicitors to place reliance on inaccurate documentation which they created for such purposes. Public confidence in the Respondent, in solicitors and in the provision of legal services was likely to be undermined by such behaviour.

Dishonesty

- 17.6 The Respondent, at the time that he sent the amended Form of Authority to Employer A, knew or believed that:
- the date on the Form of Authority had been amended by the Respondent without Client A's consent;
 - the Form of Authority was incorrect, in that it suggested that it had recently been signed;
 - a recent date on the Form of Authority would suggest to Employer A that the Firm's instructions were ongoing and that the matter was being progressed;
 - sending the Form of Authority as originally dated may cause Employer A to question the Firm's instructions or raise the apparent inactivity of the Firm to the Firm's detriment, delaying the provision of the information requested at a time when the Respondent knew that the limitation period would soon expire; and
 - Employer A had previously failed to respond to the Form of Authority, as originally dated.
- 17.7 The Respondent therefore knew, or ought to have known, that the amended Form of Authority would mislead Employer A by making its representatives believe that the Firm had ongoing instructions from Client A, and that those instructions were recent.
- 17.8 The Respondent, in his statement prepared for the police investigation explained that: "what was uppermost in my mind was the need to protect the client's interests and to progress the investigation. It was by no means clear at that time whether this claim would be one we would be prepared to pursue". However, the Respondent would have known that the legitimate protection of the interests of a client did not extend to the reliance by the solicitor on inaccurate documentation that they had either manufactured for that purpose or they knew had been manufactured by someone else.
- 17.9 In those circumstances the Respondent, by inappropriately sending Employer A the Form of Authority purportedly signed on a date he knew to be incorrect, and doing so knowing that the amended date on the Form of Authority was more likely to provide a positive response from Employer A than sending the original Form of Authority, was dishonest by the standards of ordinary decent people.

The Tribunal's Findings

- 17.10 The Tribunal found that members of the public would not expect a solicitor to provide documentation that he knew to be inaccurate, having created that inaccuracy himself. The Tribunal considered that the Respondent had failed to behave in a way that maintained the trust the public placed in him and in the provision of legal services. Accordingly, the Tribunal found that the Respondent's conduct was in breach of Principle 6 as alleged.

17.11 The Tribunal found that a solicitor of integrity would not inappropriately amend a Form of Authority in order to obtain information from a third party. Third parties ought to be able to rely on documents provided to them as being accurate, particularly when that document was an authority for the release of private information. The Respondent's conduct had failed to adhere to the ethical standards of the profession expected of him. The Tribunal was satisfied that the Respondent's conduct was in breach of Principle 2 as alleged.

Dishonesty

17.12 The Tribunal found that at the time that he sent the amended the Form of Authority to Employer A, the Respondent knew that:

- the Form of Authority had not been signed on by the client on 14 July 2016;
- the date of 14 July 2016 had been inserted by him in the way he described;
- the Form of Authority was therefore not accurate or truthful;
- the Form of Authority purported, on its face, to be a new Form of Authority recently signed by the client;
- Employer A had not previously responded to the request for information sent with the original Form of Authority.

17.13 The Tribunal was satisfied that ordinary decent people would regard amending the Form of Authority in the way that the Respondent did, and then sending that Form to Employer A, to be dishonest. That was the position even if the Respondent believed that the client would retrospectively consent to the amendment. As detailed above, retrospective consent could not ameliorate the Respondent's knowledge at the time of his conduct; client consent to inappropriate conduct could not render such conduct appropriate.

17.14 Accordingly, the Tribunal found allegation 1.2 proved on the balance of probabilities, including that the Respondent's conduct was dishonest.

Previous Disciplinary Matters

18. None.

Mitigation

19. None.

Sanction

20. The Tribunal had regard to the Guidance Note on Sanctions (7th Edition). The Tribunal's overriding objective, when considering sanction, was the need to maintain public confidence in the integrity of the profession. In determining sanction, it was the

Tribunal's role to assess the seriousness of the proven misconduct and to impose a sanction that was fair and proportionate in all the circumstances.

21. The Tribunal found that the Respondent was culpable for his misconduct. He had not been misled into taking the action that he did. Nor was he asked to do so by his client. The Tribunal accepted that the Respondent's conduct was, in his mind, a bid to preserve his client's position. However, acting in the best interests of the client did not supersede his duty to act with honesty and integrity. His conduct in amending and sending the Form of Authority to Employer A was spontaneous. He had direct responsibility for his conduct.
22. The Respondent had caused significant harm to the reputation of the profession. As was stated by Coulson J in SRA v Sharma [2010] EWHC 2022 (Admin):
 - “34. There is harm to the public every time that a solicitor behaves dishonestly. It is in the public interest to ensure that, as it was put in Bolton, a solicitor can be “trusted to the ends of the earth”.”
23. The Respondent's conduct was aggravated by his proven dishonesty, which he knew was in material breach of his obligation to protect the public and maintain confidence in the profession. He had deliberately amended the Form of Authority and sent it to Employer A.
24. In mitigation, this was single episode in an otherwise unblemished career. The Respondent had voluntarily notified the Applicant of the police interest in his conduct and had made full and frank disclosure as to the facts.
25. Given the serious nature of the allegations, the Tribunal considered and rejected the lesser sanctions within its sentencing powers such as no order, a reprimand or restrictions. The Tribunal had regard to the case of Bolton v Law Society [1994] 2 All ER 486 in which Sir Thomas Bingham stated:
 - “...Lapses from the required standard (of complete integrity, probity and trustworthiness)...may...be of varying degrees. The most serious involves proven dishonesty...In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced by the solicitor, ordered that he be struck off the roll of solicitors.”
26. The Tribunal did not find any circumstances (and indeed none were submitted) that were enough to bring the Respondent in line with the residual exceptional circumstances category referred to in the case of Sharma, in which the Court said “Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll.” The Tribunal found that the only appropriate and proportionate sanction, in order to protect the public, and maintain public confidence in the integrity of the profession and the provision of legal services, was to order that the Respondent be struck off the Roll.

Costs

27. Mr Griffiths referred the Tribunal to the Applicant's schedule of costs dated 18 May 2020. He submitted that the costs claimed were reasonable. There should be a deduction from the estimated hearing costs, as the schedule claimed for a full day's hearing whereas the hearing had taken half a day. The Respondent, in his Answer and in the EWW response had referred to his limited means. However he had provided no proof of his means as he was required to do should he want the Tribunal to take his means into account when assessing costs.
28. The Tribunal considered that the costs claimed were reasonable and proportionate to the issues to be determined and considered. The Tribunal ordered that the Respondent pay costs in the sum of £3,729.00. This reflected a £390 reduction for the shortened hearing time.

Statement of Full Order

29. The Tribunal ORDERS that the Respondent, PATRICK FITZGERALD, solicitor, be STRUCK OFF the Roll of Solicitors and it further Orders that he do pay the costs of and incidental to this application and enquiry fixed in the sum of £3,729.00.

Dated this 24th day of June 2020
On behalf of the Tribunal



J. A. Astle
Chair

JUDGMENT FILED WITH THE LAW SOCIETY
25 JUN 2020