SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12171-2021

BETWEEN:

SOLICITORS REGULATION AUTHORITY Applicant

and

VICTORIA ELLOUISE WHELAN Respondent

Before:

Mr S Tinkler (in the chair)
Mr J Evans
Ms J Rowe

Date of Hearing: 26 February 2021

Appearances

There were no appearances as the matter was dealt with on the papers.

JUDGMENT ON AN AGREED OUTCOME

Allegations

The Allegations made by the Applicant against the Respondent, were that:

1. On 31 January 2019, the Respondent sent an email to Claimant A which falsely stated that "it would appear that an email sent yesterday at 4pm was blocked by firewall due to the size of the attachment .... "when she had not sent any such email to him but had sent the email in error to an unrelated third party, Person B. In doing so, the Respondent had breached Principles 2 and 6 of the SRA Principles 2011.

2. That in relation to allegation 1 above, the Respondent acted dishonestly. However, proof of dishonesty was not a requirement for any of the allegations of misconduct.

Background

3. The Respondent qualified as a solicitor on 17 September 2018. At the time of the hearing she held a practising certificate free from conditions. The Respondent was at the material time employed by Dutton Gregory LLP ("The Firm") as an Assistant Solicitor in the Commercial Litigation Team. The Respondent began her employment at the Firm in December 2014 and commenced her training contract in March 2017.

4. The Allegations related to an email sent by the Respondent on 31 January 2019 to Claimant A, the claimant in employment proceedings in relation to which she represented the defendant employer. On 1 February 2019, the COLP of the Firm reported concerns about this email to the SRA.

Application for the matter to be resolved by way of Agreed Outcome

5. The parties invited the Tribunal to deal with the Allegations against the Respondent in accordance with the Statement of Agreed Facts and Outcome (SAF) annexed to this Judgment. The parties submitted that the outcome proposed was consistent with the Tribunal's Guidance Note on Sanctions.

Findings of Fact and Law

6. 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 her private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

7. The Tribunal reviewed all the material before it and was satisfied on the balance of probabilities that the Respondent's admissions were properly made, including the admission of dishonesty, applying the test set out in in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67. The Respondent knew that she had not sent the email to Claimant A and she knew this when she represented that she had. The Tribunal was satisfied on the balance of probabilities that this would be considered dishonest by the standards of ordinary, decent people.

8. The Tribunal considered the Guidance Note on Sanction (8th edition, December 2020). In doing so the Tribunal assessed the culpability and harm identified together with the aggravating and mitigating factors that existed.

9. The Tribunal noted that the usual sanction where misconduct included dishonesty would be a strike-off and the Tribunal had regard to Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin). The circumstances in which such a sanction was not imposed were exceptional, described in Sharma as "a small residual category where striking off will be a disproportionate sentence in all the circumstances ...".

10. In Solicitors Regulation Authority v James [2018] EWHC 3058 (Admin) at [101], Flaux LJ set out the basis of which question of exceptional circumstances was assessed:

> "First, although it is well-established that what may amount to exceptional circumstances is in no sense prescribed and depends upon the various factors and circumstances of each individual case, it is clear from the decisions in Sharma, Imran and Shaw, that the most significant factor carrying most weight and which must therefore be the primary focus in the evaluation is the nature and extent of the dishonesty, in other words the exceptional circumstances must relate in some way to the dishonesty."

11. The Tribunal considered whether the circumstances in this case were exceptional, having regard to James.

12. The Respondent had reported her actions in full a little over an hour after she had sent the misleading email. She had fully admitted what she had done and had co-operated fully with the investigation by the Firm and by the SRA. Her actions were a "moment of madness" from an inexperienced lawyer who had almost immediately realised the gravity of her error, and taken full responsibility for it. The Respondent had not benefitted from her actions and the Tribunal noted the personal difficulties within which she was struggling, which clearly significantly contributed to this serious error of judgment. The Tribunal was satisfied that the circumstances, taken together, were exceptional and related directly to the dishonesty. The Tribunal was therefore satisfied that it would be disproportionate to strike the Respondent from the Roll in this case.

13. The misconduct was still very serious however, and the proposed sanction of a suspension was entirely appropriate. The Tribunal was satisfied that the length of the suspension was appropriately reflective of the serious nature of the misconduct and the circumstances in which it occurred, and the need for the public to have confidence in the profession

14. The Tribunal therefore agreed to dispose of the matter in the manner proposed in the SAF.

Costs

15. The parties had agreed that the Respondent would pay the Applicant's costs in the sum of £5,000 and the Tribunal saw no basis to interfere with that agreement.

Statement of Full Order

16. The Tribunal Ordered that the Respondent, VICTORIA ELLOUISE WHELAN, solicitor, be suspended from practice as a solicitor for the period of SIX MONTHS to commence on the 26 February 2021 and it further Ordered that she do pay the costs of and incidental to this application and enquiry fixed in the sum of £5,000.00.

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

S Tinkler
Chair

BEFORE THE SOLICITORS DISCIPLINARY TRIBUNAL **Case No:**

IN THE MATTER OF THE SOLICITORS ACT 1974 (as amended)

AND IN THE MATTER OF:

SOLICITORS REGULATION AUTHORITY

Applicant

and

VICTORIA ELLOUISE WHELAN

Respondent

STATEMENT OF AGREED FACTS AND OUTCOME

Introduction

1. By a statement made by Hannah Pilkington on behalf of the Solicitors Regulation Authority (the "SRA") pursuant to Rule 12 of the Solicitors (Disciplinary Proceedings) Rules 2019 dated 22 February 2021, the SRA brings proceedings before the Tribunal making allegations of misconduct against the Respondent. Definitions and abbreviations used herein are those set out in the Rule 12 Statement.

Admissions

2. The Respondent admits that whilst in practice as a solicitor employed by Dutton Gregory LLP ("the Firm"):

    1. On 31 January 2019, the Respondent sent an email to Claimant A which falsely stated that *"it would appear that an email sent yesterday at 4pm was blocked by firewall due to the size of the attachment…."* when she had not sent any such email to him but had sent the email in error to an unrelated third party, Person B. In doing so, Ms Whelan breached Principles 2 and 6 of the SRA Principles 2011.

    2. That in relation to allegation 1 above, the Respondent acted dishonestly.

3. The SRA is satisfied that the admissions and outcome satisfy the public interest having regard to the gravity of the matters alleged.

Agreed Facts

4. The Respondent is a solicitor who qualified on 17 September 2018 under SRA ID 638504 who has a practising certificate free from conditions. The Respondent was at the material time employed by Dutton Gregory LLP ("The Firm") (SRA ID: 496960) as an Assistant Solicitor in the Commercial Litigation Team. The Respondent began her employment at the firm in December 2014. She began her training contract in March 2017 at the Firm.

5. The admissions set out above relate to an email sent by the Respondent on 31 January 2019 to Claimant A, the claimant in employment proceedings in relation to which she represented the defendant employer. On 1 February 2019, the COLP of the Firm reported concerns about this email to the SRA.

6. The full facts of the matter are set out in the Rule 12 Statement dated 22 February 2021 and the Respondent agrees and accepts the content of the Rule 12 Statement. In summary, the Firm was instructed to act on behalf of a defendant employer in an employment dispute before the Employment Tribunal. Claimant A was the claimant in those proceedings. The Respondent had conduct of the matter. Claimant A was not the Firm's client and was a litigant in person.

7. The firm was directed, by order of the Employment Tribunal, to prepare a bundle of medical evidence together with the Claimant A's impact statement and to provide a copy to Claimant A by 4pm on 30 January 2019.

8. The Respondent prepared the email including attachments made up of Claimant A's medical records. Instead of sending the email to Claimant A, the Respondent sent the email in error to Person B, who was unconnected to Claimant's A's matter. The email was sent at 4.09pm on 30 January 2019.

9. On 31 January 2019 at 8.46am Claimant A sent an email to the Respondent having not received the bundle of medical evidence in accordance with the Tribunal's order. The Respondent thereafter determined that the email had been sent to a third party in error and had not been sent to Claimant A.

10. Having determined that the email had not been sent to Claimant A, at 09.37am and 09.46am the Respondent sought unsuccessfully to recall her email to Person B. At 09.49am the Respondent emailed Person B asking him to delete the email sent in error.

11. On 31 January 2019 at 09.42am the Respondent sent an email to Claimant A. The email sent to Claimant A included the statement that "*it would appear that an email sent yesterday at 4pm was blocked by firewall due to the size of the attachment….My sincere apologies for any inconvenience.".*

12. The email sent by the Respondent at 09.42am was incorrect and misleading in that it implied that:

    12.1 the email had been sent to Claimant A, when it had not, as it had been sent to an unconnected party, Person B;

    12.2 the email had been blocked by the Firm's Firewall, when it had not. The Firm has confirmed that the firewall did not show any emails blocked due to the size of their attachments for the relevant date and time.

13. Thereafter on 31 January 2019 the Respondent reported the breach of data to the firm using its internal breach report facility. This report was sent to the Firm's COLP at 10.55am. The report form completed by the Respondent stated that '*his medical records were sent to the opposition (an individual) on the INT 14/7 matter in error.*'

14. On 1 February 2019 at 09:28am, the Respondent wrote to the Firm by email apologising for her mistake "*that lead to a breach of personal data*". The email further stated "*Finally, I would like to apologise again if, the course of action I took when discovering my own error was incorrect- as previously explained, I was blinded by panic as a result of our conversations/communications before Christmas..*"

15. The firm reported the data breach to the Information Commissioner's Office ("the ICO"). On 4 February 2019, the ICO wrote to the firm and told it that it would not be taking any formal action.

16. On 5 February 2019, the Firm wrote to Person B to advise him of the Firm's data breach, confirmed that it had been reported to the ICO and asked Person B to confirm that he had permanently deleted the email and not copied or disseminated it. On the same date the

Firm wrote to Claimant A in relation to this complaint that his records had been sent to a third party.

17. The Firm conducted an internal investigation. On 14 February 2019 the Respondent was given a first written warning.

Mitigation

18. The Respondent submits the following in mitigation, which is not agreed or endorsed by the Applicant:

18.1 in addition to juggling an extremely heavy workload at the time of the misconduct, the Respondent was the subject of a number of matters of a deeply personal distressing nature. These included having received extremely aggressive and stressful communications from a family member the day prior, the recent anniversary of the death of a close friend, and the fact that she was suffering physical pain and discomfort caused by an underlying health condition. In all the circumstances, the Respondent was operating at the time under acute stress and was not herself.

18.2 the misleading email was sent at a time when the Respondent was hysterical and in state of shock at having realised her error the previous day (in accidentally sending Claimant A's documents to Person B).

18.3 there was no benefit or advantage to the Respondent in sending the misleading email on 31 January 2019. The Respondent never had any intention of seeking to indefinitely cover up either the fact that Claimant A's medical records had been sent to the wrong person, or the fact that the error was her fault, both of which she knew she would need to admit to straight away, as she went on to do in the minutes after sending the email.

18.4 in sending the misleading email, the Respondent's objective in a fleeting moment of blind panic and madness at realising her error the previous day, had only ever been to buy a short amount of time in order to discuss with her superiors how best to inform Claimant A that his records had accidentally been sent to a third party, which the Respondent realised would need to be handled

sensitively and as to which she wanted assistance from those more senior than her (having only qualified four months previously).

18.5 consistent with that, having sent the misleading email at 09:42, the Respondent had immediately thereafter told her Head of Department and Head of Human Resources of her error (including in relation to the sending of the misleading error), and had then completed and sent the firm's COLP an internal breach form identifying her mistake, by 10:55 that morning . The internal breach form recorded that that the Respondent's proposal was that the firm should inform Claimant A what had happened.

18.6 having owned up immediately to several superiors at the firm about her serious error, the Respondent has co-operated with the SRA's investigation into this matter, and shown genuine insight, throughout, including making a prompt, open and frank admission as to having acted dishonestly.

18.7 the Respondent is utterly devastated at her serious error, for which she takes full responsibility and apologises sincerely and unreservedly.

18.8 the misleading email stands on its own as a single, uncharacteristic incident of fleeting duration at a time when the Respondent was a very junior solicitor.

18.9 the firm continues to employ the Respondent and has supported her throughout the SRA's investigation, evidencing the high regard in which they hold her notwithstanding her serious mistake.

18.10 in the aftermath of the incident, the Respondent focused on what changes she could implement to ensure that her original error (in sending the records of Claimant A to Person B) could not happen again and she put in place a number of steps, which have been identified to the SRA.

18.11 in circumstances in which becoming a solicitor was the realisation of a childhood dream for the Respondent that involved significant sacrifice on her part in the context of a difficult upbringing, she has already suffered immeasurably from the disciplinary hearing and outcome at the firm and the shame and trauma of the SRA's investigation. She has spent every day since the events in question in a state of deep-seated anxiety and shame and has

suffered from health issue as a result (evidence of which she provided to the SRA).

18.12 there is, in all the circumstances, no prospect whatsoever of a repetition of the Respondent's error.

Penalty Proposed

19. The Respondent agrees:

19.1 to the suspension of her Practising Certificate for a period of 6 months from the date of the order of the Tribunal;

19.2 to pay costs to the SRA agreed in the sum of £5,000 inclusive of VAT which takes into account the Respondent's means.

Explanation as to why such an order would be in accordance with the Tribunal's sanction guidance

20. The Respondent has admitted dishonesty. The Solicitors Disciplinary Tribunal's "Guidance Note on Sanction" (8th edition), at paragraph 51, states that: "*The most serious misconduct involves dishonesty, whether or not leading to criminal proceedings and criminal penalties. A finding that an allegation of dishonesty has been proved will almost invariably lead to striking off, save in exceptional circumstances (see* ***Solicitors Regulation Authority v Sharma*** *[2010] EWHC 2022 (Admin)).*"

21. In **Sharma [2010] EWHC 2022 (Admin)** at [13] Coulson J summarised the consequences of a finding of dishonesty by the Tribunal against a solicitor as follows:

"(a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the Roll … That is the normal and necessary penalty in cases of dishonesty…

(b) There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances …

(c) In deciding whether or not a particular case falls into that category, 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…"

22. The admitted allegation relates to the sending of one email to an unrepresented claimant (Claimant A) in relation to an explanation as to why he had not received an email and bundle of documentation when the Respondent had sent this in error to a third party. It is accepted that in a moment of panic, the Respondent sent the misleading email to conceal that error. The Respondent promptly admitted the true position to the Firm and provided the claimant with the appropriate documentation. She did not benefit from her actions and would not have done so even if her attempt at the concealment of her mistake had been successful (save and except to the extent that some minor embarrassment might have been avoided).

23. In the instant case the misconduct was momentary and limited to one email, and could properly be described in all the circumstances as a *"moment of madness"* at a point when the Respondent had discovered that she had sent the initial email to an unrelated third party.

24. The Respondent's conduct misled Claimant A for a short period as to the reason why he had not received the email and the extent to which the Respondent had complied with the Tribunal's directions. There was no detrimental effect on Claimant A's proceedings by way of the misleading email, save that it is accepted that the claimant was distressed not only by his information being provided in error to a third party, but by the sending of the misleading email.

25. The Respondent co-operated with the Firm's internal investigation and received a warning. The Respondent remains in the same employment with the Firm and no other concerns have been raised. The misconduct took place at a time when the Respondent was a very newly qualified solicitor. It is accepted that the Respondent promptly made expressions of apology to the Firm, communicated sincere expressions of regret and remorse very promptly (including the morning of sending the misleading email) and that there is no evidence of repetition of the misconduct, or a pattern of misconduct. The Respondent has supplied the Applicant with testimonials in support of her character and insight, and steps taken by the Respondent to avoid the underlying situation arising again;

26. The case therefore falls within the small residual category where striking off would be a disproportionate sanction.

27. However, the Respondent had direct responsibility for her actions, which were designed to conceal a mistake, and her culpability was high. Those actions were a significant departure from the “complete, integrity and probity” expected of a solicitor and corresponding harm has been caused to the reputation of the provision of legal services. Her misconduct, which was aggravated by dishonesty, was therefore still serious such that neither a reprimand, a restriction order nor a fine is a sufficient sanction or in all the circumstances appropriate.

28. In all the circumstances of the case, it is therefore proportionate and in the public interest that the Respondent should be suspended from practice for a period of 6 months.

Signed on behalf of the Applicant

Oliver Sweeney
Head of Legal & Enforcement
Dated this 22 day of February 2021

Signed by the Respondent

Dated this 19 day of February 2021