

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 12192-2021

BETWEEN:

MARLAN HIGGINS

Applicant

and

SOLICITORS REGULATION AUTHORITY LTD

Respondent

Before:

Mr W Ellerton (in the chair)

Ms A Kellett

Ms J Rowe

Date of Hearing:

3 February 2022

Appearances

The Applicant represented himself.

Victoria Sheppard-Jones, barrister of Capsticks LLP, 1 St George's Road, Wimbledon, London SW19 4DR for the for the Respondent.

JUDGMENT ON AN APPLICATION FOR DETERMINATION OF AN INDEFINITE SUSPENSION

Documents

1. The Tribunal considered all of the documents in the case which included an agreed electronic bundle on CaseLines.

Preliminary Matter

Applicant's application to dispense with the requirements of Rule 17(6) of the Solicitors (Disciplinary Proceedings) Rules ("SDPR")

2. The Applicant made a preliminary application for the Tribunal to dispense with the requirement to advertise the application in the newspaper circulating in the area of his former practice, as required by Rule 17(6) SDPR. He had successfully placed advertisements in the Law Gazette and on the Tribunal's website.
3. The Applicant explained that, following a previous adjournment of this matter on 28 October 2021 to allow him a further opportunity to place an advertisement in a newspaper circulating in the former area of practice, he had arranged to place an advertisement in the Witney Letterbox. An advertisement had duly been placed in that publication which complied with the SDPR, save that the date of the hearing was incorrectly stated as 4 January 2022 and not 3 February 2022. The Applicant told the Tribunal that the Witney Letterbox had accepted responsibility for this error and put before the Tribunal an email he had received confirming this. The Applicant also provided the Tribunal with a copy of the advertisement he had sent to the Witney Letterbox, which contained the correct date.
4. The Applicant submitted that he had done all that was required of him and through no fault of his own, the advertisement had been incorrect.

Respondent's Submissions

5. Ms Sheppard-Jones submitted that it would not be just to dispense with the requirements of this important Rule.
6. Ms Sheppard-Jones set out the history of this matter, including two previous adjournments, to give the Applicant an opportunity to comply with Rule 17(6). She submitted that, at some point he must have advised the Witney Letterbox that the date was the 4 January 2022, as that was the original date of the re-scheduled hearing. Ms Sheppard-Jones accepted that on 24 November 2021 the Applicant had emailed the advertisement with the correct date, but submitted that the evidence of his dealings with the publication had been "piecemeal".
7. Ms Sheppard-Jones submitted that the situation was unsatisfactory as a member of the public wishing to make representations might think they had missed the hearing date.

The Tribunal's Decision

8. Rule 17(6) stated as follows:

“Every application to which this Rule applies must be advertised by the Applicant in the Law Society’s Gazette and in a newspaper circulating in the area of the Applicant’s former practice (if available) and must also be advertised by the Tribunal on its website.”

9. There was no inherent discretion to waive this requirement and so the only basis on which this could be done was under Rule 6(2) which stated:

“The Tribunal may dispense with any requirement of these Rules in respect of notices, Statements, witnesses, service or time in any case where it appears to the Tribunal to be just to do so”.
10. The Tribunal considered that this power should be used sparingly as parties were expected to comply with the Rules and those Rules would have little effect if they were waived for anything other than a compelling reason.
11. The Tribunal agreed with Ms Sheppard-Jones that some of the material had been piecemeal in its presentation. However the Applicant had met the requirement to publish an advertisement in the Law Gazette and on the Tribunal’s website. In relation to the advertising in the local area, the Tribunal was satisfied that the Applicant had sent an advertisement to an appropriate publication and paid a fee for publication. Through no fault of his own, as acknowledged by the Witney Letterbox, the published advertisement contained an error as to the date of the hearing. This was unfortunate, but was clearly outside the Applicant’s control. Importantly, the date published was one before the hearing date, not after. This meant that the risk that a member of the public had been prevented from making submissions was minimised.
12. In the particular circumstances of this case, the Tribunal was satisfied that the Applicant had in fact met the requirements of Rule 17(6) and there was no need to consider dispensing with those requirements. The Tribunal was content to hear the substantive application.

Background

13. The Applicant had been admitted to the Roll in January 2002. Between 1 November 2006 and 30 October 2009, the Applicant practised on his own account as Legal Advice Direct Solicitors (“the firm”). The firm ceased trading on 30 October 2009.
14. The firm’s final accountant’s report needed to be received by the SRA no later than 30 April 2010. That report was not provided and so the SRA had written to the Applicant on three occasions between May 2010 and May 2011. The Applicant had not responded until August 2011, when he had provided representations concerning this failure, but had not provided the report. The report had never subsequently been provided to the SRA.
15. The Applicant had been referred to the Tribunal. On 13 December 2012 the matter had been listed for a substantive hearing, which proceeded in the Applicant’s absence. The Tribunal had found the following Allegations proved in full:-

- “1.1 He breached section 34(2) of the Solicitors Act 1974 and/or Rule 36(5) of the Solicitors' Accounts Rules 1998 by failing to deliver the cease to hold accountant's report in relation to his practice as Legal Advice Direct Solicitors by its due date of 30 April 2010;
- 1.2 He failed to deal with the SRA in an open, prompt and co-operative way in breach of rule 20.05(1) of the Solicitors' Code of Conduct 2007.”
16. In considering sanction, the Tribunal had concluded the following:
- “22. The Tribunal referred to its Guidance Note on Sanctions when considering sanction.
23. The Tribunal determined that neither a reprimand nor a fine was an appropriate sanction in this case, the Respondent [now the Applicant] having ignored his professional regulator over a period of time, despite a number of letters from the SRA concerning his accounts. Whilst the Respondent had said that he was unwell he had started another business. It was a totally unsatisfactory state of affairs that the Respondent's previous firm had not been closed down properly by him and that the cease to hold accountant's report was still outstanding.
24. In these circumstances the Tribunal had determined that the Respondent should be suspended indefinitely from his practice as a solicitor. Whilst the Tribunal could not fetter any future Tribunal sitting to determine whether that suspension should be lifted, it would expect the position concerning the Respondent's medical condition to be clarified before that Tribunal and the cease to hold accountant's report to have been delivered.”
17. By way of an application dated 8 April 2021 the Applicant sought to have the indefinite suspension terminated.

Applicant's Submissions

18. The Applicant referred the Tribunal to his written application, which he developed in his oral submissions.
19. The Applicant told the Tribunal that he had been suffering from poor mental health at the time of the misconduct. In April 2010 he was suffering from anxiety and depression. At the time of the disciplinary hearing in 2012, he had been unable to attend as a result of his ill health. He also had a number of serious problems in his personal life at that time, which had caused him significant difficulties. This had reached the point where he feared going into the office or taking telephone calls.
20. The Applicant told the Tribunal that he had no prior blemishes in his regulatory history and that he took full responsibility for his actions and the damage caused to the profession by them. He reminded the Tribunal that he had not been involved in any criminal conduct and had not benefited financially from his misconduct.

21. The Applicant told the Tribunal that he had recovered his health and was ready to return to the profession. The Applicant told the Tribunal that he had not been able to get a medical report as he needed a third party to request and pay for it and this had not been possible to organise. He described his qualification as a solicitor as “one of the proudest days of my life” and believed he had more to contribute.
22. In recent years, the Applicant told the Tribunal, he had been working on the front line with NHS Blood and Transplant as a Donor Carer. This was skilled and responsible work and the Applicant submitted that this demonstrated the extent of his rehabilitation and recovery. The Applicant told the Tribunal that he had been promoted in this role and was now a Project Lead, focusing on inclusion, diversity and development of NHS staff. In addition he was a UNISON steward and had recently been promoted to branch secretary, where he sought to build a better partnership with the NHS.
23. In 2020, the Applicant told the Tribunal, he had completed his mediation certificate with the support of the NHS and was currently training as a certificated Coach & Mentor.
24. In relation to the misconduct, the Applicant told the Tribunal that he was “ashamed” and deeply sorry for what he had done. Although no clients had suffered any loss when the firm closed, he accepted that creditors had. The Applicant told the Tribunal that this would never happen again.
25. In relation to rehabilitation and training, the Applicant told the Tribunal that as part of his trade union work he had undertaken a three-day course in employment law in November 2021. The Applicant told the Tribunal that if his suspension was terminated he would seek to practice in the area of employment law and not in the areas of family, domestic violence and homelessness law that he had done in the past. The nature of that work had contributed to his mental health difficulties and he did not want to repeat that.
26. The Applicant also told the Tribunal that he had acted in ligation in Jamaica as the executor of his father’s estate and submitted that he therefore had experience of complex litigation as a result of this.

Respondent’s Submissions

27. Ms Sheppard-Jones referred the Tribunal to the relevant sections of the Guidance Note on Other Powers of the Tribunal (5th Edition, December 2021) (“the Guidance Note”) and based her submissions on the factors listed in that Guidance Note when dealing with applications to terminate an indefinite suspension.
28. Ms Sheppard-Jones submitted that the previous findings that had led to the indefinite suspension were serious and that this was a factor the Tribunal should take into account when considering the application.
29. In relation to the Applicant’s medical situation, which he had submitted was a factor behind the misconduct, Ms Sheppard-Jones noted that no evidence of rehabilitation or future prognosis had been provided by a suitably qualified expert. The screenshot provided by the Applicant confirming the diagnosis did not meet that requirement.

30. There was also no evidence demonstrating any training undertaken by the Applicant or any evidence indicating that he had been provided with an employment opportunity in the profession. It was therefore not possible to assess his suitability for such work or any arrangements for supervision that might be in place were the suspension to be lifted. The Applicant was employed by the NHS but no evidence had been provided of reformation of character, insight, or steps that had been taken to ensure that the wrongdoing was not repeated. Ms Sheppard-Jones noted that the only training the Applicant appeared to have undertaken was three days in November 2021 in employment law, which was not his previous area of practice. The Applicant's certificates were not about legal training. In those circumstances, the risk to the public remained were the suspension to be lifted.
31. Ms Sheppard-Jones accepted that many years had passed since the suspension had been imposed, but urged the Tribunal not to consider that factor in isolation. Ms Sheppard-Jones also accepted that the Applicant had demonstrated genuine remorse for his misconduct.
32. In relation to the work undertaken as an executor, Ms Sheppard-Jones submitted that this was not evidence of suitability to return to the profession as acting as a litigant in person was very different from acting as a solicitor.
33. Ms Sheppard-Jones invited the Tribunal to refuse the application.

The Tribunal's Decision

34. The Tribunal took careful note of the oral and written submissions of both parties. The Tribunal had due regard to its statutory duty, under section 6 of the Human Rights Act 1998, to act in a manner which was compatible with the Applicant's right to a fair hearing 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 test was whether the Tribunal was satisfied that termination of the indefinite suspension would not adversely affect the reputation of the legal profession nor be contrary to the interests of the public.
35. The Tribunal had regard to the Guidance Note, which set out a number of factors that the Tribunal would take into account when considering an application of this nature. The Tribunal noted that at the previous hearing it had specifically drawn the Applicant's attention to the Guidance Note. Although that had been the 4th Edition, there were no material differences between that and the 5th Edition. The Tribunal went through the factors and applied the circumstances of this application to each one in deciding whether to grant the application:

“Details of the original order of the Tribunal leading to suspension. The Tribunal should consider this information for guidance as to the seriousness and circumstances of the original breach or misconduct and the steps the Tribunal regards as being relevant in supporting an application.”
- 35.1 The Tribunal recognised that the matters that resulted in the indefinite suspension being imposed were serious, though it did accept that there had not been an allegation of

dishonesty or lack of integrity. Nevertheless, failing to co-operate with the regulator was a fundamental breach of a solicitor's obligations.

“If the suspension was imposed due to concerns regarding the applicant’s fitness to practise due to physical or mental ill-health or addiction, evidence of rehabilitation and future prognosis must be provided from a suitably qualified expert.”

35.2 The Tribunal had enormous sympathy with the Applicant’s situation in relation to his health, as indeed it did for anyone experiencing pressures of work and mental health difficulties. The Tribunal recognised that there was a need to protect and support anyone going through mental health difficulty. The Tribunal was quite clear that suffering from mental health illness should not prevent anyone from being part of the profession. The difficulty in this case was that the Applicant had not provided a medical report in support of his application and that meant that the Tribunal could not make an assessment of whether his health had recovered sufficiently such that it could withstand the pressures of a return to practice. The Tribunal noted this factor in the context of other matters discussed below such as training and employment.

35.3 The Tribunal noted that the Applicant did not plan to return to his former area of practice and that he intended to go into employment law. The Tribunal was aware that employment law could be stressful and contentious. The Applicant had referred to the ability to identify triggers that would lead to a decline in his mental health. The absence of a medical report meant that the Tribunal could not adequately gauge whether those triggers would be likely to cause the same issues in the future or whether the position had improved such that they would not.

35.4 In the absence of an independent medical report addressing all of those issues and setting out a prognosis, the Tribunal was unable to satisfy itself that the health aspect of the circumstances giving rise to the misconduct had been fully addressed.

“Evidence must be provided to establish any training undertaken by the applicant or that they have kept their legal knowledge up to date in their area of practice”

35.5 The Applicant had not provided evidence of training in either his former area of law or his proposed new area of law. The Tribunal accepted that he had been on a three-day course in November 2021 on employment law, but this was in the context of his work as a trade union steward and not with a view to practising as a solicitor. The Applicant had now been out of the profession for over nine years and would require significant and substantial training. This was particularly so given his intention to start in a new area of law. There was also no evidence that the Applicant had kept up with his legal knowledge in relation to his former area of law. In those circumstances, a three day course was a wholly inadequate basis on which to establish that he had undertaken the required training.

“Evidence of any employment together with safeguards and supervision which have been put in place by the applicant’s employer or alternatively a stringent oversight of the applicant’s potential employment together with

third party risk and personal management arrangements to be put in place by a prospective employer”.

35.6 The Tribunal recognised that the Applicant had secured employment, both paid and voluntary, in recent years and it fully recognised the value of the work he had undertaken and the contribution he had made. The difficulty with this application was that the Applicant had not worked in the legal profession, which he could have done provided he had been granted permission to do so by the SRA, and so there was no evidence of safeguards being in place or the effectiveness of supervision in relation to the key question of whether the Applicant could return to practice. Further, the Applicant did not have an offer of employment in the profession and so there was no evidence before the Tribunal about what arrangements may have been put in place by a prospective employer to ensure that any risk to the public was monitored and managed.

“Evidence of genuine reformation of character of the applicant including evidence of insight into the nature and effects of the misconduct and steps taken by the applicant to ensure that the wrongdoing does not reoccur.”

35.7 The Tribunal accepted that the Applicant had demonstrated genuine insight into, and remorse for, his misconduct. The Tribunal further accepted that the Applicant’s employment outside the profession did demonstrate some progress towards managing his health and personal issues effectively. However the absence of the medical report discussed above meant that the Tribunal could not properly assess the effect of the steps taken to ensure the wrongdoing was not repeated in the future.

“The length of time since the suspension was imposed”

35.8 The Tribunal fully recognised the fact that it was now more than nine years since the Applicant was suspended.

“Whether the Tribunal which made the original order, having paid due regard to its inability to fetter the discretion of any future Tribunal considering an application for the termination of the suspension, indicated that it had in mind the possibility of an eventual termination of the indefinite suspension.”

35.9 The previous Tribunal had made specific reference to reassurance about the Applicant’s health and this is discussed above.

35.10 The Tribunal recognised that it was unrealistic to expect the missing accountant’s report to be delivered now, given the passage of time since the firm closed.

“Whether there is any continuing risk to the public”

35.11 The Tribunal was unable to be satisfied that there would be no continuing risk to the public if the suspension was terminated, due to the lack of evidence presented in support of the application.

“The Tribunal considers that the public would not harbour concerns about the propriety of the applicant returning to practice.”

35.12 The Tribunal considered that the public would harbour concerns about the Applicant returning to practice if such an application was granted notwithstanding lack of adequate supporting evidence, particularly in relation to health, training and employment in the profession.

“If the suspension was subject to conditions, evidence that they have been complied with.”

35.13 The suspension was not subject to conditions and so this was not a relevant factor in this case.

“If financial penalties were imposed, evidence that they have been discharged or attempts made by the applicant to discharge them.”

35.14 Financial penalties had not been imposed as part of the sanction and so this was not a relevant factor in this case.

“Character references.”

35.15 The Applicant had not provided character references in support of his application.

“The regulator’s response to the application.”

35.16 The Respondent had opposed the application. However while the Tribunal took note of the Respondent’s position, the decision was one solely for the Tribunal.

“Responses received by the Tribunal from others under Rule 17(7) of the Solicitors (Disciplinary Proceedings) Rules 2019 following the applicant’s advertisement of their application as required by Rule 17 (6) of those Rules”

35.17 There had been no such responses received.

36. In conclusion, faced with the application as it was presented, the Tribunal found that it could not be satisfied that there would be no adverse effect on the reputation of the legal profession or the interests of the public if the Applicant’s suspension was terminated. The Tribunal therefore refused the application.

Costs

37. Ms Sheppard-Jones applied for the Respondent’s costs in the sum of £2,100.00. The Applicant did not contest this application.

38. The Tribunal was satisfied that it was right for the Applicant to pay the costs of his application, in which he had been unsuccessful. The costs were reasonable and proportionate and the Tribunal therefore ordered that the Applicant pay costs in the sum claimed.

Statement of Full Order

39. The Tribunal Ordered that the application of MARLAN HIGGINS for the determination of the indefinite suspension be **REFUSED** and it further Ordered that the Applicant do pay the costs of and incidental to the response to this application fixed in the sum of £2,100.00.

Dated this 24th day of February 2022
On behalf of the Tribunal

JUDGMENT FILED WITH THE LAW SOCIETY
24 FEB 2022

A handwritten signature in black ink, appearing to read 'W Ellerton', written in a cursive style.

W Ellerton
Chair