SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No. 12223-2021

BETWEEN:

ADAM FOURACRE Appellant

and

SOLICITORS REGULATION AUTHORITY LTD Respondent

Before:

Mr P. Jones (in the chair)
Mr A.N Spooner
Mrs. P Iyer

Date of Hearing: 1 November 2021

Appearances

The Appellant represented himself

Nathan Cook, solicitor of Solicitors Regulation Authority of The Cube, 199 Wharfside Street, Birmingham, B1 1RN, for the Respondent.

APPEAL JUDGMENT

Documents

1. The Tribunal reviewed all the documents including:

Appellant

- Application received 16 July 2021
- Grounds of Appeal dated 15 July 2021
- Skeleton argument dated 25 October 2021
- Personal Financial Statement

Respondent

- Respondent's Response to the Grounds of Appeal dated 12 August 2021
- Decision of Adjudicator dated 30 June 2021 and Adjudication bundle
- Costs schedules dated 20 October 2021

Authorities Bundle

- SRA Warning Notice on Offensive Communications 24 August 2017
- Human Rights Act 1998
- Extracts from SRA Handbook
- Copland v The United Kingdom [2007] ECHR 253
- Barbulescu v Romania [2017] ECHR 754
- Niemitz v Germany [1992] ECHR 80
- Laurent v France [2018] ECHR 430
- Frankowicz v Poland [2008] ECHR 1712
- Ryan Beckwith v SRA [2020] EWHC 3231 (Admin)
- Ken Livingstone v The Adjudication Panel for England [2006] EWHC 2533 (Admin)
- Dudgeon v The United Kingdom [1981] ECHR 5
- Bank Mellat v HM Treasury (No 2) [2013] UKSC 39
- Konstantin Markin v Russia [2012] ECHR 514
- A v B, C, D (Case No. 2201655/2018)

Introduction

2. The Appellant, appealed under section 44E of the Solicitors Act 1974 (as amended) ("the Act") against a decision dated 30 June 2021 of an Adjudicator, ("the Adjudicator"), engaged by the Solicitors Regulation Authority ("the Respondent"). The decision of the Adjudicator was made pursuant to the Adjudicator's powers under section 44D of the Act.

The Legal Framework

3. The procedure for the hearing of the Appeal is governed by the Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011 which came into force on 1 October 2011.

4. The Tribunal has power under section 44E to make such order as it thinks fit, and such an order might in particular:

   (a) affirm the decision of the Society;

   (b) revoke the decision of the Society;

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

   (d) in the case of a solicitor, contain provision for any of the matters mentioned in paragraphs (a) to (d) of section 47(2);

   (e) …;

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

5. In light of the Divisional Court's judgment in SRA v SDT and Arslan and the Law Society (Intervening Party) [2016] EWHC 2862, the following framework principles apply to section 44E appeals:

   - The role of the Tribunal is to review the Adjudicator's decision, rather than to conduct a rehearing.

   - That review function is analogous to that of a court dealing with an appeal from another court or tribunal pursuant to Rule 52.11 of the Civil Procedure Rules. The case law that has developed under Rule 52.11 in relation to (i) the difference between a review and rehearing and (ii) the nature of a review, would inform the correct approach that the Tribunal should adopt when conducting a review.

   - The Tribunal should interfere with the Respondent's decision under review only if satisfied that the decision is wrong, or that the decision is unjust because of a serious procedural or other irregularity in the proceedings.

   - The Tribunal should not embark on an exercise of finding the relevant facts afresh. On matters of fact, the proper starting point for the Tribunal is the findings made by the Adjudicator and the evidence before the Adjudicator. If satisfied for good reason that a finding of the Adjudicator was wrong, the Tribunal is entitled to reach a different conclusion. The Tribunal has to consider whether, on that evidence, the Adjudicator was justified in making the factual findings that she did.

   - Where a challenge is made to conclusions of primary fact, the weight to be attached to the findings of the original decision-maker would depend upon the extent to which that decision-maker had an advantage over the reviewing body; the greater that advantage, the more reluctant the reviewing body should be to interfere. Where the original decision involved an evaluation of the facts on which there is room for reasonable disagreement, the reviewing body ought not generally to interfere unless it is satisfied that the conclusion reached lay outside the bounds within which reasonable disagreement is possible.

The Burden and Standard of Proof

6. The burden of proving that the Adjudicator's decision was wrong or that the decision was unjust because of a serious procedural or other irregularity in the proceedings lies with the Appellant.

7. The standard to which he is required to prove that the decision was unjust is the civil standard, namely that on a balance of probabilities it was more likely than not that the Adjudicator's decision was unjust.

SRA Principles 2011 ("the Principles")

8. Principle 6: You behave in a way that maintains the trust the public places in you and in the provision of legal services.

The Adjudicator's decision

9. On 30 June 2021 an Adjudicator of the Solicitors Regulation Authority Ltd ("SRA") considered a report made against the Appellant. The allegation was that the Appellant left a Christmas card on the desk of a female work colleague that contained inappropriate sexualised references.

10. The Adjudicator found the allegation proved and that it amounted to a breach of Principle 6 of the Principles.

11. The Adjudicator's Decision ("the Decision") was to:

- Rebuke the Appellant.
- Publish the fact that the Rebuke had been administered.
- Direct the Appellant to pay the SRA costs of investigating the report in the sum of £600.00.
- The Decision set out the background at paragraphs 4.1 to 4.11
- The Appellant's representations at paragraph 4.12 to 4.14
- The legal and regulatory framework at paragraph 5.1 to 5.2
- The Adjudicator's reasons at paragraph 6.1 to 6.18
- The Decision on publication at paragraph 7
- The Decision on costs at paragraph 8

Factual Background

12. The Appellant was at the relevant time a trainee solicitor with Dentons UK and Middle East LLP (the Firm), a recognised body. He began his training contract in August 2018.

13. Prior to the sending of the Christmas card the Appellant had received a warning from the Firm about his behaviour as he had made an inappropriate comment to some of the Firm's secretaries at an office party when he said, "*the party was dreadful and that he would rather have stayed at home and had a wank*".

14. The Appellant apologised for this comment which he referred to as "*crass and juvenile*".

15. KB was another trainee who had been seconded to the firm from another firm for six months of her training contract. On 20 December 2018, KB reported to the firm that she had received a Christmas card from the Appellant. It was her view that the card contained inappropriate comments. The Christmas card read as follows:

> "*K[redacted]. I hope you enjoyed our coffee the other day. The flat white and coffee tumblers were made by a friend and former colleague at [redacted] SP (funny right?) whose website I created (www.). I had thought of getting you a moulded vibrator with custom 'drizzle' and 'dollop' functions, along with the Haribo, in order to give you a proper 'buzz' for Christmas. Personally, however, I thought you'd prefer the 3rd action - "face painting tsunami of vizz'. However, I thought that would be too outrageous even for me. I am sorry for embarrassing you and the drama at work and for damaging your friendship with G. However, K [redacted], you do need to learn to care less about what other people think.*
>
> *6 months ago, the opinions of the people you are working with didn't matter to you. 6 months from now, most of them still won't matter to you. You need to focus on what makes you happy. You love me and I love you. Its [sic] as simple or as complicated as you need to make it.*
>
> *Let's meet up in the new year and I can tell you about my sister Lorraine, who you are scarily alike. I think you will find it very insightful.*
> *Wishing a sexy Yorkshire babe a great Christmas. Love Adam xxx*"

16. The Appellant had given KB two presents along with the card. The presents were not offensive or sexual in nature, however KB handed these back to him.

17. The return of the presents resulted in the Appellant sending the following text messages to KB:

> "*If I'm wrong [redacted] just tell me to fuck off and I'll leave you alone until March. Have a great Christmas regardless. Adz*"
>
> "*I've also deleted your number*"
>
> "*Actually, I take it back. That's a genius [sic] move. "I'm angry and I am gonna hurt you the way you hurt me, I'm gonna reject you the way you rejected me when I offered you a birthday drink, and you asked out the Australian girl*".
>
> "*Clever girl [redacted]. You have a great Christmas gorgeous because I love you too. Can't wait for you to block me, then I'll know you really have feelings. That was a fucking smart move.*"

18. An Investigation Officer at the SRA investigated the matter and formally put the allegation to the Appellant who responded by way of a written statement. Although the Appellant apologised for his actions, the decision of the Investigation Officer was that the Appellant's conduct was a breach of Principle 6 of the Principles which required a regulatory sanction.

19. Subsequently as required by the SRA Application, Notice, Review and Appeal Rules 2019, the Investigation Officer sent to the Appellant a Notice dated 9 March 2021 which had been prepared to put before an Adjudicator.

20. In this Notice the Investigating Officer recommended a financial penalty of £2,000. The Appellant's representations were invited on the Notice, and he responded by way of an Answer dated 30 March 2021.

21. The matter was considered by the Adjudicator who made a decision dated 30 June 2020. The Adjudicator did not direct a financial penalty but decided to rebuke the Appellant, to publish the rebuke and ordered him to pay costs of £600.00.

The Appellant's Appeal

22. In his written grounds of appeal dated 15 July 2021 and later Skeleton Argument dated 25 October 2021 the Appellant appealed against the decision the Adjudicator's decision.

23. The Appellant relied on 8 grounds of appeal summarised below.

24. **Ground One**
The Adjudicator fell into serious error in finding that the Appellant's right to a private life/Article 8 of the European Convention on Human Rights ("*ECHR*"*) was not engaged.*

24.1 The Adjudicator concluded at paragraph 7.4.1 of her decision:

> "*that the conduct was in relation to his role and position in the firm as an employee and not in relation to his private life*".

24.2 In support of that decision, the Adjudicator made a number of findings as part of her decision when characterising the relationship between the Appellant and KB and omitted to make reference to other facts.

24.3 The Adjudicator failed to make appropriate reference to the following:

- KB making a sexually suggestive comment to the Appellant on 23 November in the canteen within the work environment, querying whether he was a "drizzler/dolloper" and then started laughing before saying "*I should have qualified that*" or "*perhaps I should have qualified that*".

- The Appellant responded that he would "let that one twist in the wind", reflecting the fact he interpreted as a sexually suggestive remark. KB's laughing reflects an intention to convey a risqué comment. She did not seek to retract it at the time following the Appellant's response to it;

- KB was making a deliberate and conscious effort to conceal the name of her boyfriend from the Appellant and his identity. When she spoke about him, she consistently referred to him in the third person as "him", which is not consistent with someone who has only entirely platonic motivations/intentions.

- KB offered to go out for a drink with the Appellant separately after she was unable to attend his birthday party. She did not follow through with that when she found out that the Appellant had asked out another female work colleague for a drink, reflecting that her intentions were not solely professional; and

- KB told the Appellant on or around 11 December 2018 that she had told her friends about him, and that she really liked him (to them). This was during a conversation in which the Appellant made his romantic interest known to KB. One of the things that KB liked about the Appellant was that he did not take himself too seriously, commenting that they had good banter together.

24.4 The Adjudicator stated at paragraph 6.7 that: "*[KB] had a work relationship with Mr Fouracre*". However, the Adjudicator had no evidence from KB within the allegation bundle or any of the documents upon which to base the conclusion that KB had solely a work relationship with the Appellant. The evidence in its totality did not support this conclusion. There was no witness statement from KB. The Appellant said that there was a lack of objectivity and independence in the Adjudicator's decision.

24.5 The Adjudicator stated at paragraph 6.6 of her decision that:

> "*Exchanging personal mobile telephone numbers and WhatsApp messages is not enough to take a work relationship to the private sphere… That WhatsApp messages were exchanged between private mobile devices and that some of the WhatsApp messages were sent from home, as well as the card handed over when leaving the office does not mean that this is not a work-related issue. Colleagues often exchange Christmas cards and presents. This alone is not indicative of a relationship outside the work sphere.*"

24.6 The Adjudicator went on to state at paragraph 7.14 of the decision that:

> "*in relation to your activities carried out from an office must be broadly interpreted to include conduct and behaviour between work colleagues, including other trainees. This applies unless and until any work relationship moves into the private sphere. This is not such a case*".

24.7 However, the Appellant submitted that the Adjudicator fell into error in concluding that the conduct was not in the Appellant's private sphere and by concluding that they were work colleagues, and for that reason the conduct was not in the Appellant's private life and that Article 8 was not engaged.

24.8 There was no evidence from KB upon which the Adjudicator could base the conclusion that KB's view was that they had a strictly work relationship and the Adjudicator disregarded materially relevant factors and improperly took into account other factors she should not have done.

24.9 The Adjudicator made reference to the 'spheres' of relationship between the Appellant and KB, which in her view supported the notion that the conduct was not in the Appellant's private life and Article 8 was not engaged. In doing so the Adjudicator took a one- sided view of the relationship from KB's perspective and not an objective view.

27.10 Article 8 states: "*Everyone has the right to respect for his private and family life, his home and his correspondence.*" Correspondence includes letters, telephone calls, emails, text messages, instant messaging services such as WhatsApp, and Christmas cards. The case law indicates that communications from business premises as well as from the home may be covered by the notions of "*private life*" and "*correspondence*" within the meaning of Article 8. Further, Article 8 guarantees a right to "*private life*" in the broad sense, including the right to lead a "*private social life*", that is, the possibility for the individual to develop his or her social identity. In that respect, the right in question enshrines the possibility of approaching others in order to establish and develop relationships with them.

24.11 The Adjudicator was wrong to state that the conduct was in relation to his role and position at the firm and not in the Appellant's private life which would have engaged Article 8. The Adjudicator's reasoning and rationale is materially flawed.

25. **Ground Two**
The Adjudicator erred in concluding that the Respondent had jurisdiction to sanction the Appellant

25.1 Despite stating that she had recourse to the entirety of the Appellant's representations, there was no evidence in the decision that the Adjudicator gave any or any adequate explanation or consideration as to why conduct occurring outside of working hours between two trainees, their duties having finished for that day, and who are in the process of leaving the building, amounted to activities carried out by an employee.

25.2 There was merely reference to a relationship that existed and that it must cover relationships between work colleagues unless they move into the private sphere. The Adjudicator fell into error in concluding that the conduct was not in the Appellant's private and personal life.

25.3 The Appellant's duties as a trainee solicitor had finished that day and he was in the process of leaving the building to go home and in the process met up with KB. The Adjudicator did not find or conclude otherwise (paragraph 6.6 of the Adjudicator's decision: "*the card (was) handed over when leaving the office)*."

25.4 In relation to paragraphs 6.6, and 6.13 to 6.16 of the Adjudicator's decision, the Adjudicator erred in concluding that the Respondent had jurisdiction to sanction the Appellant. Principle 6 only applies in relation to activities carried out in the capacity as an employee of an authorised body by virtue of Rule 3.1 of Part 2 of the SRA Principles 2011. A trainee is an employee.

25.5 The Adjudicator failed to give any or any adequate consideration as to why that conduct amounted to activities in the capacity of an employee, other than to suggest that jurisdiction arose simply because it was conduct that occurred between two people who happened to be work colleagues and who had a professional relationship whilst carrying out work as trainees.

25.6 The Adjudicator stated that from KB's perspective she and the Appellant had a work relationship, and that unless and until any relationship moved into the private sphere, the Respondent would have jurisdiction under Paragraph 3.1 of the SRA Handbook

(paragraphs 6.14 and 6.15 of the Adjudicator's decision). The Appellant said that the Adjudicator was wrong to conclude that the 'jurisdiction' set out under Paragraph 3.1 "must" be construed broadly. The Adjudicator's rationale on jurisdiction would result in jurisdiction of unlimited scope.

25.7 Paragraph 3.1 reads in relation to the Appellant:

> "*Subject to paragraphs 3.2 to 6.1 below and any other provisions in the SRA Code of Conduct, the Principles apply to you, in relation to your activities carried out from an office in England and Wales, if you are: (d) any other person who is a (sic) ... employee of an authorised body*."

25.8 Paragraph 5.1 which is headed *'Application of the SRA Principles outside practice'* provides that "*in relation to activities which fall outside practice*", "*Principles 1, 2 and 6 will apply if you are a solicitor, REL or RFL*".

25.9 The Appellant is not a solicitor, REL or RFL and on this basis the Respondent had no jurisdiction in relation him at the time he gave KB the Christmas card, notwithstanding this took place in the office. The jurisdiction falls around the employee's role, and once the employee ceases to carry out the functions and duties of that role, the jurisdiction ceases.

25.10 This interpretation of the Respondent's jurisdiction (that it falls around the role) is supported by the definition of practice and the conduct outside of practice section of the Warning notice on Offensive communications concerning trainees, other managers, and employees which states: "*the Principles do not apply to you outside your role in an SRA-regulated firm*". Practice is defined in the glossary in relation to the Appellant as *"activities, in that capacity, of: a person employed in England and Wales by an authorised body*".

25.11 Further, the Adjudicator failed to consider the implications of the decision in Ken Livingstone v The Adjudication Panel for England [2006] EWHC 2533 (Admin) to which she had been directed by the Appellant. This case set out that the Mayor of London was not acting in a public/official capacity when *'off duty'*. In Livingstone an incident occurred when a mayoral function had ended and Mr Livingstone was leaving the building to go home. The Appellant submitted that his case was analogous to the Livingstone case.

25.12 Applying that rationale to the facts of this matter, the Appellant submitted that the Adjudicator's finding and conclusion that Principle 6 applied to the Appellant was wrong. The Appellant had ceased his duties as a trainee solicitor and was leaving the building to go home. The fact that the Christmas card was given to KB in the process of leaving the office, did not give the Respondent jurisdiction merely because the Appellant knew KB from his position as a trainee solicitor or they had a professional relationship within the context of a role that the Appellant was not fulfilling at the time of the alleged conduct.

26. **Ground Three**
The Adjudicator's decision was biased, internally inconsistent and wrong

26.1 At paragraph 6.6 and 6.8 of the Adjudicator's decision the Adjudicator stated:

> "*Work colleagues expect each other to message appropriately, but not to harass or send inappropriate messages.*" "*Mr Fouracre gave another trainee a card containing sexualised and inappropriate comments. He also sent sexually harassing and inappropriate messages to a work colleague.*"

26.2 The Adjudicator then went on to state at paragraph 6.17 of the decision:

> "*Mr Fouracre has referred to his conduct and contends that there is no breach of the Equality Act or Protection from Harassment Act. No such breach has been alleged or proved. The public would not expect an employee in a law firm to give a card to a work colleague containing sexually explicit and inappropriate comments or to send sexually harassing and inappropriate WhatsApp messages to a work colleague, in work and to continue messaging out of work.*"

26.3 In finding that the messages were harassing/sexually harassing, whilst simultaneously concluding that no breach of the Equality Act and the Protection from Harassment Act had been proved, the Adjudicator's decision demonstrated bias and was internally inconsistent.

26.4 This rationale supported the Adjudicator's decision as to why public trust and confidence was undermined in relation to the Christmas card. In finding that the messages were sexually harassing when no breach of Section 26 of the Equality Act 2010 had been proven, and in utilising that to support the conclusion that public trust and confidence had been undermined by the Christmas card, the Adjudicator came to a decision no reasonable Adjudicator could have come to in the circumstances.

26.5 In addition, the Adjudicator allowed her bias and perception of the WhatsApp messages and the conduct that transpired after the conduct comprised in the allegation occurred (the Christmas card), to improperly colour her assessment of the allegation itself.

26.6 The Adjudicator was entitled to have regard to the relationship that existed before the conduct in the allegation occurred, but what transpired after was not relevant and was prejudicial when framing the relationship at the time of the alleged conduct. As support for this contention the Appellant referred to paragraph 25.176.2 of Ryan Beckwith v SRA [2020] EWHC 3231 (Admin): "*It was not for the Tribunal to consider matters that had not been alleged; to do so would be improper*".

26.7 On this basis the Adjudicator's decision demonstrated a lack of objectivity because it relied upon improper considerations.

26.8 Further, there is no evidence that the Adjudicator gave any, or any adequate consideration to the Appellant's right to freedom of expression under Article 10. Given that the Adjudicator considered that the Christmas card was not unlawful, there was no justification for an infringement of the Appellant's right to freedom of expression.

26.9 There was no balancing of the factors relevant for the purposes of infringing the Appellant's right to freedom of expression in the Adjudicator's decision, there having been mere reference to a Warning Notice on offensive communications which is guidance only and not a rule of conduct, and of which the Appellant was unaware.

27. **Ground Four**
Bias and a lack of objectivity and a failure to carry out an independent investigation by the Respondent.

27.1 The failure to obtain a statement from another potential witness, LG, as part of the Respondent's investigation was evidence of bias on the part of the Respondent in the investigation it carried out.

27.2 There was no objective or independent investigation separate from the Firm's investigation. The Appellant submitted that the Firm's investigation was systemically flawed and dishonest.

27.3 The Adjudicator stated that KB did not take the Christmas card as a joke, but there was no evidence of that and the Respondent had selectively picked facts when characterising the relationship between the Appellant and KB: to do so represented a serious irregularity in the investigation.

28. **Ground Five**
The Adjudicator made findings that do not reflect the evidence.

28.1 The Adjudicator made a number of findings of fact not supported by the evidence and there was a failure on her part to have regard to the rules of evidence.

28.2 At paragraph 6.7 of the Adjudicator's decision, she states:

> "*[KB] avoided giving information about her whereabouts at the weekend on Lync* [Lync was the Firm's internal messaging service]."

However, the Adjudicator had no evidence or witness statement from KB. In fact the Appellant said that KB had told the him when she was in Manchester and in London, and that she was going to Birmingham.

28.3 At paragraph 6.6.2 the Adjudicator states:

> "*While I acknowledge that KB has not provided any statement, there is evidence that she found the card offensive/upsetting.*"

The Appellant submits that the Adjudicator failed to indicate on what evidence she concluded that KB found the Christmas card offensive and upsetting as there was no witness statement from KB. The evidence did not support this factual conclusion.

28.4 The Appellant submits in this ground that there was a lack of honesty in the decision and that these factors, taken together with the other highlighted issues, all point to a flawed decision.

29. **Ground Six**
The Adjudicator fell into serious error in finding the conduct proved amounted to a breach of Principle 6 and dismissed the decision in Beckwith out of hand.

29.1 The Adjudicator disregarded this authority on the basis that Mr Beckwith's conduct was conduct out of practice and the Appellant's was not. The Appellant submitted that the Adjudicator's conclusions in this respect were materially flawed.

29.2 The Divisional Court in Beckwith did not limit the proper construction of Principle 6 in terms of the nature of conduct proved and whether that engaged Principle 6 to only circumstances of conduct out of practice as the Adjudicator appeared to suggest. As per paragraph 25 of the Beckwith decision, there were two live issues the court was concerned with:

- Whether the conduct as found proved engaged Principles 2 or 6 in qualitative terms having regard to the nature of the conduct proved; and

- The scope of the application of those Principles, to conduct occurring outside work.

29.3 As per paragraph 41 of Beckwith*:*

> "*Principles 2 and 6 have a common characteristic. Of the ten 2011 Principles, eight are formulated by reference to conduct impinging on a solicitor's practise of the law. Most events that give rise to misconduct proceedings will comprise conduct that, in one way or another, contravenes one of these eight principles. Principles 2 and 6 are a little different. There will be many occasions where the obligation to act with integrity and the obligation to act so as to maintain public trust will be adjectival in the sense that misconduct that contravenes one or other of the remaining eight principles can also be characterised as showing a lack of integrity or conduct that adversely affects public trust.*"

29.4 As per paragraph 42 of Beckwith:

> "*However, both Principle 2 and Principle 6 also cover ground beyond that covered by the other eight principles. In the context of Principle 2 what that ground is, is identified by construing the contents of the Handbook - i.e. the body of rules made in exercise of the power at section 31 of the 1974 Act. See above at paragraphs 28 - 35. Approaching Principle 2 in this way keeps it within foreseeable boundaries by attaching the obligation to act with integrity to matters that touch upon professional practise as a solicitor.*"

29.5 As per paragraph 43 of Beckwith:

> "*We consider the same general approach must also apply when determining the scope of Principle 6, The content of Principle 6 must be closely informed by careful and realistic consideration of the standards set out in the 2011 Code of Conduct. Otherwise Principle 6 is apt to become unruly. There is a qualitative distinction between conduct that does or may tend to undermine public trust in the solicitor's profession and conduct that would be generally regarded as wrong, inappropriate or even for the person concerned, disgraceful. Whether*

that line between personal opprobrium on the one hand and harm to the standing of the person as a provider of legal services or harm to the profession per se on the other hand has been crossed, will be a matter of assessment for the Tribunal from case to case, but where that line lies must depend on a proper understanding of the standards contained in the Handbook."

29.6 The issue of whether the conduct occurred in practice or outside of practice is irrelevant, this is made clear at paragraph 52 of Beckwith. The issue is if Article 8/private life is involved.

29.7 The Adjudicator did not find that the Appellant had taken unfair advantage of KB by virtue of his position or status as a trainee solicitor. Indicative Behaviour 11.9 was not therefore made out. Nor did the Adjudicator find that the conduct amounted to seriously abusive conduct between a more senior and junior colleague or an abuse of seniority or authority. Outcome 11.1 of the SRA Code of Conduct 2011 was therefore not breached.

29.8 In the circumstances, the Adjudicator did not find that that Indicative Behaviours or Outcomes as set out in the SRA Handbook were breached *(see Beckwith paragraph 44)*. The Adjudicator found that there were inappropriate comments and sexualised references in a Christmas card but having failed to find any breach of the standards contained in the SRA Handbook, the Adjudicator fell into error in concluding that the conduct found proved engaged and breached Principle 6 and undermined public trust and confidence in the legal profession.

29.9 As per paragraph 45 of Beckwith what the Appellant did affected his own reputation, but there was a qualitative distinction between conduct of that order and conduct that affects either his own reputation as a provider of legal services or the reputation of the profession.

29.10 The Adjudicator asserted that the Appellant crossed the line and she made reference to the Warning notice on Offensive communications. This is circular since it is guidance not a rule of conduct and states that the Appellant needs to achieve Outcome 2.1. The warning notice also does not form part of the SRA Handbook, so is not a relevant standard that can be adopted for the construction and content of Principle 6, and the Appellant was not aware of it at the time of the conduct.

30. **Ground Seven**
The Adjudicator's decision to sanction the Appellant for the conduct was unlawful in the circumstances.

30.1 The decision to sanction the Respondent for conduct in his private life having found no breach of the standards set out in the SRA Handbook was an unlawful violation of the Appellant's Article 8 and Article 10 rights.

30.2 The Adjudicator's attempt to sidestep the Beckwith decision by asserting that the Appellant's conduct did not amount to conduct in his private life and asserting that the Beckwith decision had no implications for the decision regarding the Appellant because it related to conduct out of practice, was cynical in motivation and an incompetent and/or reckless disregard of the law and judicial precedent.

30.3 The Adjudicator had an obligation to know the law and have regard to it in the exercise of the SRA's public functions, but as is made evident by the Adjudicator's decision, she did not consider the relevant considerations and tests at all for ascertaining whether Article 8 was engaged. She disregarded the Beckwith decision out of hand.

31. **Ground Eight**
The Adjudicator's decision to sanction the Appellant amounted to unlawful discrimination in the exercise of the SRA's public functions, and was not proportionate, reasonable or fair.

31.1 It is important that the Adjudicator whilst exercising public functions on behalf of the Respondent acts fairly, reasonably, proportionately and does not make a decision that amounts to unlawful discrimination. It was unfair and discriminatory that no similar investigation was conducted with respect to KB's conduct.

The Respondent's Response

32. Mr Cook's essential submission was that the Adjudicator was justified in reaching the decision she did, having fully considered the evidence and all of the submissions made to her.

33. There were no serious procedural or other irregularities in the proceedings which would entitle the Tribunal to interfere with the decision of the Adjudicator which was both proportionate and proper for the protection of the public and to maintain the reputation of the solicitors' profession

34. Mr Cook reminded the Tribunal that in accordance with the test set out in Arslan it should not interfere with the Adjudicator's decision, and her evaluation of the evidence before her, unless it was satisfied that the conclusions reached were outside the bounds within which reasonable disagreement was possible, having regard, in particular, to the experience and expertise of the Regulator in determining the application of its own rules.

35. Mr Cook next considered each of the Appellant's grounds of appeal in turn.

36. **Ground One**

36.1 The Appellant sought to challenge the decision of the Adjudicator by re-arguing the point that his conduct was in his private life rather than that of his work by asserting that she had erred in not finding his conduct to have been in his private life.

36.2 Mr Cook said it was clear from her decision that the Adjudicator carefully considered the matter as she stated in her decision:

> "*I confirmed that I have read all of Mr Fouracre's representations and while I may not refer to them all in detail, I have considered all of them.*"

And by then stating:

> "*I have carefully considered the history and series of events which Mr Fouracre has provided of his and KB (redacted) interactions. Mr Fouracre and KB (redacted) had a work friendship.*"

36.3 As a result, the Adjudicator was entitled to find that Principle 6 of the Principles was engaged as the Appellant's conduct was not in his private life.

37. **Ground Two**

37.1 The Appellant submitted that the Adjudicator, "*erred in concluding that the SRA had jurisdiction to sanction the Appellant.*"

37.2 Mr Cook said this argument was similar to that of "Ground One" in that the Appellant sought to argue that the conduct took place in his private life so Principle 6 did not apply. However, the Adjudicator had given careful consideration to this matter and stated at paragraph 6.15 of her decision:

> "*I have found in paragraphs 6.4 to 6.8 above, that this was a work relationship. Mr Fouracre's conduct was in relation to his activities carried out from an office as such conduct includes his behaviour with his work colleagues, including other trainees. I am satisfied that Mr Fouracre's conduct was in relation to his activities carried out in the office, then this means that Mr Fouracre needed to meet Principle 6.*"

37.3 The finding of the Adjudicator that Principle 6 applied was a finding she was entitled to make.

38. **Ground Three**

38.1 The Appellant's arguments regarding bias was flawed. The Appellant took issue with the fact that the Adjudicator accepted that no breach of the Equality Act or Protection of Harassment Act has been alleged or proved and in the Respondent's submission this was in fact the proper thing for the Adjudicator to have done as there had been no breach of this legislation. Breaches of the said Acts would have required complaints and to have been proved to the requisite standard in a criminal court or civil court.

38.2 The Appellant was wrong to argue that because no such breaches had been alleged or proved and the Adjudicator had stated that the messages "...*were harassing/sexually harassing*..." then this demonstrated bias on her part in the decision she reached. Contrary to the Appellant's assertions the fact that the Adjudicator accepted that no breach of the said Acts demonstrated the fairness of her decision.

38.3 The Appellant's contention that the Adjudicator was wrong to take account of the subsequent WhatsApp messages passing between him and KB was misguided. The Adjudicator quite properly considered the WhatsApp messages in order to understand the relationship between him and KB and as stated in her decision, "*The true nature of their relationship is demonstrated in Mr Fouracre's WhatsApp messages following the handing over of the presents*".

38.4 Similarly misguided was the Appellant's assertion that the Adjudicator did not give adequate consideration to his right to freedom of speech under Article 10 as she had concluded that his conduct was not unlawful.

38.5 To this end the Appellant sought to rely on the decision in Ken Livingstone v The Adjudication Panel for England [2006] EWHC 2533 (Admin). This case sets out the rights of individuals outside of work. However, the Adjudicator had quite properly decided that the Appellant's conduct occurred in his work environment and thereby engaged Principle 6.

39. **Ground Four**

39.1 The Appellant submitted that there was bias and a lack of objectivity and a failure to carry out an independent investigation by the Respondent.

39.2 In Mr Cook's submission this was a new argument advanced by the Appellant which he had not advanced in his submissions before the Adjudicator. Furthermore, it represented a criticism of the Respondent's investigation rather than the Adjudicator's decision and it therefore formed no part of the review of the Adjudicator's decision the Tribunal was being asked to undertake and was without merit.

40. **Ground Five**

40.1 The Appellant submitted in this Ground that the Adjudicator made findings that did not reflect the evidence or concerned matters which were not in evidence. In this regard Mr Cook observed that the Appellant had made a sweeping statement that, "*There is a lack of honesty.*" It was to be assumed that the Appellant alleged this on the part of the Adjudicator.

40.2 Again, the Appellant appeared to advance this argument on the premise that KB has not given a statement so how could certain conclusions be reached by the Adjudicator particularly the finding that KB considered the card, "...*offensive/upsetting.*"

40.3 Mr Cook said that in this regard the Appellant had failed to note that the Adjudicator had dealt with this in her decision in the following way:

> "*While I note that KB (redacted) has not provided a statement, this is unnecessary. She brought this course of conduct to the attention of the firm. Given the nature and tone of the comments and messages, no statement is needed.*"

40.4 Again, Mr Cook submitted that the Tribunal had no reason to interfere with the Adjudicator's decision on this point, as it was neither wrong nor unjust due to serious procedural or other irregularity.

41. **Ground Six**

41.1 In this Ground the Appellant contended that the Adjudicator fell into error in finding the conduct proved amounted to a breach of Principle 6 and dismissed the decision in Beckwith out of hand.

41.2 In this submission, Mr Cook said that the Appellant repeated a combination of the arguments he advanced in Grounds One, Two and Three.

41.3 Mr Cook said that the Appellant's assertion that the Adjudicator, "*dismissed the decision in Beckwith out of hand*" was without merit. In fact, the Adjudicator's decision demonstrated she did consider it as follows: "*I am satisfied that Mr Fouracre's conduct was in relation to his activities carried out in the office, then this means that Mr Fouracre needed to meet Principle 6*".

41.4 Mr Cook submitted that Beckwith was concerned with Principle 6 in circumstances where the solicitor was acting outside of his practice. Whilst in Beckwith the main issue was how far Principle 2 and 6 could reach into private life the Tribunal could be satisfied that the Adjudicator had properly found that the Appellant's conduct had been carried out in the office where he worked and not in his private life. As a result, the Adjudicator was correct to decide that Beckwith did not apply.

42. **Ground Seven**

42.1 The Appellant submitted in this Ground that the Adjudicator's decision to sanction the Appellant for the conduct was unlawful and in Mr Cook's view this Ground was a misguided attempt on the Appellant's part to argue that because the Adjudicator did not agree with the submissions he made before her, i.e., his conduct occurred in his private life, then necessarily her decision must be unlawful. His argument in this respect was without merit.

42.2 It was of note that the Adjudicator, in making her decision, did not to agree with the Investigation Officer's recommendation to impose a financial penalty of £2,000. Instead, the Adjudicator considered the evidence and submissions and then decided to impose a lesser sanction, namely a Rebuke. This attested to the fair and objective approach the Adjudicator followed in reaching her decision.

43. **Ground Eight**

43.1 In this Ground the Appellant submitted that the Adjudicator's decision to sanction the Appellant amounted to unlawful discrimination in the exercise of the Respondent's public functions, and was not proportionate, reasonable or fair.

43.2 Mr Cook said that the Appellant's assertion appeared to have been based on the fact that he is a man, and in his own words, "*If you are a man, you will be shafted by the SRA, subjected to disproportionate enforcement action, and have your reputation and career damaged or destroyed.*"

43.3 In asserting this the Appellant relied on the decision in A v B, C and D (Case No. 2201655/2018) an Employment Tribunal case involving a newly qualified female solicitor. In the Respondent's view the Appellant un-meritoriously sought to align that case to the situation of KB and he again repeated his argument that the Respondent failed to ascertain the motivation of KB and that it failed to obtain a statement from a third party.

43.4 In short, Mr Cook said that none of these assertations had any relevance to the question to be determined by the Tribunal, namely, whether the Adjudicator's decision was wrong or unjust because of a serious procedural or other irregularity in the proceedings.

The Tribunal's Decision on the Appeal

44. The Tribunal applied the approach endorsed by the High Court in Arslan as the correct approach to an appeal under section 44E. The Tribunal applied the civil standard of proof to the appeal, namely the balance of probabilities and it considered with care all the material submitted by the parties and it had regard to the oral submissions each side had made and to the authorities to which it had been referred.

45. The Tribunal considered that the overarching submission made by the Appellant in his exhaustive grounds was as follows:

- that the Adjudicator had been wrong to find that the act of giving a Christmas card containing inappropriate sexual references and comments to KB had taken place in a work setting and that accordingly the Appellant had breached Principle 6.

- The Appellant accepted that as a trainee and employee of the Firm the Principles did apply to him but only for conduct within the context of his work at the Firm. The Appellant argued that the action complained of had taken place whilst he and KB were off duty and therefore the Principles were not applicable to him at that point, on the basis that he was a trainee and not a solicitor.

- The Adjudicator had been wrong to dismiss his argument that the decision in Beckwith was of direct relevance to his case.

- To have found that he had breached Principle 6 was in turn a breach of the Appellant's Article 8 and 10 rights under the ECHR and he drew the Tribunal's attention to European caselaw to support his argument in this respect.

- The Appellant further argued that the Adjudicator had been biased and lacking in objectivity in her assessment of the facts and that she had improperly taken into account matters which were not part of the allegation and not in evidence.

46. The Tribunal considered the correct starting point in order to determine the certitude of the Adjudicator's decision was an examination of the underpinning of her assessment as to the 'reach' of Principle 6 in this case. No other Principle was relied upon in the Adjudicator's decision. In particular, and differently to the Beckwith case, Principle 2 was not part of the Adjudicator's decision.

47. At paragraphs 6.15 and 6.16 of the Adjudicator's decision she set out the following:

> "*6.15 ....I am satisfied that Mr Fouracre's conduct was in relation to his activities carried out in the office, then this means that Mr Fouracre needed to meet Principle 6.*"
>
> "*6.16 Mr Fouracre seeks to rely on the decisions in Beckwith v Solicitors Regulation Authority and other case law as authority to find that he did not*

breach Principle 6. Beckwith was concerned with Principle 6 in circumstances where the solicitor was acting outside of practice."

48. Further, at paragraph 41 of the Respondent's response it was said:

> "*In Mr Fouracre's case the misconduct was carried out in the office where he worked and was clearly not in his private life. As a result, the Adjudicator was correct to decide that Beckwith v SRA did not apply*".

49. The Tribunal considered that such analysis as was made of Beckwith by the Adjudicator was based on the location of where the conduct had taken place. The Adjudicator's analysis focused on the location/ geography of the incident, as the fulcrum of her analysis.

50. The Tribunal found that the Adjudicator had taken the wrong approach in her analysis of Beckwith in that she had found that because the conduct complained of had taken place in an office then Beckwith did not apply. This *a priori* assessment undermined her subsequent reasoning by placing it on an incorrect footing. The Adjudicator stated this clearly at paragraph 6.15 of the Adjudication, stating: "I am satisfied that Mr Fouracre's conduct was in relation to his activities carried out in the office; then this means that Mr Fouracre needed to meet Principle 6."

51. In this regard the Tribunal looked to the decision in Beckwith and the matters set out at paragraphs 53 and 54 of that judgement:

> "*53. For the reasons we have already set out, neither Principle 2 nor Principle 6 has unfettered application across all aspects of a solicitor's private life. So far as concerns the requirement of legal certainty, because the requirements of each Principle are to be determined by reference to the contents of the Handbook (considered as a whole, and in particular the matters set out in the 2011 Code of Conduct), there is no reasonable scope for argument that either Principle 2 or Principle 6 fails to meet the standard required for legal certainty, set out in the judgment in James* (sic).
>
> *54. There can be no hard and fast rule either that regulation under the Handbook may never be directed to the regulated person's private life, or that any/every aspect of her private life is liable to scrutiny. But Principle 2 or Principle 6 may reach into private life only when conduct that is part of a person's private life realistically touches on her practise of the profession (Principle 2) or the standing of the profession (Principle 6). Any such conduct must be qualitatively relevant. It must, in a way that is demonstrably relevant, engage one or other of the standards of behaviour which are set out in or necessarily implicit from the Handbook. In this way, the required fair balance is properly struck between the right to respect to private life and the public interest in the regulation of the solicitor's profession. Regulators will do well to recognise that it is all too easy to be dogmatic without knowing it; popular outcry is not proof that a particular set of events gives rise to any matter falling within a regulator's remit.*"

52. Further, paragraphs 43 and 44:

> "*43. We consider the same general approach must also apply when determining the scope of Principle 6. The content of Principle 6 must be closely informed by careful and realistic consideration of the standards set out in the 2011 Code of Conduct. Otherwise Principle 6 is apt to become unruly. There is a qualitative distinction between conduct that does or may tend to undermine public trust in the solicitor's profession and conduct that would be generally regarded as wrong, inappropriate or even for the person concerned, disgraceful. Whether that line between personal opprobrium on the one hand and harm to the standing of the person as a provider of legal services or harm to the profession per se on the other hand has been crossed, will be a matter of assessment for the Tribunal from case to case, but where that line lies must depend on a proper understanding of the standards contained in the Handbook.*
>
> *44. The submission of the SRA in this appeal was that the standard to be derived from the Handbook relevant to the conduct alleged against the Appellant was that the public would have a " ... legitimate concern and expectation that junior members [of the profession or of staff] should be treated with respect ... " by other members of the profession. We accept that submission; in our view it is a reasonable formulation having regard to the "outcomes" and "indicative behaviours" set out in Chapter 11 of the 2011 Code of Conduct. Seriously abusive conduct by one member of the profession against another, particularly by a more senior against a more junior member of the profession is clearly capable of damaging public trust in the provision of professional services by that more senior professional and even by the profession generally*"

53. Applying the dicta in Beckwith, the Tribunal considered that the point at issue in this case was not the location at which the conduct occurred, and whether the conduct complained of took place in the office or out of the office as characterised by the Adjudicator. The key question to be addressed, in a proper application of Beckwith was whether the alleged breaches could with reason be closely tied to the guidance set out in the Solicitor's Handbook. This required an analysis on behalf of the Adjudicator as to whether Principle 6 was engaged in this case, by considering the substance of the events, and considering whether as a result Principle 6 was engaged. This was a substantive analysis that could not be satisfied by a decision of regulatory engagement based on location of event, rather than whether Principle 6 applied to the facts.

54. The Appellant's conduct had been reprehensible and tarnishing of his own reputation. The Appellant accepted that his conduct impacted on his own personal reputation, and the Tribunal agreed that the Appellant's conduct had been deeply inappropriate and disgraceful. That said, the Tribunal considered that the relevant issue to decide was whether such reprehensible conduct "*realistically touched upon the standing of the profession (*"*Principle 6*"*)*" as set out in paragraph 54 of Beckwith.

55. Principle 6 requires that "*You behave in a way that maintains the trust the public places in you and in the provision of legal services*". The *'and'* in Principle 6 linked public trust with the provision of legal services. In her decision there was nothing to suggest

that the Adjudicator had considered whether there was evidence which linked the Appellant's giving of the Christmas card, to the provision of legal services, as required by Principle 6.

56. The Adjudicator had concluded that the Appellant had breached Principle 6, a conclusion which she had not supported by referencing matters set out in the Handbook and to which she should have addressed her mind, and used as the appropriate basis of determining the relevance and application of Principle 6.

57. The matters to which she had referred e.g., the Warning Notice on Offensive Communications was guidance only, and did not form part of the Handbook, and the other reasons the Adjudicator set out in paragraph 6.8 of her decision, were similarly not tied to matters set out in the Handbook.

58. Paragraph 6.8 of the Adjudicator's decision did seek to discuss Principle 6. She concluded that Principle 6 did regulate "how legal professionals and employees relate to one another and their clients. This includes challenging inappropriate behaviour. Work colleagues should treat each other with respect." The Adjudicator did not however consider how the conduct engaged the wording of Principle 6. The Appellant's position may have been different had he faced a breach of Principle 2 (lack of integrity), but this was not an allegation he had been required to meet. In her reasoning set out in paragraph 6.8 of her decision the Adjudicator had fallen into error by eliding the obligation owed under Principle 2 with those required under Principle 6.

59. Overall, the Tribunal considered that the reasoning given by the Adjudicator as to why she had found a been a breach of Principle 6 had not been sufficient to satisfy the Tribunal, as the appellate court, that the Adjudicator had correctly identified why the Appellant's actions had been a breach of Principle 6. Given that the Beckwith case clearly stated that an analysis of conduct needed to focus on identified breaches of obligations set out in the handbook, and given that reliance on Principle 6 was the only basis for the case against the Appellant, the Tribunal considered that as a matter of law, the requirements of the Beckwith dicta were not satisfied.

60. For the reasons set out above the Tribunal was satisfied on the balance of probabilities that the finding of the Adjudicator was wrong and that the conclusion she had reached lay outside the bounds within which reasonable disagreement was possible.

61. The Tribunal therefore revoked the Adjudicator's decision.

62. Having made its finding for the reasons it had given the Tribunal did not go to make detailed findings on the Appellant's remaining Grounds of appeal other than to observe that it could see no bias, lack of objectivity or dishonesty on the Adjudicator's part as suggested by the Appellant. The Adjudication in the round, seemed to be a thoughtful and careful decision, but it had erred in the crucial application of the relevant legal principle.

Costs

63. The Tribunal, having announced its decision on the Appellant's appeal, next considered the question of costs and it invited the parties to make the necessary applications.

64. Neither party made any application as to costs and the Tribunal made no order for costs.

Statement of Full Order

65. The Tribunal Ordered that the appeal of ADAM FOURACRE ("the Appellant") made under Section 44(E) of the Solicitors Act 1974 (as amended) be ALLOWED and that the Adjudicator's decision dated 30 June 2021 be hereby revoked with immediate effect.

And it further Ordered that there be no order for costs in the appeal.

Dated this 22nd day of November 2021
On behalf of the Tribunal

P. Jones
Chair