# SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974 Case No 12471-2023.

**BETWEEN:**

SOLICITORS REGULATION AUTHORITY LTD Applicant

and

IAN PATRICK CHARLES CLAY Respondent

---

Before:

Mr G Sydenham (in the Chair)
Mr J Johnston
Ms K Wright

Date of Hearing:
30 October - 1 November 2023

---

**Appearances**

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

Ms Susanna Heley, solicitor advocate, of Weightmans LLP, 85 Fleet Street, London, EC4Y 1AE.

---

# JUDGMENT

---

## Allegations

1. The allegations against the Respondent, Ian Patrick Charles Clay, made by the SRA were that, while in practice as a Director and Solicitor at Walker & Co Ltd ("the Firm"):

Client F

1.1 Between 15 April 2019 and in or around August 2019 he failed to make Client F aware of information material to the retainer namely that an unless order had been made, the consequences of non-compliance with the unless order and subsequently that her disability discrimination claim had been struck out in breach of any or all of Principles 2, 4 and 6 of the SRA Principles 2011 and failed to achieve Outcome 4.2 of the SRA Code of Conduct 2011.

1.2 On 22 July 2019 he gave advice to Client F which was likely to mislead her as to the progress of the proceedings which he was conducting on her behalf, and which he knew, or ought to have known, was liable to have this effect at the time he gave the advice and thereby breached any or all of Principles 2 and 6 of the SRA Principles 2011.

Client H (Ms Harlow)

2.1 Between 2 April 2019 and on or around July 2019, he failed to make Ms Harlow aware of information material to the retainer, namely that her claim had been struck out, in breach of any or all of Principles 2, 4, and 6 SRA Principles 2011 and failed to achieve Outcome 4.2 of the SRA Code of Conduct 2011.

2.2 On 23 January 2020, he gave information to Ms Harlow which was disingenuous and/or likely to mislead Ms Harlow as to the reasons why the proceedings which he was conducting on her behalf were dismissed, and which he knew, or ought to have known, was liable to have this effect at the time he gave it and thereby breached any or all of Principles 2, 5 and 7 of the SRA Principles 2019 and Paragraph 7.11 of the SRA Code of Conduct for Solicitors, RELs and RFLs.

3 In addition, allegation 1.2 was advanced on the basis that the Respondent's conduct was dishonest. Dishonesty is alleged as an aggravating feature of the Respondent's misconduct but is not an essential element in proving the allegations.

## Executive Summary

4. In summary, Mr Clay faced four allegations spilt across two client matters namely, Client F and Ms Harlow. Both sets of allegations concern the handling of their claims and Mr Clay's failure to advise the clients of information material to their matters.

5. There was little, if any, dispute between the parties as to the facts. However, Mr Clay denied he had been dishonest or had lacked integrity, and he denied the breaches set out in Allegations in 1.2 and 2.2 in their entirety.

6. However, he accepted that his communications with Client F and Ms Harlow could and should have been clearer and more complete and he made the following admissions.

Allegation 1.1

7. That he was overly confident that the Employment Tribunal would accept substantial compliance with the order and that he should have expressly sought an agreed extension of time in respect of the Impact Statement when he knew that it would not be possible to serve it on time. He accepted that the failure to notify Client F of the *unless order* and its consequences in express terms was a service failure and would be a failure to achieve Outcome 4.2 of the SRA Code of Conduct 2011 and a breach of Principles 4 and 6 of the SRA Principles 2011.

Allegation 2.1

8. Mr Clay accepted that there was a delay in notifying Client H that her claim had been struck out which amounted to a service failing and a failure to achieve Outcome 4.2 of the SRA Code of Conduct 2011. Mr Clay admits a breach of Principles 4 and 6 of the SRA Principles 2011.

9. The Tribunal found all allegations proved in full, including that he lacked integrity save that it did not find he had acted dishonestly as an aggravating factor with respect to Allegation 1.2 on the basis of his genuine belief that his communication, whilst not as comprehensive as it should have been, was not disingenuous. In reaching its decision on dishonesty the Tribunal took account of his good character and the character references to which it had been directed.

The Facts can be found here.
The Applicant's Case can be found here: 1.1, 1.2, 2.1, 2.2
The Tribunal's Findings can be found here: 1.1, 1.2, 2.1, 2.2, Dishonesty
Mr Clay's Mitigation can be found here.
The Tribunal's Decision on Sanction can be found here.

**Documents**

10. The Tribunal considered all the documents in the case which were contained in the electronic bundle.

**Preliminary Matters**

11. Late service of witness statement

11.1 Mr Bullock, for the Applicant, applied for an extension of time and permission to serve and have admitted into evidence an additional witness statement dated 26 September 2023 from Catherine Burns. The deadline for the service of evidence had been 11 September 2023.

11.2 Mr Bullock informed the Tribunal that in his witness statement Mr Clay had made accusations that the Firm had curated or omitted to send a full set of documents on the client files to the Applicant. Mr Bullock said that this was a serious allegation against the Firm which, in fairness, required a right of reply. There would be no prejudice to any party by the late service.

11.3 Ms Heley stated that both Respondent and Applicant were largely in agreement on the facts. It was her client's position that there were some unexplained gaps in the disclosure. However, the fact that there had been incomplete disclosure did not prevent Mr Clay setting out his case on the fundamental issue which fell to be determined by the Tribunal, namely, what was in Mr Clay's head when he did what was alleged by the Applicant. The fact that there were some gaps in the disclosure did not take either party very far. Therefore, Mr Clay adopted a neutral position on the application. He did not wish to call Ms Burns to attend for cross-examination.

The Tribunal's Decision

11.4 The Tribunal noted the stance of both parties and considered that in the interests of justice the Applicant be granted the necessary extension of time and permission to adduce the witness statement into evidence. In accordance with its duty and practice the Tribunal would determine the weight to be applied to the evidence when it considered all the evidence.

11.5 Note: during the proceedings the Respondent had the opportunity of examining the hard copy files which the Applicant had in court. Whilst it was noted that there were some missing items in the electronic file, Ms Heley confirmed that Mr Clay would not be advancing any argument with respect to their absence.

**Factual Background**

12. Mr Clay, who was born December 1964 is a solicitor having been admitted to the Roll on 16 February 2009.

13. Mr Clay was employed at Walker & Co (hereinafter 'the Firm') from 6 June 2014 to 2 November 2014 as an associate and from 2 November 2014 to 28 February 2020 as a director, manager and owner.

14. He has a current practising certificate free from conditions. He is currently employed at Lewis Francis Blackburn Bray.

15. The alleged conduct in this matter came to the attention of the SRA when the Firm informed the SRA they wished to report *"an incident of misconduct"* of the 2011 and 2019 Principles by Mr Clay. This was following receipt of a complaint about Mr Clay from Ms Harlow, dated 5 February 2020. The Firm suspended Mr Clay pending an investigation. Following a disciplinary hearing, Mr Clay was dismissed by the Firm for gross misconduct on 26 February 2020. The Firm's disciplinary findings identified a further incident of misconduct arising from Mr Clay's handling of an employment claim on behalf of Client F.

16. The alleged conduct in respect of Client F occurred between approximately April 2019 and August 2019. The alleged conduct in respect of Ms Harlow occurred between approximately April 2018 and January 2020.

**Witnesses**

17. The evidence referred to will be that which was relevant to the findings of the Tribunal, and to facts or issues in dispute between the parties. For the avoidance of doubt, the Tribunal read all of the documents in the case and made notes of the oral evidence. The absence of any reference to particular evidence should not be taken as an indication that the Tribunal did not read, hear or consider that evidence.

18. **Ms Jane Harlow** (read)

18.1 She had previously worked with Mr. Clay at a bank for 8 to 10 years, prior to him re-training as a Solicitor. She considered Mr Clay to be a friend, and therefore when she was experiencing some employment difficulties, she spoke to him about her situation. He advised that she had a good case.

18.2 Ms Harlow was in a dispute with her former employer Mortgage Q Limited, also known as MAB Bingley and she instructed Mr Clay to work on her case in April 2018. Mr Clay advised that she had 65-70% chance of success and that it should take between 6 to 9 months to finalise.

18.3 Despite this assurance and unbeknownst to her the case was in fact dismissed at court in April 2019, and she was ordered to pay costs. This was because Mr Clay had failed to submit any evidence and did not attend the court hearing on 2 April 2019 on her behalf.

18.4 In April 2018 she provided all material and evidence she had to support her case and paid £360 up front costs. She received a letter from Walker & Co on 9 April 2018 accepting her instructions. The next correspondence she received was an email from Mr Clay on 5 June 2018 and he advised that Mortgage Q had sent a cheque to the value of around £3,000 and asked her if she was prepared to accept this as a settlement for her claim. She replied on the same day advising she did not accept this cheque and that she wanted to continue with her claim.

18.5 It was her understanding that court proceedings were issued in November 2018. Between April and November 2018 Mr Clay only contacted her a couple of times, and she would have to email or text asking for any updates on the progress of the case. She thought Mr Clay was quite evasive and he did not provide much information. In December 2018 after chasing for updates, she was informed that the other side had asked to have the case dismissed and that they were waiting for a court date. She then did not hear anything until April 2019 when he advised that '*the court had lost the papers and we should hear within a week'*. She was never informed about the court hearing that was due to take place on 2 April 2019.

18.6 She emailed Mr Clay on 8 April 2019 as she had heard through her brother who still worked for Mortgage Q, that they were looking to sell, and she was worried this would affect her claim. Mr Clay replied to her email on 12 April 2019 stating that if they did sell, there would still be a live claim so it would be *'inherited*'.

18.7 Another further time passed, and she had not heard anything from Mr Clay despite several attempts at contacting him. Each time she called the office she was told he was not available and that he would call me back. She believed it was around July 2019 that Mr Clay informed her via telephone call, that the case had been dismissed without his knowledge and he had to appeal, which *'was not a concern although to dismiss a case without any paperwork was unusual'*. He told her that a court date was set in April (hearing of 2 April 2019) but that he had informed the court he could not attend on the date set. Mr. Clay promised that she would hear within a week. She did not hear back from Mr Clay.

18.8 It was her later understanding that an appeal was never made by Mr Clay despite him telling her that he had appealed the decision to dismiss.

18.9 Due to the lack of progress, minimal information, and empty promises she requested the help of a friend, Mr Richardson, who is also a barrister, in November 2019. Mr Richardson contacted Walker & Co advising them that she had instructed him to look into the matter and she wrote to Walker & Co informing them she wanted to make a formal complaint on 5 February 2020.

18.10 Ms Harlow said it was disappointing that despite being a friend for several years Mr Clay misled her and provided such poor service when he had advised it was a good case and one that would be concluded quite quickly. Yet it took over 18 months with no progress being made and no updates.

19. **Ian Clay** (live)

19.1 Mr Clay said that in June 2014 he moved to Walker & Co. The three existing partners (Andrew Walker, Paul Dalowsky and Catherine Burns) informed him that Andrew Walker was seeking to begin a five-year winding down before retiring completely in 2020 and that he would replace him.

19.2 He undertook civil litigation, landlord/tenant and employment matters. Sometime in 2019 he made Andrew Walker an offer for his share in the business [REDACTED].

19.3 On several occasions during his time at Walker & Co, the Firm underwent a reaccreditation for the Lexcel standard. The Firm required this in order to undertake publicly funded work, which Andrew Walker did in Crime and Catherine Burns did in Family. In turn, this entailed the completion of online training.

19.4 Due to pressure of work, he came into the office on Saturday mornings each time this was required in order to complete the training [REDACTED].

19.5 [REDACTED].

19.6 Nevertheless, he considered Mr Walker and Ms Burns to be colleagues and firmly believed that any differences between them could be resolved amicably. However, Mr Clay came to believe that the above events soured the relationship between the three of them as partners and contributed to his ultimate dismissal by the Firm.

19.7 Mr Clay said he was dismissed by Walker & Co in February 2020 because of the issues raised in these two matters.

*Client F*

19.8 Mr Clay recalled being contacted by Client F as she had hitherto represented herself in an employment claim in which she was claiming unfair dismissal and discrimination on the grounds of disability. She had also originally made a claim for non-payment of notice pay, but when Mr Clay checked this with her, she admitted it had been paid to her. The client had had notice of a Preliminary Hearing and was unsure of how to proceed. This was also difficult for the client as she had been employed in Birmingham and the designated Employment Tribunal hearing centre was in that city.

19.9 Client F made clear that she was of limited means but informed Mr Clay that there had been two offers to settle made by Mr Clay. He therefore deemed it in the interests of the client to proceed on a Damages Based Agreement. This meant that the Firm would not be paid if the claim failed.

19.10 The care letter issued to the client made clear that she would be at risk of costs being awarded against her if her claim was found to have no basis or if it were conducted in a vexatious manner.

19.11 As part of her unfair dismissal case, the Client F informed Mr Clay that she had been absent from work on sick leave and had had no inkling of her dismissal until she had noticed her salary was not for its usual amount. To substantiate her claim for discrimination on the grounds of disability Client F stated she had detailed diaries recording her treatment by her former employer and details of a formal grievance raised with her employer. As these were potentially of great value to her case, Mr Clay requested these from Client F, together with evidence that offers to settle had been made.

19.12 He was keen to agree a settlement for the client as this would mean she would not have to repay any benefits from the amount paid, unlike an award made by the Tribunal. Given the statements made by Client F he initially had a positive view of her chances of success. However, Client F never produced any substantive detailed evidence regarding her grievance. After several requests by him, Client F did, eventually, produce some sheets of paper which she claimed were a diary of the events constituting discrimination. Contrary to what she had told Mr Clay, however, this failed to include any full names of any individual (giving the first name of just one person). It also had large gaps between any dates provided which added to the difficulty in it being of any use in substantiating her claim.

19.13 Mr Clay asked Client F for her evidence several times and then as she had failed to respond, asked her if she still wanted to pursue the matter.

19.14 An Order had been made by the Tribunal to disclose medical evidence. Again, he had to remind Client F several times to sign and return her authority for him to request her medical notes from her GP.

19.15 The medical notes were sent to the Respondents' representatives by first class post on 24 April 2019. Under Civil Procedure Rules of service this letter would be deemed to have been served on 26 April 2019, a Friday. The deadline given by the Tribunal was 29 April (i.e., the following Monday). Nevertheless, the Respondent's representative claimed that they had not received the evidence until the following day, i.e., 30 April. Given the Civil Procedure Rules, Mr Clay did not take their claim particularly seriously and considered it was simply a procedural tactic.

19.16 A further Order had been given to provide an Impact Statement by 29 April 2019 and he drafted the Impact Statement from such information as he had been provided by Client F but the *"diaries"* had failed to add anything to her case and the medical notes also had large gaps between periods of illness and failed to support a claim for disability. He sent the draft Impact Statement to the client by email on 29 April having sent an earlier letter which gave the deadline for it to be sent to Mr Clays. Unfortunately, the client was not able to sign it until 30 April. It was sent to the Respondents by email the same day.

19.17 He accepted that he should have pushed Client F harder to return the signed statement on 29 April and that he should perhaps have served an *"approved but unsigned*" statement on that date. He accepted with hindsight that it was a service failing not to do so. However, he did not then, nor now consider that there had been a breach of the case management orders that would have been prejudicial to either party, given that the hearing was not scheduled until several months in the future.

19.18 He had frequently before and since experienced much longer delays in fulfilling such orders. He did acknowledge the fact that this Order was an *unless order* with an automatic sanction which should be treated very seriously.

19.19 Yet, in his experience, it would be very rare for the Employment Tribunal to have taken a hard line on this issue notwithstanding the *unless order*, and particularly if Client F had been able to show convincing evidence of her disability as she had indicated. Whilst not minimising Client F's feelings or any difficulty she suffered it had become apparent that her perception of her position was rather worse than the evidence she had provided could support.

19.20 In this case, the claim would not have come to an end whether or not this element was struck out as the client would (and still did) have her claim under s. 15 Equality Act for discrimination arising in consequence of a disability, the Tribunal's Order only relating to her claim for direct discrimination. Accordingly, he believed that the Tribunal would not enforce the order as it would not materially prejudice the Defendant to have to deal with both aspects of the claim rather than just one. In this belief he was guided by the Employment Tribunal's Overriding Objective of dealing with matters fairly considering the balance of prejudice. In addition, his experience informed him that so long as there has been material compliance there would be no strike out.

19.21 Disclosure of evidence took place in early June. The Respondents disclosed an e-mail from the client in which she agreed to a disciplinary procedure in her absence (she was on sick leave). This completely undermined her claim for unfair dismissal as she had maintained that she had been unaware of the proceedings. Mr Clay's view of Client F's case from this point was that she could only hope to secure a commercial settlement

from the Respondents, who may have been prepared to pay a sum to avoid the cost of a hearing. The Respondents, however, were not willing to increase their offer of £486.35.

19.22 There was no indication that, in light of disclosure, the Respondents would have any grounds to revisit the offer they had made and there was no basis on which Mr Clay considered he could push for settlement even at the level of previous offers because her claim to have been unaware of her dismissal was untrue. Her credibility was completely undermined, and he took the view it was in the Client F's best interest to accept this offer and withdraw, given that she would have been at risk of costs being awarded against her had she continued. When Client F did not take his advice, Mr Clay ceased to represent her.

19.23 Mr Clay did not accept that he misled Client F. He explained his assessment of the client's case to her, the risks of continuing with the matter and the reason for my decision to come off record.

19.24 He accepted that he did not state that part of her claim had been struck out. He did not believe that that was a material issue for the reasons he had explained. However, he accepted that he could have been more explicit with Client F. He had become concerned about this client's honesty by the point at which he stopped acting. The claim was not as he had been led to believe at the outset and the client's promised clear evidence did not materialise.

19.25 Mr Clay said he had made her aware of the risks in pursuing her case and that she would be exposed to a possible adverse costs order. He said he had chased Client F several times for information but that she had missed deadlines he had set her for providing him with such.

19.26 In the event, the information which she did provide him with was of little use and the diaries she said would contain detailed and relevant supporting material did not live up to this promise. The information they contained was sketchy and not sufficient to make out or substantiate her claim for disability discrimination.

19.27 Whilst Client F was not a sophisticated client, she was not a vulnerable one, as suggested by the Applicant. However, with the benefit of hindsight Mr Clay accepted he could have been clearer in his communications with her when explaining the implications of the *unless order*.

19.28 Mr Clay accepted that he had been overconfident in his belief, borne from his experience of the Employment Tribunal, that late service of the Impact Statement would not count against Client F as the *unless order* had been complied with substantially or if it had been breached it would be easily remediable, there being no prejudice to any party given that the final hearing was several weeks away. Ultimately, he was proved correct as the Tribunal allowed relief from sanction.

*Ms Harlow*

19.29 In June 2018 the Defendants sent a cheque in the sum of £3,207.49 under cover of a letter stating that this was in full and final settlement of the claim. In line with the

practice at Walker & Co the letter was opened by the Accounts staff, who banked the cheque and then passed on the covering letter to Mr Clay.

19.30 As this was an offer to settle, he put this to the client and pointed out the merits of settlement. The amount offered was some way short of Ms Harlow's expectations and she declined. He passed on the client's instructions to the Defendants and specifically stating that the cheque had not been banked in acceptance of their offer. The position was clear and, because the cheque had already been banked by the accounts staff, in accordance with SRA requirements to bank cheques upon receipt, he did what he could to ensure that the Defendants were aware that there had been no acceptance of their offer.

19.31 Following the filing of a defence by the Defendant, the Court made case management orders, i relating to filing and service. There had been no compliance by the Defendants with this Order and Mr Clay copied the Court into his correspondence seeking compliance to possibly make an application for strike out and for an award of costs. There was no response from the Defendant's representative other than to make an application for strike out of the claim on the grounds that it had no reasonable prosects of success. Given these facts he did not believe that this application would be successful and that the Defendants were merely being tactical.

19.32 The hearing for the Defendant's application was listed for 2 April 2019. When Mr Clay received notification of this, he sent a letter to the Court, copying the Defendant's solicitors in, advising that he already had a hearing listed for that day. He provided confirmation of that hearing and sought a relisting. No other fee earner at Walker & Co would have been qualified to undertake the hearing.

19.33 Mr Clay had experienced numerous requests for hearings to be relisted on the grounds he sought, both by him and by other parties and they had always been granted in the case where this it was the first occasion on which a request has been made. He was therefore confident that his request would be granted.

19.34 He had made a diary note to ensure a response from the Court had been received and when he had not received a reply he telephoned Sheffield County Court on three occasions in late March, each time being told that someone would locate the file and call him back. Mr Clay noted that the Court provided conflicting evidence to the Firm as to when calls were (or were not) made.

19.35 Mr Clay maintained that he called the Court on three occasions before substantive information was provided mid-afternoon on 1 April 2019 that the hearing would proceed. He immediately prepared and submitted a response to the Defendant's application to the Court by e-mail. He was subsequently informed that this did not reach the court file in time for the hearing. Unfortunately, he had experienced such delays in court administration over the last few years. Nevertheless, he believed that the evidence would be before the Court at the hearing and that it would be adjourned. Again, he accepted that he should have instructed junior counsel to attend in my absence but, at the time, he did not believe it to be necessary.

19.36 There was a call made by Ms Burns on 14 February 2020 to Sheffield County Court to check if there was a record of any call from Mr Clay and was told that there was not.

This played a part in his dismissal by Walker & Co. Then, on 5 March 2020 Catherine Burns made a similar call to the Court and was told that there was a record of at least two calls from Mr Clay prior to the Court calling him at 2.38pm on 1 April 2019.

19.37 Given he had submitted papers to the Court, Mr Clay was confident that the Defendant's application would not be successful, considering the balance of prejudice to the parties and the Defendant's own procedural failings. He did not inform the client of this hearing as he saw it as a procedural matter, in which no witnesses were called, and he was fully expecting an adjournment as he was unable to attend. He did not believe the Defendant appeared in person.

19.38 The outcome of the above hearing was received in due course, sometime in mid-April. He advised Ms Harlow her that her claim had been struck out in July 2019 and he accepted that this constituted a delay in providing the information, but he did not believe that he misled Ms Harlow.

19.39 Mr Clay observed that much of Ms Harlow's complaint concerned allegations of slow progress initially when he was seeking a satisfactory resolution without the need to issue proceedings, or of her disappointment at losing her case.

19.40 He was the only fee earner at Walker & Co undertaking such work and as such he had no support. Mr Clay referred the Tribunal to several character references provided by long standing clients, fellow solicitors and professional people who have known him for a considerable time attesting to his honesty and integrity.

19.41 He admitted that there were service failings in the cases of Client F and Ms Harlow, and he could have been clearer and more specific with these clients. However, he had been under a lot of pressure at work, and he made mistakes for which he apologised to Client F and Ms Harlow, and to the Tribunal. However, he denied that he acted dishonestly or without integrity. This had been ordinary, albeit extremely regrettable, negligence and nothing more.

19.42 In cross-examination Mr Clay reiterated that with respect to not attending at court for Ms Harlow, he was so confident that the hearing would not go ahead that he did not instruct alternative counsel to attend on his behalf. He only found out in the afternoon the day before the hearing that it would not be adjourned by which time it had been too late to instruct alternative counsel to attend in his place. Instead, Mr Clay prepared a witness statement with attachments setting out the reasons for his application which he asked to be considered by the court. He was again confident that, ultimately, his application would be granted so he was not unduly concerned.

19.43 Thereafter, he was overtaken by other work priorities, and he only learned of the decision the court made in dismissing Ms Harlow's claim when he received a copy of its order around 10 April 2019.

19.44 With the benefit of hindsight Mr Clay said he would have done things differently and at this remove he could not say with certainty why he had not written without the ensuing delay to Ms Harlow to explain what had happened to her claim. Mr Clay said that it was likely he wanted to speak with her to explain in person the events which had

taken place rather than sending her a letter as he did not think she was the type of client one *'could land things upon'* and he recalled leaving a message on her answer phone.

19.45 Again, he had been confident that her claim could be reinstated as an e-mail he had sent the court was being treated as an application for relief from sanction.

19.46 With respect to the letter he had been sent from Mr Richardson, the barrister instructed by Ms Harlow, he said that he had answered the enquiry in a factually accurate way and he had been able to cover several of Mr Richardson's queries in the same sentence.

19.47 In cross-examination Mr Bullock set out four propositions relating to integrity, with which Mr Clay agreed, namely:

- A solicitor of integrity is wholly transparent with their client in all their dealings.
- They are fully and wholly frank with their client when they give information about matters concerning their retainer.
- That they disclose immediately any problems in the case without being asked to identify any errors or admissions on their part.
- Under no circumstances does a solicitor acting with integrity do anything which would tend to mislead their client about matters relevant to their retainer.

19.48 Mr Clay, said that he had acted with integrity and that his mistake had been not to be clear in his communications with his clients and in the case of Ms Harlow to have delayed longer than he should have done in telling her what had happened with her claim and the reason why this had occurred including the error in allowing the encashment of the cheque sent in full and final settlement.

19.49 Mr Bullock asked questions of Mr Clay stating essentially that prior to the terminating events on the cases of Client F and Ms Harlow, Mr Clay had been very clear in his communications with them but afterwards he had been anything but clear.

19.50 As to Client F, Mr Bullock submitted that she had been vulnerable by reason of her mental health. Mr Clay denied that this had been the case and on the contrary, she had been demonstrably robust in her dealings with him and the Tribunal and not entirely straightforward with him with respect to the strength of her supporting material. Mr Clay, however, conceded that Client F had been a client who had required careful handling.

19.51 He denied the assertion made by Mr Bullock that having made errors on two cases within the space of 4 months he must have been aware that he was at risk of having claims of negligence being made against him and the Firm, particularly following receipt of Mr Richardson's letter sent on Ms Harlow's behalf.

19.52 Mr Bullock put it to Mr Clay that because Mr Clay knew he had made errors and mistakes on two cases he had panicked, effectively putting his head in the sand and covering up. Mr Clay denied that this had been the case.

19.53 He also denied the assertion that negligence having been placed on his *'radar'* he would have had a good reason to hide and bury matters. In the case of Client F he had not only lacked integrity but he had also been dishonest by advising her to settle her claim for a much lower sum than she had hitherto been lead to believe she could obtain. His dishonesty in this regard stemmed from a deliberate and calculated omission of a material fact. Client F did not know, because he had not told her, that her claim for disability discrimination had been dismissed and in fact his e-mail to her was constructed to provide her with the misleading impression that her disability discrimination claim was still live when he knew this not to be the case.

19.54 Mr Clay did not believe his actions in this regard represented lack of integrity or that he had in any way been dishonest in his dealings with her. He had genuinely believed that he would have the disability discrimination aspect of her claim reinstated and this later proved to be the case.

**Findings of Fact and Law**

20. The Applicant was required by Rule 5 of The Solicitors (Disciplinary Proceedings) Rules 2019 to prove the allegations to the standard applicable in civil proceedings (on the balance of probabilities). 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 Mr Clay's rights to a fair trial and to respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

21. **Allegation 1.1 - Between 15 April 2019 and in or around August 2019 he failed to make Client F aware of information material to the retainer namely that an unless order had been made, the consequences of non-compliance with the unless order and subsequently that her disability discrimination claim had been struck out in breach of any or all of Principles 2, 4 and 6 of the SRA Principles 2011 and failed to achieve Outcome 4.2 of the SRA Code of Conduct 2011.**

**Allegation 1.2 - On 22 July 2019 he gave advice to Client F which was likely to mislead her as to the progress of the proceedings which he was conducting on her behalf, and which he knew, or ought to have known, was liable to have this effect at the time he gave the advice and thereby breached any or all of Principles 2 and 6 of the SRA Principles 2011.**

<u>Applicant's Case on Allegation 1.1</u>

21.1 Client F instructed Mr Clay to act for her in relation to a claim for unfair dismissal and disability discrimination against her former employer, the Royal Wolverhampton NHS Trust ("the NHS Trust"). Client F issued proceedings herself on 11 April 2018. A case management hearing was listed for 30 October 2018 and Client F subsequently instructed Mr Clay. Mr Clay sent Client F a letter confirming his instructions on 16 August 2018 and later filed a notice of acting dated 25 October 2018. Client F instructed the Firm on a *'no win no fee'* basis. Client F subsequently incurred no costs.

21.2 Mr Clay attended the case management hearing on 30 October 2018. By an order dated 2 November 2018, Judge Harding made directions for the further conduct of the

proceedings including permission to (amongst others) serve medical records for her disability discrimination claim and a witness impact statement dealing with the effect of her alleged disability on her ability to carry out normal day to day activities by 11 December 2018. The hearing in the proceedings was listed for five days from 5 to 9 August 2019.

21.3 The Employment Tribunal's order dated 2 November 2018 included the following warning:

> *"Failure to comply with any part of this Order may mean that the tribunal has insufficient time to hear the application on the hearing date and may give rise, upon application by a party who has incurred extra costs as a result, to an Order for Costs or preparation time against the offending party. Further, the tribunal may regard any failure to comply with this Order as unreasonable conduct of proceedings in the event of an application for costs or a preparation of time order against the party who has failed so to comply."*

21.4 On 10 December 2018, the Employment Tribunal listed a preliminary hearing for 15 April 2019 to consider Client F's application to amend her claim.

21.5 On listing the preliminary hearing, the Employment Tribunal on 10 December 2018 suspended the case management orders made at the hearing on 30 October 2018 *'until the outcome of the preliminary hearing'*. The Employment Tribunal stated that further case management orders would be made on the date of the preliminary hearing.

21.6 Mr Clay attended the preliminary hearing on 15 April 2019 to consider Client F's application to amend her claim.

21.7 The Judgment of Judge Woffenden dated 15 April 2019 set out further orders:

> *"The Claimant has leave to amend her claim by replacing section 8.1 of her claim form with paragraphs 8-33 of the Further and Better Particulars of Claim dated 6 November 2018 ("the Particulars") save for "and direct discrimination on grounds of disability contrary to section 13 Equality Act 2010" of paragraph 8 and paragraphs 16 17 18 19 20 21 and 23 of the Particulars."*

21.8 Client F therefore had permission to amend her claim to include disability discrimination but not direct disability discrimination and to amend her unfair dismissal claim to limit it to a failure to follow a fair procedure only. This meant that Client F could no longer rely on a submission that she was dismissed at a time when there was a realistic chance she could have returned to work.

> *"Unless by the 29 April 2019 the Claimant complies with paragraph 3.1 a) and b) of the order of Employment Judge Harding sent to the parties on 2 November 2018 ("the Order") the claim of disability discrimination shall be dismissed without further order".*

21.9 Paragraph 3.1 a) and b) in the order of Judge Harding initially required Client F to serve copies of her medical notes, reports and other evidence and a witness impact statement

dealing with the effect of her alleged disability on her ability to carry out normal day to day activities on the NHS Trust by 11 December 2018, before the directions were suspended. The order of Judge Woffenden dated 15 April 2019 amended this deadline to 29 April 2019. The order also stated that if Client F failed to comply with this order, then Client F's claim for disability discrimination would be dismissed without further order.

21.10 On 16 April 2019, Mr Clay wrote to Client F to update her following his attendance at the preliminary hearing on 15 April 2019. He told Client F that the Employment Tribunal Judge was *"agreeable to one form of claim, namely discrimination arising out of disability, but not the other, namely direct disability discrimination"*. Mr Clay told Client F about the amended date to submit her medical notes and Impact Statement by 29 April 2019. Mr Clay did not tell Client F about the *unless order* or its terms.

21.11 On 17 April 2019, the NHS Trust made an offer to settle Client F's claim for £486.35 and warned Mr Clay that it would seek to recover its costs from his client.

21.12 On 24 April 2019, Mr Clay sent Client F's medical records to the NHS Trust by post.

21.13 On 26 April 2019, Mr Clay notified Client F about the NHS Trust's offer and asked for her instructions. He did not provide Client F with a copy of the NHS Trust's letter. Mr Clay warned Client F that the NHS Trust had threatened to pursue her for its legal costs *'should this matter proceed to a tribunal hearing'* but advised Client F that such an order would be unusual and would only apply if a person had conducted their matter unreasonably, such as bringing a case with no reasonable prospects of success. He said that *'the danger of that in this matter is low but you should still be aware of the danger.'*.

21.14 By an email dated 29 April 2019, timed at 08:18, Client F replied rejecting the NHS Trust's offer and by an email dated 29 April 2019, timed at 10:34, Mr Clay sent a draft Impact Statement to Client F. He asked Client F to provide her instructions and return it *'as quickly as possible'*. Client F replied by email on the same date at 10:45 with instructions for further information to be added to her Impact Statement.

21.15 By email dated 29 April 2019, timed at 11:28, Client F emailed Mr Clay to ask if it was OK for her to attend the office the next day, on 30 April, at 2:30, to sign the Impact Statement as she did not have a printer.

21.16 By email dated 29 April 2019, timed at 11:46, Mr Clay replied to Client F *"OK"*. Mr Clay did not advise Client F that by attending the next day she would breach the terms of the *unless order*, which required the documents to be filed and served by 29 April 2019 or her claim would be dismissed. Client F was therefore unaware of the risks imposed by her attendance to sign the witness impact statement on the following day which Mr Clay agreed to, when he knew or ought to have known that this would breach the terms of the unless order and put her claim at risk.

21.17 By an email dated 30 April 2019 Mr Clay sent Client F's updated schedule of loss and impact statement to Hill Dickinson LLP, who were the legal representatives for the NHS Trust.

21.18 On 30 April 2019 Mr Clay also wrote a *"without prejudice"* letter to Hill Dickinson LLP acting for the Respondent sent by post. He notified it that the NHS Trust's minimal offer of settlement was rejected. Mr Clay said he remained confident about his client's prospects of success and made a counter -offer in settlement of £13,771.86.

21.19 On 3 May 2019 Hill Dickinson LLP sent an email to the Employment Tribunal copied to Mr Clay, requesting that Client F's disability discrimination claim be struck out because of her failure to comply with the unless order made at the hearing on 15 April 2019.

21.20 Hill Dickinson LLP confirmed the following:

- That posted copies of the medical records were received from Mr Clay on 30 April 2019.

- A signed copy of Client F's impact statement was received by email on 30 April 2019.

- That the *unless order* required those documents to be served by 29 April 2019 and because they were not served until 30 April 2019, Client F's disability discrimination claim was therefore struck out.

- It was also submitted that Client F's impact statement did not address how her disability affected her ability to carry out day to day activities, and therefore, it did not meet the requirements of the court order. The NHS Trust did not however deem it necessary to make an application to this effect to strike out Client F's claim because her claim was already struck out as a result of her failure to comply with the *unless order* due to the late service of her medical records and impact statement.

21.21 In response to Hill Dickinson LLP on 4 June 2019, Mr Clay wrote to the Employment Tribunal confirming his position as follows:

- Client F's medical records were sent to the NHS Trust by letter dated 24 April 2019 and "*it is submitted that the normal rules of service would dictate that medical records were served within the time limit prescribed by the Tribunal"*.

- Client F's impact statement was submitted one day late because Client F was unable to sign it until 30 April.

21.22 It was admitted by Mr Clay that this caused a delay of one day but that the NHS Trust did not suffer any prejudice by a delay of one day.

21.23 With regards to NHS Trust's criticism of the content of Client F's Impact Statement, Mr Clay stated that it did evidence that her disability was long term and it had an impact on her ability to manage her day-to-day affairs.

21.24 By an email dated 6 June 2019, timed at 15:03, Hill Dickinson LLP responded to Mr Clay's email of 4 May 2019 stating the Tribunal's order was clear; if the Claimant did not meet the terms of the unless order, the claim would be dismissed without further order.

21.25 By email dated 21 June 2019, timed at 10:28, Mr Clay told Client F that the other side had applied to strike out the disability discrimination claim, but did not state the reasons why.

21.26 On 13 July 2019, the Employment Tribunal sent a letter to the parties directing that:

> *"As there had, by the Claimant's solicitors own admission, been non-compliance with an unless order, the claim has been dismissed. There is no discretion in relation to this. However, Walker & Co's letter of 4 June 2019 could be treated as an application for relief from sanctions. If it is treated as such, does the Respondent oppose it, and if so on what basis?".*

21.27 By Mr Clay's own admission, he had failed to comply with the unless order and Client F's claim for disability discrimination was dismissed.

21.28 Both parties were invited to reply in writing by no later than 22 July 2019.

21.29 By an email dated 22 July 2019 (the final date by which the Claimant was to reply to the Court with any representations about relief from sanctions), timed at 09:30, Mr Clay contacted Client F and made the following statements:

> *"I have now had an opportunity to consider all the documents in this case following disclosure by the other side."*

21.30 Having received no response to her email, Client F emailed Mr Clay again on 24 July 2019 at 12:44 stating she wishes to make a complaint and to fully understand what has gone wrong.

21.31 On 28 July 2019 at 10:38, Client F emailed Mr Clay again requesting copies of her diary and wage slips. There was no evidence that Mr Clay replied to this email. On 7 August 2019 at 05:36, Client F emailed Mr Clay requesting to pick up her notebook.

21.32 On 2 August 2019, Mr Clay made a file note of a telephone call with Client F. Mr Clay reiterated his advice regarding the merits of the case and the danger of an adverse costs order. The note states "*I confirmed that her unfair dismissal claim had reasonable prospects of success, but the disability claim didn't."* The note further stated, *"the client was adamant that she wished to go ahead even given my clearly expressed concerns regarding costs being awarded against her".*

21.33 At the time of the email exchanges and telephone call referred to above, Mr Clay knew that Client F's claim had already been dismissed because of his failure to comply with the unless order.

21.34 At the Preliminary Hearing on 8 August 2019 Client F's disability discrimination claim was reinstated *'in the interests of justice'*. The Order of Britton J provides the following reasons:

> *"The Unless Order that came into effect on 29 April 2019 with the consequence that the Claimant's disability discrimination claim was struck out is set aside pursuant to Rule 38(2) on the basis that it is in the interests of justice to do so."*

*"In exercising my discretion to set aside the strike out Order, I have taken into account the Claimant's explanation for the delay, which I have accepted was innocent and unintentional. She appears to have been completely in the hands of her solicitor."*

*"..it did appear that there were grounds to suspect at the very least that the Claimant may not have been kept informed of what was required by the Tribunal and what was needed in order to comply with the unless order and by what date."*

*"The impact statement on reading does appear to me to be materially deficient in that it did not address the question of the impact of the Claimant's alleged disability upon her ability to carry out day-to-day activities. However, as indicated above, I am satisfied that the Claimant was entirely in the hands of her representative in this regard."*

*"I believe that your claim for disability discrimination would on balance be unsuccessful. There are some merits in the claim but the medical evidence goes back a considerable time and there does not appear to be any action or actions taken by the Trust that can be put to the disability.*

*Also it is unfortunate that the evidence for remarks and actions individuals (sic) is very scarce and incomplete, with only a first name known or guessed at".*

*"The claim for unfair dismissal would probably succeed…The Trust has the 'fall back' position however of being able to say that they would have dismissed you in any event…In the event that you are successful I do not foresee you being awarded a great deal more than what is now being offered, given their 'fall back' position.*

*On that basis I recommend we accept what is being offered".*

21.35 Client F replied at 09:36 on 22 July 2019, stating:

*"I am more than disappointed I thought the Judge was going to look at the disability part of it and decide?*

*"No way am I accepting the offer and I will go to court on the 5th and let the judge decide…It's up to you if you still want to represent me but I'm not dropping the case".*

21.36 Mr Clay replied to Client F on 22 July 2019 at 10:16 advising Client F again that her claim for disability discrimination would not succeed and recommended that she consider withdrawing her claim stating *"I appreciate what you say about how they treated you but I really do recommend that you consider withdrawing"* and he further states *"If you want to continue you will have to put together a witness statement and exchange this with the Trust's solicitors".*

21.37 Client F replied at 10:34 on 22 July 2019 stating:

*"I will be continuing so what do I need to put in a witness statement. I understand what yr saying but as far as I'm concerned, I will be having my day in court just to put my side across and see what happens".*

21.38 Replying to Client F's email Mr Clay replied to Client F at 11:53 advising her about the form and content of her witness statement explaining that she would need the hearing bundle which he would have ready for her to collect.

21.39 During this exchange on 22 July 2019 at 11:41, Mr Clay emailed the Employment Tribunal and the NHS Trust with notice that he had ceased to act for Client F.

21.40 By email on 22 July 2019 at 12:08, Client F replied, *"So will you not be representing me"*. And again at 12:10 *"when does it have to be done for"*.

21.41 By email on 22 July 2019 at 12:19, Mr Clay replied stating, *"Once you have the bundle, I recommend you contact the Trust's solicitors to agree a date".*

21.42 Mr Clay then sent Client F a series of blank emails attaching sections of the hearing bundle. Client F requested these in paper format.

21.43 By email on 22 July 2019 at 12:18, Client F responded, *"nice to know that I'll have to go it alone".* And again at 12:22 further stated *"I thought a solicitor was meant to deal with a case and see it through to the end."*

21.44 By email on 22 July 2019 at 14:27, Client F asked Mr Clay where she has to be on the 5th. Mr Clay replied at 2:39PM confirming the address of the Employment Tribunal.

21.45 By email on 22 July 2019 at 3:31PM, Client F emailed Mr Clay *"why are they saying that they asked about the witness statement last week and had no response from my representative?"*. And again at 6:38PM *"Can you call me ASAP please its regarding my case I need to ask why some things haven't been carried out."*

21.46 By email on 23 July 2019 at 06:39, Client F sent a further email to Mr Clay asking why the other side were saying that she failed to actively pursue her claim and why she was not told the date by which her witness statement needed to be filed. She stated *"they are going on like I haven't bothered to do anything when its been out of my hands and left with a solicitor to let me know which direction I should go. I have asked you numerous times do I need to do be doing anything and you said no. Its really unfair of yourselves as a firm of solicitors to do this. I need answers today and I need to know what to do with the bundle how many copies do I need."*

21.47 Mr Clay emailed Client F on 23 July 2019 at 08:22 stating, *"you send one copy to them and take 4 more with you"*. Mr Clay's response was silent on Client F's requests for information about why the other side was saying that she has actively failed to pursue her claim.

21.48 By email on 23 July 2019 at 11:23, Client F emailed Mr Clay stating, *"why are they now asking for the whole thing to be thrown out because of yr firm not responding or giving them what they ask for? I've emailed numerous times asking you if theres anything you need from me or I should be doing. No details have been sent to them*

*regarding my job or job searches or payslips nothing why is this. If it gets thrown out for not cooperating I will be taking this further".*

21.49 Having received no response to her email, Client F emailed Mr Clay again on 24 July 2019 at 12:44 stating she wishes to make a complaint and to fully understand what has gone wrong.

21.50 On 28 July 2019 at 10:38, Client F emailed Mr Clay again requesting copies of her diary and wage slips. There was no evidence that Mr Clay replied to this email. On 7 August 2019 at 05:36, Client F emailed Mr Clay requesting to pick up her notebook.

21.51 On 2 August 2019, Mr Clay made a file note of a telephone call with Client F. Mr Clay reiterated his advice regarding the merits of the case and the danger of an adverse costs order. The note states "*I confirmed that her unfair dismissal claim had reasonable prospects of success, but the disability claim didn't."* The note further stated, *"the client was adamant that she wished to go ahead even given my clearly expressed concerns regarding costs being awarded against her".*

21.52 At the time of the email exchanges and telephone call referred above, Mr Clay knew that Client F's claim had already been dismissed because of his failure to comply with the unless order.

23.53 At the Preliminary Hearing on 8 August 2019 Client F's disability discrimination claim was reinstated *'in the interests of justice'*. The Order of Britton J provides the following reasons:

> *"The Unless Order that came into effect on 29 April 2019 with the consequence that the Claimant's disability discrimination claim was struck out is set aside pursuant to Rule 38(2) on the basis that it is in the interests of justice to do so."*
>
> *"In exercising my discretion to set aside the strike out Order, I have taken into account the Claimant's explanation for the delay, which I have accepted was innocent and unintentional. She appears to have been completely in the hands of her solicitor."*
>
> *"..it did appear that there were grounds to suspect at the very least that the Claimant may not have been kept informed of what was required by the Tribunal and what was needed in order to comply with the unless order and by what date."*
>
> *"The impact statement on reading does appear to me to be materially deficient in that it did not address the question of the impact of the Claimant's alleged disability upon her ability to carry out day-to-day activities. However, as indicated above, I am satisfied that the Claimant was entirely in the hands of her representative in this regard."*

21.54 Britton J further noted that at the Preliminary Hearing on 30 October 2018, Client F's unfair dismissal claim had been pleaded on the basis that she was dismissed at a point that there was a realistic chance that she could have returned to work. In addition, it

was pleaded that she was dismissed without being given the opportunity to attend a meeting to discuss her potential dismissal.

21.55 Britton J noted that when Client F's claim was amended by Mr Clay on 15 April 2019, he narrowed the scope of her claim. The amendment meant that it was no longer part of Client F's claim that she was dismissed at a point when there was a realistic chance that she could have returned to work. The only basis for unfair dismissal was that she did not have the opportunity to attend a meeting to discuss her potential dismissal. However, he noted that the NHS Trust relied on a text message from Client F to a colleague asking them to pass on a message that she did not wish to attend the disciplinary hearing and wanted it to proceed in her absence. Britton J found that this meant that Client F's unfair dismissal claim had little prospect of success. As a consequence, Britton J ordered Client F to pay a deposit of £100 as a condition of being permitted to continue to advance her claim for unfair dismissal.

21.56 By email on 9 August 2019 at 09:04, Client F emailed Mr Clay updating him following the hearing. She stated:

> *"I had a very eventful day yesterday although I represented myself the judge was less than sympathetic around paperwork provided, he said that you had not returned in time and was going to throw the whole case out. He then asked me why I think he should give me another chance and keep the case going!..... I now ask once again for my diary, wage slips, p60 etc to be ready for me to collect today, I have asked on numerous occasions."*
>
> *"I put my case in yr hands as I thought it would be dealt with expertly but it definitely wasn't."*
>
> *"Now I have to find a solicitor to help me do things properly".*

21.57 By email on 5 September 2019 at 15:40, Client F again requests copies of her documents including her wage slips and P60, and that she will be attending the offices the next day.

21.58 On 25 October 2019 at 12:43, Mr Clay emailed the Firm's insurance consultants confirming a threat of a wasted costs order.

21.59 On 29 October 2019, Mr Clay sent a letter to the NHS Trust's representatives, Hill Dickinson LLP, stating, *"Given our ongoing duty of confidentiality we are obviously not at liberty to discuss the advice given to our former client as to the merits of her case following disclosure or the details of Tribunal Orders. [Client F] has been informed that she can collect any documents she has previously left with us."*

21.60 Client F did not receive copies of her documents until 14 November 2019.

21.61 By letter dated 15 October 2019 Hill Dickinson LLP wrote to the Firm. It put the Firm on notice that because of Mr Clay's handling of Client F's matter it intended to seek a wasted costs order against the Firm at the conclusion of the hearing of Client F's unfair dismissal claim in the proceedings in June 2020. The NHS Trust stated that its costs at that stage were in excess of £21,000.

21.62 In Mr Clay's legal representative's letter dated 6 May 2021 Mr Clay maintained that his decision to come off record was motivated by the fact that Client F failed to follow his advice as regards settlement, and because she had misled him about the evidence to prove her claim. However, Mr Clay did not advise Client F to accept the NHS Trust's minimal offer of settlement until 22 July 2022, after her disability discrimination claim had already been dismissed due to the non-compliance with the unless order. Mr Clay also advised Client F that the danger of the NHS Trusts pursuing her for legal costs was low.

21.63 Prior to 8 August 2019, it was clear that Mr Clay gave inconsistent advice to Client F by advising on 30 April 2019 that her claim had good prospects of success and only on 22 July 2019 did he advise her claim was likely to be unsuccessful. This was despite knowing on 13 July 2019 that her claim had already been dismissed.

21.64 In further correspondence from Mr Clay's legal representative on 3 November 2022 it was stated that the client file which has been disclosed did not appear to be complete, lacking in key documents.

21.65 The Applicant was provided with further disclosure from the Firm together with confirmation that they had revisited Mr Clay's email account and searched the account for all email correspondence on Client F's file. The Firm have confirmed that the Applicant has everything which was in the Firm's in their possession and control and it is not aware of the existence of any other documents relating to these matters.

*Breaches of Principles (Allegations 1.1 and 1.2)*

21.66 *Principles 2 of the SRA Principles 2011*

21.66.1 Mr Clay's actions amounted to a failure to act with integrity (i.e., with moral soundness, rectitude and steady adherence to an ethical code) in breach of Principle 2 of the SRA Principles 2011. In Wingate v Solicitors Regulation Authority v Malins [2018] EWCA Civ 366, it was said that integrity connotes adherence to the ethical standards of one's own profession. A solicitor acting with integrity would have notified his client that his failure to comply with the unless order meant that her claim had been dismissed as a consequence.

21.66.2 He would have been open and honest with his client about the communications he received from the other side and from the Employment Tribunal confirming that her claim had been struck out at the earliest opportunity. Mr Clay relies on the order of the Employment Tribunal dated 8 August 2019 to prove that Client F's claim had not been struck out. However, under s.38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 it states the following:

*Unless orders*
*"38 (1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis*

*the Tribunal shall give written notice to the parties confirming what has occurred.*

*(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.*

*(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21." (own emphasis)*

21.66.3 The order made in the Judgment of Judge Woffenden dated 15 April 2019 confirmed the terms of the *unless order* and the consequences of non-compliance i.e., the order would come into effect and "*the claim of disability discrimination shall be dismissed without further order"*. Mr Clay would have been in no doubt of its terms.

21.66.4 Further, Britton J's order dated 8 August 2019 setting aside *"the Unless Order that came into effect on the 29 April 2019 with the consequence that the Claimant's disability discrimination claim was struck out"* on the basis that *"it is in the interests of justice to do so"* is further evidence that this was an *unless order*. Britton J found that Client F's failure to comply with the unless order was innocent and unintentional and that the failing to comply with the unless order was that of Mr Clay who failed to inform her about what was required and by what date.

21.66.5 Mr Clay further misled Client F when he represented in an email to her dated 22 July 2019 that he had changed his advice about the strength of her claim because of documents disclosed to him by the other side on 3 June 2019 which he had had an opportunity to consider.

21.66.6 Mr Clay represented that he changed his advice only after Client F's claim is dismissed on 13 July 2019. If it is correct that at the time Mr Clay advised Client F on 22 July 2019 that her claim was unlikely to succeed because of disclosure from the other side, then he did not advise Client F of this until 6 weeks after the disclosure and in circumstances where he knew her claim had already been dismissed because of his failure to comply with the unless order (as he had been informed by the court via an earlier letter dated 13 July 2019).

21.67 *Principle 4 of the SRA Principles 2011*

21.67.1 A solicitor must act in the best interests of a client, an integral part of which is keeping a client informed. A solicitor in keeping a client informed must provide them with accurate information as to the status of their claim.

21.67.2 To allow a situation to arise where a matter is struck out without informing the client that it has occurred and the reasons why is clearly not acting in their best interests. A solicitor acting in his client's best interests would not

conceal that her disability discrimination claim had been dismissed. He would not notify her that he had changed his advice on the merits of her claim without revealing that, regardless of the merits, her claim had been dismissed. The client should be afforded the opportunity to attempt to address/rectify the matters in issue.

21.67.3 However, to do so the client must be provided with the correct information. Client F was not afforded that opportunity until she represented herself at the Preliminary Hearing on 8 August 2019 and Britton J reinstated her claim. By acting in this way, Mr Clay breached Principle 4 of the 2011 Principles.

21.68 *Principles 6 of the SRA Principles 2011*

21.68.1 When providing Client F with his advice on 22 July 2019, Mr Clay provided her with information which he knew or ought to have known was inaccurate. Mr Clay advised Client F that her claim was unlikely to succeed and that she should withdraw it when he knew her claim had already been dismissed because of the failure to comply with the unless order.

21.68.2 A solicitor must conduct themselves in a manner which upholds public trust and confidence in the profession. A member of the public who was a client would expect their instructed solicitor to be open and transparent with them about material matters relevant to their claim. By failing to inform Client F at the earliest opportunity and in his email to her of 22 July 2019 that her claim had been struck out because of the failure to comply with the unless order, Mr Clay was not conducting himself in a manner which maintains public confidence in the profession.

21.68.3 Client F was entitled to be kept informed with accurate information as to the status of her claim such that she could take appropriate action and/or make informed decisions in relation to her claim. By misleading Client F about information material to her claim and providing her with information which he knew or ought to have known was inaccurate, Mr Clay diminished the trust which the public placed in him and in the provision of legal services in breach of Principle 6 of the SRA Principles 2011.

21.69 *Outcome 4.2 of the SRA Code of Conduct 2011*

21.69.1 A solicitor who is advising a client makes that client aware of all information material to that retainer of which the individual has personal knowledge. For the reasons given in relation to Principles 2 and 6 above, Mr Clay failed to achieve this outcome.

<u>Respondent's Case re Allegations 1.1 and 1.2</u>

21.70 Essentially, Ms Heley viewed most aspects of the Applicant's case as stemming from the issue of delay and she questioned when and how delay became something unethical. Ms Heley made the general point that throughout the prior investigation and in his evidence Mr Clay remained steadfast and consistent in his genuinely held view that the

strike out order with respect to the disability discrimination claim would be reversed and that it had been nothing more than a procedural hiccough.

21.71 As to allegation 1.1 Mr Clay accepted that he did not expressly inform Client F that the order made on 15 April 2019 was an *unless order*. He did notify her of the relevant deadlines on the next day after the hearing.

21.72 He did take steps to comply with the Order on time and, aside from the Impact Statement, did meet the deadlines imposed. Mr Clay accepted that he was overly confident that the Employment Tribunal would accept substantial compliance with the Order and that he should have expressly sought an agreed extension of time in respect of the Impact Statement when he knew that it would not be possible to serve it on time.

21.73 He did inform Client F that there was an application to strike out her case in an email of 21 June 2019.

21.74 It was Mr Clay's account that he told Client F what she needed to know, and deeper legal issues would have served only to confused her. However, he accepted that his failure to notify Client F of the *unless order* and its consequences in express terms was a service failure and would be a breach of Outcome 4.2 and give rise to a potential claim in negligence if any loss could be proven as a result.

21.75 It followed that Mr Clay admitted that he acted contrary to Principles 4 and 6 of the SRA Principles 2011 and he denied that he acted without integrity contrary to Principle 2 of the SRA Principles 2011.

21.76 As to Allegation 1.2 Mr Clay maintained that the advice, he gave Client F on 22 July was correct. Client F's claim was lacking in merit, and she was advised to settle the claim on the best terms available.

21.77 At the time, he knew that the claim was continuing as regards unfair dismissal and he believed, genuinely, that the disability claim could be reinstated because the non-compliance had been minor, a day's delay in providing an impact statement. Ms Heley explained that it was not for the Tribunal to determine the reasonableness of the belief but only what had been in Mr Clay's head at the material time and whether that belief was genuinely held by Mr Clay. This was to be determined by reference to all the evidence and the consistent nature of his account.

21.78 His view was that client F should be discouraged from proceeding with the overall claim because it was likely to fail on the merits and she risked having to pay adverse costs.

21.79 Mr Clay accepted that his communications with client F could and should have been clearer. The advice he gave was nevertheless accurate and ultimately borne out by the result in the Employment Tribunal which did reinstate the disability discrimination claim and ultimately dismissed it on its merits.

21.80 Accordingly, allegation 1.2 was denied by Mr Clay in its entirety. Whilst Mr Clay accepted that his advice could have been clearer and more complete, he denied that it was liable to mislead given his view as to the likelihood of reinstatement.

The Tribunal's Findings

21.81 General

21.81.1 The Tribunal reminded itself that with respect to all the allegations the burden was solely upon the Applicant to prove its case to the requisite standard, namely on the balance of probabilities. Mr Clay was not bound to prove that he did not commit the alleged acts and great care must be taken to avoid an assumption (without sufficient evidence) of any deliberate failure or act on his part.

21.81.2 The Tribunal recognised that the civil standard of proof is finite and unvarying and there is no sliding scale of proof dependent upon the seriousness of the allegations. Cogent evidence is required in all cases.

21.81.3 The Tribunal noted that the parties agreed on the essential facts underpinning all the allegations and that Mr Clay had made admissions to some but not all the breaches cited therein. Therefore, the primary exercise before it was for the Tribunal to determine whether Mr Clay's acts and/or omissions represented breaches of those matters which Mr Clay had not admitted and that the admissions he had made had been properly made.

21.82 Allegation 1.1

21.82.1 The Tribunal was satisfied to the requisite standard that Mr Clay's admissions were properly made to breaches of Principles 4 and 6 of the SRA Principles 2011 and a failure to achieve Outcome 4.2 of the SRA Code of Conduct 2011.

21.82.2 With respect to allegation concerning lack of integrity the Tribunal bore in mind matters set out in Wingate & Malins and also the four propositions relating to integrity set out by Mr Bullock with which Mr Clay had agreed in cross-examination.

21.82.3 The Tribunal accepted that Mr Clay's explanations (on all the allegations) were consistent and his opinion of the issues which unfolded before him may have been genuinely held by him. However, when viewed objectively his assessment did not bear scrutiny.

21.82.4 The solicitor/client relationship is one based on mutual trust. The solicitor trusts the client to provide them with instructions based on their genuine knowledge and belief and the client trusts the solicitor to provide them with, and advise them upon, all information material to their case so that they may make informed decisions. Mr Clay's failure to set out the full and unambiguously accurate position and then to ask for further instructions from his client, knowing that she did not know what he knew about her case was a breach and departure from the ethical standards of the profession.

21.82.5 Mr Clay's actions lacked the 'moral compass' expected of a solicitor to the extent that it was a breach of Principle 2 of the Principles 2011. A solicitor

acting with integrity would have notified his client that her failure to comply with the *unless order* meant that her claim had been dismissed. His client had expected and required openness from him on all aspects of her case and particularly one of pivotal importance to it, namely that a part of the claim upon which she had pinned her hopes had been struck out.

21.82.6 The Tribunal found Allegation 1.1 proved in full to the requisite standard, namely on the balance of probabilities.

21.82.7 The Tribunal therefore found proved breaches of:

- Principle 2 of the Principles 2011;
- Principle 4 of the Principles 2011;
- Principle 6 of the Principles 2011; and
- A failure to achieve Outcome 4.2 of the SRA Code of Conduct 2011.

21.83 Allegation 1.2

21.83.1 With respect to Allegation 1.2, the Tribunal also found that his actions constituted a breach of Principle 2 of the Principles 2011. He had misled Client F when he represented in an email to her dated 22 July 2019 that he had changed his advice about the strength of her claim because of documents disclosed to him by the other side on 3 June 2019.

21.83.2 Whether or not he had intended to mislead, and the Tribunal found that there was evidence that he had given thought about the extent of the information he provided to her, the effect of his actions was that Client F was in fact misled and placed at a disadvantage. This fundamentally represented a lack of integrity.

21.83.3 Having found a breach of Principle 2, it was clear that his conduct was also a breach of Principle 6. A solicitor must conduct themselves in a manner which upholds public trust and confidence in the profession. Members of the public expect their instructed solicitor to be open and transparent with them about material matters relevant to their claim and Client F was entitled to be kept informed with accurate information as to the status of her claim such that she could take appropriate action and/or make informed decisions in relation to her claim.

21.83.4 By misleading Client F about information material to her claim and providing her with information which he knew or ought to have known was inaccurate, Mr Clay diminished the trust which the public placed in him and in the provision of legal services in breach of Principle 6 of the SRA Principles 2011.

21.83.5 The Tribunal found Allegation 1.2 proved in full to the requisite standard, namely on the balance of probabilities.

21.83.6 The Tribunal therefore found proved breaches of:

Principle 2 of the Principles 2011; and
Principle 6 of the Principles 2011.

*Although relating to Allegation 1.2, dishonesty was considered separately as set out in Allegation 3.*

22. **Allegation 2.1 - Between 2 April 2019 and on or around July 2019, he failed to make Ms Harlow aware of information material to the retainer, namely that her claim had been struck out, in breach of any or all of Principles 2, 4, and 6 SRA Principles 2011 and failed to achieve Outcome 4.2 of the SRA Code of Conduct 2011.**

The Applicant's Case on Allegation 2

*The Harlow file*

22.1 Mr Clay was instructed by Ms Harlow in April 2018 on a private basis in connection with a contract dispute with her former employer, Mortgage Q Limited ("Mortgage Q"). The claim was that Ms Harlow believed she was owed commission payments arising from work undertaken for Mortgage Q.

22.2 On 23 April 2018, as requested by Mr Clay, Ms Harlow paid £360 on account of the Firm's costs in acting for her. After sending an initial letter of claim to Mortgage Q on behalf of Ms Harlow, Mortgage Q sent the Firm a letter enclosing a cheque for £3,207.49 on 4 June 2018 which it maintained was the only liability it had to Ms Harlow.

22.3 The letter stated *"if the cheque is encashed then we will take this as full and final settlement of any claim your client believes she may have. Similarly, if the cheque is not cashed then it needs to be returned to us within the next 7 days or again we will take its non-return as full and final settlement of any claim your client believes she may have"*.

22.4 On the same day on 4 June 2018, the Firm's accounts department banked the cheque and forwarded the accompanying letter from Mortgage Q for Mr Clay's attention. It is accepted that the Firm's accounts department banked the cheque without prior notice to Mr Clay.

22.5 On 5 June 2018, Mr Clay emailed Ms Harlow to notify her about receipt of the cheque and Mortgage Q's offer of settlement. Mr Clay explained to Ms Harlow the terms of the settlement and provided h er with advice about her prospects of success with her claim. Mr Clay asked Ms Harlow what her instructions were in relation to Mortgage Q's offer of settlement. By an email of the same date Ms Harlow instructed Mr Clay that she did not accept that sum in full and final settlement of her claim and wanted to *"carry on"*. There is no evidence that the client was told that the cheque had been cashed.

22.6 In the Firm's minutes of their meeting with Mr Clay dated 20 February 2020, in response to the allegation that he failed to inform Ms Harlow that if the cheque was chased or not returned it would be deemed to have been accepted, it states *"IC said he*

*had not told the client all the specifics of the letter and client was unaware that if cheque cashed then that's it."* Further, in response to the Firm's allegation that he had failed to inform Ms Harlow the cheque had been cashed the findings state "*CB stated IC failed to inform the client we cashed the cheque and that he had still not told the client there was a risk to her claim if we kept the cheque. IC accepted this."*

22.7 On 18 June 2018, Mr Clay wrote to Mortgage Q acknowledging their letter of 4 June 2018 and accompanying cheque. Mr Clay stated that the cheque was not accepted in full and final settlement and that the balance would "*be used to offset the final claim should this matter proceed to Court"*. Mortgage Q responded on 19 June 2018 expressing surprise at Mr Clay's letter, stating that *"our terms of encashment could not have been clearer, this indicated full and final settlement of any claim your client believed she may have had against us. If this was disputed, then the cheque should have been returned which again was abundantly clear in our letter."*

22.8 On 29 June 2018, Mr Clay emailed Ms Harlow stating "*anyway, all MAV have said about the cheque is that it was for the 'gross commission generated for a case in the name of Gibson'. Their stance at the moment is that this is all they're prepared to pay."* Mr Clay did not send Ms Harlow a copy of Mortgage Q's letter dated 19 June 2018, nor did he advise Ms Harlow that the cheque had been cashed. Ms Harlow was also not told that Mortgage Q had threatened to pursue costs against her if the case was pursued.

22.9 On 11 July 2018, Mr Clay sent Ms Harlow a draft Particulars of Claim. Paragraph 12 of the Particulars states *"the Defendant has paid the sum of £3,207.49 in respect of a case in the name of Gibson"*. On 11 July 2018 Ms Harlow responded with her suggested amendments including *"12 para – has offered the sum of £3207.49 in respect…. (we sent it back didn't we?)"* and further comments that the total sum claimed should be adjusted to reflect that £3207.49 was sent back to Mortgage Q. Mr Clay did not respond to Ms Harlow.

22.10 Between 8 August 2018 and 30 November 2018, Ms Harlow chased Mr Clay for an update about her claim:

> *8 August 2018*
>
> *"Sorry to burden you with mundane matters like work but have you had any updates? Have the court rec'd and actioned the papers?"*
>
> *30 August 2018*
>
> *"How are things and more importantly have we heard anything? Do we know if the papers have been served or anything yet?"*
>
> *10 September 2018*
>
> *"I'm not sure if you have retired or are too busy completing the application for the Radio 2 Breakfast job? Starting to think you're ignoring me. Any news or update? Have papers been served?"*
>
> *13 September 2018*

*"What does that even mean?.....I will let you have something to look at soon? Holiday photos, properties to view? I thought we had sent papers to the court weeks ago?"*

*30 November 2018*

*"Did you get my desperate voicemail yesterday? Just wondered if you had any update…"*

22.11 On 21 October 2018, Mr Clay issued proceedings on behalf of Ms Harlow against Mortgage Q, which included a court fee of £1,689.66. This was paid from the Firm's office account. On the same day Mr Clay wrote to Ms Harlow confirming he had issued proceedings on her behalf and enclosed the Firm's invoice for his fees to date.

22.12 In response to Ms Harlow's claim, Mortgage Q filed a defence on 14 November 2018. Mortgage Q relied on the fact that the cheque for £3207.49 was cashed on 7 June 2018 and therefore any claims Ms Harlow believed she may have, had been settled. Mortgage Q also confirmed that it was their intention to strike out the claim. Mr Clay emailed Ms Harlow on 11 December 2018 to confirm that a defence had been filed but he did not state that Mortgage Q intended to make an application to strike out the claim. Mr Clay also accepted during the Firm's own investigation that he did not provide Ms Harlow with a copy of Mortgage Q's defence or application to strike out.

22.13 On 11 December 2018, Mortgage Q applied for summary judgment based on the cashing, and not returning, the cheque for £3,207.49 sent to the Firm on 4 June 2018.

22.14 By a Notice of Hearing of Application dated 13 February 2019 a hearing was listed for Mortgage Q's application for summary judgment on 2 April 2019. The Firm confirmed in their report to the SRA that Ms Harlow's file did not show that she was informed about the hearing date or that she was provided with any advice on the summary judgment application. The Firm's report also confirmed that the hearing date was not recorded on the client file or in Mr Clay's diary.

22.15 Mr Clay sent a letter to the court dated 20 February 2019 stating that he had a prior hearing booked that day and provided a list of dates he was unavailable to assist with re-listing.

22.16 On 31 March 2019 Ms Harlow emailed Mr Clay asking for an update about her claim because she has not heard from him for four months.

22.17 Mr Clay's position was that upon notification of the listing date for Mortgage Q's application for summary judgment he contacted the court on four occasions to notify it he was unable to attend the hearing on that date. On the 1 April 2019, Mr Clay was notified by telephone from the Court that the hearing would go ahead the next day.

22.18 On 1 April 2019, upon realising that his adjournment request had been refused, Mr Clay emailed the court at 15:57 and Mortgage Q at 16:03. Mr Clay attached a witness statement dated 1 April 2019 to both emails. It was Mr Clay's position that it would be contrary to the overriding objective to permit the hearing to go ahead in his absence.

22.19 The hearing on 2 April 2019 was before District Judge Batchelor which was attended by counsel for the Mortgage Q and there was no attendance by or on behalf of Ms Harlow. Mortgage Q were awarded summary judgment and the court order dated 10 April 2019] provides that:

> *"Upon hearing from counsel for the Defendant and there being no attendance by or on behalf of the Claimant.*
>
> *And upon the Court noting the Defendants application for summary Judgment dated 11.12.18 and the witness statement Ciaran Corry served in support and there being no written evidence filed and served by the Claimant in response contrary to CPR 24.5(1)*
>
> *IT IS ORDERED THAT*
>
> *1. There be summary Judgment for the Defendant pursuant to CPR 24.*
>
> *2. The Claimant shall pay the Defendants costs summarily assessed in the sum of £3555, payable within 14 days from service of the order."*

22.20 On 8 April 2019, Ms Harlow emailed Mr Clay and told him that Mortgage Q was to be sold and asked how this affected her claim.

22.21 On 12 April 2019 at 14:19, Mr Clay replied to Ms Harlow stating that she would still have a live claim. In a further email on the same day at 15:18 Mr Clay provided Ms Harlow with an update that:

> *"the other side made an app to strike out on the basis we didn't have a chance of success and this was listed for a hearing. I had another hearing on that day and wrote to the court with confirmation but nothing since."*

22.22 At the time of this email, Mr Clay was aware that:

- Mortgage Q's application to strike out Ms Harlow's claim relied upon the cashing of the cheque and that Mr Clay's failure to send the money back in accordance with their terms put Ms Harlow's claim at risk;
- that Mortgage Q's application for summary judgment had been listed to be heard on 2 April 2019;
- that his first adjournment request in relation to the 2 April 2019 listing had been refused by the court (as he had been told by the court by telephone on 1 April that the hearing on 2 April 2019 was to proceed) and;
- he had submitted his own signed witness statement to the court on 1 April 2019 seeking that the hearing did not proceed in the absence of the Claimant. Mr Clay did not represent the true position to Ms Harlow.

22.23 The Applicant accepted that there was a possibility that Mr Clay had not seen the order dated 10 April 2019 in relation to the 2 April 2019 hearing when he replied to Ms Harlow as above on 12 April 2019 because the order had not been date stamped.

22.24 However, the order dated 10 April 2019 was received by the Firm in the post which the Firm state would be the usual pre covid procedure for receipt of orders in the office and would take 1-2 days to be received. Even if Mr Clay had not seen a copy of the order on 12 April 2019 notifying him of the outcome at the time he replied to Ms Harlow on 12 April 2019, he should have informed Ms Harlow that the court had refused his adjournment request on 1 April 2019, that he was notified that the hearing was proceeding the next day on 2 April 2019, and he had not received a response from the court to his email dated 1 April 2019 at 15:57 requesting a further adjournment.

22.25 On 23 April 2019 Mr Clay raised a cheque for £3,555 from client account. He used the sum of £3,207.49 sent to the Firm on 5 June 2018 by Mortgage Q in settlement of Ms Harlow's claim. In addition, he used the remaining balance of £60 from the payment on account of costs paid by Ms Harlow to the Firm on 23 April 2018.

22.26 The sum total of £3,555 was made up by a transfer of £290 from office account. By letter dated 23 April 2019, Mr Clay sent Mortgage Q's solicitors a cheque for £3,555 in payment of its costs as ordered by the court at the hearing on 2 April 2019. He failed to notify Ms Harlow about the payment in settlement of her liabilities under the court order to Mortgage Q.

22.27 On 3 June, 25 June and 9 August 2019, Ms Harlow contacted Mr Clay asking for an update about her claim, stating:

On 3 June 2019:

> *"Sorry to pester but just wondered…..have we still not had a date from the courts? Last I heard was over 2m ago when you said that you had been allocated one but were already in court so had asked for another date. When are we likely to hear?"*

On 25 June 2019:

> *"Any update?*

On 9 August 2019:

> *"I know you don't like being asked for updates but I am conscious that in December we were waiting for a court date and were in August now and still in the same position."*

22.28 There is no evidence that Mr Clay replied to Ms Harlow's emails requesting an update and if so, how he responded.

22.29 Between 12 April 2019 and sometime in July 2019, Ms Harlow confirmed to the Applicant that she had not heard anything from Mr Clay *"despite several attempts at*

*contacting him. Each time I called the office I was told he was not available and that he would call me back"*. Ms Harlow states that she was not notified that her claim was dismissed until July 2019 when Mr Clay informed her, through a telephone call, *"that the case had been dismissed without his knowledge and he had to appeal, which was not a concern although to dismiss a case without any paperwork was unusual"*.

22.30 Mr Clay states that he did notify Ms Harlow of the outcome of the 2 April 2019 hearing by telephone. He said he did so within a short time of the decision being received. He said that his note recording the conversation was likely to be a handwritten one but it has not been placed on the client file. He also said that he responded to Ms Harlow's requests for an update in June and August 2019.

22.31 However, Ms Harlow's position that she was unaware of the outcome of the hearing of 2 April 2019 was corroborated by her chaser emails to Mr Clay on 3 June and 25 June requesting updates about her claim asking when the court date is when no court date was forthcoming as her claim had been struck out. Mr Clay did not reply to these emails. Therefore, for at least two months later Ms Harlow was still without knowledge as to the status of her claim.

22.32 Ms Harlow was not notified that her claim had been struck out until sometime in July 2019 when Mr Clay informed her, in a telephone call, *"that the case had been dismissed without his knowledge and he had to appeal, which 'was not a real concern although to dismiss a case without any paperwork is unusual'."*

22.33 Ms Harlow tried to contact Mr Clay on 11 September 2019, 19 September 2019, and 25 September 2019 seeking an update without success. When Mr Clay failed to provide an update, she instructed another legal representative to contact him on 9 December 2019 to find out what had happened to her claim.

22.34 Ms Harlow instructed Adam Richardson, a barrister, to write to the Firm on her behalf due to *"the lack of progress, minimal information and empty promises"*. In a letter dated 9 December 2019, Mr Richardson stated that Ms Harlow did not know the full position with her claim and asked for an update and next steps. Mr Richardson set out the matters Ms Harlow was unsure about, including the current progress of her claim, the current balance on her account, the current bill of costs incurred to date, her prospects of success and recovery, the location and quantity of an interim payment made on account, if her claim was struck out and then reinstated and if any deadlines were approaching or passed.

22.35 In a letter from Mr Clay's legal representative dated 6 May 2021, Mr Clay sought to explain why he thought the hearing would be postponed stating that *'When dealing with employment matters over the course of the previous 6- or 7-years [he] had often experienced applications, either by himself or the other party, and none had ever been declined provided that they had been made for this reason, with evidence provided. He therefore had no reason to believe that the postponement would not be agreed'*.

22.36 This response showed that Mr Clay continued not to be aware or acknowledge that he was required to make a formal application to postpone the hearing and comply with the relevant procedure to submit written evidence for the hearing on Ms Harlow's behalf. Ms Harlow's claim was dismissed without any submissions or evidence filed on her

behalf because Mr Clay failed to attend the hearing or arrange someone else from the Firm to attend on his behalf and failed to file any written evidence.

22.37 Further, Mr Clay did have reason to believe the postponement was not agreed in circumstances where he was informed by the Court the day before the hearing that the hearing would proceed and, after sending his adjournment request, he failed to follow up with the Court to confirm whether his request had been granted. Mr Clay did not receive any response to his application from the Court, nor any indication that the adjournment was agreed. This should have been a clear indication to him that he was still required to attend.

22.38 Further, in Mr Clay's response to the SRA dated 6 May 2021, it states:

> *"Mr Clay did not tell the client of the hearing as he did not think there was anything the client could add to the hearing. The court would not expect her to attend or give evidence and he was confident the application would be unsuccessful on the papers."*.

22.39 It was concerning that Mr Clay instead allowed the hearing to proceed in his absence in the knowledge that it had not been adjourned and in circumstances where he had not arranged an alternative advocate. It is also concerning that Mr Clay did not think it was appropriate to inform Ms Harlow about the hearing in circumstances where he could not attend.

22.40 After the court gave summary judgment and dismissed Ms Harlow's claim on 2 April 2019, Mr Clay also failed to take any steps to seek relief for his client from his failure to comply with the court rules or apply to set aside or appeal the judgment. As a consequence of the dismissal of her claim, and the making of a costs order against her, Ms Harlow lost the opportunity to pursue her claim or recover any of the damages or compensation she was seeking from Mortgage Q in the proceedings.

*Breaches of Principles*

22.41 *Principle 2 of the SRA Principles 2011*

22.41.1 Mr Clay's actions amounted to a failure to act with integrity (i.e., with moral soundness, rectitude and steady adherence to an ethical code as per Wingate & Malins).

22.41.2 A solicitor acting with integrity would have notified their client of the real reasons their claim had been struck out. He would have been open and honest about the communications he received from the court at the outset confirming that their claim had been struck out. The Court Order was clear as to the two reasons Ms Harlow's claim was struck out i.e., *"there being no attendance by or on behalf of the Claimant"* and *"there being no written evidence filed and served by the Claimant in response contrary to CPR 24.5(1)"*.

22.41.3 [CPR 24.5(1) states that if Mr Clay to an application for summary judgement wishes to rely on written evidence at the hearing, it must be filed and served at least seven days before the summary judgment hearing date.]

22.41.4 There is no indication of any opinion on the merits of the case set out in the Court Order i.e., no realistic prospects of success as Mr Clay later asserts. A client being informed of this would conclude that the court considered their case had no merit when that was not what the Court Order stated. At the time of Mr Clay's email to Ms Harlow on 12 April 2019, he was aware that Mortgage Q's application to strike out Ms Harlow's claim relied upon the cashing of the cheque and that his failure to send the money back put Ms Harlow's claim at risk, not because there was no realistic chance of success.

22.41.5 Further, Mr Clay had many opportunities to update Ms Harlow but chose not to and if he did respond, he demonstrated a lack of candour that was likely to mislead Ms Harlow.

22.41.6 On 29 June 2018 he sent an email to Ms Harlow but does not advise her the cheque had been cashed or explain that Mortgage Q's position in relation to the cashed cheque or that they had threatened to pursue costs against her if the case was pursued.

22.41.7 On 11 December 2018 he emailed Ms Harlow after Mortgage Q filed a defence to the claim relying on the fact that the cheque had been cashed on 7 June 2018 and therefore any claims Ms Harlow believed she may have were settled. He failed to advise his client of this or that Mortgage Q intended to make an application to strike out her claim. On the same day, Mortgage Q applied for summary judgment based on the cashing, and not returning, the cheque for £3,207.49 sent to the Firm on 4 June 2018.

22.41.8 On 13 February 2019 the court listed the hearing for 2 April 2019. Mr Clay failed to advise Ms Harlow of the hearing date until after the hearing date had passed.

22.41.9 On 31 March 2019, Ms Harlow emailed Mr Clay requesting an update as she had not heard anything for 4 months. Mr Clay failed to reply and instead made it his sole focus to try and vacate the hearing without updating his client up to and including after he was notified on 1 April 2019 that the hearing was proceeding.

22.41.10 On 8 April 2019, Ms Harlow emailed Mr Clay again. Mr Clay responded on the same day advising her for the first time that Mortgage Q made an application to strike out her claim on the basis it had no chances of success and that this had been listed for a hearing but that he couldn't attend and was waiting to hear from the court. He failed to advise his client that the court had notified him by telephone on 1 April 2019 that the hearing would proceed.

22.41.11 Mr Clay should have used these opportunities to clarify the real reason for the strike out of her claim, i.e., the cashing of the cheque, and that encashment potentially put her claim at risk of being struck out, and his failure to represent her at the hearing on 2 April 2019 or submit any evidence on her behalf. Instead, Ms Harlow was allowed to continue to believe over a period of 9 months that the cheque had been returned and the defendant's offer of

settlement rejected in accordance with her instructions and that her claim failed because the case had no realistic prospect of success.

22.41.12 Further, it is noted that Ms Harlow's client money was insufficient to meet the costs order because Mr Clay took £290 out of office account to make up the balance. If Mr Clay genuinely believed that the costs order did not arise as a result of his failings, he would have informed Ms Harlow about the costs order made against her and been open about how it was to be paid. Instead, he did not seek the full amount of the costs order from Ms Harlow but used the Firm's resources to make up the balance due.

22.42 *Principle 4 of the SRA Principles 2011*

22.42.1 Ms Harlow trusted Mr Clay to pursue his matter in her best interests. Mr Clay breached that trust by failing to respond to her requests for updates about her claim; by not notifying her of the outcome promptly; and by failing to be transparent about the reasons her claim was dismissed because of his failure to conduct her claim in a proper manner and in accordance with the court rules.

22.42.2 A solicitor acting in their clients' best interests would have notified their client promptly and within a reasonable time afterwards about the true circumstances giving rise to the dismissal of her claim and the making of a costs order against them. Instead, the evidence shows Mr Clay waited almost 3 months to inform Ms Harlow that her claim was struck out, and after her attempts to chase him went ignored.

22.42.3 When asked specific questions solicitors must answer them in a timely fashion with correct information such that a client can assess the situation and act and provide instructions accordingly. As a result of Mr Clay's actions, Ms Harlow lost the opportunity to fully defend her claim and recover the compensation she was seeking from Mortgage Q.

22.43 *Principle 6 of the SRA Principles 2011*

22.43.1 A member of the public would expect a solicitor to respond to requests for updates from clients and be fully transparent in those communications. By providing Ms Harlow with disingenuous explanations that were likely to mislead her about the outcome of her claim in the proceedings, and about his use of her client money to pay the costs order, Mr Clay diminished the trust which the public placed in him and in the provision of legal services.

22.44 *Outcome 4.2 of the SRA Code of Conduct 2011*

22.44.1 A solicitor who is advising a client makes that client aware of all information material to that retainer of which the individual has personal knowledge. For the reasons given in relation to Principle 2 above, Mr Clay failed to achieve this outcome.

Respondent's Case

22.45 As to Allegation 2.1 Mr Clay denied that he knew judgment had been entered in default with respect to Ms Harlow's claim until at least 12 April 2019 and Ms Heley submitted that this allegation rested upon his delay in notifying Ms Harlow of that fact. The delay lasted from at least 12 April to a date likely to have been in June or July 2019 when he informed Ms Harlow that the claim had been dismissed.

22.46 He accepted that that the delay amounted to a service failing and a breach of Outcome 4.2 and that it followed that he breached of Principle 4 and Principle 6.

22.47 Mr Clay denied that he acted without integrity, stating that this was a case of simple negligence, and it did not rise to a level of lacking integrity. Mr Clay was guilty of delay in having a difficult conversation with a client who was also a friend.

The Tribunal's Findings re Allegation 2.1

22.48 The Tribunal was satisfied to the requisite standard that Mr Clay's admissions were properly made to breaches of Principles 4 and 6 of the SRA Principles 2011 and a failure to achieve Outcome 4.2 of the SRA Code of Conduct 2011.

22.49 The Tribunal found that whilst this was a separate allegation it bore similar hallmarks to the matters which gave rise to its finding of lack of integrity in Allegations 1.1 and 1.2.

22.50 Notwithstanding the explanation put forward by Mr Clay, a solicitor acting with integrity would have notified their client of the reasons why their claim had ended and Mr Clay had decided not to do so. The Court Order was clear as to the two reasons Ms Harlow's claim was struck out i.e., *"there being no attendance by or on behalf of the Claimant"* and *"there being no written evidence filed and served by the Claimant in response contrary to CPR 24.5(1)"*.

22.51 At the time of Mr Clay's email to Ms Harlow on 12 April 2019, he was aware that Mortgage Q's application to strike out Ms Harlow's claim relied upon the cashing of the cheque and that his failure to send the money back put Ms Harlow's claim at risk, not because there was no realistic chance of success.

22.52 He failed to advise his client of this or that Mortgage Q intended to make an application for summary judgment on the basis that the cheque had been encashed. Thereafter he delayed, and delayed again in providing Ms Harlow with a full explanation, even when he was in receipt of the letter from Mr Ricardson of counsel.

22.53 A solicitor acting with integrity would have been open and transparent with his client by explaining the reality of the situation and giving her an opportunity to consider her position even if this required taking alternative and independent advice with a view to taking an action in negligence against him and/or the Firm.

22.54 The Tribunal found Allegation 2.1 proved in full to the requisite standard, namely on the balance of probabilities.

22.55 The Tribunal therefore found proved breaches of:

- Principle 2 of the Principles 2011;
- Principle 4 of the Principles 2011;
- Principle 6 of the Principles 2011; and
- A failure to achieve Outcome 4.2 of the SRA Code of Conduct 2011.

23. **Allegation 2.1 - On 23 January 2020, he gave information to Ms Harlow which was disingenuous and/or likely to mislead Ms Harlow as to the reasons why the proceedings which he was conducting on her behalf were dismissed, and which he knew, or ought to have known, was liable to have this effect at the time he gave it and thereby breached any or all of Principles 2, 5 and 7 of the SRA Principles 2019 and Paragraph 7.11 of the SRA Code of Conduct for Solicitors, RELs and RFLs.**

<u>The Applicant' s Case on Allegation 2.2</u>

23.1 On 23 January 2020, it was said that Mr Clay gave information to Ms Harlow which was disingenuous and/or likely to mislead her as to the reasons why the proceedings which he was conducting on her behalf were dismissed, and which he knew, or ought to have known, was liable to have this effect at the time he gave it.

23.2 Additionally, the Applicant relied upon the following facts and matters.

23.3 By a letter dated 23 January 2020, Mr Clay contacted Ms Harlow in response to her barrister's letter dated 9 December 2018. In this letter Mr Clay stated:

> *"As regards the progress of the matter, the claim was struck out by the court as having no realistic prospects of success, as you were informed by telephone."*
>
> *"In making the decision to strike the matter out the court awarded costs against you of £3,555, payable to the Defendant".*
>
> *"The Defendant had made an offer of £3,207.49 which you declined to accept as full and final settlement and accordingly proceedings were issued. As you will appreciate, the costs awards extinguished the payment made".*

23.4 Mr Clay failed to explain to Ms Harlow the reasons given in the court order i.e., there was no attendance on behalf of Ms Harlow and no written evidence was filed in response to Mortgage Q's application on her behalf, in breach of CPR 24.5(1).

23.5 Mr Clay therefore failed to notify Ms Harlow why her claim was dismissed or about the costs order of 2 April 2019 until 23 January 2020. In this letter, Mr Clay stated that her claim had been struck out, there was no prospect of an appeal as there were no merits to one and a costs order had been made against her.

23.6 In this letter Mr Clay still failed to give any indication as to the real reasons why Ms Harlow's claim was struck out and the awarding of the costs order, i.e., the cashing of the cheque, and that the encashment was a factor which had placed her claim at risk of being struck out, his failure to represent her at the hearing or submit any evidence on her behalf.

23.7 Mr Clay gave information to Ms Harlow which was disingenuous and/or likely to mislead her as to the reasons why the proceedings which he was conducting on her behalf were dismissed, not simply a failure to notify her that the claim had been dismissed. Mr Clay's failure to respond to Ms Harlow promptly or at all during this period had caused Ms Harlow to believe that her claim was continuing, and a court date was awaited when, in reality, it had already been struck out.

23.8 Mr Clay therefore misrepresented the true position because he failed to disclose to Ms Harlow that her claim was dismissed, and a costs order made against her, because of his failure to conduct her claim in a proper manner and in accordance with the court rules.

*Breach of Principles*

23.9 *Principle 2 of the SRA Principles 2019*

23.9.1 The public expects solicitors to act in a way that upholds public trust and confidence in the profession and in legal services. The public would be alarmed by a solicitor who did not inform a client about the outcome of their claim in proceedings and the correct reasons for the outcome openly and promptly and within a reasonable time. A member of the public would expect a solicitor to be honest and open and transparent with Ms Harlow about the reasons why her claim was dismissed, that a costs order was made against her and that he had used her client money to pay the costs order. Such openness was relevant particularly at the point when Mr Clay had been contacted by another representative on Ms Harlow's behalf, in this case a barrister, seeking an explanation.

23.10 *Principle 5 of the SRA Principles 2019*

23.10.1 Mr Clay's actions amounted to a failure to act with integrity (i.e., with moral soundness, rectitude and steady adherence to an ethical code as per Wingate & Malins) in breach of Principle 5 of the SRA Principles 2019.

23.10.2 Mr Clay failed to act with integrity in that, in his letter dated 23 January 2020, he gave Ms Harlow the misleading impression that her claim was struck out because it had no prospects of success. Mr Clay failed to explain to Ms Harlow that he had failed to send the cheque back, failed to attend the hearing on her behalf and failed to file written evidence on her behalf in breach of the court rules which resulted in an adverse costs order being made against her. He therefore gave Ms Harlow a misleading explanation to cover up his own failures which led to her claim being dismissed. Mr Clay put his own interests before those of his client.

23.11 *Principle 7 of the SRA Principles 2019*

23.11.1 A solicitor must act in the best interests of each client. A solicitor, in keeping a client informed, must provide them with accurate information as to the status of their claim. To allow a situation to arise where a matter is struck out without informing the client that it has occurred for a period of 3 months and

failing to explain the correct reasons why, both at the time and when an explanation is requested, is clearly not acting in their best interests. A solicitor acting in his client's best interests would not conceal that their client's claim had been dismissed. He would not misrepresent the true position to his client in order to conceal the real reason the claim was struck out.

23.12 *Rule 7.11 of the SRA Code of Conduct for Solicitors, RELs and RFLs*

23.12.1 A solicitor is expected to be honest and open with clients if things go wrong, and if a client suffers loss or harm as a result, they put matters right (if possible) and explain fully and promptly what has happened and the likely impact. Mr Clay should have been honest and open with Ms Harlow about the reasons why her claim was dismissed and that a costs order was made against her.

23.12.2 Instead, he ignored her requests for an update until she instructed another legal representative to contact him on her behalf (and even then did not provide a full explanation of what had actually happened). Further, Mr Clay failed to take any steps to seek relief from his failure to comply with the court rules or apply to set aside or appeal the judgment resulting in Ms Harlow losing the opportunity to pursue her claim and recover compensation she was seeking from Mortgage Q. Mr Clay should have tried to put matters right but failed to do so.

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

23.13 As to Allegation 2.2 Mr Clay denied that his letter of 23 January 2020 was misleading. The letter recited the essential facts; that the claim had been dismissed and there was no realistic prospect of appeal.

23.14 Ms Harlow confirmed in her witness statement that Mr Clay had told her by phone that there had been a hearing in April which he had been unable to attend. The information contained in the letter of 23 January 2020 was incomplete and it could have been more fully set out, but it was accurate as far as it went. There was no absolute duty upon Mr Clay to accept wrongdoing on his part without properly assessing the situation, taking advice, and discussing the matter with the Firm's insurers.

23.15 Accordingly, Mr Clay denied that the contents of his letter was in breach of Principles 2, 5 and 7 of the SRA Principles 2019. Mr Clay disputed the application of Rule 7.11 since the Rule only came into force with effect from 25 November 2019 and the claim had already been dismissed for over 7 months by that point; Ms Harlow was aware in July 2019 that the claim had been struck out and that there had been a hearing which had not been attended.

<u>The Tribunal's Findings re Allegation 2.2</u>

23.16 Whilst this was a separate matter to the other allegations it again raised similar concerns but this time citing SRA Principles 2019 due to the date of the alleged misconduct.

23.17 The Tribunal did not find Mr Clay's explanation of the facts to be a compelling one. The Tribunal found the Applicant's evidence, including the information set out in Ms Harlow's statement and supporting material satisfied the burden upon the Applicant of proving on the balance of probabilities that the breaches had occurred through Mr Clay's misconduct. Mr Clay was aware that his response contained incomplete and partial information.

23.18 The public expects solicitors to act in a way that upholds public trust and confidence in the profession and in legal services. A member of the public would expect a solicitor to be open and transparent with Ms Harlow about the reasons why her claim was dismissed, that a costs order was made against her and that he had used her client money to pay the costs order. Such openness was relevant particularly at the point when Mr Clay had been contacted by another representative on Ms Harlow's behalf, in this case a barrister, seeking an explanation. Mr Clay thereby breached Principle 2 of the 2019 Principles

23.19 Mr Clay's actions amounted to a failure to act with integrity in breach of Principle 5 of the Principles 2019. Mr Clay failed to act with integrity in that, in his letter dated 23 January 2020, he gave Ms Harlow the misleading impression that her claim was struck out because it had no prospects of success. Mr Clay chose not to explain to Ms Harlow that he had failed to send the cheque back; failed to attend the hearing on her behalf and failed to file written evidence on her behalf in breach of the court rules which resulted in an adverse costs order being made against her. The inescapable conclusion from the evidence was that he gave Ms Harlow a misleading explanation to cover his own failures which had led directly to her claim being dismissed. Mr Clay therefore put his own interests before those of his client.

23.20 From its findings it was evident that in breach of Principle 7 he had not acted in Ms Harlow's best interests. He had permitted a situation to arise where summary judgment was entered and then he did not inform Ms Harlow for a period of 3 months what had happened and when he did so he failed to explain the correct reasons why matters had played out as they did.

23.21 It also followed that he was in breach of Rule 7.11 of the SRA Code of Conduct for Solicitors, RELs and RFLs wherein a solicitor is expected to be honest and open with clients if things go wrong, and if a client suffers loss or harm as a result, they put matters right (if possible) and explain fully and promptly what has happened and the likely impact. Mr Clay failed to do so.

23.22 The Tribunal found Allegation 2.1 proved in full to the requisite standard, namely on the balance of probabilities.

23.23 The Tribunal therefore found proved breaches of:

Principle 2 of the Principles 2019;
Principle 5 of the Principles 2019;
Principle 7 of the Principles 2011; and
Rule 7.11 4.2 of the SRA Code of Conduct 2011.

The Applicant's Case re Allegation 3: Dishonesty *(Allegation 1.2 only)*

23.25 The Applicant relied upon the test for dishonesty stated by the Supreme Court in Ivey v Genting Casinos [2017] UKSC 67, which applies to all forms of legal proceedings, namely that the person has acted dishonestly by the ordinary standards of reasonable and honest people:

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

23.26 At the time that Mr Clay sent the email to Client F on 22 July 2019 at 09:30 stating that:

- He had now had an opportunity to consider all the documents in the case following disclosure from the other side.
- Client F's claim for disability discrimination would on balance be unsuccessful.
- Recommending that Client F accept NHS Trust's settlement offer of £486.35.
- There was a threat of NHS Trusts pursuing Client F for costs.

23.27 He knew or believed the following matters:

- The terms of the unless order made by EJ Woofenden set out above, and that failure to comply with those terms as a consequence of regulation 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 would result in Client F's claim being dismissed.
- That by Client F signing her witness impact statement on 30 April 2019 there was a delay of one day in breach of the date set out within the terms of the unless order.
- By a letter dated 3 May 2019 sent to Mr Clay by email, the NHS Trust had applied for an order that Client F's claim was struck out having failed to satisfy the *'unless'* terms.
- Following receipt of correspondence from the Employment Tribunal dated 13 July 2019, that Client F's claim had been dismissed because, by Mr Clay's own admission, the claimant had failed to comply with the unless order.

23.28 Mr Clay therefore sought to persuade Client F to settle her claim because he was on notice that he faced a real risk of criticism for failure to comply with the terms of the unless order. Whilst Mr Clay represented that he had changed his advice about the

merits of her claim, he did so in circumstances where he knew Client F's claim was already dismissed due to non-compliance with the unless order.

23.29 Further, when Mr Clay ceased to act for Client F because she did not wish to settle, Mr Clay recognised that he had to extract himself from the case because of his failure to comply with unless order. Mr Clay did not tell Client F about this failure and instead ceased to act for her without telling her that her disability discrimination claim had been struck out. It was only at the hearing on 8 August 2019 (which Client F attended by herself) that she became aware of the extent of Mr Clay's non-compliance during the proceedings and that the NHS Trust would be making representations at the same hearing about the validity of her remaining unfair dismissal claim.

23.30 It is a further aggravating feature that, having instructed Mr Clay on a *'no win no fee basis'* under a Conditional Fee Arrangement ("CFA"), the Firm was liable for the other side's costs in circumstances where the case had been dismissed due to a failure to comply with the unless order. The Firm incurred £4,000 in wasted costs because of Mr Clay's failures.

23.31 Mr Clay therefore sought to persuade Client F to settle her case, in circumstances where her claim had already been dismissed. Client F chose not to settle, and Mr Clay then sought to bring the CFA to an end.

23.32 In those circumstances, Mr Clay was dishonest by the standards of ordinary decent people.

The Respondent's Case

23.33 The allegation of dishonesty in relation to allegation 1.2 was denied. Mr Clay had sincerely believed that the advice given on 22 July, whilst lacking a full explanation, was correct and, if followed, would have resulted in a better outcome for Client F.

23.34 In reaching its determination on dishonesty Ms Heley reminded the Tribunal to give careful consideration to Mr Clay's good character and the panoply of character references prepared by people who knew him and the quality of his work. His good character should be used to consider matters relating to his credibility as a witness and his propensity to be dishonest.

23.35 Each character witnesses considered him to be a dedicated and honest person.

The Tribunal's Finding re Allegation 3: Dishonesty *(Allegation 1.2 only)*

23.36 Dishonesty, being the most serious of the allegations faced by Mr Clay, rested at the heart of the case, and it was his state of knowledge at that time which fell to be determined in its consideration of dishonesty. The Tribunal reminded itself of the full test for dishonesty as set out in Ivey as follows: -

> *"When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an*

*additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest".*

23.37 Further, the Tribunal reminded itself that whilst dishonesty and integrity may be kindred and related matters they are in fact distinct concepts for the purposes of professional conduct and a finding of dishonesty would not necessarily flow automatically from findings of lack of integrity made upon the same facts.

23.38 The Tribunal accepted that Mr Clay had been consistent in the account he had given in relation to his communication with Client F and it accepted that it had been his belief that he had presented all the information to Client F which he had thought, genuinely she could absorb, as he was certain he would be successful in reinstating her claim.

23.39 In assessing Mr Clay's honesty, the Tribunal weighed in the balance his good character and the character references to which it had been directed by Ms Heley as this was essential material to help determine Mr Clay's credibility as a witness and his propensity for dishonesty.

23.40 This was a finely balanced decision but one, considering all the evidence in the round, which would be made in Mr Clay's favour and that it had not been Mr Clay's intention to deliberately mislead Client F in circumstances where his view of the situation was that what had gone wrong would be repaired. On this basis whilst he had no doubt misled Client F he had not done so dishonestly.

23.41 In this context the Tribunal found that Mr Clay had not been dishonest by the standards of ordinary decent people, and it did not find dishonesty proved to the requisite standard, namely on the balance of probabilities.

23.42 The Tribunal therefore did not find dishonesty proved.

**Previous Disciplinary Matters**

24. There were no previous findings.

**Mitigation**

25. Ms Heley asked the Tribunal to take into consideration that this matter had been hanging over Mr Clay's head for the last 3 years but that there had been no further complaint of any misconduct in that time. Mr Clay no longer worked in litigation and he had instead established himself as a property lawyer, an area which suited his skill set and character much better.

26. Mr Clay was entirely remorseful for his failings, and he apologised to the Tribunal, Client F, Ms Harlow and the profession. He accepted that there had been service

failings and he had let matters slip. He recognised he should have handled the situations which developed more timeously.

27. The Tribunal was asked to take into account his admissions, his co-operation with the SRA investigation, his character evidence and his unblemished career hitherto.

28. It was of note that whilst dishonesty had been pleaded by the Applicant as an aggravating feature, the Tribunal had not found this most damaging accusation proved. Lack of integrity had been found proved on an objective basis.

29. Ms Heley said that Mr Clay was a dedicated and hardworking family man. He had shown insight and moved on in his career. He had been open with current employer about the present matter. Whilst there was no risk of recurrence of the conduct which had brought him before the Tribunal, she said that Mr Clay was willing to undertake any further training the Tribunal considered necessary to satisfy itself that he did not represent a continuing risk to the public.

30. Ms Heley entreated the Tribunal to decide upon a sanction which would enable Mr Clay to stay within the profession and to put this matter firmly behind him.

**Sanction**

31. The Tribunal had regard to the Guidance Note on Sanctions (10th Edition – June 2022). The Tribunal's overriding objective, when considering sanction, was the need to maintain public confidence in the integrity of the profession.

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

33. In assessing culpability, the Tribunal found that there had been no overt motivation, rather there had been a series or errors and muddles made by Mr Clay with respect to Client F and Ms Harlow. Genuine mistakes were badly handled by Mr Clay, and he allowed matters to spiral to the extent that his clients were prejudiced and disadvantaged.

34. There was a failure on his part to understand the end result his decisions to edit the information he gave his clients would have upon them and this stemmed from an absence of critical thought and analysis which he should have been applied to the issues before him. Instead, he placed over reliance on expecting matters to right themselves without taking his clients' instructions and/or his own effective intervention, e.g., his failure to ensure that Ms Harlow's hearing was covered in circumstances where he had had no assurance that his request for a new date had been granted by the court.

35. The breaches had not been planned or spontaneous, but they were the natural consequence of Mr Clay's over confidence and an apparent laissez-faire attitude

towards his clients' cases. Litigation requires scrupulous attention to detail and for a solicitor to act quickly and decisively in their client's best interests. To disregard an *'unless order'* (which, by its nature is draconian) in the case of Client F or allow matters to play out in the way they did for Ms Harlow was extremely careless.

36. There was some element of breach of trust in the sense that both Client F and Ms Harlow had trusted and expected Mr Clay to ensure that their cases were progressed competently and in a professional way. Mr Clay had had direct control of the factors giving rise to the misconduct and sufficient experience (he was 10 years post qualification) to understand what was expected of him. However, he let his two clients down. He should have been open with them when he became aware of the errors instead of burying the information and hoping things would correct themselves in his clients' favour. The way he handled matters was a recipe for disaster, rebounding ultimately upon himself.

37. The Tribunal did not find that Mr Clay had misled the Regulator or that he had failed to co-operate in a meaningful way.

38. The impact of the misconduct upon Client F and Ms Harlow was significant. In the case of Client F, she was compelled to argue before the Judge for the disability discrimination aspect of her case to be reinstated in circumstances where Mr Clay had divested himself of her as a client yet he had not told her that this aspect of her case had been struck out. She had been in ignorance of this fact until told by the Judge what had occurred. This must have been shocking to Client F and it was something which would tarnish the reputation of the profession in the eyes of the public. Due to Mr Clay's knowledge of Client F and her opinions on the strength of her claim, the harm caused by his misconduct and lack of care was reasonably foreseeable by him.

39. The Tribunal next considered aggravating factors. The Tribunal acknowledged that whilst there had been one allegation of dishonesty this had not been proved to the requisite standard. Matters had not arisen from overt dishonesty but from a level of ineptitude and willingness to dodge difficult issues with his clients which constituted lack of integrity.

40. The facts relating to Client F and Ms Harlow had overlapped in time to the extent that this could be characterised as a pattern of behaviour, comprising of two episodes over a relatively short, 4-month period.

41. There was no evidence of any sort which indicated that the misconduct had involved the commission of a criminal offence. His actions had been deliberate and calculated in the sense that he had given the issues some thought but insufficient thought to counteract his over confidence, approaching complacency, that Client F would have her disability discrimination claim reinstated and that Ms Harlow's hearing date would be vacated. His confidence in these matters running smoothly in the way he envisioned was misplaced.

42. Whilst the Applicant had portrayed Client F as vulnerable this had not necessarily been the case, although, Mr Clay had agreed that she had needed careful handling. The Tribunal therefore did not find that he had taken advantage of a vulnerable person although he had concealed important information from her and from Ms Harlow.

43. Mr Clay would have known or ought reasonably to have known that the conduct complained of was in material breach of his obligations to protect the public and the reputation of the legal profession.

44. Mr Clay's conduct had not been motivated by hostility, nor had it been based on a protected characteristic of Client F or Ms Harlow and there was no evidence whatsoever of bullying or coercion on his part towards them. Mr Clay had no previous disciplinary findings recorded against him and that this was to be viewed as a short pattern of misconduct in a hitherto unblemished career.

45. Although Mr Clay had not voluntarily notified the Regulator, he had made some admissions which demonstrated a level of insight. Additionally, he had moved to a different area of practice which suited him better and to this end there had been no repetition of the circumstances in the intervening 3 years whist the proceedings were hanging over him. That said, the Tribunal found that Mr Clay's insight was not at a level commensurate to the seriousness of the misconduct it had found to have occurred.

46. The Tribunal did not consider that Mr Clay appreciated, for example, in the case of Client F he had, allowed her case to be struck out, not told her that this had happened and then effectively abandoned her and placed her at risk of an adverse costs order. In the case of Ms Harlow, he had allowed a situation to develop whereby she had had judgment against her in default and then did not inform her of this material information when advising her on the prospects of success. In both cases he had delayed and curated the information he gave each client which actively misled them.

47. The Tribunal found that in the circumstances of this case the level of seriousness of the misconduct was high. The Tribunal, however, took into account Mr Clay's good character and the character references which had been presented to it, all attesting to his personal and professional qualities. The Tribunal had no doubt that Mr Clay was in many respects a caring and dedicated solicitor. The character references, provided by professionals aware of the present proceedings, represented important evidence to weigh in the balance in circumstances where there had been multiple findings of lack of integrity, in addition to other breaches. The references, along with other personal mitigation would be useful in determining the fairest and most proportionate sanction to be imposed.

48. As to sanction, the Tribunal adopted a *'bottom up'* approach. Whilst the Tribunal was careful not to place inordinate weight upon the seriousness of 4 linked findings of lack of integrity and to avoid double counting, the Tribunal found that to make no order or to impose a Reprimand would not be appropriate. These had not been minor breaches of a minor nature. Here, both Client F and Ms Harlow had been left in situations of legal risk for which they had not been prepared.

49. For the same reason the Tribunal did not consider that a fine, in any amount, was a sufficient sanction commensurate with the seriousness of the misconduct.

50. In Bolton v Law Society [1993] EWCA Civ 32 Sir Thomas Bingham MR (as he then was) stated:

> "*If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the Tribunal as an informed and expert body on all the facts of the case. Only in a very unusual and venial case of this kind would the Tribunal be likely to regard as appropriate any order less severe than one of suspension."*

51. The Tribunal found that Mr Clay's misconduct was such that he had fallen far short of the standards of integrity, probity and trustworthiness expected of a solicitor. In the words of Sir Thomas Bingham MR, a solicitor must be capable of being *"trusted to the ends of the earth".*

52. The Tribunal determined that given that this had been an isolated aberration in his behaviour, albeit a serious one, his misconduct did not merit a Strike Off from the roll and that a suspension from the Roll for a period of 6 months was the minimum sanction to reflect the gravity of the misconduct.

53. The Tribunal was concerned that Mr Clay had adopted a somewhat cavalier attitude to his client care and his duties to the court, and for his assistance and the protection of the public the Tribunal considered that Mr Clay's attendance at a Law Society course on ethics and professionalism would be required and that he be restricted from practice until he had completed such a course.

54. This aspect of the Tribunal's sanction was canvassed in open court before being formally pronounced and Mr Clay raised no objection.

55. As a final observation the Tribunal reminded all solicitors, and others working under a solicitor's supervision, to recognise the stage when the volume of their work is impacting adversely on their practice. Those who are under such pressure must seek help from their colleagues at an early stage and be open with their clients when problems arise. Whilst mistakes and errors will happen, prompt action may prevent them becoming conduct matters.

**Costs**

56. The parties reached agreement on the quantum of costs in the sum of £12,000.00.

<u>The Tribunal's Decision on Costs</u>

57. The Tribunal noted the agreement reached by the parties and it accepted that on the face of it the costs were neither unreasonable nor disproportionate.

58. The Tribunal therefore ordered Mr Clay to pay the Applicant's costs in the sum of £12,000.00.

59. **Statement of Full Order**

1. The Tribunal Ordered that IAN PATRICK CHARLES CLAY, solicitor, be suspended from practice as a solicitor for the period of 6 months to commence on the 6th day of November 2023 and it further Ordered that he do pay the costs of and incidental to this application and enquiry fixed in the agreed sum of £12,000.00.

2. The Tribunal further Ordered:-

   2.1 That as from 6th November 2023, Mr Clay be restricted from practice until such time as he has completed the Law Society course on SRA Principles and SRA Code of Conduct for Solicitors, RELs and RFLs.

3. There be liberty to either party to apply to the Tribunal to vary the condition set out at paragraph 2 above.

Dated this 29th day of November 2023
On behalf of the Tribunal

JUDGMENT FILED WITH THE LAW SOCIETY
29 NOV 2023

*G Sydenham*

G Sydenham
Chair