SOLICITORS DISCIPLINARY TRIBUNAL

<table><tr><td><u>IN THE MATTER OF THE SOLICITORS ACT 1974</u></td><td><u>Case No. 12495-2023</u></td></tr></table>

BETWEEN:

SOLICITORS REGULATION AUTHORITY LTD	Applicant
and	
MATTHEW NESTER	Respondent

Before:

Mr E Nally (in the chair)
Ms A Banks
Mr P Hurley

Date of Hearing: 21 February 2024

Appearances

Andrew Bullock, counsel in the employ of the Solicitors Regulation Authority Ltd, for the Applicant.

Jonathan Goodwin, solicitor-advocate, for the Respondent.

JUDGMENT

Allegation

1. The allegation made against Matthew Nester by the Solicitors Regulation Authority Limited ("SRA") was that while in practice as a Solicitor at Hugh James Solicitors ("the Firm"):

   Between 4 and 7 January 2022, he created records as to the time spent by him working on client matters which were inaccurate, misleading and in excess of the time actually spent on the client matters against which they were recorded. In doing so, he breached any or all of Principles 2, 4 and 5 of the SRA Principles 2019 ("the Principles") and/ or he breached Paragraph 1.4 of the SRA Code of Conduct for Solicitors RELs and RFLs 2019 ("the Code").

Executive Summary

2. Mr Nester admitted that his conduct was in breach of Principles 2 and 5. He denied that his conduct was dishonest in breach of Principle 4 and paragraph 1.4 of the Code. The Tribunal found that in creating time records as he did, Mr Nester's conduct was dishonest in breach of Principle 4, and misleading in breach of Paragraph 1.4 of the Code. Accordingly, the Tribunal found the allegation proved in its entirety. The Tribunal's reasons can be accessed here:

   - The Tribunal's Findings

Sanction

3. The Tribunal determined that given the seriousness of its findings, the only appropriate and proportionate sanction was to strike Mr Nester off the Roll of solicitors. The Tribunal's sanction and its reasoning on sanction can be found here:

   - Sanction

Documents

4. The Tribunal reviewed all the documents submitted by the parties, which included (but was not limited to):

   - Rule 12 Statement and Exhibit AML1 dated 31 August 2023
   - Respondent's Answer and Exhibits dated 3 October 2023
   - Applicant's Schedule of Costs dated 15 February 2024

Factual Background

5. Mr Nester was a solicitor having been admitted to the Roll in July 2021. He joined the Firm in July 2021 and continued to work for the Firm as a solicitor until he was dismissed on 12 January 2022. As at August 2023, Mr Nester was employed in the Legal Department of a charity. He held an unconditional practising certificate. At the time of the hearing Mr Nester was unemployed.

Witnesses

6. The following witnesses provided statements and gave oral evidence:
   - Mr Nester – Respondent

7. The written and oral evidence of Mr Nester is quoted or summarised in the Findings of Fact and Law below. 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.

Findings of Fact and Law

8. The Applicant was required to prove the allegations 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 Nester'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.

Dishonesty

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

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

10. When considering dishonesty, the Tribunal firstly established the actual state of the Respondent's knowledge or belief as to the facts, noting that the belief did not have to be reasonable, merely that it had to be genuinely held. It then considered whether that conduct was honest or dishonest by the standards of ordinary decent people. When considering dishonesty, the Tribunal had regard to the character references supplied on Mr Nester's behalf.

Integrity

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

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

12. **Allegation 1 – While in practice as a Solicitor at the Firm: Between 4 and 7 January 2022, Mr Nester created records as to the time spent by him working on client matters which were inaccurate, misleading and in excess of the time actually spent on the client matters against which they were recorded. In doing so, he breached any or all of Principles 2, 4 and 5 of the Principles and/or he breached Paragraph 1.4 of the Code.**

The Applicant's Case

12.1 The alleged conduct first came to the attention of the SRA when the Firm's Head of Compliance and Quality, Ms Cromwell, made a report dated 25 January 2022, explaining that on the review of a closed file, a partner in the Firm Mr Kubiak noticed that on 5 January 2022, Mr Nester had recorded five units (30 minutes) of time on the file for a "quarterly file review". The quarterly file review was recorded as having taken place on 4 January 2022. Mr Kubiak thought that this was unusual because, firstly, the file was closed and secondly, it was not part of Mr Nester's role to conduct quarterly file reviews.

12.2 Mr Kubiak arranged a virtual meeting with Mr Nester on 10 January 2022 at which he asked Mr Nester why he had recorded 5 units of time for a quarterly file review. Mr Nester said that he had completed the file review following receipt of a firm-wide email reminding staff that Q4 file supervisions were due.

12.3 Mr Kubiak explained to Mr Nester that the email was aimed at line managers and supervisors, and it was not something that Mr Nester specifically needed to do. However, as Mr Nester had, apparently, completed the file review, Mr Kubiak asked him to send him the File Supervision Checklist which should have been saved to the client file on completion of the file review.

12.4 Mr Nester agreed to do this, and the meeting was concluded. Later that day, Mr Nester sent Mr Kubiak the File Supervision Checklist for the review which he said he had carried out on 4 January 2022. Mr Kubiak noticed that the document had been created on 10 January, after the time of his meeting with Mr Nester, rather than on 4 January. He also noticed that the firm-wide email was actually sent the day after on 5 January 2022. Given that Mr Nester had said that he had carried out the file review on 4 January in response to the email, the discrepancy did not make sense to Mr Kubiak.

12.5 Mr Kubiak then ran a time recording report for Mr Nester. The report showed that Mr Nester had made a total of nine postings of five units (30 minutes) each for nine quarterly file reviews alleged to have been conducted on 4 January 2022. Mr Nester had recorded a further six postings of five units for quarterly file reviews on six files, allegedly completed on 5 January 2022. Mr Kubiak spoke to the Firm's HR department for guidance on how to approach the concern that Mr Nester had recorded time on client matters when the time had not genuinely been spend doing that work.

12.6 At a second meeting on 10 January 2022, Mr Kubiak asked Mr Nester to explain why he had recorded a total of four and a half hours of work on file reviews on 4 January and three hours of file reviews on 5 January when the file reviews had not been carried out.

12.7 Mr Nester admitted that he had recorded time on 4 and 5 January for work which he had not completed. Mr Nester said that he intended to complete the work later that week. Mr Nester's explanation was that he had to help with childcare on 4 and 5 January and, therefore, had not completed his required six and a half chargeable hours per day. Mr Nester confirmed that he had recorded seven and a half hours of chargeable time over 4 and 5 January when he had not carried out the work.

12.8 On request from Mr Kubiak, Mr Nester undertook a review of his time recording. He sent an email to Mr Kubiak on 10 January 2022 detailing the time recordings that he had entered incorrectly. Mr Nester identified that he had recorded time for nine quarterly file reviews on 4 January and six quarterly file reviews on 5 January when he had not carried out the work. He also identified that he had recorded time for a quarterly file review on one file twice: once on 4 January and once on 5 January. He identified that on 6 January 2022 he had recorded ten units of non-chargeable time (one hour) against a matter for "Know your client" checks when the time spent was closer to five or six units. Also, Mr Nester identified that on 7 January 2022, he had incorrectly recorded five units on a file for preparation of engagement documents and incorrectly recorded five units for the review of correspondence.

12.9 Mr Nester also identified within his email to Mr Kubiak, additional matters he had worked on between October to December 2021, on which he had billed time in excess of that he had actually undertaken working on those matters.

12.10 The Firm conducted an investigation and concluded that Mr Nester had been dishonest in his time recording on client files. He had admitted to posting 5 units of time on 14 separate client files and duplicating his posting on a file on 4 and 5 January 2022, when the work had not been carried out at all. In addition, for 7 January 2022, he had posted 10 units of work on a file when that work had not been carried out at all. He also posted 10 units of work, on a file on 6 January 2022 when he admitted that the time worked was closer to 5 or 6 units.

12.11 On 12 January 2022, Mr Kubiak and Hannah Ribeyro from the Firm's HR department met with Mr Nester, confirmed the findings of the investigation and terminated his employment. The Firm reported Mr Nester's conduct to the SRA on 25 January 2022. Mr Nester reported himself to the SRA by a letter dated 7 February 2022 in which he admitted the conduct and explained why he had behaved as he did.

12.12 Mr Bullock submitted that Mr Nester admitted that he had not completed the file reviews as recorded on 4 and 5 January. Had the matter not been queried by Mr Kubiak the clients might have been charged for work that had not been carried out, as Mr Nester had recorded the time as chargeable.

12.13 Mr Nester denied that the time recording was dishonest as he intended to complete the work on a later date, which he would have done had his employment not been terminated.

12.14 Mr Bullock submitted that there was no evidence that Mr Nester attempted to complete the work at a later date, and he had not explained how or when he intended to find the time to complete the work. 4 January was a Tuesday and 5 January was a Wednesday, yet Mr Nester had not completed the work by the following Monday 10 January.

12.15 Mr Nester stated that he had not been able to complete the required six and a half chargeable hours of work on 4 and 5 January because he was looking after his three children who were at home on those days and he was unable to focus on his work. Therefore, he recorded time in excess of the time he had actually worked so that the firm would not realise that he had not reached the target for his chargeable hours on those two days.

12.16 Following the request to review his time recording, Mr Nester informed Mr Kubiak of other issues regarding his time recording, including charging in excess of the time actually spent on a file, and charging for work that had not been undertaken. Mr Bullock submitted that this work would have been charged to the clients had the Firm not taken the decision to write off the charges.

12.17 Mr Nester's explanation for his inaccurate time recording on 6 and 7 January is that he had posted his time on those days, in a hurry to complete his time recording at the end of the week. He said that he was distracted from his work throughout that week because he was working from home and his children were also at home because their schools had not re-opened due to a lockdown in Wales. Mr Nester stated: "This resulted in the three-time posts being made carelessly, but at the time they were posted I had believed them to be correct".

12.18 Mr Bullock submitted that members of the public expected solicitors to accurately and properly record the time spent working on a matter so that clients are only charged for work that the solicitor has actually carried out. The public would not expect a solicitor to inflate or falsely record their time spent working on a matter. The public should be able to trust that the time recorded by a solicitor was an accurate reflection of the work carried out. By making a record of his time worked which was inaccurate, misleading and in excess of the time actually worked, Mr Nester has undermined public trust and confidence in the solicitors' profession and in the provision of legal services and thereby breached Principle 2.

12.19 By creating records as to the time spent by him working on client matters which were inaccurate, misleading and in excess of the time actually spent on the client matters against which they were recorded, Mr Nester failed to act with integrity, i.e. with moral soundness, rectitude and steady adherence to an ethical code. Mr Nester knew that he had not carried out the work either in full or at all, when he recorded the time worked on nine files on 4 January, six files on 5 January, one file on 6 January and one file on 7 January. A solicitor acting with integrity would not falsely record that he had worked on a file when he had not done so, nor would he record the time in excess of that worked. In doing so, Mr Nester had failed to act with integrity in breach of Principle 5.

12.20 Mr Nester inaccurately recorded the time worked on nine client files on 4 January and on six client files on 5 January 2022. The total of the inaccurate time recorded was seven and a half hours. At the time when he recorded the time on the firm's file management system, Mr Nester knew that he had not carried out the work at all.

12.21 At the time when Mr Nester recorded the time worked on nine files on 4 January, six files on 5 January and one file on 7 January 2022, he knew or believed the following matters:

- that he had not carried out work on any of those files at all,
- that the time recorded was not an accurate reflection of the work that he had carried out on 4, 5 and 7 January,
- that he should only record time for work which he had already carried out,
- that he was recording chargeable, rather than non-chargeable, hours,
- that, as a consequence, the clients would be charged for the cost of the work which he had recorded on the files,
- that the firm would believe that he had carried out the work for the time which was recorded on the system thus leading to a disparity of knowledge,
- that there was no agreement with the firm that he could record time on a file and then carry out the work on a later date.

12.22 At the time when Mr Nester recorded the time worked on 6 January 2022, he knew that he was recording time in excess of the time actually spent working on the file. The time was recorded on the same day as the work was carried out and Mr Nester would have had the clearest recollection of the time worked, on that day. Mr Nester would have known that he had only spent 30-36 minutes checking the "know your client" documentation rather than the one hour which he recorded.

12.23 In those circumstances, given Mr Nester's state of knowledge as set out above, Mr Nester was dishonest by the standards of ordinary decent people.

12.24 Further, by recording time that was inaccurate or in excess of the time worked, Mr Nester attempted to mislead his employer. He did this by allowing the Firm to believe that he had worked on files when either he had not or when he had worked for less time than was recorded.

The Respondent's Case

12.25 Mr Nester admitted the allegation save that he denied that his conduct was dishonest in breach of Principle 4 or that he had misled or attempted to mislead anyone in breach of Paragraph 1.4 of the Code.

12.26 In his written and oral evidence, Mr Nester accepted that he had recorded time for work that he had not completed, however, it had been his intention at the time and thereafter, to complete the work for which he had recorded time. Given that stated intention, Mr Nester did not consider that his actions were dishonest.

12.27 Mr Nester explained that at the time of his conduct, his home was chaotic. There was a national lockdown in Wales. His wife and 3 children were all at home. At the time he did not have a designated working space in his home and so was working in a communal area, where he was constantly disturbed by his children and his pet dog. As a result, he was unable to work efficiently and had been unable to be as productive as he ordinarily was.

12.28 Mr Nester stated that he had intended to do the work that he had recorded time for. He would have done in his own time, outside of working hours. Indeed, he had completed some of the file reviews by the time he met Mr Kubiak on 10 January and would have completed the rest, making any appropriate adjustments to the time recorded, had his employment not been terminated.

12.29 He explained that he knew that the firm monitored time recording and thus it made no sense for him to record time for work that he had not completed; there was no doubt in his mind that he had to undertake that work.

12.30 Following his dismissal, Mr Nester self-reported to the SRA as he considered it to be important for the matter to be brought to the SRA's attention without delay. His self-report was submitted prior to any report from the Firm. Mr Nester stated that he accepted that his actions were misguided and that he fully accepted the resulting consequences. He did not accept that his actions were dishonest, given that he intended to complete the work.

12.31 For clarification, the Tribunal asked Mr Nester why he had not simply recorded the time once the work was completed. Mr Nester replied that he was upset with himself that the amount of hours actually worked fell below what he would usually do. He decided to record the additional time so that his time recording would reflect an appropriate amount of time for those days. As to why he had recorded time for work that he had not done, Mr Nester explained that this was a lapse in his judgment; he accepted he should not have conducted himself as he did.

12.32 Mr Nester accepted that there was no record on the system that would enable the Firm to know that he had not undertaken the work that he had recorded time for. He also accepted that the Firm would therefore have no way of knowing that the work had not been done. Mr Nester "generally" agreed that it was dishonest to set out to mislead his employer. He also agreed that the purpose of his recording time in the way that he did was to make it appear that he had worked for the time recorded. He did not accept that the purpose was to mislead the Firm, as he would not have entered time for work that he did not genuinely believe that he was going to do.

12.33 Mr Goodwin submitted that the sole issue for the Tribunal to determine was dishonesty. Mr Nester's explanation had been consistent from the time of the investigation by the Firm to his appearance before the Tribunal, namely that he had a genuine belief at the time, that he could act as he did.

12.34 The Tribunal should note that at no time prior to, or subsequent to that short time in January 2022, had Mr Nester's honesty or integrity been called into question. There was nothing to challenge Mr Nester's explanation as to his state of mind at the time and

his knowledge and belief that he could act as he did in that period. He had not changed his position during cross-examination by Mr Bullock.

12.35 The SRA was required to prove that it was more probable than not that Mr Nester had acted dishonestly; it had failed to do so. Mr Goodwin submitted that it was inherently improbable that Mr Nester had acted dishonestly. This contention was supported by his unblemished character, his unblemished regulatory history and the fact that he had completed some of the work claimed for prior to his dismissal. It was plain that, had his employment not been terminated by the Firm, Mr Nester would have completed all of the work that he had recorded time for.

12.36 Mr Goodwin submitted that the application of Ivey was a two-stage test. The Tribunal was required to establish Mr Nester's knowledge and belief as to the facts at the time. The question the Tribunal should address was whether Mr Nester genuinely believed that there was no issue with his recording time in the way that he did because he intended to do the work at a later date. If the Tribunal accepted that this was his genuinely held belief at the time, then this was determinative of the allegation in Mr Nester's favour.

12.37 Mr Goodwin referred the Tribunal to the Court of Appeal decision in Barton Booth v R [2020] EWCA - Crim 575 in which the Lord Chief Justice, The Rt Hon The Lord Burnett of Maldon commented upon the decision in Ivey, concluding that it established the test for dishonesty. However, the Court of Appeal, (which, it was submitted, was a highly distinguished court comprising not only the Lord Chief Justice, but amongst others, the President of the Queen's Bench Division, and the Vice President of the Court of Appeal Criminal Division) said, amongst other things:

> *"This approach, which was the approach of the Supreme Court in Ivey, makes clear that when Lord Hughes talked in [74] of the "actual state of mind as to knowledge or belief as to the facts" he was referring to all the circumstances known to the accused and not limiting consideration to past facts. All matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard. That will include consideration, where relevant, of the experience and intelligence of an accused. In an example much used in debate on this issue, the visitor to London who fails to pay for a bus journey believing it to be free (as it is, for example, in Luxembourg) would be no more dishonest that (sic) the diner or shopper who genuinely forgets to pay before leaving a restaurant or shop. The Magistrates or jury in such cases would first establish the facts and then apply an objective standard of dishonesty to those facts, with those facts being judged by reference to the usual burden and standard of proof."*

12.38 This was highly supportive and helpful of the position in this case of Mr Nester's genuinely held belief and knowledge at the time.

12.39 In Maxfield Martin v SRA [2022] EWHC 27 (Admin) the Court stated:

"A finding of dishonesty did not necessarily follow from the Tribunal's finding that the factual basis of Allegation 1.1 was established. That is self-evident, but in any event is further demonstrated by the fact that the SRA identified this as a distinct additional allegation (Allegation 1.3) for the Tribunal to consider: see also the similar example of that practice in Raychaudhuri at [32].

It is at this stage of the enquiry that PMM's belief that he had authority to act as he did came potentially into play. Counsel for the SRA recognised this in his concession, recorded at [37.8], which in turn was consistent with the SRA's particulars of dishonesty which included absence of authority as one of the matters relied on. Whilst the concession was expressed by reference to the fact of authority, what matters for this purpose is the belief that he had such authority. This is reflected in the first of the two- stage tests reaffirmed in Ivey; whereby the fact-finding tribunal 'must first ascertain (subjectively) the actual state of the individual's knowledge and belief as to the facts".

On a fair reading of the paragraphs which relate to the Ivey first stage enquiry [37.29- 37.30] the Tribunal identified PMM's state of knowledge and belief as that he (i) believed himself to have been authorised by GGJ to act as he did; but (ii) knew that the declaration by GGJ was false. Accordingly, both those aspects of his state of mind fell for consideration at the second stage of the objective question.

However, when it turned to that question [37.31], the Tribunal gave no real weight to the first of those two findings. It began by taking account of the evidence of PMM's previous good character; but then placed its focus on the fact of PMM's knowledge that the declaration on behalf of GGJ was false. Its consideration of the issue of authority was expressed in the terms of 'notwithstanding the authority [PMM] had"; and took no apparent account of the associated and proper concession of Counsel for the SRA that the issue of authority was a potentially relevant factor in the objective assessment. Thus, in effect it treated PMM's knowledge of the falsity of the declaration (the factual basis of Allegation 1.1) as determinative of the issue of dishonesty raised by Allegation 1.3.

In my judgment it is clear that PMM's belief that he had GGJ's authority to act as he did was potentially relevant to the second stage objective test for dishonesty. This is apparent from the terms of SRA's particulars of dishonesty and the associated concession from Counsel at the hearing. It was particularly so in the circumstances where, as the Tribunal accepted, (i) the evidence showed a pattern whereby GGJ would not complete the declarations himself but would allow and trust others to do so on his behalf and (ii) the contents of the form as they related to PMM and his application for re-accreditation were accurate. This in turn is reflected in the Tribunal's comparative assessment of the evidence of Ms Young."

12.40 Maxfield-Martin demonstrated the importance of a correct application of the first limb of the Ivey test. The Tribunal, in considering Mr Nester's state of mind at the time, should consider his genuinely held belief that he was entitled to act as he did. Further,

a finding of dishonesty did not necessarily follow from the factual findings or Mr Nester's admissions to breaching Principles 2 and 5.

12.41 The Tribunal was referred to Raychaudhuri v GMC [2017] EWHC 2116 (Admin) in which the Court held that a doctor, who completed entries on a patient assessment form before assessing the patient, with the intention of correcting the form once the assessment had taken place, had not acted dishonestly. Mr Goodwin submitted that Mr Nester's case was similar; he had recorded time for work that he later intended to do.

12.42 The Tribunal was referred to the character references submitted on Mr Nester's behalf which, individually and collectively attested that he was a person of honesty, integrity, and trustworthiness.

12.43 Mr Goodwin submitted that for the reasons detailed above, the allegation that Mr Nester's conduct was in breach of Principle 4 and paragraph 1.4 of the Code, should be dismissed.

The Tribunal's Findings

12.44 The Tribunal found that Mr Nester's conduct was in breach of Principles 2 and 5 as alleged on the facts and evidence. The Tribunal found that his admissions in that regard were unequivocal and were properly made. The Tribunal then considered the disputed matters.

12.45 The Tribunal firstly considered what Mr Nester knew at the time of the alleged misconduct. The Tribunal found Mr Nester knew that:

- he had created the time records;
- those time records were not accurate as he had not spent that time doing the work;
- the time recorded was in excess of the time actually spent;
- he should only record time for work which he had already undertaken;
- the time records were misleading as they suggested that he had undertaken work which he had not;
- the firm would believe that he had carried out the work for the time which was recorded on the system; and
- that there was no agreement with the firm that he could record time for work which he had not in fact done.

12.46 Whilst the Tribunal did not doubt that Mr Nester intended to undertake that work on some future date, it did not accept that when creating the time records, Mr Nester genuinely believed that it was permissible to record time for work that he had not done. He had attended internal courses at the Firm and there were documents of which he was aware which made it plain that inaccurate time recording was a disciplinary matter.

Accordingly, the Tribunal did not accept Mr Nester's evidence that he genuinely believed, at the time, that his actions were proper. The Tribunal did not find (contrary to the Applicants submission) that as a consequence of his actions, clients could have potentially been charged for the work he had undertaken. The evidence put before the Tribunal established that the time recorded was for administrative work that would not properly have been charged to clients.

12.47 The Tribunal determined that ordinary and reasonable people would consider that a solicitor who fabricated time on a file, in order to make his employer believe that he had done more work than he actually had, was dishonest. Accordingly, the Tribunal found that Mr Nester's conduct was in breach of Principle 4 as alleged.

12.48 The Tribunal found that the purpose of recording time in the way that he did, was to mislead the Firm as to the actual amount of work undertaken in order to suggest to his employers that he had achieved his time recording target of six and a half chargeable hours per day. Such conduct was clearly in breach of Paragraph 1.4 of the Code as alleged.

12.49 The Tribunal thus found allegation 1 proved in its entirety.

Previous Disciplinary Matters

13. None.

Mitigation

14. Mr Goodwin submitted that Mr Nester was aware that save in exceptional circumstances, a finding of dishonesty would lead to his being struck off the Roll. The Tribunal, in considering whether exceptional circumstances existed should, in accordance with the decision in SRA v Sharma [2010] EWHC 2022 (Admin) examine the nature and the scope of the dishonesty itself; whether it was momentary or over a lengthy period of time; whether it was of benefit to the solicitor, and whether it had an adverse effect on others.

15. Mr Goodwin submitted that the circumstances of Mr Nester's misconduct were exceptional such that they fell into the small residual category of cases where to strike Mr Nester off the Roll would be disproportionate. The circumstances of the misconduct were unique. They had occurred during a period of lockdown due to the Covid 19 pandemic. Mr Nester had explained the chaotic period of time whilst he was working at home in difficult circumstances alongside his wife and children. It was a discreet and isolated period in January 2022. Mr Nester was of hitherto unblemished character with an unblemished regulatory history. He had not attempted to conceal his actions and had positively assisted and volunteered information to the Firm to assist in its investigation of his actions. Mr Goodwin noted that there was no benefit to Mr Nester from his actions. Further, there was no adverse effect. No clients were charged, as the work recorded was for administrative matters that would not be charged to any client.

16. Mr Nester had considered that he was entitled to act as he did. As had been his consistent evidence, he had always intended to undertake the work for which he had recorded time. He recognised that his approach was inappropriate and misguided.

Mr Goodwin submitted that this was supportive of genuine insight and remorse. Mr Nester had accepted his culpability throughout as was evidenced by his admission to breaching Principles 2 and 5.

17. Mr Goodwin submitted that given the unusual and unique circumstances, this was a case where the striking Mr Nester off the Roll would be disproportionate.

Sanction

18. 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. 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.

19. The Tribunal found that Mr Nester's conduct was motivated by his desire to evidence to the Firm that he was working effectively and achieving his daily time recorded hours as expected of him. As he stated in his evidence, he was annoyed that he had not been as productive as would usually be. His actions were planned. He repeated the false time recording across a number of files, in the knowledge that he had not worked the time that he had recorded. He had breached the trust placed in him by the Firm to accurately record the work that he was doing. Mr Nester was solely and wholly in control and responsible for his conduct. Whilst he was a newly qualified solicitor at the time of his misconduct, the Tribunal considered that his lack of experience was not a mitigating factor in his conduct. All solicitors, irrespective of their experience, knew that it was improper to record time for work that had not been performed.

20. The Tribunal accepted that Mr Nester's misconduct had not caused direct harm to clients or to the Firm. The Tribunal also noted that the false file review entries were in fact non-chargeable. However, he had caused damage to the reputation of the profession, as per Coulson J in Sharma:

> *"34. There is harm to the public every time that a solicitor behaves dishonestly. It is in the public interest to ensure that, as it was put in Bolton, a solicitor can be "trusted to the ends of the earth"."*

21. Mr Nester's conduct was aggravated by his proven dishonesty, which was in material breach of his obligation to protect the public and maintain public confidence in the reputation of the profession. It was deliberate, calculated and repeated across a number of files. He had abused the trust placed in him by the Firm to record accurately the time he spent on client matters.

22. In mitigation, the Tribunal accepted that Mr Nester had intended, at some future point, to undertake the work that he had recorded. He had cooperated fully with the Firm's internal investigation and had made admissions to failing to maintain public trust and acting without integrity from the outset. He had self-reported his misconduct to the SRA. His misconduct, whilst repeated, happened over a very short period of time in a previously unblemished career. He had displayed some insight into his misconduct and had offered his apology to the Tribunal, the public and the profession.

23. Given the serious nature of the allegation, the Tribunal considered and rejected the lesser sanctions within its sentencing powers such as no order, a reprimand, or restrictions. The Tribunal had regard to the case of Bolton v Law Society [1994] 2 All ER 486 in which Sir Thomas Bingham stated:

> *".... Lapses from the required standard (of complete integrity, probity and trustworthiness)....may....be of varying degrees. The most serious involves proven dishonesty.... In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced by the solicitor, ordered that he be struck off the roll of solicitors."*

24. The Tribunal did not find any circumstances (including in particular those contained in Mr Goodwins submissions) that were enough to bring Mr Nester in line with the residual exceptional circumstances category referred to in the case of Sharma. The Tribunal reminded itself of the findings of Flaux LJ in SRA v James et al [2018] EWHC 3058 (Admin):

> *"... in my judgment, pressure of work or extreme working conditions whilst obviously relevant, by way of mitigation, to the assessment which the SDT has to make in determining the appropriate sanction, cannot either alone or in conjunction with stress or depression, amount to exceptional circumstances. Pressure of work or of working conditions cannot ever justify dishonesty by a solicitor ..."*

25. The Tribunal did not consider that Mr Nester's working conditions, or the concerns that he had for the health of members of his family at the time, were sufficient to be classed as exceptional. Nor did those issues relate in some way to his dishonest conduct.

26. The Tribunal decided that in view of the serious nature of the misconduct, in that it involved dishonesty, the only appropriate and proportionate sanction was to strike Mr Nester off the Roll of Solicitors.

Costs

27. The parties agreed costs in the sum of £8,000. The parties agreed that this amount was reasonable and proportionate.

28. Mr Goodwin submitted that Mr Nester was currently unemployed. He had dependent children and a significant amount of debt. Further, Mr Nester had no assets. Mr Nester had submitted his statement of means, evidencing his financial position. The Tribunal was referred to Barnes v SRA The appropriate order was dependent upon the Tribunal's sanction. Were Mr Nester to be struck off the Roll, he would no longer be able to work in the profession. In those circumstances, No Order for costs would be appropriate. The Tribunal was further referred to the decision in Barnes v SRA [2022] EWHC 677 (Admin) where it was held that the Tribunal should not make an order for costs where it was unlikely to ever be satisfied on any reasonable assessment of Mr Nester's current or future circumstances. Alternatively, if the Tribunal determined that a costs order was appropriate, such order should not be enforced without the leave of the Tribunal.

29. Mr Bullock submitted that if Mr Nester was without means and without means of securing employment because of the Tribunal's sanction, that did not mean that the costs of the proceedings should be thrown back on to the profession. The Applicant should be able to be a creditor in any IVA. The agreed costs were an accurate and fair figure for the costs of these proceedings.

30. The Tribunal found that the quantum claimed by the Applicant and agreed by the Respondent was reasonable and proportionate. The Tribunal considered Mr Nester's means. It noted the significant amount of debt that he owed, and that he was unemployed. The Tribunal determined that was no reasonable prospect of his being able to pay the costs given his current and his likely future circumstances. Accordingly, and in line with Barnes, the Tribunal determined that the appropriate costs order was to make No Order as to costs.

Statement of Full Order

31. The Tribunal ORDERED that the Respondent, MATTHEW NESTER solicitor, be STRUCK OFF the Roll of Solicitors and it further Ordered that there be No Order as to costs.

Dated this 7th day of March 2024
On behalf of the Tribunal

E Nally

E Nally
Chair

JUDGMENT FILED WITH THE LAW SOCIETY
07 March 2024