SDT Solicitors Disciplinary Tribunal

Guidance Note on Sanctions

10th Edition

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CONTENTS

	PAGE NUMBER
INTRODUCTION	**2**
A. PRINCIPLES AND PROCEDURE	**3-6**
SANCTIONS AND ORDERS AVAILABLE TO THE TRIBUNAL	
Solicitors	3
Solicitors' employees	4
PURPOSE OF SANCTIONS AND TRIBUNAL'S APPROACH	5
HUMAN RIGHTS, EQUALITY, DIVERSITY AND INCLUSION	5-6
COMMON PROCEDURAL ISSUES AFFECTING SANCTION	7-8
Admission, but dispute as to facts	7
Multiple/alternative allegations	7
Sanction for each separate and distinct allegation	8
B. DETERMINING SANCTION	**9-18**
ASSESSING SERIOUSNESS	9
Culpability	9
Harm	9-10
Aggravating Factors	11
Mitigating Factors	11-12
PARTICULAR SANCTIONS	12-18
No order	12
Reprimand	12
Fine	12-14
Level of Fine	13
Indicative Fine Bands	14
Restriction Order	14-15
Suspension	15-16
Suspended Term of Suspension	16
Fixed Term of Suspension	17
Indefinite Suspension	17
Striking off the Roll of Solicitors	18
Sanction in respect of a Registered European Lawyer (REL) or Registered Foreign Lawyer (RFL)	
C. DISHONESTY	**19-20**
Exceptional Circumstances	19
Absence of Dishonesty	20
Misappropriation of client money falling short of Dishonesty	120
D. PERSONAL MITIGATION	**21**
E. COSTS	**22-26**
Costs against Respondent: allegations admitted/proved	22-23
Costs against Respondent: some allegations not proved	23-24
Costs against Applicant	24-26

INTRODUCTION

This Guidance Note consists of a distillation of current Solicitors Disciplinary Tribunal ("the Tribunal") sanctioning principles brought together in one document. Every case is fact-specific, and this Guidance Note consists of guidelines only; it is not intended in any way to fetter the discretion of the Tribunal when deciding sanction. The exercise of its powers and the imposition of sanctions are matters solely for determination by the Tribunal. The purpose of this Guidance Note is to assist the parties, the public and the legal profession in understanding the Tribunal's decision-making process.

The Tribunal is the statutory tribunal responsible for adjudicating upon applications and complaints made under the provisions of the Solicitors Act 1974 (as amended) ("the Act").

It is the function of the Tribunal to protect the public from harm, and to maintain public confidence in the reputation of the legal profession (and those that provide legal services) for honesty, probity, trustworthiness, independence and integrity. The public must be able to expect to receive a high standard of service from a competent and capable solicitor.

The Tribunal deals with an infinite variety of cases. Prescriptive, detailed guidelines for sanctions in individual cases are neither practicable nor appropriate. The Tribunal adopts broad guidance. Its focus is to establish the seriousness of the misconduct and, from that, to determine a fair and proportionate sanction.

The contents of the Guidance Note are reviewed at least annually.

This edition of the Guidance Note is in force from 20 June 2022.

SECTION A: PRINCIPLES AND PROCEDURE

SANCTIONS AND ORDERS AVAILABLE TO THE TRIBUNAL

Solicitors

1. The Tribunal's jurisdiction and powers on an application are set out in Section 47 of the Act and include:

    - the imposition of a reprimand.
    - the imposition of an unlimited financial penalty payable to HM Treasury.
    - the imposition of restrictions upon the way in which a solicitor can practise (not explicitly listed in Section 47, but implied by the words "the Tribunal shall have power to make such order as it may think fit" in the preamble to that Section, and see **Camacho v The Law Society [2004] EWHC 1675 (Admin)**).
    - suspension from practice indefinitely or for a specified period or a suspended suspension.
    - striking off the Roll.

2. The Tribunal is not restricted as to the number or combination of sanctions which it may impose.

3. Other orders which the Tribunal can make in respect of solicitors or former solicitors include:

    - no order.
    - termination of a period of suspension (see separate "Guidance Note On Other Powers of the Tribunal").
    - restoration to the Roll following strike off (see separate "Guidance Note On Other Powers of the Tribunal").
    - costs.

Solicitors' non-lawyer employees and managers

4. By Section 43 (1) and (1A) of the Act the Tribunal has jurisdiction to deal with misconduct by those who are not admitted but are employed or remunerated by solicitors and others. The powers which the Tribunal may exercise in respect of such individuals are:

   - no order.

   - to make an order prohibiting, save with the prior consent of the regulator, any solicitor and others from employing or remunerating the person to whom the order relates, or from being a manager or having an interest in a recognised body.

   - to review or revoke a Section 43 Order (see separate Guidance Note on Other Powers of the Tribunal).

5. Under S34A (2) and (3) of the Act there is provision for complaint to be made to the Tribunal in respect of an employee of a solicitor. The Tribunal's powers have been extended by Section 47(2E) of the Act. The Tribunal's powers in respect of complaints by the Solicitors Regulation Authority Ltd (SRA Ltd) concerning managers and employees of recognised bodies have been extended by an amendment by the Legal Services Act 2007 to Schedule 2 to the Administration of Justice Act 1985. When considering these matters the Tribunal has the power to make one or more of the following:

   - an order directing payment of an unlimited financial penalty payable to HM Treasury.

   - an order requiring the SRA Ltd to consider taking such steps as the Tribunal may specify in relation to the individual.

   - if the individual is not a solicitor, a Section 43(2) Order.

   - an order requiring the SRA Ltd to refer to an appropriate regulator any matter relating to the conduct of that employee.

6. The Tribunal has the power to make one or more of the following in respect of complaints made to the Tribunal concerning a recognised body:

   - an order revoking the recognition of the recognised body.

   - an order requiring the payment of a penalty by the recognised body.

PURPOSE OF SANCTIONS

7. The case of **Bolton v The Law Society [1994] 1 WLR 512** sets out the fundamental principle and purposes of the imposition of sanctions by the Tribunal:

> "Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal."
>
> "... a penalty may be visited on a solicitor ... in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way ..."
>
> "... to be sure that the offender does not have the opportunity to repeat the offence; and"
>
> "... the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth ... a member of the public ... is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires." (per Bingham, then Master of the Rolls)

TRIBUNAL'S APPROACH TO SANCTION

8. Guidance on the Tribunal's approach to sanction is set out in **Fuglers and Others v Solicitors Regulation Authority [2014] EWHC 179** (per Popplewell J) as follows:

> "28. There are three stages to the approach... The first stage is to assess the seriousness of the misconduct. The second stage is to keep in mind the purpose for which sanctions are imposed by such a tribunal. The third stage is to choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question."

HUMAN RIGHTS, EQUALITY, DIVERSITY AND INCLUSION

9. The Tribunal is a "public authority" for the purposes of the Human Rights Act 1998, and it seeks to uphold and promote the principles of the European Convention on Human Rights in accordance with the Act. In deciding what sanction, if any, to impose the Tribunal should have regard to the principle of proportionality, weighing the interests of the public with those of the practitioner. The interference with the solicitor's right to practise must be no more than necessary to achieve the Tribunal's purpose in imposing

sanctions. Reasons should be given for the sanction imposed, and the decision should usually be pronounced publicly.

10. The Tribunal is committed to equality of opportunity and aims to treat everyone who appears before it fairly and with respect, regardless of their background. Its processes and procedures are designed to be fair, objective, inclusive, transparent and free from unlawful discrimination. Tribunal Members and everyone acting for the Tribunal are expected to adhere to the spirit and letter of the Equality Act 2010 and other equality legislation.

COMMON PROCEDURAL ISSUES AFFECTING SANCTION

Admission, but dispute as to facts

11. A respondent may admit the alleged misconduct but dispute particular details. The Tribunal will hear from the parties to determine whether in its view the disputed evidence would materially affect its sanction. If not, the Tribunal will proceed to determine sanction on the respondent's version of events. Where the dispute is such that it would materially affect sanction the Tribunal shall decide, having heard all the evidence, the factual basis upon which sanction will be based.

12. The Tribunal adopts the principle established in **R v Newton [1983] Crim LR 198**, and will only impose sanction upon a respondent where the particular misconduct is either admitted by, or proved against the respondent.

13. If at a hearing to establish the facts on which sanction is to be based (a "Newton hearing"), the respondent fails to adduce evidence in support of facts exclusively within his knowledge, this will entitle the Tribunal to draw such inference from that failure as it might see fit: **R v Underwood [2005] 1 Cr.App.R. 13.**

14. Once the factual basis has been established, the respondent will have the opportunity to make representations as to the level of sanction to be imposed before the Tribunal makes its final decision.

Multiple/Alternative allegations

15. Multiple allegations involving essentially the same wrongdoing committed concurrently and drafted in the alternative, or numerous similar examples of wrongdoing committed over a period of time, sometimes come before the Tribunal. When some or all of such allegations are found proved, it may be disproportionate and unjust to impose a sanction for each matter. In such a situation the Tribunal may in respect of matters found proved:

- impose a sanction, determined by the totality of the misconduct, which is specified as being in respect of all those matters; or

- impose a sanction on the more serious allegation/s, and make no separate order (or sanction) in respect of other more minor matters.

Sanction for each separate and distinct allegation

16. Where distinct and separate allegations are either admitted or proved, the Tribunal may:

- impose a particular sanction (determined by the totality of the misconduct) specified as being in respect of all matters; or

- determine the individual seriousness of each separate and distinct proven allegation, and the appropriate sanction in respect of each. Sanctions imposed will be proportionate to the totality of the misconduct.

SECTION B: DETERMINING SANCTION

The starting point in determining sanction is to establish the seriousness of the allegation proved. The Tribunal will determine which of the sanction thresholds have been crossed, working from the lowest sanction upwards.

In determining seriousness the Tribunal must consider the respondent's culpability for their conduct and the harm caused or the harm that was intended or might reasonably be foreseen to have been caused by their actions.

When the Tribunal has identified the starting point it can add to or reduce this to reflect any aggravating or mitigating features which impact on the culpability of the respondent and harm caused to reach a provisional sanction.

On reaching a provisional sanction the Tribunal should take appropriate account of personal mitigation of the respondent before coming to a final decision.

The following list of factors is not exhaustive. Each case must be determined on its own facts and merits. Where a factor is considered to reach a decision on seriousness, it should not be considered again in deciding aggravating factors.

ASSESSING SERIOUSNESS

17. The Tribunal will assess the seriousness of the misconduct in order to determine which sanction to impose. Seriousness is determined by a combination of factors, including:

- the respondent's **level of** culpability for their misconduct.
- the harm caused by the respondent's misconduct.
- the existence of any aggravating factors.
- the existence of any mitigating factors.

Culpability

18. The level of culpability ("responsibility for fault or wrong") will be influenced by such factors as (but not limited to):

- the respondent's motivation for the misconduct.
- whether the misconduct arose from actions which were planned or spontaneous.

- the extent to which the respondent acted in breach of a position of trust.

- the extent to which the respondent had direct control of or responsibility for the circumstances giving rise to the misconduct.

- the respondent's level of experience.

- whether the respondent deliberately misled the regulator (**Solicitors Regulation Authority v Spence [2012] EWHC 2977 (Admin)**).

Harm

19. The Tribunal will determine the harm caused by the misconduct and in doing will assess:

- the impact of the respondent's misconduct upon those directly or indirectly affected by the misconduct the public, and the reputation of the legal profession. The greater the extent of the respondent's departure from the "complete integrity, probity and trustworthiness" expected of a solicitor, the greater the harm to the legal profession's reputation.

- the extent of the harm that was intended or might reasonably have been foreseen to be caused by the respondent's misconduct.

Aggravating Factors[1]

20. Factors that aggravate the seriousness of the misconduct include (but are not limited to):

- dishonesty, where alleged and proved.

- misconduct involving the commission of a criminal offence, not limited to dishonesty.

- misconduct which was deliberate and calculated or repeated.

- misconduct continuing over a period of time.

- taking advantage of a vulnerable person including deliberate targeting of a vulnerable person.

- misconduct motivated by, or demonstrating hostility, based on any protected or personal characteristics of a person.

[1] Aggravating Factors should be considered individually and are not set out in any order of seriousness

- abuse of power or position of authority.
- misconduct involving violence, bullying; coercion by the respondent and/or a sexual element.
- concealment of wrongdoing.
- placing the blame for the misconduct on others (including other respondents in the proceedings) when the Tribunal has found that the respondent was responsible for the misconduct.
- misconduct where the respondent knew or ought reasonably to have known that the conduct complained of was in material breach of obligations to protect the public and the reputation of the legal profession.
- previous disciplinary matter(s) before the Tribunal where allegations were found proved.

Mitigating Factors[2]

21. Factors that mitigate the seriousness of the misconduct itself include (but are not limited to):

- misconduct resulting from deception; coercion or otherwise by a third party (including the client and/or any other respondent in these proceedings).
- the timing of and extent to which any loss arising from the misconduct is made good by the respondent.
- whether the respondent voluntarily notified the regulator of the facts and circumstances giving rise to misconduct.
- whether the misconduct was either a single episode, or one of very brief duration in a previously unblemished career.
- genuine insight, assessed by the Tribunal on the basis of facts found proved and the respondent's evidence.
- open and frank admissions at an early stage and/or degree of cooperation with the investigating body.

[2] Mitigating Factors should be considered individually and are not set out in any order of weight

NOTE: Matters of purely personal mitigation are of no relevance in determining the seriousness of the misconduct. However, they will be considered by the Tribunal when determining the fair and proportionate sanction (see Section D, paragraphs 61 and 62).

PARTICULAR SANCTIONS

22. Having determined the seriousness of the misconduct, the Tribunal will assess whether to make an order, and if so, which sanction to impose. The Tribunal, in making this assessment, will start from the least serious option.

No Order

23. The Tribunal may conclude that, having regard to all the circumstances, and where the Tribunal has concluded that the level of seriousness of the misconduct or culpability of the respondent is low, that it would be unfair or disproportionate to impose a sanction. In such circumstances, the Tribunal may decide not to impose a sanction, save for an order for costs.

Reprimand

24. A Reprimand will be imposed where the Tribunal has determined that the seriousness of the respondent's misconduct justifies a sanction at the lowest level and that the protection of the public and the reputation of the legal profession does not require a greater sanction.

25. Relevant factors may include:

- the respondent's culpability is low.
- there is no identifiable harm caused to any individual.
- the risk of any such harm is negligible.
- the likelihood of future misconduct of a similar nature or any misconduct is very low.
- evidence of genuine insight, assessed by the Tribunal on the basis of facts found proved and the respondent's evidence.
- minor breaches of regulation not dealt with under the SRA Ltd's own disciplinary jurisdiction.

Fine

26. A Fine will be imposed where the Tribunal has determined that the seriousness of the misconduct is such that a Reprimand will not be a sufficient sanction, but neither the protection of the public nor the protection of the reputation of the legal profession justifies Suspension or Strike Off.

Level of Fine

27. The Tribunal will consider the following guidance in determining the appropriate level of Fine or combination of Fines to be imposed upon an individual and/or an entity:

- there is no limit to the level of Fine the Tribunal may impose. In deciding the level of Fine, the Tribunal will consider all the circumstances of the case, including aggravating and mitigating factors. The Tribunal will fix the Fine at a level which reflects the seriousness of and is proportionate to the misconduct.

- the respondent shall be expected to adduce evidence that their ability to pay a Fine is limited by their means (please refer to Practice Direction No. 6, clause 13 for cases issued prior to 24 November 2019 or Rule 43(5) of the Solicitors (Disciplinary Proceedings) Rules 2019 for cases issued on or after 25 November 2019; the terms of Standard Directions and/or specific Directions ordered by the Tribunal in the case).

- the factors to be considered include those outlined by Popplewell J at paragraph 35 of **Fuglers** (above), which may result in movement of the level of fine up or down the Indicative Fine Bands below. The Indicative Fine Bands provide broad starting points only. Factors to be considered include: (1) whether the seriousness of the misconduct, and giving effect to the purpose of the sanction, puts the case at or near the top, middle or bottom of the category (2) the level of fines imposed by other disciplinary tribunals or the High Court in analogous cases (3) the size or standing of the solicitor or firm in question (4) the means available to an individual or a firm. In considering means it is relevant to take into account the total financial detriment which is suffered, including any costs order, and any adverse financial impact of the decision itself.

28. In the absence of **evidence** of limited means, the Tribunal is entitled to assume that the respondent's means are such that they can pay the Fine which the Tribunal decides is appropriate.

29. Fines are payable to HM Treasury, which is responsible for enforcing payment, including the agreement of instalment terms.

Indicative Fine Bands (for individuals)

Fine Band	Overall Assessment of Seriousness of Conduct	Fine Range
Level 1	Lowest level for conduct assessed as sufficiently serious to justify a fine (rather than a reprimand)	£0-£2,000
Level 2	Conduct assessed as moderately serious	£2,001-£7,500
Level 3	Conduct assessed as more serious	£7,501-£15,000
Level 4	Conduct assessed as very serious	£15,001-£50,000
Level 5	Conduct assessed as significantly serious but not so serious as to result in an order for suspension or strike off	£50,001 - unlimited

30. In determining the appropriate Fine for a firm the Tribunal will take into account the factors set out at paragraph 28 above. Any Fine imposed must be proportionate to the wrongdoing and be sufficient to meet the primary objectives of sanctions, including punishment for the firm, and being a meaningful deterrent for the profession. The Tribunal will also take into consideration:

- the seriousness of the misconduct.
- the size and financial resources of the firm and the effect of a Fine on its business. This assessment of resources should include considering the amount of revenue generated by the firm; the level of profitability per partner or registered individual and market share.
- the loss to clients.
- any income generated by the misconduct.

Restriction Order

31. A Restriction Order may be combined with any other sanction made by the Tribunal.

32. The Tribunal, in exercising its wide power to "make such order as it may think fit", may if it deems it necessary to protect the public, impose restrictions in the form of conditions upon the way in which a solicitor continues to practise. If the conditions are for an indefinite period it must be part of the order that the solicitor subject to the condition(s) has liberty to apply to the Tribunal to vary or discharge the conditions. Any breach of conditions imposed by the Tribunal would be a disciplinary offence which would generally merit a separate penalty. See in particular **Ebhogiaye v Solicitors Regulation Authority [2013] EWHC 2445 (Admin).**

33. Restricted practice will only be ordered if it is necessary to ensure the protection of the public and the reputation of the legal profession from future harm by the respondent.

34. A Restriction Order may be for either a finite or an indefinite period.

35. If the Tribunal makes an order for an indefinite period, it will specify as part of the order that the respondent may apply to the Tribunal to vary or rescind the restrictions either at any time or after the lapse of a defined period.

36. Examples of restrictions that may be imposed are as follows:
The respondent may not:

- practise as a sole practitioner or sole manager or sole owner of an authorised or recognised body.
- be a partner or member of a Limited Liability Partnership (LLP), Legal Disciplinary Practice (LDP) or Alternative Business Structure (ABS) or other authorised or recognised body.
- be a Compliance Officer for Legal Practice or a Compliance Officer for Finance and Administration.
- hold client money.
- be a signatory on any client account.
- work as a solicitor other than in employment approved by the SRA Ltd.

37. In imposing any restriction the Tribunal must consider that restriction necessary and appropriate. The restrictions imposed should relate to the particular misconduct of the respondent If the Tribunal is considering imposing restrictions upon any respondent it should hear submissions from the respondent(s) in relation to the restrictions it is considering before imposing any such restrictions (**Manak v Solicitors Regulation Authority [2018] EWHC 1958 (Admin))**

Suspension

38. Suspension from the Roll will be the appropriate penalty where the Tribunal has determined that:

- the seriousness of the misconduct is such that neither a Restriction Order, Reprimand nor a Fine is a sufficient sanction or in all the circumstances appropriate.

- there is a need to protect both the public and the reputation of the legal profession from future harm from the respondent by removing their ability to practise, but

- neither the protection of the public nor the protection of the reputation of the legal profession justifies striking off the Roll.

- public confidence in the legal profession demands no lesser sanction.

- professional performance, including a lack of sufficient insight by the respondent (judged by the Tribunal on the basis of facts found proved and the respondent's evidence), is such as to call into question the continued ability to practise appropriately.

39. Suspension from the Roll, and thereby from practice, reflects serious misconduct.

40. Suspension can be for a fixed term or for an indefinite period. A term of suspension can itself be temporarily suspended.

Suspended Term of Suspension

41. Where the Tribunal concludes that the seriousness of the misconduct justifies suspension from the Roll, but it is satisfied that:

    - by imposing a Restriction Order, the risk of harm to the public and the public's confidence in the reputation of the legal profession is proportionately constrained; and

    - the combination of such an Order with a period of pending Suspension provides adequate protection and addresses the risk of harm to the public and the need to maintain the reputation of the profession

    the Tribunal must suspend that period of suspension for so long as the Restriction Order remains in force (**SRA v Dar [2019] EWHC 2831 (Admin)**).

42. If the Restriction Order referred to above is breached, activation by the Tribunal of the term of suspension may follow.

43. In accordance with the guidance set out in **Solicitors Regulation Authority v James et al [2018] EWHC 3058 (Admin)** if the Tribunal imposes a suspended suspension the Tribunal should make clear that the suspension will be activated if further misconduct is committed.

44. If the period under restriction is successfully completed and the Restriction Order lifted, the pending suspension will cease to have effect.

Fixed Term of Suspension

45. Having concluded that the respondent should be immediately removed from practice, but that the protection of the public and the protection of the reputation of the legal profession do not require that they be struck off the Roll, the Tribunal will fix a term of suspension of such length both to punish and deter whilst being proportionate to the seriousness of the misconduct.

46. The Tribunal can also impose a staged order with a fixed term of suspension followed by a period of restricted practice under a Restriction Order.

Indefinite Suspension

47. Indefinite Suspension marks the highest level of misconduct that can appropriately be dealt with short of striking off the Roll. In deciding that an indefinite period of suspension is the fair and proportionate sanction, the Tribunal will have formed the view that:

- the seriousness of the misconduct is so high that striking off is the most appropriate sanction; **but**

- the presence of truly compelling and exceptional personal mitigation makes that course of action unjust; **and/or**

- there is a realistic prospect that the respondent will recover from, for example, illness, addiction, relevant medical condition etc. or respond to retraining so that they no longer represent a material risk of harm to the public or to the reputation of the profession.

Striking Off the Roll

48. Where the Tribunal has determined that:

- the seriousness of the misconduct is at the highest level, such that a lesser sanction is inappropriate; and

- the protection of the public and/or the protection of the reputation of the legal profession requires it

the Tribunal will strike a solicitor's name off the Roll.

Sanction In Respect of a Registered European Lawyer (REL) or Registered Foreign Lawyer (RFL)

49. RELs and RFLs are individuals registered with the SRA under applicable legislation. They are subject to the same rules of professional conduct and regulatory and disciplinary regime as apply to solicitors. The powers of the Tribunal in relation to sanction apply to RELs and RFLs. It should be noted that the Tribunal's powers to sanction a REL include additionally the withdrawal or suspension of their registration (see Section 26(2), The European Communities (Lawyer's Practice) Regulations 2000 as amended by The Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2020).

50. The sanction of withdrawal of registration in respect of a REL "possesses a gravity that lies between the sanctions of suspension and/or strike-off in the case of an English solicitor" (per Laws LJ in **Giambrone v Solicitors Regulation Authority [2014] EWHC 1421 (Admin)** at paragraph 55 and also paragraph 60 per Foskett J).

SECTION C: DISHONESTY

51. Some of the most serious misconduct involves dishonesty, whether or not leading to criminal proceedings and criminal penalties. A finding that an allegation of dishonesty has been proved will almost invariably lead to striking off, save in exceptional circumstances (see **Solicitors Regulation Authority v Sharma [2010] EWHC 2022 (Admin)**).

Exceptional Circumstances

52. In considering what amounts to exceptional circumstances: relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary, or over a lengthy period of time; whether it was a benefit to the solicitor, and whether it had an adverse effect on others." (**Sharma** above). The exceptional circumstances must relate in some way to the dishonesty (**James** above).

53. The principal focus in determining whether exceptional circumstances exist is on the nature and extent of the dishonesty and the degree of culpability (**Sharma** and **R (Solicitors Regulation Authority) v Imran [2015] EWHC 2572 (Admin))**.

54. As a matter of principle nothing is excluded as being relevant to the evaluation, which could therefore include personal mitigation**.** In each case the Tribunal must when evaluating whether there are exceptional circumstances justifying a lesser sanction, focus on the critical questions of the nature and extent of the dishonesty and degree of culpability and engage in a balancing exercise as part of that evaluation between those critical questions on the one hand and matters such as personal mitigation, health issues and working conditions on the other. (**James** above)**.**

55. Where dishonesty has been found mental health issues, specifically stress and depression suffered by the solicitor as a consequence of work conditions or other matters are unlikely without more to amount to exceptional circumstances:

> "The SDT having concluded that, notwithstanding mental health issues, each of the respondents was dishonest, I consider that it was contrary to principle for it then to conclude that those mental health issues could amount to exceptional circumstances".
>
> "....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...." per Flaux LJ in **James** (above).

Absence of Dishonesty

56. Striking off can be appropriate in the absence of dishonesty where, amongst other things:

- the seriousness of the misconduct is itself very high; and
- the departure by the respondent from the required standards of integrity, probity and trustworthiness is very serious.

57. In such cases, the Tribunal will have regard to the overall facts of the misconduct, and in particular the effect that allowing the respondent's name to remain on the Roll will have upon the public's confidence in the reputation of the legal profession - see in particular **Solicitors Regulation Authority v Emeana, Ijewere and Ajanaku [2013] EWHC 2130 (Admin).**

Misappropriation of client money falling short of Dishonesty

58. The Tribunal regards the breach of the absolute obligation to safeguard client money, which is quite distinct from the solicitor's duty to act honestly, as extremely serious.

59. The dishonest misappropriation of client money will invariably lead to strike off.

60. Strike off can be appropriate in the absence of dishonesty. Where a respondent's failure properly to monitor client money leads to its misappropriation or misuse by others, such a serious breach of the obligation could warrant striking off.

> "....the tribunal had been at pains to make the point, which was a good one, that the solicitors' accounts rules existed to afford the public maximum protection against the improper and unauthorised use of their money and that, because of the importance attached to affording that protection and assuring the public that such protection was afforded, an onerous obligation was placed on solicitors to ensure that those rules were observed" per Bingham LCJ in **Weston v Law Society [1998]** Times, 15th July.

SECTION D: PERSONAL MITIGATION

61. Before finalising sanction, consideration will be given to any particular personal mitigation advanced by or on behalf of the respondent. The Tribunal will have regard to the following principles:

> "Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. .... All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears, likely to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price." (Bolton above).

62. Particular matters of personal mitigation that may be relevant and may serve to reduce the nature of the sanction, and/or its severity include that:

- the misconduct arose at a time when the respondent was affected by physical or mental ill-health that affected his ability to conduct himself to the standards of the reasonable solicitor. Such mitigation must be supported by medical evidence from a suitably qualified practitioner.

- the respondent was an inexperienced practitioner and was inadequately supervised by his employer.

- the respondent made prompt admissions and demonstrated full cooperation with the regulator.

SECTION E: COSTS

63. The Tribunal has the power to make such order as to costs as it thinks fit, including the payment by any party of costs or a contribution towards costs of such amount (if any) as the Tribunal may consider reasonable (Section 47 of the Act). Such costs are those arising from or ancillary to proceedings before the Tribunal.

64. The Tribunal may make an order for the payment of a fixed amount of costs. This will be the usual order of the Tribunal where the parties are in agreement as to the liability for, and the amount of, those costs. Otherwise, the Tribunal will determine liability for costs, and either summarily assess those costs itself or refer the case for detailed assessment by a Costs Judge.

Costs against Respondent: allegations admitted/proved

General considerations

65. The Tribunal, in considering the respondent's liability for the costs of the applicant, will have regard to the following principles, drawn from **R v Northallerton Magistrates Court, ex parte Dove (1999) 163 JP 894**:

- it is not the purpose of an order for costs to serve as an additional punishment for the respondent, but to compensate the applicant for the costs incurred by it in bringing the proceedings and

- any order imposed must never exceed the costs actually and reasonably incurred by the applicant.

66. Before making any order as to costs, the Tribunal will give the respondent the opportunity to adduce financial information and make submissions. A respondent is not entitled as of right to an adjournment to produce evidence of means and the granting of an adjournment, which is at the Tribunal's discretion, may increase the overall costs awarded against the respondent. Respondents should therefore strictly comply with Practice Direction No. 6 for cases issued prior to 24 November 2019 or Rule 43(5) of the Solicitors (Disciplinary Proceedings) Rules 2019 for cases issued on or after 25 November 2019 and case-specific directions regarding the provision of evidence of means:

> "If a solicitor wishes to contend that he is impecunious and cannot meet an order for costs, or that its size should be confined, it will be up to him to put before the Tribunal sufficient information to persuade the Tribunal that he lacks the means to meet an order for costs in the sum at which they would other-wise arrive. ... where a solicitor admits the disciplinary charges brought against him, and who therefore anticipates the imposition of a sanction upon him, it should be

incumbent upon him before the hearing to give advance notice to the SRA and to the Tribunal that he will contend either that no order for costs should be made against him, or that it should be limited in amount by reason of his own lack of means. He should also supply to the SRA and to the Tribunal, in advance of the hearing, the evidence upon which he relies to support that contention" (**Solicitors Regulation Authority v Davis and McGlinchey [2011] EWHC 232 (Admin)** per Mitting J and **Agyeman v Solicitors Regulation Authority [2012] EWHC 3472 (Admin)**).

67. A respondent will be expected to adduce evidence that their ability to pay costs is limited by their means (please refer to Practice Direction No. 6, clause 13 for cases issued prior to 24 November 2019 or Rule 43(5) of the Solicitors (Disciplinary Proceedings) Rules 2019 for cases issued on or after 25 November 2019; the terms of Standard Directions and/or specific Directions ordered by the Tribunal in the case).

68. The Tribunal should not make an order for costs where it is unlikely ever to be satisfied on any reasonable assessment of the respondent's current or future circumstances (**Barnes v SRA Ltd [2022] EWHC 677 (Admin)**).

69. Where the Tribunal decides that the respondent is, notwithstanding their limited means, properly liable for the applicant's costs (either in full or in part) and is satisfied that there is a reasonable prospect that, at some time in the future, their ability to pay those costs will improve, it may order the respondent to meet those costs but direct that such order is not to be enforced without leave of the Tribunal. Such orders will not be granted as a matter of course. A respondent must always provide evidence of means in support of an application for an order that any costs awarded by the Tribunal to the SRA should not be enforced without leave of the Tribunal. It should be noted that costs may be increased by an application by the SRA to enforce the same.

Costs against Respondent: some or all allegations not proved

70. Where the respondent is partially successful in defending the allegations pursued by the applicant, in considering the respondent's liability for costs the Tribunal will have regard to the following factors:

- the reasonableness of the applicant in pursuing an allegation on which it was unsuccessful.
- the manner in which the applicant pursued the allegation on which it was unsuccessful and its case generally.
- the reasonableness of the allegation, that is, was it reasonable for the applicant to pursue the allegation in all the circumstances.

- the extra costs in terms of preparation for trial, witness statements and documents and so on, taken up by pursuing the allegation upon which the applicant was unsuccessful.
- the extra Tribunal time taken in considering the unsuccessful allegation.

- the extent to which the allegation was inter-related in terms of evidence and argument with those allegations in respect of which the applicant was successful.

- the extra costs borne by the respondent in defending an allegation which was not found to be proved.

71. The Tribunal may award costs against a respondent even if it makes **no** finding of misconduct. In considering what costs to order, if any, the Tribunal will consider all relevant matters including the conduct of the parties.

72. The Tribunal must also take into account the decision of **Broomhead v Solicitors Regulation Authority [2014] EWHC 2772 (Admin)**, in which Mr Justice Nicol stated as follows:

> "42. However, while the propriety of bringing charges is a good reason why the SRA should not have to pay the solicitor's costs, it does not follow that the solicitor who has successfully defended himself against those charges should have to pay the SRA's costs. Of course there may be something about the way the solicitor has conducted the proceedings or behaved in other ways which would justify a different conclusion. Even if the charges were properly brought it seems to me that in the normal case the SRA should have to shoulder its own costs where it has not been able to persuade the Tribunal that its case is made out. I do not see that this would constitute an unreasonable disincentive to take appropriate regulatory action."

Costs against Applicant

73. The circumstances in which costs should be awarded against the regulator (where that is the applicant in a particular case) were addressed by the Supreme Court in **CMA v Flynn Pharma Ltd [2022] UKSC 14** at [22] as follows:

> "... In its written intervention, the SRA points out that it undertakes about 120-130 prosecutions a year. It is funded predominantly by practising certificate fees and other fees paid by the solicitors' profession. Although, following Baxendale-Walker, it is not usually subject to an adverse costs order where the solicitor is successful, it does usually recover its costs from the unsuccessful solicitor when the Disciplinary Tribunal upholds the complaint. These costs can be considerable

and if they were not recovered by the SRA from the unsuccessful solicitor, the costs would have to be borne by the profession. I recognise the importance of the Baxendale-Walker authority for the continued proper functioning of the SRA and I do not regard this judgment as casting any doubt on the correctness of that decision."

74. The starting point adopted by the Tribunal in considering whether costs should be awarded against the regulator (where that is the applicant in a particular case) is:

> "In respect of costs, the exercise of its regulatory function placed the Law Society in a wholly different position from that of a party to ordinary civil litigation. Unless a complaint was improperly brought or, for example, had proceeded as a "shambles from start to finish", when the Law Society was discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs followed the event" (per Laws LJ, **Baxendale-Walker v The Law Society [2007] EWCA Civ 233**).

75. Where a respondent seeks to pursue an application for costs against the regulator, the Tribunal will have regard to the following principles:

- an order that the applicant pay a successful respondent's costs on the grounds that costs follow the event should not ordinarily be made on that basis alone.
- there is no assumption that such an order will automatically follow.
- "to expose a regulator to the risk of an adverse costs order simply because it properly brought proceedings which were unsuccessful might have a chilling effect upon its regulatory function" (per **Baxendale-Walker**, above).

76. The Tribunal will consider the balance to be struck between:

- the financial prejudice to the successful respondent in the particular circumstances if an order for costs is not made in their favour; and
- "the need for a regulator to make and stand by honest, reasonable and apparently sound decisions made in the public interest without fear of exposure to undue financial prejudice if unsuccessful" (per Bingham LCJ, **Bradford MDC v Booth (2000) 164 JP 485 DC**).

77. The Tribunal may also take account of the decision in **Perinpanathan v Westminster Magistrates Court [2010] EWCA Civ 40** which requires the Tribunal to examine the

conduct of the applicant so as to consider whether its conduct had been unreasonable or otherwise justified a costs order being made against it.

78. Where a respondent seeks to pursue an application for costs against a non-SRA (lay) applicant, the Tribunal will have regard to the fact that once a case to answer has been certified by the Tribunal there is a public interest in such proceedings continuing irrespective of the identity of the prosecutor (**Greene v Davies [2022] EWCA Civ 414**).

79. The Tribunal will receive submissions from the parties at the substantive hearing and will adjourn the hearing insofar as it relates to costs only for that purpose if necessary (but see paragraph 66 above).

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