The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

Report of the Disciplinary Tribunal Decision

Disciplinary Tribunal

1. In accordance with an appointment made by the President of the Council of the Inns of Court contained in a Convening Order, I sat as Chairman of a Disciplinary Tribunal to hear and determine one charge of professional misconduct contrary to the Bar Standards Board Handbook.

Panel Members

2. The other members of the Tribunal were:

   Mrs Lucinda Barnett (Lay Member)
   Miss Georgina Gibbs (Respondent Member)

Charges

3. Professional misconduct contrary to Core Duty 5 of the Bar Standards Board Handbook.

Parties Present and Representation

4. The Respondent was present and was represented by Counsel. The Bar Standards Board ("BSB") was also represented by Counsel.

Pleas

5. The Respondent denied the charge.

Judgment

6. This is the unanimous judgment of the Tribunal to which all members have contributed. In accordance with rE243A of the Disciplinary Tribunals Regulations 2017, parts of the judgment have been summarised so as to anonymise the Respondent and so as to ensure that no part of the judgment could lead to the Respondent's identification.

The charge

7. The Respondent is charged with professional misconduct contrary to Core Duty 5 of the BSB Handbook. Core Duty 5 provides:

   "You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession."

8. The particulars of the alleged offence are that:

   The Respondent acted in a way that was likely to diminish the trust and confidence which the public places in a barrister, or the profession, by attempting to serve directly upon a lay opponent, deposit monies arising from possession proceedings and doing so in a manner which was aggressive and or intimidating.

9. The alleged offence occurred outside a courtroom following a day-long hearing of an appeal concerning the lay opponent's flat. At that hearing the Respondent had acted on behalf of the lay opponent's landlord. Following the incident, the lay opponent made a complaint to the police regarding the Respondent's behaviour alleging an assault. The police investigated but took no further action. In the original complaint to the BSB the lay opponent made the following complaints about the Respondent: "1. Common Assault; 2. Breach of the peace; 3. Aggressive behaviour; 4. Unprofessional behaviour; 5. Intimidation; 6. Bullying".

10. Following investigation of the complaint, the Professional Conduct Committee decided that the complaint should form the subject of a charge before a disciplinary tribunal.

The hearing before us

11. In the course of a two day hearing the Tribunal heard oral evidence from two witnesses relied upon by the BSB: the Respondent's lay opponent and her barrister at the day in question. The Respondent gave evidence and called four witnesses appeared on his behalf .

12. At the end of the evidence, we heard detailed closing submissions from Counsel for the BSB and Counsel for the Respondent. We subsequently announced that we intended to reserve our judgment.

Our factual findings

13. In determining the facts of what happened that day we remind ourselves that we have to apply the criminal standard of proof when deciding charges of professional misconduct: Disciplinary Tribunal Regulations 2017, para rE164.

The BSB's primary case

14. In her skeleton argument, Counsel for the BSB stated:

> The BSB's primary case is that the Respondent behaved in the manner described by the lay opponent and her barrister.

The BSB's "secondary case"

15. Counsel for the BSB also advanced a "secondary case" in the skeleton argument which was put as follows:

> The BSB's secondary case is that core elements of the Respondent's own account of the incident….. are sufficient to prove to a criminal standard that he acted in an aggressive and/or intimidating manner, and that he is guilty of professional misconduct.

Our findings in relation to the BSB primary case

16. In his closing submissions, Counsel for the Respondent, said that there were four key elements of the BSB's primary case against the Respondent. Those elements were that in the course of the incident which it was agreed by all witnesses occurred over a matter of seconds:

    (a) The Respondent was "angry": someone described him as "tense and furious" whilst another said that the Respondent seemed as though he was "in a trance";

(b) That the Respondent "snatched" the envelope containing the deposit moneys;

(c) That the Respondent then "lunged", "rushed" or "charged" at the lay opponent; and

(d) That the Respondent "hit" the lay opponent more than once on her arm with the envelope containing the deposit.

17. We agree with Counsel for the Respondent that this is an accurate distillation of the key elements of the BSB primary case.

18. We have come to the clear conclusion that we cannot be satisfied to the requisite standard of proof that this is what happened. Our principal reasons are as follows.

19. *First*, none of the Respondent's witnesses present at the scene support the account summarised above. We considered each of these witnesses to be credible, giving their best recollection of events. Each of them gave slightly differing accounts of what happened but significantly none told us that they saw the Respondent "snatch" the envelope, "lunge" or "charge" at the lay opponent, "hit" the lay opponent with the envelope. Equally none of them described the Respondent as being "angry". Whilst they may not have seen everything that happened over the short time that we are concerned with we think it is striking that none of them saw any of the key aspects relied upon by the BSB.

20. *Secondly*, both Counsel for the BSB and Counsel for the Respondent agreed that we could take into account the fact that in proceedings relating to the lay opponent's flat, the Judge found the lay opponent had not been telling the truth having heard her give sworn evidence. That finding was not disturbed when the Judge's finding was appealed. That is a factor that we have taken into account to a limited degree. However, we have relied mainly on our own assessment of the lay opponent's reliability when considering those parts of the lay opponent's evidence which are not supported by the respondent's witnesses.

21. In our judgment, the lay opponent was a practised litigant who was – perfectly understandably – seeking to avoid eviction. The litigation had been going for some two

years. We accept the evidence of the Respondent's witnesses to the incident to the effect that the lay opponent's initial reactions to the attempts by the Respondent to serve her with the deposit moneys was a deliberate attempt to avoid service which would have assisted her landlord's case against her. In the course of cross-examination the lay opponent became genuinely upset when recollecting what had happened. Regardless of whether or not her initial reaction was what was described as a "ruse", we are sure that at the end of the incident in question – when she was in the recess or alcove with the locked security doors behind her – she was genuinely upset. That is a factor which is relevant to what Counsel for the BSB called in her skeleton argument the BSB's "secondary case", and which we consider further below. However, we are not satisfied to the requisite standard such that we can accept the lay opponent's account that the Respondent "hit" her with the envelope, or that he seemed to be in a "trance" or that he "lunged" at her.

22. *Third*, in her evidence to us the lay opponent's barrister emphasised on a number of occasions that her recollection was poor of what happened. This was despite the fact that she told us that she had found the case upsetting from a personal as well as legal point of view such that we would have expected the events to have stuck in her memory. The witness also told us that that after the appeal hearing she was concerned with drafting the consequential order and only had a partial view of what happened. The witness explained that she did not think that the Respondent meant to be intimidating but that he was irritated and poor at reading at cues.

23. When she was being cross-examined about the gaps in her memory, the witness referred to her police statement as being a more accurate reflection of what she could tell us when cross-examined, as the police statement was made closer in time to the incident. However, when cross-examined about the police statement she said that it was incomplete and did not represent everything that she had told the police.

24. In the witness' police statement, she said that the Respondent "roughly" took the envelope from someone and said something like "stop being silly". She described the Respondents' "sudden change" in demeanour as "frightening". The witness said in her statement that the Respondent then "lunged" at the lay opponent and that she "immediately flinched" and "looked scared". The witness said that the lay opponent

moved into the recess where there were locked security doors and said, “get out of my space” in “an upset tone of voice”. She said that “I did not see him hit her with the envelope” but that “I was frightened and shocked by the force he used and that he had taken matters into his own hands”. The witness said that afterwards that the Respondent came into the conference room and insisted on counting the money “as if the lay opponent would have taken some of it”. Some aspects of this account tallies with the account given by the Respondent, and other witnesses - in particular the fact that another witness did not see the Respondent hit the lay opponent with the envelope, that it was at the end of the incident that she heard the lay opponent say “get out of my space” and that the Respondent said “stop being silly” (an odd choice of words for someone who was said to have been “frightening”). Other aspects cannot be reconciled however and, in our judgment, cannot be relied upon to the requisite standard, particularly given the factors that we have set out at paragraphs 22 and 23 above.

25. *Fourthly and finally*, we formed the view that the Respondent gave a straightforward account in his evidence to us which withstood cross-examination. He readily acknowledged that he was embarrassed by what had happened and told us that he regretted upsetting the lay opponent. During the hearing he repeated the apology to the lay opponent that he gave on the day in question as well as in his letter of 21 December 2016 responding to the complaint that had been made against him.

26. Our assessment of the Respondent is reinforced by the character evidence adduced on his behalf from members of his chambers and from a judge. We do not accept Counsel for the BSB’s contention that this evidence is entirely irrelevant and should be ignored as it came from the Respondent’s colleagues and peers and said nothing as to how he would treat a lay opponent. We disagree: the evidence does give us some insight into the likelihood of whether or not the Respondent behaved in the way alleged by the BSB in its primary case. For example, the senior clerk of the Respondent’s chambers states in his letter that the Respondent “has never, ever been aggressive towards a colleague, client or staff member. Nor has he ever displayed any tendency to over-react.” Further, we note that the Respondent has no previous disciplinary findings against him and has never been the subject of a complaint before.

Our findings on the BSB secondary case

27. In Counsel for the BSB's skeleton argument she summarised that the key aspects of the Respondent' own account of the incident which she said supported the BSB's secondary case:

    a. The Respondent knew that Ms X would attempt to return the deposit to the lay opponent outside court if their client lost its appeal, so that it could then serve a repossession notice on her, and that in preparation for this, someone had brought the deposit in cash and the repossession notice to court.

    b. When Ms X tried to return the deposit (an envelope containing cash) to the lay opponent, the lay opponent refused to take it from her.

    c. The Respondent took the envelope from Ms X.

    d. The lay opponent said that she did not know what to do about accepting the deposit and that she wanted to speak to her solicitor.

    e. The Respondent 'proffered' the envelope to the lay opponent.

    f. At the same time, the Respondent asked the lay opponent repeatedly ('two, perhaps three times') to take the envelope from him.

    g. The lay opponent 'took a few steps backwards' and the Respondent spoke to her again.

    h. The Respondent tried again to give the lay opponent the envelope and 'she again backed away from [him] and [he] followed her'.

    i. The lay opponent turned to try the door into the corridor, but it was locked 'and she had nowhere to go'.

    j. As a result, the Respondent was standing in front of the lay opponent holding the envelope.

k. it became obvious to the Respondent that the lay opponent was not going to take the envelope from him.

l. The Respondent continued to try to have the lay opponent take the envelope.

m. The Respondent (on his account) tried to 'slip' the envelope between the papers the lay opponent held under her left arm.

n. As he did so, the Respondent said: 'I hereby return your deposit', or words to that effect.

o. On the Respondent's account (there is a dispute as to the precise words and the timing of the remark), the lay opponent said at this point that the Respondent was 'invading her space'.

p. The envelope dropped to the ground and the Respondent left it there and moved away.

28. Counsel for the BSB stated in her skeleton argument that:

On the Respondent' own account, he took the envelope from his female instructing solicitor who was attempting unsuccessfully to serve the lay opponent, and pursued the lay opponent, his physically smaller, female, lay opponent while she retreated backwards in an enclosed area in order to escape him. She said she needed to speak to her solicitor (who was not present). He told her repeatedly to take the envelope, and he persisted in trying to serve the envelope on her even after she tried to escape into the corridor but found the door behind her was locked, so that she had nowhere to go. He realised that she would not voluntarily take the envelope from him and he ultimately attempted to serve her by physically attempting to push the envelope (he says) into papers under her arm (which must mean at chest height), and, said that he was thereby returning her deposit. The envelope dropped to the ground, and only then did he move away. These actions were intimidating and/or aggressive.

Our findings in relation to the BSB secondary case

29. We do not accept that it is fair to say that the Respondent "pursued" the lay opponent (as suggested by Counsel for the BSB) or that he "trapped" the lay opponent. Nonetheless, in our judgment, what happened during the incident on his own account is a cause for concern. The Respondent was wrong to downplay its significance when he said in cross-examination that what had happened was "not great". In our view, the incident undoubtedly represented a real lack of judgment on his part.

30. Nonetheless we are clear that it was no more than a momentary lack of judgment. It was accepted by all the witnesses that the events that we are concerned with occurred, as we have said, over a matter of seconds. The Respondent rightly regrets his actions which resulted in the lay opponent holding her hands up and saying that he was invading "her space". By that stage we accept that the lay opponent was genuinely upset. However, the Respondent immediately recognised that he was at fault and moved away.

31. The question for us however is whether we are satisfied to the criminal standard that what happened amounted to behaviour that was "likely to diminish the trust and confidence which the public places" in the Respondent or in the profession, contrary to Core Duty 5, such as to amount to professional misconduct.

32. Counsel for the Respondent submitted that we should approach that question by reference to the guidance given in *Walker v Bar Standards Board*, case no PC 2011/0219. In that case Sir Anthony May gave the judgment of the Visitors of the Inns of Court in relation to an appeal from a finding of professional misconduct. In the course of that judgment Sir Anthony May stated, at paragraph 17, that "the concept of professional misconduct carries resounding overtones of seriousness, reprehensible conduct which cannot extend to the trivial." Counsel for the Respondent drew a comparison between the question in *Walker* as to whether Mr Walker's "single and momentary error was sufficiently serious to be characterised as professional misconduct. Was it, to use a phrase

in the authorities, 'particularly grave'"[1] and the question for us in determining the secondary case against the Respondent.

33. Counsel for the BSB sought to distinguish *Walker* and said that the sole question for us was whether or not we were satisfied to the requisite standard that what had happened on the Respondent' own account had led to a breach of Core Duty 5. If we were so satisfied, then Counsel for the BSB said that it would necessarily follow that the Respondent was guilty of professional misconduct.

34. We are far from being persuaded that the approach in *Walker* can be distinguished and is of no relevance to this case. In any event it is unnecessary for us to decide that question because in our judgment we are not satisfied to the requisite standard that what happened over the course of a matter of seconds was behaviour that was likely to diminish the trust and confidence of the public in the Respondent or in the profession.

35. Our conclusion would be even stronger when made by reference to the approach in *Walker*.

36. As a consequence, we find the charge of professional misconduct not proved and the charge is dismissed.

Dated: 22 January 2018

Jonathan Glasson QC

Chairman of the Tribunal

[1] Paragraph 32 of the judgment of Sir Anthony May