

SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

Case No. 11706-2017

BETWEEN:

SOLICITORS REGULATION AUTHORITY

Applicant

and

DANIEL SMITH

Respondent

Before:

Ms T. Cullen (in the chair)

Mr B. Forde

Mr M. Palayiwa

Date of Hearing: 16 January 2018

Appearances

There were no appearances as the matter was dealt with on the papers.

JUDGMENT ON AN AGREED OUTCOME

Allegations

1. The allegations against the Respondent made in a Rule 5 Statement dated 18 August 2017:-
 - 1.1 That on or around 23 March 2016, he fabricated an email which he dated 16 December 2015 timed at 13.55, and by doing so he:
 - (a) failed to act with integrity in breach of Principle 2 of the SRA Principles 2011; and/or
 - (b) failed to behave in a way that maintains the trust the public places in him and in the provision of legal services in breach of Principle 6 of the SRA Principles 2011.
 - 1.2 That by:
 - 1.2.1. forwarding a copy of the fabricated email referred to in allegation 1.1 to Ms VM and Mr JC at the Firm on 23 March 2016 at 16.36; and/or
 - 1.2.2. providing a misleading response in emails he sent to Ms VM and/or Mr JC timed at 17.05 and 20.47 on 23 March 2016 and 9.04 on 24 March 2016 in relation to queries raised about the fabricated email referred to in allegation 1.1;

he sought to mislead the firm, and thereby:

 - (a) failed to act with integrity in breach of Principle 2 of the SRA Principles 2011; and/or
 - (b) failed to behave in a way that maintains the trust the public places in him and in the provision of legal services in breach of Principle 6 of the SRA Principles 2011.
2. Dishonesty was alleged with respect to the allegations at paragraphs 1.1, and 1.2 but dishonesty was not an essential ingredient to prove those allegations.

Documents

3. The Tribunal had before it the following documents:-
 - Rule 5 Statement dated 18 August 2017
 - The Respondent's Answer dated 12 September 2017
 - Email from VM to the Respondent dated 23 March 2016
 - Letter from Dr Brenner dated 31 May 2017
 - Letter from Mr McCarron dated 5 June 2017
 - Report of Dr A J Wilkins dated 27 October 2017 and Dr Wilkins' Curriculum Vitae
 - The Respondent's Personal Financial Statement dated 12 December 2017
 - Applicant's Statement of Costs dated 3 January 2018

- Statement of the Respondent dated 4 January 2017 (sic) with exhibit DS1
- Letter from the Applicant dated 9 January 2018
- Statement of Agreed Facts and Proposed Penalty dated 9 January 2018
- Emails from Ms Lavender and Mr Forman as to redaction of the Statement of Agreed Facts and Proposed Penalty
- Email from Dr Rajput dated 12 January 2018

Factual Background

3. The Respondent was born in May 1982 and admitted to the Roll of Solicitors on 1 October 2009. At the date of the Rule 5 Statement, the Respondent's name remained upon the Roll of Solicitors and he held a current Practising Certificate free from conditions. He was currently employed as an in-house solicitor.
4. Between 11 January 2010 and 31 August 2016 the Respondent was a solicitor at Eversheds LLP ("the Firm") and at the material time was an Associate at the Firm.
5. On 8 April 2016, the Firm made a report to the SRA. They reported that on or around 16 March 2016 the Respondent was asked to handover conduct of a matter to a Senior Associate, Mr JC and to provide him with copies of correspondence about the matter. They have reported that one of the email items provided was fabricated and this was admitted by the Respondent.

Application for the matter to be resolved by way of Agreed Outcome

6. The parties invited the Tribunal to deal with the Allegations against the Respondent in accordance with the Statement of Agreed Facts and Proposed Penalty dated 9 January 2018. A redacted version of that document is annexed to this Judgment. The parties submitted that the outcome proposed was consistent with the Tribunal's Guidance Note on Sanctions.
7. The Applicant, in its covering letter dated 9 January 2018 explained that it did not wish to pursue the allegation of dishonesty given the assessment of the Respondent's mental health by Dr Wilkins.
8. The Respondent admitted allegations 1.1 and 1.2.
9. In support of the Application the following explanation was contained in the Applicant's letter dated 9 January 2018:

“Explanation as to why the proposed sanction would be in accordance with the Tribunal's Guidance Note on Sanctions

The proposed sanction within the Statement is that the Respondent be suspended from practice as a solicitor for a period of 12 months to commence in January 2018, that period of suspension to be suspended for 2 years from the same date subject to compliance by the Respondent with the terms of a Restriction Order imposing conditions on practice set out in paragraph 32.2 of the Statement.

The starting point is the seriousness of the allegations proved.

The admitted allegations are set out in paragraph 1 of the Statement.

In assessing seriousness, the Solicitors Disciplinary Tribunal will take into account:

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

Culpability

The SRA alleges, and the Respondent accepts, that his actions of:

- creating a backdated email;
- forwarding a copy of the fabricated email to senior members of the firm;
and
- providing a misleading response in emails he sent to queries raised in respect of the backdated email.

amount to misconduct which was serious.

The Respondent had direct control over the circumstances that gave rise to the misconduct although his actions of fabricating a holding response and forwarding on such fabricated email occurred over just one day and did not represent a course of conduct.

The Respondent's culpability is, however, reduced because he was suffering from [medical condition redacted by the Tribunal] and that impaired his judgment.

Harm Caused

The Respondent's actions have caused harm to the reputation of the profession. The Respondent's conduct would undermine public confidence in him and in the profession as the public would not expect a solicitor to create a backdated email which purported to be (but which was, in fact not) a true copy of an email sent to their opponent in litigation.

The Respondent's actions did not prejudice his client's case.

Aggravating Factors

The Respondent should have known that fabricating an email and misleading a partner and senior associate about the email was wrong. However, the Respondent's actions should be viewed in light of his medical condition which he was suffering from at the time.

Mitigating Factors

The following factors mitigate the seriousness of the Respondent's misconduct:

1. The misconduct was of a brief duration.
2. The Respondent was suffering from [medical condition redacted by the Tribunal] at the time of his actions and that impaired his judgment.
3. There have been no previous disciplinary findings made against the Respondent.
4. The Respondent has made admissions to the allegations against him at an early stage and has co-operated with the SRA.

Appropriate Sanction

The Respondent created and forwarded on to senior members his firm a backdated holding response in a litigation case. His conduct has caused harm to public confidence in the profession and he acted without integrity.

The Respondent's judgment at the time of his actions was impaired as a result of a medical condition.

Having regard to the Tribunal's Guidance Note on Sanctions and taking all the above together, the seriousness of the Respondent's misconduct is such that neither a Reprimand nor a Fine is a sufficient sanction in all the circumstances.

A suspended term of suspension would be appropriate in the circumstances as it would be a sufficient sanction, combined with a restriction order, to reflect the seriousness of the misconduct, to protect the public and the reputation of the legal profession.

The intention is for the Respondent to seek immediate medical treatment. Imposing conditions on the Respondent practising in the terms proposed (paragraph 32.2 of the Statement) will help to address the Respondent's actions whilst protecting the public.

The SRA submits, and the Respondent accepts, that the appropriate and proportionate sanction in this matter, in order to protect the public and the reputation of the profession is a suspended term of suspension order with a restriction order imposing conditions on practice.

In the event that the Tribunal approve the agreed outcome, we request that the suspended term of 12 months suspended for 2 years together with the restriction order imposing conditions on practice take immediate effect.”

10. The Tribunal noted that the Statement of Agreed Facts and Proposed Penalty contained reference to documents in the Rule 5 exhibit bundle. Given that this document is published in the Tribunal’s view this should be a standalone document without cross references to the bundle of documents contained in the exhibit to the Rule 5 Statement. It is also of assistance to the Tribunal if the explanation as to why the proposed sanction was in accordance with the Tribunal’s Guidance Note on Sanction was set out in the Statement of Agreed Facts and Proposed Penalty rather than a covering letter.

Findings of Fact and Law

11. The Applicant was required to prove the allegations beyond reasonable doubt. The Tribunal had due regard to the Respondent’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.
12. The Tribunal considered what was essentially the Applicant’s application to withdraw the allegation of dishonesty based on the medical evidence. Given the contents of Dr Wilkin’s report the Tribunal decided that it was in agreement to the withdrawal of the allegation of dishonesty on the particular facts of this case.
13. The Tribunal reviewed all the material before it and was satisfied beyond reasonable doubt that the Respondent’s admissions were properly made in respect of allegations 1.1 and 1.2.
14. The Tribunal considered its Guidance Note on Sanction (December 2016). In doing so the Tribunal assessed the culpability and harm identified together with the aggravating and mitigating factors that existed. This was a case where there was clear and unequivocal medical evidence. Taking all of these factors into account the Tribunal determined that the proposed sanction was appropriate and proportionate. The Respondent would be suspended for a period of twelve months, such suspension to be suspended for two years subject to compliance by the Respondent with specific conditions set out below. Either party had liberty to apply to the Tribunal to vary the conditions.
15. In the Statement of Agreed Facts and Proposed Penalty dated 9 January 2018 the opinion of Dr Wilkin’s was set out in detail at paragraphs 31.1 to 31.10. The Tribunal had, prior to considering the Statement of Agreed Facts and Proposed Penalty, asked the parties for their views on whether any information should be redacted from the document annexed to this Judgment if the proposed penalty was agreed. The parties suggested that these paragraphs should be redacted on privacy grounds as the detailed opinions of Dr Wilkins should remain confidential. The Tribunal could not identify a public interest or compelling reason as to why the level of detail should be in the public domain. It was relevant to the Tribunal’s decisions but the Respondent’s privacy should be respected and the Tribunal directed that the information set out at

paragraphs 31.1 to 31.10 of the Statement of Agreed Facts and Proposed Penalty be redacted from the published version of that document.

Costs

16. The Applicant had filed and served a costs schedule in the sum of £4,379.00. The parties had agreed between them that the Respondent would pay costs in this sum. Given the agreement between the parties the Tribunal ordered the Respondent to pay costs in this sum.

17. Statement of Full Order

1. The Tribunal ORDERED that the Respondent, DANIEL SMITH, solicitor, be suspended from practice as a solicitor for a period of 12 months to commence on 16 January 2018, that period of suspension to be suspended for 2 years from the same date subject to compliance by the Respondent with the terms of the Restriction Order imposing conditions on practice set out in sub-paragraph 2 below.

2. The Respondent shall be subject to conditions on practice imposed by the Tribunal for the period of 2 years to commence on 16 January 2018 as follows:

2.1 The Respondent must provide half-yearly reports to the SRA from a recognised medical practitioner as to the Respondent's mental health and fitness to practice, the first such report to be submitted by 30 June 2018. The report must include details of what course of treatment the Respondent has received and what is his current prognosis.

2.2 The Respondent must not:

2.2.1 Practise as a sole practitioner or sole manager or sole owner of an authorised or recognised body;

2.2.2 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;

2.2.3 Be a Compliance Officer for Legal Practice or a Compliance Officer for Finance and Administration; and

2.2.4 Work as a solicitor other than in employment approved by the Solicitors Regulation Authority.

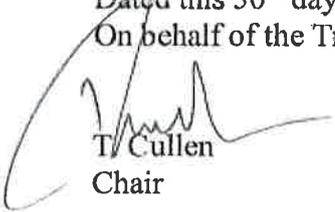
2.2.5 The Respondent must inform his current employer and any prospective employer of the existence of these conditions and the reasons for them together with details of his mental health record.

2.3 If the Respondent is found to have breached any of the conditions set out in paragraph 2.2 above during the period of 2 years under restriction or a medical report is produced showing that the Respondent is not fit to practise, activation by

the Tribunal of the period of suspension of 12 months will follow in addition to any sanction imposed for the breach of condition(s).

- 2.4 There be liberty to either party to apply to the Tribunal to vary the conditions set out at paragraph 2.2 above.
3. The Tribunal further Ordered that the Respondent does pay the costs of and incidental to this application and enquiry summarily assessed and fixed in the sum of £4,379.00.

Dated this 30th day of January 2018
On behalf of the Tribunal


T. Cullen
Chair

Judgment filed
with the Law Society
on 30 JAN 2018

IN THE MATTER OF THE SOLICITORS ACT 1974

SOLICITORS REGULATION AUTHORITY

Applicant

and

DANIEL SMITH

Respondent

STATEMENT OF AGREED FACTS AND PROPOSED PENALTY

1. The Respondent admits the following allegations:

Allegation 1.1

That on or around 23 March 2016, he fabricated an email which he dated 16 December 2015 timed at 13.55, and by doing so he:

- (a) failed to act with integrity in breach of Principle 2 of the SRA Principles 2011; and/or
- (b) failed to behave in a way that maintains the trust the public places in him and in the provision of legal services in breach of Principle 6 of the SRA Principles 2011.

Allegation 1.2

That by:

- 1.2.1. forwarding a copy of the fabricated email referred to in allegation 1.1 to Ms VM and Mr JC at the firm on 23 March 2016 at 16.36; and/or
- 1.2.2. providing a misleading response in emails he sent to Ms VM and/or Mr JC timed at 17.05 and 20.47 on 23 March 2016 and 9.04 on 24 March 2016 in relation to queries raised about the fabricated email referred to in allegation 1.1;

he sought to mislead the firm, and thereby:

- (a) failed to act with integrity in breach of Principle 2 of the SRA Principles 2011; and/or
 - (b) failed to behave in a way that maintains the trust the public places in him and in the provision of legal services in breach of Principle 6 of the SRA Principles 2011.
2. Page references in this Statement of agreed facts relate to documents contained in the bundle of documents exhibited to the Rule 5 Statement dated 18 August 2017.

Agreed Facts

- 3. The Respondent was born on 28 May 1982 and admitted to the Roll of Solicitors on 1 October 2009. The Respondent remains upon the Roll of Solicitors and has a current Practising Certificate.
- 4. Between 11 January 2010 and 31 August 2016 the Respondent was a Solicitor at Eversheds LLP and at the material time was an Associate at the firm.
- 5. On 8 April 2016, the firm made a report to the SRA (PL 1, pages 1 - 7). They reported that on or around 16 March 2016 the Respondent was asked to handover conduct of C P Ltd v L Plc to a Senior Associate, Mr JC and to provide him with copies of correspondence about the matter. They have reported that one of the email items provided was fabricated.
- 6. On or around 16 March 2016, the Respondent was asked to handover conduct of C P Ltd v L Plc (matter number 179612.000531) to a Senior Associate at the firm, Mr JC and to provide him with copies of correspondence about the matter. The Respondent acted for L Plc in defending a claim by C P Limited concerning a fixed rate loan. The Solicitor for the Claimant, C P Limited, was Ms LJ of ABG and then DBS (when Ms LJ moved to that firm).
- 7. On 23 March 2016 at 14.17, the Respondent forwarded to Mr JC an email from the Solicitors acting for the Claimant, DBS, dated 16 March 2016 timed at 12.40 (pages 8 - 9, pages 115 -116 and 117). Mr JC in turn forwarded that to the Supervising Partner at the firm, Ms VM on the same date (page 8). The email from DBS confirmed that the writer, Ms LJ had moved from ABG to DBS and that DBS now acted for the Claimant. Further, Ms LJ referred to an email sent to the Respondent on 16 December 2015 to which she had not received a response. Ms VM asked Mr JC in an email of 23 March 2016 for a copy of the ABG's email dated 16 December 2015 and whether a reply was still due to DBS in response to this email (page 10).
- 8. At 16.23 on 23 March 2016, the Respondent forwarded to Ms VM, copying in Mr JC, an email from Ms LJ at ABG dated 16 December 2015 timed at 13.06 (pages 17 - 18 and page 118). Ms LJ was asking in that email for the Respondent to

provide evidence by return of the dialogue between the parties on 5 February 2009 where confirmation of the break fee was allegedly provided as this was the first time that such dialogue had been referenced.

9. At 16.36 on 23 March 2016, the Respondent forwarded to Ms VM, copying in Mr JC, an email from the Respondent to the Respondent dated 16 December 2015 timed at 13.55 with the message *"My holding response to ABG's email of 16 December 2015 appears below."* (pages 27 - 28). The "holding response" read *"Dear Louise Thank you for your email. As I explained during our call a moment ago, I am awaiting further documentation from my client and I will write to you once again once I have that."* (pages 28).
10. Eversheds LLP's IT Security Operations Manager accessed the Respondent's Mimecast account and located copies of emails sent and received on 16 December 2015 relating to this client matter (pages 60 - 100). He could not locate any email in Mimecast timed at 13.55. Emails sent from and to the same Eversheds email account (such as the Respondent's email to himself dated 16 December 2015 timed at 13.55) do not appear in their Mimecast records.
11. At 16.59 on 23 March 2016, Ms VM sent an email to the Respondent in which she pointed out that his "holding response" dated 16 December 2015 was sent from him to him (page 27). The Respondent responded to Ms VM, copying in Mr JC, at 17.05 on 23 March 2016 saying that this was a mistake on his part and that he had sent the email on 16 December 2015 to himself in error so it was never in fact received by ABG (page 27).
12. At 18.35 on 23 March 2016, Ms VM asked the Respondent to provide her with a copy of his original "holding response" as an attachment (page 50). The Respondent replied to Ms VM at 20.47 on 23 March 2016 to say that he could not as he had deleted it from his sent items after he had realised the error (page 50).
13. At 21.20 on 23 March 2016, Ms VM asked the Respondent whether he could retrieve the email from his deleted items, or whether she should ask IT to do it (page 50). The Respondent said in his response to Ms VM of 9.04 on 24 March 2016 that he would speak to IT (page 48).
14. At 9.39 on 24 March 2016, Ms VM sent an email to the Respondent asking for clarification; she asked whether it was the case that he had deleted the "holding response" from both his sent and received items, and then went into deleted items and deleted it from there (page 48).
15. The Respondent admitted later that day (on 24 March 2016) that on 23 March 2016 he had fabricated the email dated 16 December 2015 timed at 13.55.
16. The firm undertook an investigation into the matter.
17. The Respondent tendered his resignation on 1 April 2016 which was accepted by the firm. (page 126).

18. On 8 April 2016, following the conclusion of the firm's investigations, the firm reported the Respondent's conduct to the SRA (pages 1 - 7).
19. The Respondent created a backdated email, which purported to be (but which was, in fact not) a true copy of an email sent to their opponent in litigation.
20. He created a backdated email and sent it to a partner and senior associate in his firm. He did so in order to create the impression that the matter had been properly and efficiently progressed when, on the face of the emails, that did not appear to be the case.
21. Subsequent responses the Respondent provided to queries regarding the backdated email were misleading as they gave the impression that the backdated email had been sent at the time at which it was purportedly sent (16 December 2015) albeit it had been mistakenly sent to himself rather than the intended recipient, that he deleted the original email he sent and that there was a prospect of retrieving the deleted email.

Respondent's Points of Mitigation

22. The following points are advanced by way of mitigation on behalf of the Respondent, but their inclusion in this document does not amount to adoption or endorsement of such points by the SRA.
23. The Respondent responded to the SRA's Explanation with Warning letter ('EWW letter') on 23 December 2016 (pages 134 - 140). He made the points referred to in paragraphs 24 to 26 below.
24. The Respondent stated that *"I regret that, on 23 March 2016, I did create the email dated 16 December 2015 which was sent to my colleagues Ms VM and Mr JC at Eversheds. I admitted this to Ms VM the following day and accepted full responsibility for the same in a disciplinary process that was subsequently commenced. I am both embarrassed and ashamed of my conduct on this occasion and the contrition I have demonstrated since then is whole-hearted and sincere."* (page 135).¹
25. The Respondent goes on to explain that at the time of his misconduct, he was based in Cardiff but he, his wife and young son, were hoping to move back to London as they had no family support in Cardiff (pages 135 - 136).
26. The Respondent says that he spoke to his line manager, Mr AD, the following day (page 136).

¹ The Respondent's Answer to the Rule 5 Statement dated 12 September 2017 modifies the Respondent's initial response by stating that the Respondent believed that he had sent the holding response email to ABG on 16 December 2015 but could not locate it and therefore he attempted to replicate what he believed he had sent (paragraph 42 of the Respondent's Answer).

27. On 26 July 2017, the Respondent's legal representative, Robert Forman at Murdochs Solicitors wrote to the SRA (pages 148 - 149). They made further representations on behalf of the Respondent. Mr Forman made the following points:

27.1. The Respondent accepts that the email purported to be sent from the Respondent to himself on 16 December 2015 at 13.55, and subsequently included in a chain of emails on 23 March 2016, was not the original version of an email that he had sent.

27.2. The Respondent accepts that he subsequently made representations to his employers on 23 March 2016 which would have caused them to have been misled regarding the email dated 16 December 2015 at 13.55.

28. On 26 July 2017 Robert Forman at Murdochs Solicitors wrote to the SRA on the instructions of the Respondent to make further representations on his behalf. Mr Forman stated that the Respondent believed that he was suffering from a mental disorder at the time, materially interfering with his decision-making capacity and/or his awareness of, or understanding of the nature of his actions. The Respondent has a history of mental health issues, having seen a psychiatrist in 2006 and undertaken a course of treatment with a psychotherapist in 2007. The Respondent wished to procure expert psychiatric evidence with a diagnosis and opinion on the effect of such mental disorder.

Medical Evidence

29. Dr Anthony John Wilkins, Consultant Psychiatrist in General Adult and Forensic Psychiatry of Priory Hospital, Roehampton, London, prepared a medical report on the Respondent dated 27 October 2017.

30. Dr A J Wilkins was asked to conduct a psychiatric evaluation of the Respondent's current mental health, his past mental health and how his mental health may or may not have impacted upon his behaviour at the relevant time.

31. Dr A J Wilkins' was of the opinion that:

[REDACTED]

[REDACTED]

31.11. The Respondent is currently working and finds work distracting and helpful. He is able to work and practise as a solicitor but requires treatment for his condition. This would mitigate the effect that his symptoms, which are likely to fluctuate throughout the rest of his life, will have upon his life in general and his work in particular.

Penalty proposed

32. The parties agree that the following sanction meets the seriousness of the admitted allegations and submit it is sufficient to protect the public and public confidence in the delivery of legal services:

32.1. The Respondent be suspended from practice as a solicitor for a period of 12 months to commence on [] January 2018, that period of suspension to be suspended for 2 years from the same date subject to compliance by the Respondent with the terms of the Restriction Order imposing conditions on practice set out in sub-paragraph 2 below.

32.2. The Respondent shall be subject to conditions on practice imposed by the Tribunal for the period of 2 years to commence on [] January 2018 as follows:

32.2.1. The Respondent must provide half-yearly reports to the SRA from a recognised medical practitioner as to the Respondent's mental health and fitness to practice, the first such report to be submitted by 30 June 2018. The report must include details of what course of treatment the Respondent has received and what is his current prognosis.

32.2.2. The Respondent must 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; and
- Work as a solicitor other than in employment approved by the Solicitors Regulation Authority.

32.2.3. The Respondent must inform his current employer and any prospective employer of the existence of these conditions and the reasons for them together with details of his mental health record.

32.3. If the Respondent is found to have breached any of the conditions set out in paragraph 32.2 above during the period of 2 years under restriction or a medical report is produced showing that the Respondent is not fit to practise, activation by the Tribunal of the period of suspension of 12 months will follow in addition to any sanction imposed for the breach of condition(s).

32.4. There be liberty to either party to apply to the Tribunal to vary the conditions set out at paragraph 32.2 above.

32.5. The Respondent does pay the costs of and incidental to this application and enquiry summarily assessed and fixed by the Tribunal in the sum of £4,379.00.

Signed:

P MILTON

.....
Name:

Position:

For and on behalf of the Solicitors Regulation Authority

Signed:

R FORMAN

.....
Name:

For and on behalf of Daniel Smith

Dated this day of January 2018