

Mental health matters

By Emma Walker

On Tuesday 13 November, the High Court handed down judgment on three significant appeals brought by the Solicitors Regulation Authority (“SRA”) of cases from the Solicitors Disciplinary Tribunal (“SDT”). In each case, the SDT had made findings of dishonesty against a solicitor before deciding that, due to working conditions and mental health considerations, “exceptional circumstances” justified a sanction short of strike-off.

Why were the SDT decisions wrong?

The High Court allowed the SRA’s appeals, quashed the suspended suspensions the SDT has given out and struck-off the three solicitors, concluding that the SDT’s sanction in each case was “*unduly lenient and clearly inappropriate*”.

In his judgment, Lord Justice Flaux explained that, when the SDT came to assess whether there were exceptional circumstances relevant to sanction, it did not focus on the critical questions of the nature and extent of the dishonesty and degree of culpability and weigh them in the balance. He continued: “*Had it done so, it should have concluded that in none of these cases could the dishonesty be said to be momentary.*” He also said: “*I do not consider that, in cases of repeated dishonesty and misconduct of this kind, the lesser sanction of suspension (let alone suspended suspension) addresses the risk of harm to the public or the need to maintain the reputation of the profession which, as all the case law since Bolton demonstrates, is the principal purpose of the sanction.*”

Evaluating exceptional circumstances

In summary, the judgment expounds the following approach to evaluating whether there are exceptional circumstances that would justify a lesser sanction than striking off, for cases where a solicitor is found to have acted dishonestly:

1. “*The most significant factor carrying most weight and which must therefore be the primary focus in the evaluation is the nature and extent of the dishonesty*”;
2. Mental health issues (specifically stress and depression) cannot, “*without more*”, amount to exceptional circumstances;
3. Pressure of work or extreme working conditions cannot amount to exceptional circumstances, whether coupled with stress or depression or not.

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Nature and extent of dishonesty

What is meant by the “*nature and extent of dishonesty*” is indicated elsewhere in the judgment and includes whether the dishonesty:

- Was momentary or perpetrated over a long period of time;
- Repeated or not;
- Was of benefit to the solicitor;
- Had an adverse effect on others;
- Had an impact on the character of the solicitor;
- Had an impact on the wider reputation of the profession, in how it impinges on the public’s perception of the profession as a whole

Left wanting more?

So the High Court’s view is that mental health factors cannot amount to exceptional circumstances “*without more*”. Having understood that the primary focus in the evaluation exercise of exceptional circumstances is the nature and extent of the dishonesty, “*more*” could be taken to refer to, what is described elsewhere in the judgment as, “*a moment of madness*”.

The duration of the act speaks to the extent of the dishonesty. Elaborating on this, Lord Justice Flaux explains that:

“where the SDT has concluded that, notwithstanding any mental health factors or work or workplace related pressures, the respondent’s misconduct was dishonest, the weight to be attached to those mental health and working environment issues in assessing the appropriate sanction will inevitably be less than is to be attached to other aspects of the dishonesty found, such as the length of time for which it was perpetrated, whether it was repeated and the harm which it caused, all of which must be of more significance.”

Work pressures

The High Court accepted that whilst pressure of work or an aggressive, uncaring workplace could excuse carelessness, a lapse of concentration or a mistake, dishonesty of any kind is a different matter “*involving conscious and deliberate wrongdoing*”.

Lord Justice Flaux adds that, in applying the *Ivey* dishonesty test, the SDT had made findings about the actual states of mind of the respondents and that, despite their mental health issues, each respondent knew the difference between honesty and dishonesty and that what they done was dishonest.

Looking at the test in *Ivey* then, *“...the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts... When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”*

Left high and dry?

The Court’s analysis does leave open the option that if it were possible to show that the individual being prosecuted was unable to (as a result of a mental health issue) appreciate the difference between honesty from dishonesty, then it could be that the conduct does not qualify as dishonest. On this point, some commentators have noted that understanding of how mental health can impair decision-making remains low. Some impairments are such that, in effect, they render any consciousness of the honesty, or otherwise, of an act all but meaningless.

The outcome of the appeals has prompted calls for questions of health, including mental health, to be dealt with outside of the disciplinary process. Paul Bennett, who acted for one of the respondents, has noted that the SRA has had powers to make rules to regulate through fitness to practice for more than a decade but has yet to exercise them. He has suggested that *“There is now an enormous credibility test for the SRA to address the statutory provisions and to ensure that as profession we do not discriminate against those with any physical or mental impairment”*. He added:

“It must be hoped that mental health campaigners, charities and the Law Society will now get behind a campaign to ensure the SRA adopts fitness to practise rules, raise awareness of the health issues across the profession and to create a supportive environment to protect the public and promote good mental health practice across the profession.”



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In September 2018, Leigh Day launched its own Regulatory & Disciplinary team to advise and support others with their compliance, regulatory and disciplinary needs. Emma forms part of that team.



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