

Appeal Ref: CO/971/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: 19 July 2023

Start Time: 14.10 Finish Time: 15.22

Before:

MR JUSTICE JAY

Between:

VICTOR NWOSU

Appellant

- and -

SOLICITORS REGULATION AUTHORITY LTD

Respondent

MR ARFAN KHAN appeared on behalf of the **Appellant**
MR JAMES COUNSELL KC and **MISS NIMI BRUCE** appeared on behalf of the
Respondent

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MR JUSTICE JAY:

(14.10)

Introduction

1. Mr Victor Nwosu (“the appellant”) appeals as of right under section 49(1) of the Solicitors Act 1974 against an order of the Solicitors Disciplinary Tribunal (“the SDT”) dated 25 February 2022 finding that he committed misconduct, in substance sexual misconduct, contrary to a number of the SRA Principles 2011 and Outcomes 2.4 and 11.1 of the SRA Code, imposing a sanction in the form of a fine of £20,000, and ordering that he pay the costs of the Solicitors Regulatory Authority (“the SRA”) in the sum of £23,550. The SRA also cross-appeals on the issue of sanction.
2. The appeal was argued before me today by Mr Arfan Khan on behalf of the appellant, and Mr James Counsell KC and Miss Nimi Bruce on behalf of the SRA. I am grateful for their written and oral submissions.
3. Ultimately, the appeal has raised issues which in my judgment are relatively straightforward. The cross-appeal is somewhat more complicated, not because the facts or the law are complex, but because this court is being asked to interfere with the evaluative assessments of an expert Tribunal. The issues overall are not so complex as to require a reserved judgment.

The Essential Factual Background

4. The appellant was admitted to the Roll of Solicitors on 15 April 2005. He is a married man with a family, and came to the SDT with a sheaf of highly positive character references. There were no previous disciplinary findings against him. He is the

principal solicitor in his own firm, Dylan Conrad Kreolie (“DCK”) based in Hendon, North London. His own practice is wide-ranging, and covers both criminal and civil litigation. He has numerous female and vulnerable clients. In the present climate of austerity in publicly-funded work, I am prepared to infer that he does valuable service for those in his community and in the relevant geographical area.

5. On 30 April 2018, the appellant was interviewing Person A for a paralegal position. At that time, Person A was aged 22, and she had a glittering CV including a first-class honours degree, I understand, in law. The interview took place in the appellant’s office, and started at 4.25 p.m.
6. The allegations against the appellant were that on this occasion he inappropriately:
 - 1.1 asked Person A to turn around, and/or
 - 1.2 after asking Person A to turn around said words to the effect “mmm, I like what I see”, and/or
 - 1.3 told Person A that she was “pretty”, “very pretty”, “beautiful” and/or “very beautiful” or words to that effect on one or more occasions, and/or
 - 1.4 asked Person A if she had a boyfriend, and/or 1.5 asked Person A if she had a brother or brothers, and/or
 - 1.6 told Person A that if she worked for the firm she would have to wear skirts and/or high-heeled shoes or words to that effect, and/or
 - 1.7 told Person A that he only employed women and/or only beautiful women worked at the firm or words to that effect.

7. As already discussed, the SRA allege various breaches of the SRA Principles and of the Code. As an aggravating factor, it was alleged that the appellant's conduct was of a sexual nature and/or was sexually motivated.
8. The SDT conducted these proceedings remotely and heard evidence from Person A and Person C, the latter being in the nature of recent complaint evidence. In the end, the SDT placed very little weight on Person C's evidence, and I therefore say no more about it. The SDT also relied on the written evidence of Mr Kevin Okeke, to which I will turn in due course. The appellant himself gave evidence.
9. I can confirm that I have carefully studied the SDT's determination and have read the transcript of Person A's and of the appellant's evidence, together with parts of the closing submissions.

The SDT's Decision

10. In a thorough and comprehensive decision, the SDT set out in some considerable detail the evidence that it received, including a summary of the cross-examination.
11. Person A's account was to some extent corroborated by close to contemporaneous messaging to her then boyfriend on WhatsApp. Her complaint to the SRA was made on the following day on 1 May 2018, although there was some dispute between the parties as to the circumstances in which it was made and Person A's motivation.
12. The evidence in relation to Allegation 1.1 was somewhat equivocal, and the SDT did not find it proved. There were potential inconsistencies and lacunae in Person A's account which were thoroughly explored in cross-examination and then addressed in closing argument. I have been reminded of those in the appellant's skeleton argument.

13. The SDT recorded all the points which were arguably in the appellant's favour at various places in their judgment, in particular when setting out the evidence. It is unnecessary for me to set out all of these forensic points, but I do mention a limited number of them.
14. It is said that the "mmm, I like what I see" remark was directed to Person A's CV and not to her personal appearance. That point was extensively laboured by the appellant. It is agreed that Person A was not directly in his line of sight when that comment was allegedly uttered. It was, however, Person A's evidence that the appellant did not have a copy of her CV in front of him at the time those words were spoken. She accepted in cross-examination that the CV was printed off during the course of the interview.
15. The "look very smart" remark was not included in the initial SRA complaint. Taken in isolation, it was not the strongest point in the case.
16. Person A could not say how many times the "you're very beautiful" comment was made either verbatim or in its related formulations.
17. In a WhatsApp message to her friends, Person A claimed that the appellant had tried to touch her. Person A accepted in cross-examination that she might well be mistaken about that.
18. The SDT's approach was to recognise that this was essentially a one person's word against another's case. The SDT had rightly refused a somewhat ambitious submission of there being no case to answer. The SDT's assessment of Person A was that she was credible, consistent, reliable and persuasive.
19. The SDT did not come to the same conclusion about the appellant and his evidence. It is difficult for me, sitting in this position, to reach any reliable conclusions about

evidence I did not see or hear. However, it is right that I make a limited number of points.

20. First, the appellant did himself no favours in cross-examination. He must have come across as somewhat arrogant and entitled, and his personal attacks on Person A and her integrity were misplaced. He could have left that exercise, if well-directed, to his legal representative. Much of his evidence was frankly argumentative and self-justificatory. That could not have helped him either.
21. Secondly, the appellant's case was put very high: that Person A was an outright liar. In reality though, it had to be, because there was no room for honest mistake in relation to the multiple "you're very beautiful" remarks. The appellant sought to persuade the SDT that they should really accept his evidence, being that of a distinguished and well-respected solicitor, over that of a mere 22-year-old. He was indeed a distinguished and well-respected solicitor. But that strategy was, at best, high risk.
22. Thirdly, the appellant's case was undoubtedly harmed, as I pointed out in oral argument, by a memorandum entitled "The Firm's Dress Code". Employees were instructed that "cleavage baring" tops "are prohibited". And then this: "We should always be well presented because it is very unprofessional for colleagues to be baring skin inappropriately like people working in clubs or strippers." This memorandum speaks for itself.
23. The SDT found the remainder of the allegations proved and found that, in relation to what was Allegation 2, the appellant's conduct was sexually motivated. I set out in full paragraphs 15.13 and 15.14 of its determination:

"The Tribunal was deeply concerned at the comments made in questions asked by the respondent of Person A during a formal job interview for a legal position

within his firm. The language used in the memo revealed outdated attitudinal shortcomings predicated on the objectification of women in a sexual manner. Referring to Person A's physical appearance in terms of 'pretty, beautiful' and 'mmm, I like what I see' could only, in the Tribunal's view, be considered to have sexual connotations. Asserting that women should wear 'skirts and heels' were opinions which, in the Tribunal's view, could only be held for sexual gratification. Enquiring as to Person A's personal relationships with regards to a boyfriend and whether she had brothers was designed to ascertain the viability or otherwise of a future sexual relationship.

The Tribunal considered the submissions made by Mr Goodwin, in particular the character references that had been filed on the respondent's behalf to attest to the fact that he was not a 'sexual predator'. The Tribunal was not required to determine whether the respondent was a 'sexual predator'. It was required to determine whether the comments he made and questions he posed to Person A during a job interview on 30 April 2018 were sexually motivated and/or for sexual gratification. The Tribunal determined that they were."

I will be addressing the Tribunal's findings on sanction in the context of the respondent's cross-appeal.

24. The grounds of appeal to this court are as follows:

- (i) The SDT was wrong not to apply the correct standard of proof, namely proof beyond reasonable doubt.
- (ii) The SDT was wrong in failing to have any or adequate regard to the appellant's good character on the issue of credibility when determining whether the allegations had been made out.
- (iii) There was a procedural irregularity rendering the trial unfair in that the SDT refused to allow oral evidence from Mr Okeke, a key witness of fact.
- (iv) The SDT was wrong not to have resolved the conflict between Mr Okeke's evidence and that of the complainant and/or erred in law by setting the threshold for a breach of the disciplinary rules and outcomes too low.

- (v) The trial was unfair due to delay which was a significant departure from the regulatory framework causing the disciplinary hearing to be unjust and/or prejudicial to the appellant.
- (vi) The SDT was wrong to order costs without applying a reduction to reflect that the respondent had not been successful in all the complaints.
- (vii) The SDT was wrong to impose a sanction of £20,000 which was excessive or disproportionate.

25. I do not interpret these grounds as seeking to raise a freestanding independent challenge to any of the SDT's findings of fact. If I should have misunderstood the position, I must say at once that such a challenge would have failed. Although this court must allow an appeal where the SDT's decision is "wrong" (see CPR 52.11(3)), it is well established that it must show considerable deference to an expert Tribunal that has seen and heard the witnesses. This judicial restraint is all the more emphatic in a case where, as here, the SDT has so carefully and thoroughly considered and analysed the oral evidence.

26. Against that background, I now turn to consider and address the appellant's grounds.

Analysis of the Grounds

27. Mr Arfan Khan, for the appellant, presented his oral argument in a slightly different order. He may well have had forensic reasons for doing so. But for present purposes and for ease of comprehension, I will adhere to the sequencing set out in the grounds of appeal and paragraph 3 of the skeleton argument.

28. The first ground is that the incorrect standard of proof was applied: that it should have been criminal and not the civil standard. Before the coming into effect of the Solicitors (Disciplinary Proceedings) Rules 2019, an SDT applied the criminal standard of proof. For applications to the SDT made on or after 25 November 2019, the civil standard of proof applies. The appellant raises two basic submissions in this context.
29. First of all, he submits that the relevant date for the making of the application is 1 May 2018 and not, as the respondent would have it, the date that the SRA made an application to the Tribunal which was on 26 August 2021. If the appellant is right in that regard, it would follow that the criminal standard of proof should have applied.
30. The second submission is one that was not foreshadowed in writing, and amounts to this. The relevant date should have been taken as 30 April 2018, which is when these events took place. This is because the relevant standards fixing misconduct were those in place as at that date (see the decision of Foster J in *Mariaddan v SRA* [2023] EWHC 207 (Admin)).
31. That second argument is, with respect, completely misconceived. The relevant standards in this case have not changed, I suspect, for decades. Sexual misconduct was the same in all material respects both before and after the coming into effect of these regulations. The position could well be different in relation to more technical aspects of the principles and code, but not in respect of something so basic as this.
32. As for the first submission, Mr Counsell in his skeleton argument characterised it as misconceived and invited the appellant to withdraw it.
33. The position here is that under section 31(2) of the Solicitors Act 1974, “any person may make a complaint in respect of that failure to the Tribunal”. It may be debated

whether a member of the public such as Person A could have made a complaint to the Tribunal directly, rather than to the SRA. I suspect that the position is that a member of the public could not.

34. What happened in the present case is that Person A made a complaint to the SRA, and it was that latter body that made an application or complaint to the SDT, well after the coming into effect of the 2019 regulations. That analysis is borne out by the wording of the regulations themselves, in particular Regulation 3 which defines an application as “an application or complaint to which these rules apply”.
35. The only entity that made an application or complaint to the SDT was the respondent to this appeal, the SRA. It is not arguable, therefore, that the relevant date is 1 May 2018, and I reject the appellant’s submissions in that regard. The civil standard of proof was, therefore, correctly applied.
36. The second ground is that the SDT failed to have any or any proper regard to the appellant’s good character. The submission, as developed by Mr Khan, is that although passing reference was made to the character references, there was no formal good character direction and certainly no analysis of how good character was a factor in the appellant’s favour in two respects, first in relation to propensity and then as regards credibility. Mr Khan referred me to relevant authority, in particular a decision of Julian Knowles J in *Khan v GMC* [2021] EWHC 374 (Admin). In order to place Mr Khan’s submissions in their correct context, an examination of that authority is valuable.
37. In that case there was, in fact, a good character direction from the legally qualified Chair (see paragraph 84 of the judgment). That direction reflects the model which judges habitually give to juries in criminal trials. The reasons of the Tribunal did not contain a formal self-direction as to good character. At paragraph 87 of his judgment,

Julian Knowles J identified the issue for the court as whether it must be inferred that the Tribunal did not take good character into account.

38. At paragraph 90 of his judgment, Julian Knowles J referred to *Vitalis v NMC* [2017] EWHC 3281 (Admin) and to my decision in *Shaw v Logue* [2014] EWHC 5 (Admin).

39. *Shaw* was a disciplinary case in the solicitors' context. There was no good character direction, and the SDT made no express reference to the extensive good character evidence. I concluded that an experienced Tribunal would have considered the good character evidence as well as its saliency, and that it was not required formally to set out the relevant legal principles.

40. Julian Knowles J drew the strands together at paragraph 92 of his judgment:

“From these authorities I derive the following. Whilst a disciplinary Tribunal must take good character evidence into account in its assessment of credibility and propensity, *Donkin*, supra, and *Bryant*, supra, show it is an error not to do so, it is not required slavishly in its reasons to give a self-direction to that effect (although if it does so, there can be no room for argument, a proposition Miss Hearnden did not disagree with). It is sufficient, where the matter is raised on appeal, if the appeal court is able to infer from all the material that the Tribunal must have taken good character properly into account. That is the conclusion I reach in this case. It would be simply unrealistic to suppose that the Tribunal overlooked it, given what it had received orally and in writing including, most importantly, a clear direction from its legally qualified Chair, who was a constituent member of the Tribunal.”

41. It may be said on behalf of the appellant that the present case is not so strong because we do not see any legal advice given to this Tribunal from the legally qualified chair.

42. My task, therefore, is to consider this central question: am I able to infer from all the material that the SDT must have taken good character properly into account?

43. Mr Counsell submitted that it was inconceivable that the SDT did not have the issue well in mind, and that it understood what I have called the “saliency” of good character

evidence. It was, after all, the principal thrust of the appellant's case both in evidence and in submission.

44. At paragraph 14.73 of the SDT's judgment, the appellant referred in terms to character references from female employees. That was during the course of his evidence. Paragraph 15.14 of the determination does, as we have seen, refer to character references, admittedly though in the context of Allegation 2. In addition, Mr Counsell submitted that there was a plenitude of evidence of good character from various witnesses who knew the appellant and from the appellant himself, and there was no requirement for the SDT to say that it expressly took it into account.
45. In my judgment, it would have been preferable had the SDT set out its understanding of the legal position, namely that good character evidence is relevant to the issues of both propensity and credibility. However, in line with my own decision in *Shaw v Logue*, it is not a fundamental legal requirement. It is clear from all the available material that the SDT must have had the appellant's good character well in mind and have understood the weight capable of being placed on it, given that it featured so strongly in Mr Goodwin's closing submissions. Mr Counsell's submission that it is inconceivable that the SDT did not have good character in mind seems to me to be well-founded.
46. The third ground is that the SDT refused to allow oral evidence to be adduced from Mr Okeke. By the time the hearing commenced, his witness statement was an agreed statement before the SDT. Mr Okeke's evidence was relevant to the appellant's good character and the layout of this fairly small office. The photographs appended to Mr Okeke's statement would give anyone a reasonable impression of the configuration of this office and of the relative proximity of people working there. So, Mr Okeke stated

that this was a small open-plan office and that statement is borne out by the photographs; and that he was “pretty certain” that he was in the office when Person A attended for her interview. The inference he draws, or would be drawn, is that he would have heard what is now being alleged by Person A against the appellant. At paragraph 8 of his witness statement, Mr Okeke uses the somewhat graphic metaphor that “walls have ears”.

47. During the course of closing submissions, Mr Goodwin on behalf of the appellant sought to rely on Mr Okeke’s evidence and at one point made an application that he be called to give oral evidence. This hearing was being conducted entirely remotely, and I accept the appellant’s submission that Mr Okeke could have been made available in effect at short notice. The SRA argued, through junior counsel, that it was now too late for Mr Goodwin to make this application because Person A had not been cross-examined on matters set out in Mr Okeke’s witness statement. Mr Goodwin’s response was that if the SRA were taking the point, he would wish to call Mr Okeke to give evidence about these matters.

48. The issue was resolved along these lines, and here I am citing directly from the transcript:

“MISS EVANS: My understanding, if it is of assistance, Mr Goodwin, is that in terms of the matters which might be controversial or not accepted by Person A which we can glean from her evidence, you are not now in a position to put those forward to the Tribunal; but in other respects which are not controversial, we can take into account as evidence on those points. Is that acceptable, Mr Goodwin?”

MR GOODWIN: Madam, it seems that it may be. And of course, you have my client’s evidence as regards to the office, and my learned friend had the opportunity to put those matters to him. It is a matter of weight, and you can give such weight or not to the statement as you deem appropriate, it seems to me.”

MISS EVANS: Very well. That is how we will proceed.”

MR GOODWIN: I am grateful.”

49. It may be said by way of preliminary observation that it was not wholly clear which matters were controversial and which were not. That could well be a matter of opinion and therefore further argument.
50. The submission advanced by Mr Khan is that there was both a procedural irregularity and a breach of natural justice. Mr Okeke was available to give oral evidence, and it is said that he should have been permitted to be called to support the appellant’s case. Further or alternatively, Person A should have been recalled. Further evidence from Mr Okeke would have been of assistance on a number of issues bearing on the inherent plausibility or otherwise of this conversation taking place without it having been heard by this witness.
51. In my judgment, Person A could not sensibly have been cross-examined as to her recollection of the layout of this office and whether the walls were so thin as to have metaphorical ears.
52. However, contrary to the view I expressed in oral argument, there were two issues which did arise out of Mr Okeke’s witness statement about which she was not questioned: first, whether the door to the appellant’s office was closed; and secondly, whether she recalls Mr Okeke or anyone else seated anywhere near the appellant’s office at the material time. Person A’s answers to those questions might have thrown light on Mr Okeke’s claim to be “pretty certain” he was present at the time of the interview, although he has no independent recollection now of Person A herself.
53. Secondly, Mr Goodwin did not make an application to recall Person A for further cross-examination. I am completely satisfied that had such an application been made,

it would have been refused. That was far too late. No explanation could be given for failing to cross-examine Person A on all potentially relevant matters earlier.

54. Thirdly, at one point at least, this was a late application made on the appellant's behalf for Mr Okeke to give oral evidence. It was made effectively during closing submissions. That was not *necessarily* too late, but the context is of course relevant. Even if, contrary to the view I expressed above that the Chair (Miss Evans) took a false point about Mr Goodwin's failure to cross-examine Person A in relation to certain aspects of Mr Okeke's evidence, consideration should be given in this court as to the evidential significance of Mr Okeke's witness statement.
55. First of all, this could not be regarded as an opportunity to call evidence very late in the day in relation to matters which were not covered in Mr Okeke's witness statement. That was the thrust of Mr Khan's argument before me. Mr Okeke's witness statement may not have been particularly well drafted; but it was, after all, his evidence.
56. Secondly, on the basis of the witness statement, Mr Okeke's evidence did not take the appellant's case much further. Walls may have ears, but it is important to know whether the door was closed and exactly where Mr Okeke either was or would have been sitting. His absence of any recollection now about Person A also raises an obvious difficulty.
57. In any event, and this is the final aspect of the matter, my interpretation of the relevant portion of the transcript is that Mr Goodwin did not press the application to call Mr Okeke to give evidence. He was content that matters proceed on the basis indicated by the Chair, even if there were an inherent vagueness and lack of precision in what she said.

58. For all these reasons, therefore, Ground 3 must fail.
59. Ground 4 raises the related point that the SDT was wrong not to have taken Mr Okeke's evidence properly into account and not to have resolved the conflict between his evidence and that of Person A. There are, in essence, two answers to this ground.
60. The first answer, as Mr Counsell submitted, is that the SDT did expressly refer to Mr Okeke's evidence (see paragraph 3 of its determination). It would have been surprising had the SDT not done so, particularly after the exchanges between its Chair and Mr Goodwin as set out earlier in this judgment.
61. Secondly, there was little or no conflict between Mr Okeke's evidence and Person A's. I have already referred to a lack of precision in Mr Okeke's evidence which created obvious forensic difficulties for the appellant. I refer to what I said earlier that Mr Okeke would have had to have been called to give additional evidence for this ground to have any possibility of success. Not merely would that be erroneous in principle, but there is the obvious difficulty that we do not know what Mr Okeke would or might have said had he been called to say more.
62. Ground 5 is that the disciplinary hearing was unfair owing to delay, being a significant departure from the regulatory framework leading to a process that was unjust and prejudicial to the appellant.
63. Standing back from the detail of this case, there is a superficial attraction to this ground. A review of the chronology does show that there were considerable delays in the investigation of this complaint (which, after all, was not particularly complex) and

in bringing the matter to the attention of the SDT. That did not take place until August 2021. At first blush, that was very late.

64. Moreover - and this may be no more than a jury point - the critical date for the appellant's purposes was the coming into force of the 2019 regulations, and it could just about be maintained that an expeditious investigation would have resulted in a complaint or application by the SRA to the SDT before 25 November 2019.
65. It is unnecessary, however, for me to examine the merits of these superficially attractive points. The fundamental difficulty here is that it was not argued before the SDT or at any stage during the disciplinary procedure that the matter should be stayed for abuse of process. It is unnecessary for me to comment on whether such a submission would or might have succeeded. The fact remains that no application on that basis was ever made.
66. Mr Khan's submission that this was a pure point of law which did not require any factual substratum or underpinning is one that I cannot accept. If Ground 1 were made out, the fact that no one sought to submit before the SDT that the criminal standard of proof applied could scarcely be fatal to the appellant's case. He would, of course, succeed.
67. However, for this ground to have any prospects of success, certain necessary findings of fact would have to be made by the SDT. It would have to carry out some investigation into the reasons for the apparent delay. I should emphasise that all I that I have said thus far is that the delays in this case appear to be excessive. I am not making any express finding one way or the other.

68. Secondly, the SDT would need to examine the issue of any prejudice to the appellant. It has been maintained before me that relevant notes of the interview have been lost. It is quite unclear whether that has been brought about by the delay or on account of some other reason. In any event, it is fanciful that interview notes taken in these circumstances could throw any light on the allegations Person A is now making. Accordingly, Ground 5 cannot succeed.
69. Ground 6 is that the SDT should have reduced the SRA's costs to reflect that it had not been successful in all the complaints. However, the fact that Allegation 1.1 was found not proved could not have enhanced the costs in any material way.
70. The appellant's Ground 7 of disproportionate sanction will be considered in the context of the respondent's cross-appeal, to which I will now turn.

The Respondent's Cross-appeal on Sanction

71. In relation to sanction, the SDT referred to its Guidance Note on Sanctions, 9th Edition, published in December 2021.
72. The SDT considered that the appellant (whom I will continue to refer as such) was highly culpable. He was directly responsible, had direct control over his actions, was 15 years qualified at the material time, and was in a position of trust, vis-à-vis Person A. Although his behaviour was spontaneous in the sense that it was not premeditated, "the repeated and multifaceted comments made/questions posed, all of which were sexually motivated, were deliberate and repeated".
73. The SDT acknowledged the "obvious and significant direct harm" caused to Person A by the appellant's conduct. She described it thus:

“The interview was quite traumatic for me. It was the first paralegal role that I have ever applied for...

I felt so violated as the appellant is in a position of power as I was in an interview, especially when I was told to turn around. I went home and cried. I felt that I could not go into the profession. I had built up my hopes of what it would be like, and it was crushing.

I was not going to make a complaint, as I thought he was in a position of power and no one would believe me. It was Person C who helped me realise I could speak up for myself.

I was so horrified by how he behaved, I felt it would be trading in my dignity to work there. I felt like a piece of meat, and I was objectified... I have a first-class degree and a Masters. I worked very hard to get where I was. I am the only woman in my family who has gone to university. I felt very angry, as being a lawyer is not about your looks, it is about how you contribute to society. I felt very undermined and underappreciated. I also felt undermined by the salary because of my qualifications, and I felt devalued...”

74. The SDT found that the impact on Person A was “eminently foreseeable”. It also acknowledged the respondent’s complete lack of insight in the context of what was described as “abhorrent behaviour”.
75. The aggravating factors of the case included: (a) repeated inappropriate comments/questions during the course of the interview; (b) taking advantage of a vulnerable person, given the power imbalance; (c) demonstrable lack of insight; and (d) conduct which the respondent knew was a material breach of the duty incumbent on him, as a solicitor of the Supreme Court, to protect the public as well as the reputation of the profession.
76. As for the mitigation, this included: (a) the misconduct related to a single episode; (b) it was of brief duration; (c) the previous unblemished regulatory record; (d) full co-operation; and (e) the character references on his behalf.
77. At paragraph 27 of its judgment, the SDT said this:

“Weighing all of the attendant circumstances in the balance, the Tribunal assessed the misconduct as so serious that neither No Order, a Reprimand, nor a Restriction Order was appropriate. The Tribunal did consider that a financial penalty commensurate with the seriousness of the misconduct would sufficiently protect the overarching public interest, namely the protection of the public, the declaration/upholding of proper standards within the profession, and the maintenance of public confidence in the regulation of the profession.”

78. For my part, I would certainly strongly endorse the finding of “demonstrable lack of insight”. This is borne out by the appellant’s written and oral submissions, and in particular by his oral evidence before the SDT. I am sure, however, once the metaphorical dust has settled in this case, the appellant will have the opportunity to think long and hard about what happened on this particular admittedly isolated occasion.
79. I should have added that the SDT, in deciding to impose a fine, came to the conclusion that this was a Level 4 case which entailed “very serious” misconduct. It rejected the argument that a Level 2 fine should be imposed, which is appropriate for cases of moderately serious misconduct. It also took into account the appellant’s relatively limited means.
80. In cogent written and oral submissions, Mr Counsell contended that, standing back from this case, the sanction imposed by the SDT was simply too low and did not reflect the particularly serious misconduct which it found proved. What was highly relevant in this case is the impact of the appellant’s behaviour on an aspiring entrant to the legal profession and the knock-on consequences in relation to those in a similar position. Mr Counsell, as he was entitled to, underscored the appellant’s “astounding” lack of insight. There were numerous aggravating features in this case, not all of which were properly considered in paragraph 25 of the SDT’s determination. With reference to the Sanctions Guidance, he submitted that this was deliberated and calculated conduct, it

was motivated by sexual gratification, it constituted an abuse of power and, although this was a somewhat weaker point, the appellant was seeking to place the blame on others. Mr Counsell also submitted that paragraph 27 of the SDT's determination was sparsely reasoned, and did not demonstrate a focused and accurate evaluation of all the particular features of this case. At the very least, submitted Mr Counsell, the appellant should have been suspended. I was referred in this context to para 48 of the Guidance Note.

81. In written submissions reliance was placed on the decision of Soole J in *Kearney v BSB* [2022] EWHC 52 (Admin). That case involved inappropriate sexual misconduct demonstrated by a barrister towards a mini-pupil. The appeal was on the basis that the sanction of 6 months' suspension was plainly wrong. In my opinion, that case turned on its own facts, as does the present case, and Soole J's judgment establishes no general principles.
82. Mr Khan, on the other hand, submitted in relation to the cross-appeal that the SDT should receive a considerable amount of forensic latitude. He was forced to contend, in the context of his appeal, that this element of judicial restraint should be lacking. His contention was that, properly analysed, this was a case of moderate severity and that a Level 2 fine would be appropriate.
83. As for the governing legal principles, the parties' skeleton arguments reminded me of the relevant authorities. Although the rules make it clear that the test is whether the decision under appeal was "wrong", in practice I consider that this means "clearly" wrong. The insertion of the adverb is not "meaningless" (*pace* Mostyn J in one of the cases I was referred to). Rather, it reminds the appellate court that it must pay

appropriate regard to the expertise of the first-instance tribunal. That having been said, the nature and purpose of regulatory sanctions must not be forgotten.

84. In my judgment, the entirety of the SDT's determination on sanction must be considered. Once that approach is undertaken, it is plain that the SDT had regard to all the salient features of this case, including the appellant's high culpability, the fact that this was determined and calculated misconduct, albeit spontaneous, and the severe impact on Person A. The identification of the salient aggravating and mitigating factors came after the SDT's identification of these essential ingredients.
85. Contrary to Mr Counsell's submission, I consider that the Tribunal did bear in mind the deliberate and calculated nature of the appellant's behaviour, the fact that it was sexually motivated, the fact that it constituted an abuse of power, and the other relevant features of this case. As I pointed out to Mr Counsell in oral argument, this is not a situation where the appellant was seeking to place blame on others. He may have been blaming Person A rather than himself, but that is not what the Sanction Guidance is about.
86. In a situation where all relevant factors had been considered, Mr Counsell is then constrained to argue that insufficient weight was given to some factors and excessive weight given to others.
87. Arguments of this sort are always problematic in the context of a jurisdiction where this court accords considerable deference to the expert assessments and judgments made by the SDT. My interpolation of the adverb "plainly" is there to underscore that it is not for this court to decide what sanction it would have imposed in the light of everything known about the circumstances of this case and of the appellant.

88. Ultimately, and following this approach, I am not persuaded by Mr Counsell's submissions that the appellant should, at the very least, have been suspended. I would be prepared to say that the SDT's sanction in this case was on the lenient side; and that had the appellant been suspended for three months, any appeal on his part would have encountered clear difficulties. I suspect that many STDs would have suspended the appellant. But that is not the test. This SDT considered this case very carefully indeed and, in my judgment, came overall to a sensible and reasonable conclusion.
89. In terms of the message going out to the public, that question must be addressed in the light of all the evidence in this case, rather than a few selective soundbites. This was a very substantial fine for someone of relatively modest means. I have considered the statement of means form provided to the SDT, and have noted that some sections are incomplete. However, the figure for monthly income for an experienced solicitor is striking. I suspect that that is largely down to the level of fees in publicly-funded cases, rather than any lack of industry on his behalf. I must not be understood as suggesting that for one moment.
90. Given that the respondent has not persuaded me that the SDT's decision on sanction was wrong, it follows that the cross-appeal must be dismissed.
91. Ground 7 of the appellant's appeal must also be dismissed, for largely similar reasons. Indeed, my assessment that the SDT's sanction was on the lenient side must reinforce that conclusion. The appellant's submission that this was a moderately severe case rather than a very severe case needs to be understood in context. It is in the context of a decision already having been made to impose a fine, rather than some higher sanction including suspension. Given that this case is in the realm of fine in the estimation of the SDT, I can see absolutely nothing wrong with an assessment that this was a very

serious case of its type. In any event, the ascription of adverbs in this context is always likely to be a matter of opinion. It is not the appellant's opinion that counts; it is the SDT's.

92. For all these reasons, therefore, both the appeal and the cross-appeal are dismissed.

(15.22)

(Please note the following discussion post judgment)

(15.23)

MR COUNSELL: My Lord, can I tentatively suggest a couple of minor corrections to the judgment?

MR JUSTICE JAY: Yes, of course.

MR COUNSELL: The first one is that when your Lordship was reading out the paragraphs of the allegations and you got to paragraph 1.5, you incorrectly said "brother or sisters".

MR JUSTICE JAY: It is brother.

MR COUNSELL: It is "brother or brothers".

MR JUSTICE JAY: Yes.

MR COUNSELL: And the second one, I may have misunderstood this, but your Lordship I think was drawing a contrast between Tribunals such as the SDT which had a constituent lawyer and Tribunals of what was the Fitness to Practice Panel and now of course is the Medical Practitioners Tribunal. And that, of course does as well now.

MR JUSTICE JAY: Oh, it does now, does it?

MR COUNSELL: Yes. It has a legally qualified Chair in all Tribunals.

MR JUSTICE JAY: Right. Well, I did see that in the last appeal I did, and it was a barrister who chaired it. It is just that when I was doing these up to about 12 years ago...

MR COUNSELL: Yes, it changed.

MR JUSTICE JAY: ...There was a legal assessor.

MR COUNSELL: Yes. In fact, a lot of the legal assessors became a legal Chair.

MR JUSTICE JAY: Right. Thank you. Well, those corrections will be noted on the transcript, and I will incorporate them.

MR COUNSELL: Yes. Thank you very much.

(15.25)
