

ENGLAND AND WALES / JUDGMENT

Lindsay v Solicitors Regulation Authority [2018] EWHC 1275 (Admin) (25 May 2018)

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Case No: CO/516/2018

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

25 May 2018

B e f o r e :

MRS JUSTICE LANG DBE

Between:

ANDREW LINDSAY

Appellant

- and -

SOLICITORS REGULATION AUTHORITY

Respondent

Henry Mainwaring (under the Direct Access Scheme) for the Appellant

Andrew Tabachnik QC (instructed by Russell-Cooke LLP) for the Respondent

Hearing date: 26 April 2018

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Mrs Justice Lang :

The Appellant appeals against the decision of the Solicitors Disciplinary Tribunal ("the Tribunal"), dated 9 January 2018, in which it found allegations of misconduct and dishonesty proved, and struck him off the Roll. He was ordered to pay costs in the sum of £108,371.65.

The Appellant was admitted to the Roll on 1 September 1989. At all material times, he was Managing-Director and 95% shareholder of the firm Tandem XJA Limited (trading as Tandem Law). The essence of the allegations against him was that Tandem obtained funding totalling £5,920,225 from an investment fund (the Axiom Fund), in circumstances where it was improper to do so, leading to substantial financial losses. The Tribunal found these allegations proved, together with allegations that he failed to co-operate with the Respondent's investigation and gave the Respondent false and misleading responses. His co-director, Ms Marina Frankel, was the Second Respondent at the Appellant's disciplinary hearing. The Tribunal also found the allegations against her proved, and she was suspended indefinitely.

The Appellant appealed against the Tribunal's findings of guilt, and the sanction and costs order made against him, on the ground that the proceedings were procedurally unfair, because the Tribunal:

- i) refused to adjourn the hearing of the renewed application to stay the hearing, on 16 November 2017;
- ii) refused his application to stay the proceedings, on grounds of ill-health, on 20 November 2017;
- iii) proceeded with the hearing in the Appellant's absence, on 20 to 29 November 2017.

At the outset of the appeal hearing, I granted an application by the Appellant to adduce further medical evidence, namely, notes from his General Practitioner, dated 20 November 2017 and notes from the Accident and Emergency Department at Blackpool Teaching Hospitals NHS Trust, dated 20 November 2017. This was fresh evidence, relevant to the issues in the appeal, which was not available at the date of the Tribunal's decisions.

Legal framework

The Appellant has a statutory right of appeal to the High Court against the order of the Tribunal, pursuant to section 49 of the Solicitors Act 1974. The High Court, on such an appeal, can make such order "as it may think fit" (section 49(4)).

The appeal is governed by CPR Pt 52 and PD 52D. Under CPR 52.21(3), the question for the Court is whether the decision of the Tribunal is "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings in the lower court".

The appeal proceeds by way of review unless the Court considers that it would be in the interests of justice to hold a rehearing: see CPR 52.21(1), and

Salsbury v Law Society

[2009] 1 WLR 1286

, at [30]. The scope of the court's powers on a review in most cases renders it unnecessary to hold a re-hearing:

Adesemowo v Solicitors Regulation Authority

[2013] EWHC 2020 (Admin), at [9]-[12].

Interference with the findings of a specialist tribunal, especially one which heard the case over many days, "will not be made lightly":

Solicitors Regulation Authority v Barnett

[2016] EWHC 1160

at [17], and

Williams

v

Solicitors Regulation Authority

[2017] EWHC 1478

at [55].

An application for a stay or adjournment on medical grounds must be supported by proper medical evidence: see the decision of Vos J in

The Governor and Company of the Bank of Ireland v Jaffery

[2012] EWHC 734 at [48-50], and the Tribunal's Practice Note on Adjournments.

An appeal against a refusal to stay or adjourn on medical grounds is an appeal against a case management decision, in respect of which a tribunal enjoys a wide discretion: see

Jaffery

at [48] and

Andreou v Lord Chancellor

[2002] EWCA Civ 1192

at [35]. In

Andreou

, Gibson LJ said at [35] – [38]:

"35. There is no doubt but that the exercise of discretion by a tribunal, particularly in relation to a case management matter such as whether there should be an adjournment, is one with which the EAT should be slow to interfere, and then only on limited grounds. There is no dispute but that such grounds include perversity. It is also clear that where the consequences of the refusal of the adjournment are severe, such as when it will lead to the dismissal of the proceedings, the Tribunal must be particularly careful not to cause an injustice to the litigant seeking an adjournment: see my remarks in

Teinaz v London Borough of Wandsworth

(unreported) 16th July 2002 at paragraph 20. In that judgment I made some general observations on adjournments:

"21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.

22. If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved."

36. Similarly, Arden LJ said at paragraph 37:

37. 37. It is to be noted that the standard of review as respects the exercise of discretion involves the grant of considerable deference to the inferior tribunal. In particular, where several factors going either way have to be balanced by the inferior tribunal, the appellate tribunal does not interfere with the balancing exercise performed by the inferior tribunal unless its conclusion was clearly wrong."

38. She also said in paragraph 39:

"While any tribunal will naturally want to be satisfied as to the basis of any last minute application for an adjournment and will be anxious not to waste costs and scarce tribunal time or to cause inconvenience to the parties and their witnesses, it may be that in future cases like this a tribunal or advocates for either party could suggest the making of further enquiries and a very short adjournment for this purpose.""

In

Brabazon-Drenning v UKCC

[2001] HRLR 6, a refusal to adjourn disciplinary proceedings in the Nursing and Midwifery Council, was successfully appealed. Giving the leading judgment of the Divisional Court, with which Rose LJ agreed, Elias J. held at [18]:

"... Save in very exceptional cases where the public interest points strongly to the contrary, it must be wrong for a committee which has the livelihood and reputation of a professional individual in the palm of its hands, to go on with a hearing when there is unchallenged medical evidence that the individual is simply not fit to withstand the rigours of the disciplinary process."

Applying those principles to the facts of the case, Elias J. continued at [19]:

"...She clearly was unable to attend this hearing because she was too ill to do so. In those circumstances, I do not think there were any overriding public interest considerations which should have deprived her of her basic rights to be present when the case was put against her, and to be in a position where she could either of course examine herself, or have a representative with whom she could communicate cross examine on her behalf. It was a breach both of the principles of natural justice and Article 6."

Whether to proceed in the absence of a respondent to disciplinary proceedings should be assessed in line with the decision of the House of Lords in

R v Jones

[2002] UKHL 5

, as applied to the disciplinary context in

General Medical Council v Adeogba

[2016] EWCA Civ 162

, by the President of the Queen's Bench Division:

"18 It goes without saying that fairness fully encompasses fairness to the affected medical practitioner (a feature of prime importance) but it also involves fairness to the GMC (described in this context as the prosecution in Hayward at [22(5)]). In that regard, it is important that the analogy between criminal prosecution and regulatory proceedings is not taken too far. Steps can be taken to enforce attendance by a defendant; he can be arrested and brought to court. No such remedy is available to a regulator.

19 There are other differences too. First, the GMC represent the public interest in relation to standards of healthcare. It would run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process. The consequential cost and delay to other cases is real. Where there is good reason not to proceed, the case should be adjourned; where there is not, however, it is only right that it should proceed.

20 Second, there is a burden on medical practitioners, as there is with all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession.

...

23 Thus, the first question which must be addressed in any case such as these is whether all reasonable efforts have been taken to serve the practitioner with notice. That must be considered against the background of the requirement on the part of the practitioner to provide an address for the purposes of registration along with the methods used by the practitioner to communicate with the GMC and the relevant tribunal during the investigative and interlocutory phases of the case. Assuming that the Panel is satisfied about notice, discretion whether or not to proceed must then be exercised having regard to all the circumstances of which the Panel is aware with fairness to the practitioner being a prime consideration but fairness to the GMC and the interests of the public also taken into account; the criteria for criminal cases must be considered in the context of the different circumstances and different responsibilities of both the GMC and the practitioner."

Although not expressly relied upon by the Appellant, Article 6 of the European Convention on Human Rights is engaged where the appellant's right to practise his profession may be at stake (see

Albert & Le Compte v Belgium

(1983) 5 EHRR 533

). The common law standards of procedural fairness set out above are consistent with the standards required under Article 6.

Summary of the proceedings

The allegations against the Appellant were set out in the statement made pursuant to rule 5(2) of the Solicitors (Disciplinary Proceedings) Rules 2007 ("the Rules"), dated 11 November 2016. The Appellant was required to file an Answer by 19 December 2016. The Appellant has never filed an Answer to the allegations.

On 18 January 2017, the Appellant applied for an adjournment of the forthcoming case management hearing, alleging he had not been served with the proceedings and that he was too ill to attend. On 20 January 2017, the Tribunal refused the application for an adjournment. On 23 January 2017, the Appellant emailed the Tribunal stating he was too ill to participate in the case management hearing.

On 25 January 2017, at the case management hearing, the Appellant was ordered to authorise disclosure of his GP and medical records, and to make any application for a stay on medical grounds by 8 February 2017.

On 27 January 2017, the Appellant served a letter from Dr Scott Gall, his treating Cardiologist to his General Practitioner, dated 17 January 2017, which briefly described his history of ischaemic heart disease, his symptoms and treatment. Among other matters, Dr Gall stated:

"He has recently had his echocardiogram which shows again, a significantly dilated and severely impaired left ventricle with an aneurysmal apical segment. Reassuringly his valves do not show any significant problem and his left atrium remains normal size.

Unfortunately Andrew had an ICD shock yesterday which seems to be appropriate secondary to VT. As per my previous correspondence, he has been reported to be under considerable stress recently and in my view of his severe underlying heart disease, I wonder whether or not this could have played a part in this significant arrhythmias... I have again advised him that he should, at all costs try to avoid significant stressful situations as we certainly saw an increase in arrhythmias a few years ago when he had stress at work and if he is getting ongoing stress this may precipitate further life threatening arrhythmias and would certainly be best avoided if possible."

Dr Gall also produced an open letter describing the Appellant's condition and concluding:

"Given Mr Lindsay's significant cardiac history and severely impaired left ventricle and given the clearly documented occurrence of potentially life-threatening arrhythmias at times of stress, I think it reasonable to conclude that Mr Lindsay's recent deterioration may be the result of recent stress. In view of this it is my medical opinion that Mr Lindsay is not fit to be involved in his upcoming case, which I gather may involve significant and prolonged mental effort and stress as I would be concerned that this would precipitate further life-threatening arrhythmias."

On 8 February 2017, the Appellant applied to stay the proceedings on medical grounds.

Russell-Cooke (solicitors for the Respondent) commissioned a report from Mr Cripps, consultant cardiologist. Mr Cripps disagreed with Dr Gall's assessment but since he did not have the benefit of examining the Appellant nor reviewing his medical notes, the report was of limited value.

On 7 March 2017, a case management hearing took place in the Appellant's absence. An "unless" order was made about provision of Mr Lindsay's GP and medical records. Directions were given for Mr Lindsay to attend an examination by a consultant cardiologist (acting as the Tribunal's expert).

On 23 March 2017, Professor Hart was instructed by the Tribunal. On 14 June 2017, Professor Hart had a consultation with the Appellant. Professor Hart's report, dated 20 June 2017, advised as follows:

"

5.0 Opinion on fitness to proceed with the Tribunal

5.1 Mr Lindsay has serious heart disease which limits his activities and causes ongoing symptoms. I shall consider first the pump function of the heart, and then the rhythm. The EF is an index of the pumping capacity of the LV and in Mr Lindsay this is ~0.30-0.35 (normal =0.55). However he is able to maintain a good level of functional capacity for someone with this degree of LV dysfunction. There has been no clinical evidence of heart failure. The echo measurements and appearances have been stable for some time, and were last documented in January 2017. In my opinion it would not be expected that the Tribunal would cause a deterioration in LV pump function, which would permit Mr Lindsay to participate in the proceedings, to instruct representatives, to attend the hearing and be cross-examined.

5.2 Mr Lindsay is in paced rhythm at a normal rate for >90% of the time, and his beta-blocker therapy is able to suppress, to some degree, the increase in heart rate in response to physiological stimuli and in AF. This is a stable situation which would be expected to permit Mr Lindsay to engage in correspondence, instructing legal representatives and preparing statements etc. during the normal working day. There has been a single instance of life-threatening arrhythmia that was terminated by the ICD, which took place when he was in a condition of severe stress. It is well known that stress can exacerbate and cause cardiac arrhythmias, and it would seem reasonable to assume that on balance of probabilities, the high stress level played a part in the genesis of this arrhythmia. For this reason, and because most of his recent symptomatology is associated with stress, I suggest that it is necessary for the Tribunal to take into account the implications of the stress response in this case.

5.3 It is likely that Tribunal proceedings are normally associated with a degree of stress in any Respondent. It is my view that if his levels of stress were nearer "normal" Mr Lindsay's heart rhythm and rate would be well able to cope with participation in proceedings, instructing representatives and attendance at the hearing. However I would recommend that situations associated with severe, immediate and evoked stress such as can occur during adversarial cross-examination in court should if possible be avoided. But it is likely that if the levels of stress in

court were to begin to approach the level at which his ICD was triggered, Mr Lindsay would already have withdrawn from the proceedings.

5.4 Currently Mr Lindsay's symptoms and capabilities appear to be dominated by a severe stress/anxiety reaction that has been triggered by the onset of the tribunal proceedings, and is likely at this stage to have become chronic. I am not an expert in stress disorders but it would appear to me that this reaction has affected his behaviour and concentration, and has caused him to look for and to react to irregularities of heart rhythm that he might otherwise live with or ignore. At the present time he feels unable to engage with the proceedings in any form on account of stress.

5.5 I suggest that it may be helpful to seek an opinion from a consultant psychologist or psychiatrist, who may be able to give worthwhile recommendations for stress management in this case. And it would be in Mr Lindsay's interests to accept and to cooperate with strategies that may potentially reduce the likelihood of further ICD shocks.

6.0 Conclusions

6.1 Mr Lindsay has severe heart disease and an implanted cardioverter-defibrillator. In my opinion from a purely cardiac point of view he would be safe to continue with the Tribunal proceedings, with the caveat above (paragraph 5.3) regarding severe stress and confrontational questioning. However Mr Lindsay appears to be suffering from a severe stress/anxiety condition which has in my opinion, on the balance of probabilities, contributed to the rhythm that activated his defibrillator, and currently prevents him from participation in the proceedings."

In the light of Professor Hart's report, on 5 July 2017, Russell-Cooke wrote to the Appellant inviting him to consent to an examination by a consultant psychiatrist.

The Appellant sent various emails objecting to a psychiatric examination, accompanied by medical articles. On 21 July 2017, the Appellant's ex-wife, Anne Lindsay, also sent an email objecting to a psychiatric examination of the Appellant.

At a case management hearing on 24 July 2017, the Appellant was ordered (in his absence) to attend an examination by Dr Britto, consultant psychiatrist, by 18 August 2017.

On 3 August 2017, the Appellant applied to vary the directions given at the case management hearing on 24 July 2017. He explained that he and his ex-wife were taking their terminally ill daughter (who has spastic quadriplegic cerebral palsy) for a holiday to Scotland in early August. Thereafter he planned to visit his son in Gran Canaria, until 20 September 2017.

On 8 August 2017, Ms Frankel sent an email to the Respondent supporting the Appellant's application for a stay.

In a Tribunal Memorandum, dated 9 August 2017, the order of 24 July 2017 was varied to extend the period for the examination to 21 to 28 September 2017.

On 19 September 2017, the Appellant sent, by email, a letter before action alleging that the Tribunal procedures were unfair and in breach of his human rights. He complained, amongst other matters, about Professor Hart's failure to serve his report upon him, and that Professor Hart had included in his report reference to medical conditions (some of an intimate nature) which he considered to be irrelevant to his application for a stay. He stated that he refused to undergo any more medical examinations or engage in the Tribunal processes.

In two letters dated 10 October 2017, Russell-Cooke resisted the allegations in the Appellant's letter before claim. The Respondent's response to the complaints about Professor Hart were as follows. In error, Professor Hart had not been asked to serve his report directly on the Appellant, but it was supplied under cover of Russell-Cooke's letter of 5 July 2017, and the Appellant was not prejudiced by the delay. On request, Professor Hart specifically confirmed in writing that the other medical conditions, which were in the Appellant's medical notes, were not irrelevant to his cardiac condition.

On 12 October 2017, the Appellant sent a lengthy email arguing his case for a stay. He then sent a further email late that night.

On 13 October 2017, the Tribunal heard the application for a stay on medical grounds, in the Appellant's absence, and reserved its decision.

On 23 October 2017, the Appellant sent further representations in respect of his application.

On 24 October 2017, the Tribunal announced that the application for a stay was refused. Its detailed reasons were set out in its Memorandum dated 13 November 2017, and its key conclusions included the following:

"66. The Tribunal considered that Professor Hart had made his recommendation regarding a psychologist/psychiatrist for a fairly broad purpose rather than for a therapeutic plan to address stress as the First Respondent suggested. The report was about the First Respondent managing his heart condition during the hearing. The Tribunal did not therefore consider that the First Respondent had provided a cogent reason for not cooperating with Dr Britto. He had originally indicated that he was willing to cooperate but he did not do so in spite of the Tribunal varying the timeline for the examination to accommodate his holiday plans. Professor Hart said that the First Respondent could go ahead with the proceedings if his stress levels were kept down.

67. The further report from a psychologist/psychiatrist which Professor Hart recommended had not been possible because the First Respondent had not cooperated. In the context of whether it would be unfair to require the First Respondent to undergo a substantive hearing the Tribunal considered that an experienced Tribunal should be able to manage the situation. It could ensure that the First Respondent was afforded regular breaks and the First Respondent could manage his own participation including as Professor Hart indicated, withdrawing if appropriate. The Tribunal did not overlook the fact that Dr Gall was the First Respondent's treating physician and took a rather different view from Professor Hart but the latter had made clear that he regarded himself as instructed as an independent expert and

his actions in electing not to read the report of Dr Cripps bore out his independence....the Tribunal accepted the submissions of Mr Tabachnik in his skeleton argument contrasting the report of the First Respondent's treating cardiologist with that of Professor Hart who was independent of their relationship.

68. The Tribunal also noted the detailed submissions made over the last few days by the First Respondent in respect of his application. By contrast the First Respondent had elected not to comply with the Tribunal's directions and submit an Answer to the allegations in the Rule 5 Statement. The Tribunal noted that the First Respondent had been able to correspond and deal with his interlocutory application and correspondence arising out of it. Whatever help he had received, it was clear that he had been able to prepare for and follow the arguments relating to the application working late into the evening and engaging in discussions with the Second Respondent.
69. The First Respondent had raised objections to the continued involvement of both the Tribunal and the Applicant (and its representatives) in these disciplinary proceedings and asserted that he refused to cooperate with Dr Britto because his instruction arose out of the report of the Professor. His objections were based on alleged violation of his rights concerning private information because Professor Hart's report made reference to another medical condition which the First Respondent had suffered from earlier than the six-year period to which the medical records released to the Professor had related but which had been referred to in those records. The Tribunal could see nothing exceptional in what had occurred in that regard; and it had no relevance to the conduct of a fair and impartial hearing. The Respondent was himself an experienced clinical negligence solicitor and would have on many occasions had experience of providing documents to medical experts for comment. It was a matter for the expert in question to determine what aspects of the documentation provided should be referred to in their independent report. Russell-Cooke had written to Professor Hart and enquired why he had made reference to the other medical condition and the Professor had replied.

.....

71. The Tribunal could find no grounds for staying the proceedings on the basis that the Respondent had not had the opportunity to prepare because of his medical condition as he clearly could prepare for Tribunal hearings when he chose to do so. Based on the medical reports which the Tribunal had been provided with, there was nothing to prevent the substantive hearing taking place as listed provided the division of the Tribunal hearing the application offered reasonable adjustments to the First Respondent and if he did exhibit symptoms which gave the sitting Tribunal serious concern it was a matter for that division of the Tribunal to deal with it at the time.
72. Having considered the multiple correspondence from the First Respondent and the points he had raised, the Tribunal considered that none was of significant relevance to the question of his ability to have a fair trial or good reason for the substantive hearing listed to

commence on 20 November 2017 not to go ahead. The Tribunal was sensitive to his medical condition and could make reasonable adjustments. The Tribunal had afforded the First Respondent the opportunity for further medical evidence to be obtained but he had chosen not to cooperate and the Tribunal did not consider the absence of that evidence to be an obstacle to proceeding. The Tribunal therefore dismissed the First Respondent's application for a stay of the proceedings."

On 13 November 2017, the Appellant's newly-appointed solicitors (Glassbrooks Ltd) applied for the stay application to be re-heard under Rule 19(2) of the Rules. Glassbrooks relied upon a report from Dr Saleem, a consultant psychiatrist, dated 11 November 2017. Dr Saleem diagnosed Mr Lindsay as suffering from "generalised anxiety disorder", which affected his ability to concentrate, and which was aggravating his cardiac problems. Dr Saleem's view was that preparing for, and attending, the Tribunal hearing could lead to considerable stress for the Appellant. This in turn might lead to life-threatening cardiac events. Dr Saleem recommended treatment in the form of anxiety management and CBT sessions, but doubted that this would reduce the Appellant's vulnerability to stress if he attended the Tribunal hearing.

On 14 November 2017, Russell-Cooke wrote to Glassbrooks requesting a copy of their letter of instruction to Dr Saleem, and confirmation as to whether the Appellant's numerous long letters/emails in the proceedings had been provided to Dr Saleem.

The Tribunal treated the Appellant's application as a fresh application for a stay supported by Dr Saleem's report. On 15 November 2017, the Tribunal refused the application, giving reasons in a Memorandum, which stated:

"11. The medical evidence of Dr Saleem did not specifically address the First Respondent's ability to participate in these proceedings, his ability to instruct legal representatives to act on his behalf, his ability to give evidence and be cross-examined, and if so subject to what reasonable adjustments. There was no evidence that if the proceedings were stayed to enable CBT/anxiety management treatment, that this would result in the First Respondent being in a better position to participate in the proceedings. Indeed, he would have the stress of the ongoing proceedings during any such period.

12. The Second Respondent had made a number of representations about the impact of these proceedings on her. If the substantive hearing was adjourned this would mean that the proceedings in respect of her were also adjourned, unless they were to be severed and another division of the Tribunal had previously decided against severance. The Tribunal had to balance the position of both Respondents in reaching its decision.
13. The First Respondent had not participated in these proceedings in any meaningful way. He had not seen Dr Britto, the psychiatrist nominated in accordance with the earlier direction of the Tribunal, despite extensive re-organisation of the arrangements for his appointment to see Dr Britto to accommodate the First Respondent's holidays. He had declined to comply with the earlier direction of the Tribunal, which was significantly directed towards obtaining guidance on making reasonable adjustments during the hearing to accommodate the First

Respondent's stress. At the eleventh hour he had submitted the report of Dr Saleem which notably failed to address the question. Nonetheless the Tribunal could and would make reasonable adjustments during the period of the substantive hearing. There was no additional information in Dr Saleem's report that led the Tribunal to conclude that the proceedings should be stayed and the application was refused".

A "Clerk's Note" indicated that the Appellant was entitled to renew his application when the substantive hearing began, if he so wished.

On 15 November 2017, Glassbrooks came off the record and the Appellant resumed acting in person.

On 16 November 2017, the Appellant sent an email withdrawing the application for the dismissal of his stay application to be reviewed under Rule 19 of the Rules. He indicated that he wished to renew his stay application at the start of the substantive hearing on 20 November 2017. However, the Tribunal had already determined the application on the previous day.

On 19 November 2017, the Appellant sent an email stating that he would not attend the hearing, listed for the next day, and that he would in due course submit "the necessary medical details and a preliminary Doctor's note by way of confirmation". No medical details or Doctor's note were supplied to the Tribunal.

On 20 November 2017, the Appellant sent an email stating that he was not fit to attend the Tribunal that day. He indicated that he was prepared to undertake to apply to be removed from the Roll as a condition of any stay of the prosecution, and that he was willing to be examined by an independent psychiatrist, expressing regret at not having done so previously.

On 20 November 2017, which was Day 1 of the hearing, the Tribunal considered and rejected the Appellant's application to renew and/or adjourn the preceding week's stay application. The Tribunal determined that the Appellant was absent voluntarily, and that it was fair to proceed with the substantive hearing. Its reasons were set out at [24]-[28] of its judgment, as follows:

"24. The only new evidence before the Tribunal since it had made its decisions on 15 November 2017 was the further correspondence from the First Respondent and the letter of instruction to Dr Saleem. The First Respondent had referred to having been unwell for seven to ten days and the Tribunal would have thought he might have been able to produce some updating medical evidence but had not done so.

25. The Tribunal was not prepared to adjourn further consideration of the First Respondent's application for a stay. The First Respondent said that he was now willing to be assessed by an independent expert having declined to co-operate with that assessment since July 2017. The First Respondent had sent a number of cogent emails during the course of the proceedings. He had understood the reasons for the assessment and had declined to co-operate with it. There was no evidence that he would now co-operate with it other than his email of 20 November 2017. The application for a stay was refused.

26. The Tribunal proceeded to consider the application to proceed in the First Respondent's absence. He had put himself at a disadvantage by failing to file an Answer. There was a public interest in the hearing proceeding. The case against the First Respondent involved serious allegations including a number of allegations of dishonesty.
27. The Tribunal also had to consider the impact on the Second Respondent if the hearing was adjourned. The investigation had been ongoing for some years. The recollection of events in 2014 would not become any clearer with the further passage of time. Given the way in which the allegations were interlinked it would not be in the interests of justice for the cases to be severed and none of the parties had made this application to the Tribunal.
28. The Tribunal carefully considered Mr Tabachnik's submissions and the factors set out in the case law it had been referred to. The First Respondent had not substantively engaged with these proceedings, he was aware of them and aware of the hearing date, having confirmed that he was not going to be attending the hearing. In the circumstances the Tribunal concluded that the First Respondent had voluntarily absented himself and it would proceed in his absence. It was in the interests of fairness and justice for the substantive hearing to go ahead."

During the remainder of Day 1, the Respondent opened its case against the Appellant. At 5:46 p.m. on Day 1, the Appellant emailed to say that his GP had referred him to hospital for tests.

On 21 November 2017, which was Day 2 of the hearing, the Appellant emailed in the morning to say that "the cardiac pain was not related to myocardial infarction", and that he had been discharged from the hospital. Further documentary evidence was promised. The Respondent completed its opening against the Appellant.

On 21 November 2017 Russell-Cooke wrote to the Appellant to update him on the proceedings to date and the programme for the rest of the substantive hearing. The letter made clear that the Appellant was entitled to address the allegations against him (after the case against Ms Frankel had been heard).

On 22 to 24 November 2017, which were Days 3 to 5 of the hearing, the Tribunal heard the case against Ms Frankel. On 24 November 2017, Russell-Cooke provided the Appellant with a further update on the proceedings.

On 27 November 2017, at 7:53 a.m., the Appellant sent an email stating "I am not well enough to attend". This was treated by the Tribunal as a further application for a stay/adjournment, but this was rejected as it was unsupported by any additional medical evidence. The Tribunal said in its judgment at [36]:

"The Tribunal had not received any fresh medical evidence in relation to the First Respondent's attendance at hospital. He had said that he would send the discharge notice but had not yet done so. Having reviewed all of the previous considerations, including the requirement to be fair to all the parties and recent correspondence the Tribunal rejected the application for an adjournment or stay that was implicit in the email dated 27 November 2017."

On 27 November 2017, which was Day 6 of the hearing, the Tribunal commenced deliberations. Russell-Cooke wrote to the Appellant to inform him.

On 28 November 2017, which was Day 7 of the hearing, the Tribunal announced that it had found all allegations against the Appellant proved. It adjourned issues of sanction and costs to the next day, to allow the Appellant an opportunity to make representations on these matters. The Appellant was informed of this by email.

On 29 November 2017, which was Day 8 of the hearing, the Appellant sent a lengthy email to the Tribunal, setting out mitigation and submissions on costs. The Tribunal announced its decisions on sanction and costs the same day. The Appellant was ordered to be struck off the Roll and to pay £108,371.65 in costs.

On 9 January 2018, the Tribunal filed its judgment with the Law Society, setting out full reasons for dismissing the adjournment applications on Day 1, and for its decisions on the allegations, sanction and costs.

Conclusions

In my judgment, it is apparent from the Tribunal's decisions that at each stage it correctly directed itself on the law, and the principles to apply to the Appellant's applications for an adjournment or stay of the proceedings on grounds of ill-health. Those principles are set out above. I note that the Tribunal had the benefit of written and oral submissions on the law from experienced counsel, Mr Tabachnik QC, who also appeared in this appeal.

The Tribunal recognised that the Appellant suffered from a serious cardiac condition, which was potentially life-threatening, and potentially exacerbated by his symptoms of anxiety and stress. The Appellant's position was that the Tribunal proceedings should be permanently stayed because of his medical condition. However, in addition to its duty to act fairly to the Appellant, the Tribunal was under a duty to ensure that the disciplinary proceedings were effective, if at all possible, as it was in the public interest that action be taken against solicitors facing serious charges of misconduct and dishonesty. Thus, the Tribunal rightly addressed the question whether, and to what extent, the Appellant could nonetheless participate in the proceedings, despite his ill-health. The Appellant did not address this question, and nor did the two doctors (Dr Gall, a cardiologist, and Dr Saleem, a psychiatrist) whom the Appellant instructed to prepare medical reports on his behalf.

In my view, the Tribunal was entitled to require independent medical advice on the Appellant's condition, from approved practitioners, based upon appropriately drafted letters of instruction and full disclosure of the evidence. Both Dr Gall and Dr Saleem based their reports upon somewhat self-serving accounts given by the Appellant, and they were not aware of the lengthy detailed emails from the Appellant, which demonstrated his ability to engage with the proceedings, despite his ill-health. The Tribunal was entitled to accept Mr Tabachnik QC's submissions on why the report of the independent expert cardiologist, Professor Hart, should be preferred to Dr Gall's report.

The Claimant's complaints about late service of Professor Hart's report and his reference to other medical conditions did not make it unfair for the Tribunal to rely upon the report.

Professor Hart concluded that the Appellant was suffering from severe heart disease which limited his activities and caused a range of ongoing symptoms, as described in his report. He concluded that he was able to maintain a good level of functional capacity and there was no clinical evidence of heart failure. In his opinion, his cardiac condition did not prevent him from participating in the proceedings, instructing representatives, attending the hearing and giving evidence. However, Professor Hart noted that the single instance of life-threatening arrhythmia which was terminated by the ICD took place when he was in a condition of severe stress, and since stress could exacerbate and cause cardiac arrhythmia, it seemed reasonable to assume that his high level of stress played a part on that occasion.

Professor Hart rightly recognised that tribunal proceedings would cause a degree of stress in anyone, and any situation liable to cause severe stress, such as adversarial cross-examination, should be avoided by the Appellant. He advised that a consultant psychiatrist might be able to give worthwhile recommendations for stress management.

In the light of this evidence, the Tribunal made the reasonable and responsible direction, on 24 July 2017, that an independent consultant psychiatrist should advise on the Appellant's ability to participate in the hearing, and any adjustments which might be required because of his stress. The Appellant unreasonably refused to comply with this direction, which could only have assisted him.

In its decision of 24 October 2017, the Tribunal considered whether it would be unfair to require the Appellant to undergo a substantive hearing and concluded that an experienced Tribunal should be able to manage the situation. It could ensure that the Appellant was afforded regular breaks and the Appellant could manage his own participation including, as Professor Hart indicated, withdrawing if appropriate. This was confirmed in its decision on 15 November 2017.

The Tribunal had procedures for attendance by video link, which Ms Frankel, the Second Respondent, utilised. The Appellant could have remained at his home, thus avoiding the strain of travel, and participated by video link, as and when he felt able to do so.

As Mr Tabachnik QC submitted to the Tribunal, the Appellant had chosen to instruct legal representatives from time to time during the disciplinary proceedings, and it was open to him to do so for the substantive hearing. Legal representation would obviously alleviate the burden of reading papers etc. and responding to the allegations.

It was apparent from reading the Appellant's numerous, lengthy emails that he was able to engage with the proceedings energetically, and defend himself with vigour. He was also able to make written submissions on mitigation and costs during the course of the hearing. In the light of this evidence, I have no doubt that he was also physically and mentally capable of making written submissions to the Tribunal in response to the allegations against him. It is therefore telling that the Appellant never complied with the requirement to file an Answer to the allegations. Nor did he submit a witness statement to the Tribunal. In my view, the reason for these failures was that he did not want the proceedings to go ahead, not that he was too unwell.

His lack of co-operation was further demonstrated by the email of 19 September 2017 which was a letter before action threatening legal proceedings for breach of his human rights in which he stated he refused to undergo any more medical examinations or engage in the Tribunal processes.

On 20 November 2017, during Day 1 of the hearing, the Appellant notified the Tribunal that he was unable to attend as planned, as he was unwell and he was attending his GP. As set out at paragraph 44 above, the Tribunal gave proper consideration to this, noting that the Appellant could have attended his GP earlier, since he had had the symptoms for 7 to 10 days.

For the first time on 20 November 2017, the Appellant indicated his intention to attend the hearing and to co-operate by seeing a psychiatrist, as directed by the Tribunal. In the light of the history and the Appellant's lack of co-operation, I consider that the Tribunal was entitled to be sceptical about his apparent change of stance. The Appellant's proposal would have necessitated an adjournment and the Appellant had already had ample opportunity to see a psychiatrist.

To adjourn the hearing on the first day would have resulted in wasted costs and delay. An adjournment of the Tribunal hearing to a later date was also strongly opposed by Ms Frankel, the Second Respondent, because of the damaging effect of the delay. Importantly, as the Tribunal observed in its decision of 15 November 2017, there was no evidence to suggest that the Appellant's cardiac condition was likely to improve, or that CBT/anxiety management treatment would result in the Appellant being in a better position to participate in the hearing. Indeed, prolonging the duration of the disciplinary process would be likely to increase the Appellant's level of stress.

The Tribunal had recently given careful consideration to the medical evidence, and concluded that he was fit to attend, provided reasonable adjustments were made for him. In all the circumstances, the Tribunal was entitled to conclude that he was absenting himself voluntarily.

At this appeal, I saw the GP notes of his attendance on 20 November 2017. His reported condition was "left lower chest pains for 7-10 days, associated breathlessness. Thinks it is AF pains, attends today as concerning him. Has significant cardiac history." There is no explanation as to why he did not attend the doctor earlier. The GP reported that he was "alert, looks well, no respiratory distress, speaking in full sentences". On examination, there was no clinical abnormality.

The GP referred him to the Accident & Emergency Department at Blackpool Teaching Hospitals NHS Trust, which he attended the same day. According to the medical records, the Appellant attended hospital in order to obtain blood tests to check whether his troponin levels were normal, which they were. The doctor took blood tests and examined him. The Appellant declined further medication and was discharged the same day, with no follow-up noted in the records.

In my view, these medical records would not have altered the Tribunal's decision, if they had been available.

In his email to the Respondent on 21 November 2017, the Appellant confirmed that the "A & E investigations yesterday determined the cardiac pain was not related to my cardio infarction. My troponin levels are normal. I was discharged home approximately midnight last night and will be seen in cardiology on a date to be fixed sometime soon to investigate the cardiac pain further, although the A & E medic did believe it likely AF related. In the meantime I remain in pain, have intermittent arrhythmias and shortness of breath and unable to travel or attend the hearing. I will send the necessary documentary evidence as soon as the hospital writes to my GP and it becomes available."

On 27 November 2017 the Appellant sent a further email stating "I am not well enough to attend". This was treated by the Tribunal as a further application for a stay/adjournment, but was rejected as unsupported by any medical evidence.

Despite promising to do so, he never sent the Tribunal any medical evidence to explain or justify his absence, on Day 1 or thereafter. He never attempted to attend the hearing, whether in person or by video link, even though he was not receiving medical treatment after Day 1, and he was kept informed of the progress of the hearing. In my view, it was never his intention to attend the hearing.

In conclusion, I consider the Tribunal's exercise of its discretion in deciding not to stay or adjourn the disciplinary proceedings against the Appellant was lawful and his appeal must be dismissed.

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