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Case No: AC-2023-MAN-000018

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

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Before:

HIS HONOUR JUDGE STEPHEN DAVIES
(Sitting as a Judge of the High Court)

- -

Between:

ROBERT KEARNEY	**Appellant**
- and -	
THE BAR STANDARDS BOARD	**Respondent**

- -
- -

MR ROSANNO SCAMARDELLA, KC for the **Appellant**

MISS HARINI IYENGAR counsel for the **Respondent**

- -

APPROVED JUDGMENT

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JUDGE STEPHEN DAVIES :

1. This judgment concerns the first ground of appeal brought by the Appellant, Mr Robert Kearney, a barrister, to the High Court against the sanction of disbarment made against him on 19 July 2023 by a panel of the Bar Tribunals and Adjudication Service (BTAS for short) in relation to two separate cases. The panel comprised five members, the Chair being His Honour Judge Jonathan Carroll, who is also the Chair of BTAS. Ground 1 of the appeal is that the panel was wrong to refuse to recuse themselves from proceeding further to hear the case when asked to do so at a hearing on 5 January 2023.

2. I have dealt with ground 1 separately and in advance of the other grounds because, as counsel for both parties agreed, if it is made out it follows that the appeal must be allowed on that basis alone and the case remitted to a differently constituted panel for a re-determination of sanction, so that there would be no purpose in my hearing or making findings on the remaining grounds.

3. I have had the benefit of extremely helpful submissions from counsel for the Appellant, Mr Rosanno Scamardella, KC and counsel for the Respondent, the Bar Standards Board, Ms Harini Iyengar. I have considered their submissions and reflected over lunch on the points they have made and I now give my judgment.

4. I will begin with various introductory matters. The Appellant faced a number of charges under two separate cases.

5. Case 21/4962 related to allegations of sexual harassment of a person to whom I shall refer as person A, as she was referred to below to protect her identity, during a mini pupillage which she attended between 23 to 26 July 2018 at the chambers of which the Appellant was then a member. At a hearing on 11 October 2022 he admitted two charges relating to that conduct.

6. Case 20/0928 concerns allegations of sexual harassment of two persons, again referred to only as pupil A and pupil B, at two social events on 13 June 2020 and, following an indication given at the 11 October 2022 hearing, six charges were formally admitted on 5 January 2023 relating to that conduct. There were three other charges on that case which the Respondent decided not to proceed with at the hearing which had been listed for three days on 7 December 2022. The expectation had been that the panel would deal with the other three charges over 7 and 8 December 2022 and proceed to deal with sanction on all matters admitted and/or found proved on 9 December 2022.

7. However, on 7 December the Appellant, who was also represented then by Mr Scamardella, did not appear and provided some evidence that this was because he was suffering from Covid. The position of the Respondent, also then represented by Ms Iyengar, was that it opposed any adjournment. However, in the end the hearing was adjourned to 9 December 2022 because the Respondent had decided not to proceed with the three charges referred to, so that the expectation was either that the sanctions hearing could proceed on the other matters on 9 December or, if the Appellant was still unwell and could prove that his illness was such as to justify his non-attendance, would have to be adjourned.

8. On 9 December the Appellant did not attend but did produce evidence in the form of an email from his general practitioner which, in the end, was accepted by the panel as justifying an adjournment, albeit that they did so with evident reluctance. There was also some considerable discussion as to whether or not the panel had power to make order of interim suspension in the meantime which, after considerable investigation and, again, with evident reluctance, the panel concluded it could not do, although it did extract certain undertakings from the Appellant through his counsel. The sanctions hearing was then adjourned to 5 January 2023. However, on 22 December 2022 the Appellant made a written application, drafted by Mr Scamardella, for recusal of the panel based on the events of 9 December.

9. After the hearing on 9 December had concluded, and on the same day, HHJ Carroll, in his capacity as Chair of BTAS, sent an email to Green LJ, who is the Chair of the Inns of Court, copied to the Director-General of the Bar Standards Board and the Registrar of BTAS, which was subsequently disclosed to the Applicant by BTAS following representations made by the Bar Standards Board. The content of that email is at the heart of the recusal application which was made by Mr Scamardella and refused by the panel on 5 January 2023 and which is now pursued before me on appeal.

10. The application is made on the basis of actual or apparent bias on the part of the panel.

11. I should say straight away that I have no doubt that the allegation of actual bias is not made out. However, I must consider the allegation of apparent bias based on the contents of that email. It is necessary for me to read it out in full but I should say that it is the content of what is the sixth paragraph which is at the heart of the allegation. The email reads as follows:

> "I write in my capacity as Chair of BTAS to you in your capacity as Chair of the Council of the Inns of Court. I consider the issue so important that I have taken the liberty of copying this letter to the Director-General of BSB and the BTAS Registrar.
>
> As you are aware, the issue of sexual misconduct and harassment and other forms of misconduct in circumstances of a significant power imbalance are issues that have rightly become very major concerns of the Bar Council, the Inns of Court and the bar regulatory system and, indeed, the wider profession and public. Our capacity to police such conduct is crucial.
>
> When chairing a five member panel today in two cases against the same Respondent, both of which relate to very serious and now admitted conduct of sexual misconduct, a lacuna in the regulations was revealed that is so concerning I wish to bring it to your immediate attention to consider what, if anything, can and should be done about it.
>
> Because the hearing concerned has not yet reached resolution I shall not disclose any confidential panel discussions but I can set out the key points without any such breach.

> The Respondent before the panel is a senior member of the bar and faced two separate cases. Both relate to serious sexual misconduct (non-contact matters) and in each case the complainants were very junior, one being a mini pupil, the other being pupils within their first six months. Indeed, one had only begun her pupillage a matter of days before. The Respondent has two previous BSB findings and sanctions against him for almost the exact same behaviour. Indeed, on the chronology he must have committed at least some of the new conduct whilst being investigated and sanctioned for the earlier conduct. In relation to these new paragraphs he admitted the misconduct on all matters at the very last moment on the first day of the contested hearing listing causing considerable delay to the overall process."

This is paragraph 6:

> "The matter was listed today for sanction hearing. His earlier misconduct was dealt with under the old sanctions guidance which is now generally accepted as providing insufficient sanction for this type of behaviour. His new matters will be dealt with under the new sanctions guidance. I can freely indicate, because it was indicated within the tribunal hearing, that both cumulatively and individually the current guidance points to disbarment. The Respondent has not cooperated with proceedings and caused delay throughout. Now at day of sanction he has provided a sick note re Covid and applied to adjourn sanction. He has continued to practise. Whilst we could not go behind the Covid sick note, given his past history we unanimously were of the view that he is a high likelihood of further offences and ought in the public interest and in the interest of young females at the bar, he ought to be suspended until the sanction hearing can be concluded. We were dismayed to find that we have no such power. The power for temporary suspension sits largely in the BSB's hands and in overly restrictive terms so that neither the panel acting of its own motion nor BSB could temporarily suspend the Respondent pending his final sanction hearing. This leaves him free to practise and continue to be a danger to women with the tribunal power to address this in any way other than re-listing the case as soon as practicable. We have all re-arranged our diaries to continue this case on 5 January."

The email ended with the suggestion that urgent consideration should be given to addressing this lacuna in advance of any full re-draft of the tribunal regulations.

12. I have been referred to the law that applies to applications in relation to recusal for bias. In *Porter v McGill* [2001] UKHL 67 the House of Lords approved the following test formulated in the *Re: Medicaments* case by the Court of Appeal in the following terms.

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased."

I have also found some helpful commentary applicable to the particular facts of this case as part of the editorial notes to Part 1.1 of the Civil Procedure Rules in Civil Procedure at paragraph 1.1.3.

> "The fair minded observer is not unduly sensitive or suspicious (*Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 W.L.R. 2416, HL). Where there are real grounds for doubt as to a lack of bias it should be resolved in favour of recusal.
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> …
>
> The disqualification of a judge for apparent bias is not a discretionary matter. Either there is a real possibility of bias or there is not.
>
> …
>
> A judge to whom a case has been assigned for trial has to be very careful in ruling on pre-trial applications not to prejudge any matter that will be argued and decided at trial and not to pre-empt any decision that will be made on that occasion (*Hammond v ProFit USA Limited* [2007] EWHC 2941 Ch.
>
> …
>
> "Care should, however, be taken where case management is concerned (see *AB v British Gold Corporation* [2006] EWCA (Civ) 172 CA where it was noted that to characterise too readily a judge's conduct in this role as conduct at risk of being perceived as apparent bias would subvert the proactive management of cases expected of judges under the Civil Procedure Rules).
>
> …
>
> At a trial a judge may legitimately give assistance to the parties by telling them about the views that he is forming in his mind as the evidence goes along but it is not acceptable for a judge to form or to give the impression of having formed a firm view in favour of one side's credibility when the other side has not yet called evidence which is intended to impugn it (*Amjad v Steadman Byrne* [2007] EWCA (Civ) 625).
>
> And finally:
>
> "Where a party makes adverse comment about a party in a private conversation that is inadvertently broadcast to the party that may give rise to an apprehension of bias where the basis of the comments could have been put to the party during a hearing (*Re: C (A child*) [2020] EWCA (Civ) 987 at paragraph 29.)
>
> Those are the legal principles which I will apply in this case.

13. I will turn to the first matter of complaint where the email says, as I have said:

> "I can freely indicate, because it was indicated within the tribunal hearing, that both cumulatively and individually the current guidance points to disbarment."

In fact, an examination of the transcript shows that no such comment was made at the hearing on 7 or 9 December 2022. What was said at the hearing on 10 October of 2022 was this:

"I want to be absolutely clear – all sanctions/options are open at the moment up to and including a suspension and, indeed, up to and including a disbarment at the top end of the range".

14. In its final decision the panel said at paragraph 82, by reference to the BTAS sanctions Guidance January 2022 version, that it concluded that this conduct fell within but towards the upper end of the middle range, attracting a sanction range of over 24 months' suspension to disbarment, before consideration of aggravating and mitigating circumstances. Having addressed those circumstances it decided, at paragraph 90, that the aggravating features identified warranted a considerable movement upwards within the range and the mitigating features warranted a moderate adjustment downwards. It concluded, at paragraph 97, that there should be a sanction of disbarment on the charges relating to the two pupils and, if considered alone, a 12 month suspension would have been appropriate for the charges relating to the mini pupil but, given the existing sanction of disbarment, there would be no benefit in doing so and disbarment was ordered on that matter as well. The decision noted that this was a majority decision, but did not explain the reasons for the minority dissent.

15. The submission made on behalf of the Appellant is that what was said in the email was plainly a clear indication that the panel had already decided, and not just provisionally, that the Guidance pointed to disbarment. Not only was this wrong, it is submitted, as revealed by the previous indication and the subsequent finding, but it also was a pre-judgment reached before having heard submissions or evidence from the BSB or from the Appellant in relation to sanction. It also appeared to have been reached following confidential panel discussions which were not revealed in the course of the open hearings.

16. Miss Iyengar's submission was that, whilst she accepted of course that the panel should be and remain open-minded in relation to sanction until they made their decision, at this point the circumstances were that the panel had already adjourned in order to address sanction later and there was nothing improper in indicating a provisional view based on their reading into the case in advance.

17. However, in my judgment, this was not simply a case of indicating a provisional view in the course of an open hearing. It contained a clear indication that a decision had already been made by the panel in private that the Guidance pointed to disbarment. Not only was this wrong because, as I have said, in fact the position was that the guidance pointed either to a lengthy suspension or to disbarment but also, and importantly, it was not limited to a simple statement as to what the Guidance said but - at least reasonably arguably – also amounted to an indication of an apparent view as to where the appropriate sanction lay in this case.

18. I do however accept that if this was all that was said then it might not by itself justify a finding of apparent bias. Hence, I must go on to consider what else was said which is relied on by the Appellant and to consider the cumulative impact of what was said.

19. The second comment upon which reliance is placed by the Appellant is the statement that the Respondent had not co-operated with the proceedings and had caused delay throughout. This was a statement which, at least so far as the Appellant is concerned, was a contentious one. Miss Iyengar has carefully taken me through the chronology of

the somewhat complex history of these and the two previous complaints. It is undoubtedly true that the Appellant had not been fully co-operative at all stages and that his conduct was, at least in part, responsible for some of the delay. However, as the panel itself recognised and accepted in the final decision having heard submissions on the point, the Appellant was not the only one to blame and it was also critical in some respects of the Bar Standards Board, so that in the end it decided not to consider the Appellant's conduct in relation to delays as an aggravating factor.

20. Nonetheless, as the Appellant submits, to make that statement in that email in those unqualified terms clearly at least reasonably arguably indicates a degree of pre-judgment which goes beyond the simple expression of a provisional view. Again, I accept that, read by itself, this would not justify a finding of apparent bias and, again, I need to go on to consider the cumulative impact of everything which was said.

21. The email continued, in the next passage objected to:

> "Now at the day of sanction he has produced a sick note and applied to adjourn. He has continued to practise. We could not go behind the Covid sick note."

Again, it is submitted by Mr Scamardella that on a fair reading this, especially when read with the previous comment, shows that the panel were deeply suspicious of the credibility of the Covid explanation and believed that this was simply another excuse for delay, which was completely unjustified on the evidence the before them.

22. Miss Iyengar submits that this was no more than the panel either recording the BSB's submissions or expressing a concern, which was not directly related to this case, as to the potential for abuse in such cases. She reminds me that in the end the case was adjourned and nothing was said in the decision about this particular point.

23. However, in my judgment, there is a clear indication here that the panel had at least reasonably arguably formed an adverse view of the credibility of the explanation provided and considered that it was yet further evidence of deliberate delaying tactics by the Appellant.

24. The next and final passage relied upon was the passage which said that the panel were unanimously of the view that the Appellant was a high likelihood of committing further offences and continuing to be a danger to women. Again, this appears to be a disclosure of confidential panel discussions and also indicates in no uncertain terms that the panel had already formed a clear view of this issue. It is submitted by Mr Scamardella that this is clearly relevant not just to the question of interim suspension but also to the question of sanction and, in particular, to the issues of his current and future risk and thus the crucial question as to whether a lengthy suspension was sufficient or whether only disbarment would be justified.

25. Miss Iyengar has submitted that this observation was directed only to the question of suspension and not to sanction and, anyway, is plainly justified by the chronology which discloses repeat offending on four separate occasions. These are powerful submissions but nevertheless, as is submitted on behalf of the Appellant, the vice here is that there is at least reasonably arguably evidence of a clear, rather than a provisional, view being reached before evidence and submissions on mitigation which

is as relevant to sanction as to interim suspension and which is not couched in clear terms as either only provisional or relevant only to the question of interim suspension.

26. Standing back from the detail, it is difficult in my judgment not to see, on a common sense reading of this email in the round, that it is the combination of the comments about the panel's assessment of the risk posed by the Appellant and the pattern of repeat offending, added to the history of delay, which is, if not at the heart of at the very least a powerful explanation for the clear view expressed that this was a disbarment case. That clear view of course goes to the heart of the case in circumstances where the key issue for the panel to decide on sanction was, as I have said, whether to impose a lengthy suspension or disbarment.

27. I therefore return then to the legal test: would a fair minded and informed observer conclude that there was a real possibility or a real danger that the tribunal was biased? In my judgment, on the totality of this material they would. It is very different from the robust expression of a provisional view in an open hearing. It is what has been decided in private, before any evidence or submissions on mitigation has been heard. In my view, it provides real grounds for doubt as to a lack of bias and it should, therefore, be resolved in favour of recusal.

28. In my judgment, a reasonable observer would conclude that the Appellant would have a justified sense of grievance at having been disbarred by a panel which had already formed such views in private before any evidence and submissions on mitigation had been adduced.

29. In my view it cannot be said that what was, undoubtedly, an extremely conscientious, thorough and detailed final determination is sufficient to remove that concern. Indeed, since the panel ought to have recused itself on 5 January 2023, the fact that it subsequently made such a decision cannot assist the case. The reasonable observer would still be left wondering whether, notwithstanding what was said on the face of the determination, the panel was still influenced by the conclusions already reached in private at an earlier stage and that this case was always only ever going to end up with disbarment, whatever was said in mitigation.

30. It is important to note that at this later stage, when the sanctions hearing finally took place, the Appellant put in a reflective statement giving evidence of the concrete steps he had taken to deal with what he recognised as wholly unacceptable behaviour, and providing a series of character references, including references from those who had not known him at the time of offending but had come across him in a professional capacity subsequently. If there may reasonably be perceived to be a real risk that this evidence was not treated in the fair way that it deserved, due to minds already being closed, then that perception supports the conclusion that the panel ought to have recused itself beforehand.

31. I would wish to emphasise first that this decision is made firmly only on the basis of apparent bias, and second is adopting the approach of erring on the side of caution where there is a real possibility or a real danger of apparent bias. Since, on the authorities, that is the appropriate test to apply I must allow the appeal on ground 1.

32. Finally, I should say that I have considered carefully what was said in the decision at paragraph 18 in relation to the reasons for not recusing. It is only the last section which deals with the email. In my judgment, the points made at sub-paragraph (f), whilst no doubt accurately stating the actual position of the panel at the time of the decision, do not address the issue of apparent bias at the time that the application was made. That, as I have already said, seems to me to be the essential question in this case.

33. That then concludes my Judgment on ground 1.

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(This Judgment has been approved by the Judge.)

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