Neutral Citation Number: [2016] EWHC 2943 (Admin)

Case No: CO/5430/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/ 2016

Before:

MR JUSTICE HOLROYDE

- -

Between:

JOHN ITESHI	**Appellant**
- and -	
BAR STANDARDS BOARD	**Respondent**

- -
- -

Mr Iteshi appeared in person
Mr Christopher Aylwin (instructed by **Bar Standards Board**) for the **Respondent**

Hearing dates: 4th October, 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE HOLROYDE

Mr Justice Holroyde :

1. On 16th October 2015, a disciplinary tribunal convened in accordance with the Disciplinary Tribunals Regulations 2014 ("the tribunal") made an order that the appellant Mr John Iteshi be disbarred and expelled from the Honourable Society of the Middle Temple. Mr Iteshi appeals against that order.

2. At the hearing of the appeal, Mr Iteshi appeared in person. The respondent Bar Standards Board was represented by Mr Christopher Aylwin.

3. Mr Iteshi was called to the Bar by the Honourable Society of the Middle Temple on 11th October 2007. His attempts to obtain pupillage were unsuccessful. Accordingly, he has never practised as a barrister. Until the decision of the Tribunal, however, he remained on the Roll of Barristers of England and Wales, and was entitled to call himself a barrister. In his submissions to me Mr Iteshi emphasised that that was a justifiable source of pride to him. I readily accept that is so. It is clear that the order disbarring him has been a cause of great distress to Mr Iteshi.

The regulatory framework:

4. Regulatory functions in relation to the Bar are vested in the Bar Standards Board ("BSB"), an approved regulator under the Legal Services Act 2007. At the time when Mr Iteshi passed his professional examinations and was called to the Bar, the conduct of barristers was governed by a Code of Conduct, which I will refer to for convenience as "the old Code".

5. Paragraph 104 of the old Code stated its general purpose in these terms:

> "The general purpose of this Code is to provide the requirements for practice as a barrister and the rules and standards of conduct applicable to barristers which are appropriate in the interests of justice and in particular:
>
> (a) in relation to self-employed barristers to provide common and enforceable rules and standards which require them:
>
> (i) to be completely independent in conduct and in professional standing as sole practitioners;
>
> (ii) to act only as consultants instructed by solicitors and other approved persons (save where instructions can be properly dispensed with);
>
> (iii) to acknowledge a public obligation based on the paramount need for access to justice to act for any client in cases within their field of practice;
>
> (b) to make appropriate provision for:
>
> (i) barrister managers, employees and owners of Authorised Bodies ; and

> (ii) employed barristers taking into account the fact that such barristers are employed to provide legal services to or on behalf of their employer."

6. By paragraph 105, that general purpose was applicable to all barristers.

7. Paragraph 301 of the old Code, also applicable to all barristers, stated –

> "301. A barrister must have regard to paragraph 104 and must not:
>
> (a) engage in conduct whether in pursuit of his profession or otherwise which is:
>
> (i) dishonest or otherwise discreditable to a barrister;
>
> (ii) prejudicial to the administration of justice; or
>
> (iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;
>
> (b) engage directly or indirectly in any occupation if his association with that occupation may adversely affect the reputation of the Bar or in the case of a practising barrister prejudice his ability to attend properly to his practice"

8. With effect from January 2014, the old Code was replaced by the BSB's Handbook. Part 2 of the Handbook contains a Code of Conduct (which I shall refer to as "the new Code"). This sets out the mandatory standards which all persons regulated by the BSB are required to meet in the form of ten Core Duties. By paragraph rI1.7.1, the persons subject to such regulation include –

> "all barristers, that is to say:
>
> .a barristers who hold a practising certificate in accordance with Section 3.C ("practising barristers");
>
> .b barristers who are undertaking either the first non-practising six months of pupillage or the second practising six months of pupillage, or a part thereof and who are registered with the Bar Standards Board as a pupil ("pupils"); and
>
> .c all other barristers who do not hold a practising certificate but who have been called to the Bar by one of the Inns and have not ceased to be a member of the Bar ("unregistered barristers")".

9. It follows that in accordance with the Handbook, Mr Iteshi until he was disbarred was an unregistered barrister and was subject to the Core Duties.

10. Core Duty 5 is in the following terms:

> "You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession."

11. Part 5 of the Handbook contains the Complaints Regulations. These provide that the Professional Conduct Committee ("PCC") has the power to bring charges of professional misconduct against barristers and to prosecute such charges before a disciplinary tribunal. "Professional misconduct" is defined in the Handbook as

> "A breach of this Handbook by a BSB regulated person which is not appropriate for disposal by way of no further action or the imposition of administrative sanctions".

12. The sanctions which may be imposed, when professional misconduct has been proved before a disciplinary tribunal, are (in summary) disbarment; suspension from practice; prohibition from accepting public access instructions; exclusion from providing representation funded by the Legal Aid Agency; a fine; additional CPD requirements; reprimand; and advice as to future conduct.

13. The Council of the Inns of Court has published "Sentencing Guidance in respect of Breaches of the BSB Handbook". As revised in July 2015, that Guidance sets out the purposes of sentencing in these terms:

> "3.1 The purposes of applying sanctions for professional misconduct are:
>
> a) To protect the public and consumers of legal services;
>
> b) To maintain high standards of behaviour and performance at the Bar;
>
> c) To promote public and professional confidence in the complaints and disciplinary
>
> process.
>
> 3.2 The three purposes of applying sanctions (outlined above) have equal weighting; in fulfilling the purposes it is important to avoid the recurrence of behaviour by the individual or the authorised body as well as provide an example in order to maintain public confidence in the profession. Decision makers must take all of these factors into account when determining the appropriate sanction to be imposed in an individual case. Decision makers should also bear in mind that sanctions are preventative and not intended to be punitive in nature but nevertheless may have that effect."

14. At paragraph 6.3, the Guidance says this of disbarment:

> "Disbarment is the most serious sanction which can be imposed and should be reserved for cases where the need to protect the public or the need to maintain confidence in the profession is

> such that the barrister should be removed from the profession. It is not possible to provide a definitive list of the circumstances in which disbarment will be appropriate as it will depend on the facts of the case and the individual background of the barrister. However, as Sir Thomas Bingham M.R. stated in Bolton v The Law Society [1994] 2 All ER 486:
>
> To maintain [the] reputation and sustain public confidence in the profession, it is often necessary that those guilty of serious lapses are not only expelled but denied readmission
>
> .... the reputation of the profession is more important than the fortunes of any individual barrister'.
>
> Therefore, disbarment may be appropriate where one or more of the following factors apply:
>
> a) a serious and/or persistent departure or departures from professional standards;
>
> b) serious harm has been caused to either the administration of justice, the reputation of the Bar or any person including the individual complainant and there is a continuing risk to the public or the reputation of the profession if the barrister is permitted to continue in practice;
>
> c) the barrister has committed a serious criminal offence involving dishonesty, violence or sexual offences;
>
> d) the barrister has acted dishonestly regardless of whether it was in connection with a criminal offence (see 6.2 below)
>
> e) the barrister has shown a persistent lack of insight into the seriousness of his/her actions or the consequences for his/her practice, the administration of justice or the reputation of the Bar."

15. By rule E183 of the Disciplinary Tribunals Regulations 2014 (also contained in Part 5 of the Handbook), a barrister against whom a charge of professional misconduct has been proved may appeal to the High Court, in accordance with the Civil Procedure Rules, against his conviction and/or sentence. Part 52.11(1) of the Civil Procedure Rules has the effect that an appeal will be limited to a review of the decision of the disciplinary tribunal. The effect of Part 52.11(4) is that the High Court can only allow an appeal where the decision of the disciplinary tribunal was wrong, or was unjust because of a serious procedural or other irregularity in the proceedings before the disciplinary tribunal.

The Restriction of Proceedings Order made against Mr Iteshi:

16. Between November 2007 and November 2011 Mr Iteshi commenced 30 claims in Employment Tribunals. One of the claims was made against the Bar Council. Four were made against Mr Iteshi's employers. The remaining 25 were made against recruitment agencies and employers to whom Mr Iteshi had made job applications. Each of the claims alleged direct and indirect race discrimination. Some also alleged sex discrimination and victimisation.

17. None of the claims was successful. Many were struck out as having no reasonable prospect of success. In the course of litigating these claims, Mr Iteshi brought many appeals to the Employment Appeal Tribunal, both against striking out orders and against final decisions.

18. In addition, Mr Iteshi commenced proceedings in the High Court against the Bar Council challenging the professional requirements in relation to pupillage.

19. The last of the claims which Mr Iteshi commenced in an Employment Tribunal was issued in November 2011, and was withdrawn in March 2012. The last of the various appeals which he made to the Employment Appeal Tribunal was determined in December 2012.

20. In 2013 HM Attorney General made an application for a Restriction of Proceedings Order ("RPO"), pursuant to section 33 of the Employment Tribunals Act 1996, against Mr Iteshi. So far as is material for present purposes, that section provides:

> "(1) If, on an application made by the Attorney General … under this section, the Appeal Tribunal is satisfied that a person has habitually and persistently and without any reasonable ground – (a) instituted vexatious proceedings , whether … in an employment tribunal or before the Appeal Tribunal, and whether against the same person or against different persons, or
>
> (b) made vexatious applications in any proceeding, whether … in an employment tribunal or before the Appeal Tribunal
>
> The Appeal Tribunal may, after hearing the person or giving him an opportunity of being heard, make a restriction of proceedings order.
>
> (2) A "restriction of proceedings" order is an order that –
>
> a) No proceedings shall without the leave of the Appeal Tribunal be instituted … in any employment tribunal or before the Appeal Tribunal by the person against whom the order is made,
>
> b) Any proceedings instituted by him … in any employment tribunal or before the Appeal Tribunal before the making of the order shall not be continued by him without the leave of the Appeal Tribunal, and

> c) No application (other than one for leave under this section) is to be made by him in any proceedings … in any employment tribunal or before the Appeal tribunal without the leave of the Appeal Tribunal.
>
> (3) A restriction of proceedings order may provide that it is to cease to have effect at the end of a specified period, but otherwise it remains in force indefinitely.
>
> (4) Leave for the institution or continuance of, or for the making of any application in, any proceedings … in an employment tribunal or before the Appeal Tribunal by a person who is the subject of a restriction of proceedings order shall not be given unless the Appeal Tribunal s satisfied –
>
> a. That the proceedings are not an abuse of the process, and
>
> b. That there are reasonable grounds for the proceedings
>
> or application."

21. That application was heard by Mitting J on 12th March 2014. Mr Iteshi appeared at the hearing. He made brief submissions in support of a renewed application to have the Attorney General's application struck out, but departed when that application was refused. Mitting J continued with the substantive hearing in Mr Iteshi's absence. In a detailed judgment, he set out the circumstances of each of the 30 claims and applications, and the reasons why each had been unsuccessful. He summarised the claims in these terms:

> "Each of them has common characteristics, with the exception of that brought against the Bar Council. Mr Iteshi has applied for jobs; he has been turned down; he has accused the recruitment agencies if they were involved or the employers if only they were involved or both of race and sex discrimination when he proved unsuccessful. He has never had any basis for making that allegation."

22. Having concluded that the conditions for the making of an RPO were satisfied, Mitting J noted that Mr Iteshi had made the point that his last claim form had been issued in November 2011 and that the last step taken in any of the proceedings initiated by him was in December 2012. The learned judge accepted that a litigant who had conducted vexatious and unreasonable litigation, but had then ceased and had undertaken not to do so in future, might avoid an order being made against him. He concluded however that an affidavit which Mr Iteshi had sworn in the proceedings before him demonstrated that Mr Iteshi had had no change of heart. He said that he had no confidence at all that if he did not make an RPO, Mr Iteshi would see the error of his ways and would litigate, if at all, only in cases where the facts justified him in doing so. In those circumstances the learned judge was satisfied it was necessary for him to make an RPO of indefinite duration. He so ordered.

The disciplinary proceedings:

23. By a letter dated 28th July 2014, HM Attorney General brought the making of the RPO to the attention of the BSB, and invited the BSB to consider whether Mr Iteshi's actions were in keeping with the professional standards required of him.

24. Following such consideration the BSB wrote to Mr Iteshi on 4th August 2014 informing him that he BSB had decided of its own motion to raise a complaint against him, and requiring his written comments. At that stage, the BSB was considering a complaint that Mr Iteshi had breached not only Core Duty 5 (which I have quoted above) but also Core Duty 3 (which states "You must act with honesty and integrity"). The BSB enclosed with its letter, amongst other things, copies of various media articles relating to Mr Iteshi. One which must be mentioned was an article in the London Evening Standard online edition of 25th July 2014, reporting the making of the RPO and illustrating the article with two photographs of Mr Iteshi, one of which appears to have been taken on his night of his call to the Bar, and the other of which was taken shortly before the article was published.

25. Mr Iteshi responded to the BSB by a letter dated 25 August 2014, in which he indicated that he would provide a response if necessary, but summarised his position by saying

> "I wish to inform you that I am a non-practising barrister and that none of the proceedings that led to the said restriction order by the Employment Appeal Tribunal related in any way to my providing any form of legal service to anyone. Since none of the proceedings which the Employment Tribunal used to justify imposing the restriction order had anything to do with any client and/or provision of legal services, it is therefore highly unlikely that I have breached any aspect of Core Duties 3 and 5 or the Code."

26. The BSB replied on 9th September 2014 confirming that Mr Iteshi was correct in thinking that Core Duty 3 would not apply to him as an unregistered barrister, but stating that Core Duty 5 did apply to him.

27. After a further exchange of correspondence, Mr Iteshi set out his position in much more detail in a letter dated 24th September 2014. He made clear that he did not agree that he had committed any act of professional misconduct. The points which he made included, in summary, the following. First, he pointed out that he had taken no steps in any proceedings in any tribunal or court since about mid 2012. Secondly, he explained his reasons for believing that he had been unlawfully discriminated against and was therefore bound to bring the various proceedings which he had issued in the Employment Tribunals, and said that all he had ever tried to do was to "use all legal means available to me to challenge discriminatory acts against me". He complained that it was not right to take action against him when he had made valid allegations which had not been investigated by any independent body. Thirdly, he said that it would be unfair to apply a Core Duty, which only came into effect in 2014, to events two years earlier. Fourthly, he said that the Core Duties had been promulgated without any notice to him as a non-practising barrister, and he had only heard about them in the course of responding to this complaint. He emphasised that he was "a

completely unblemished man" and stressed that he had never been found "by even the most antagonistic judge" to have provided any incorrect or misleading evidence. Nor had any judge ever found that he had not genuinely been seeking employment or had made job applications solely for the purpose of bringing complaints in the tribunal.

28. Mr Iteshi also sent to the BSB a copy of a long letter which he had sent to HM Attorney General on 27th September 2010, inviting him to "intervene and/or investigate the wanton abuse of judicial power in my claims and appeals with the Employment Tribunal and Employment Appeal Tribunal". HM Attorney General's office replied that they had forwarded Mr Iteshi's letter to the Ministry of Justice as the Ministry with responsibility for the Employment Tribunals.

29. The PCC thereafter considered the complaint against Mr Iteshi. On 27th November 2014 the PCC wrote to Mr Iteshi informing him that

> "the complaint for having become the subject of [the RPO] should form the subject of a charge or charges before a five-person Disciplinary Tribunal of the Council of the Inns of Court."

30. Mr Iteshi was thereafter charged by the BSB with professional misconduct. The charge sheet against him was in the following terms:

> "Statement of Offence
>
> Professional misconduct contrary to Core Duty 5 in the Bar Standards Board Handbook (First Edition January 2014).
>
> Particulars of Offence
>
> John Iteshi, a barrister behaved in a way which was likely to diminish the trust and confidence which the public places in the legal profession, in that in the Employment Appeal Tribunal on 12th March 2014 he was made the subject of a restriction of proceedings order by Mr Justice Mitting under section 33 of the Employment Tribunals Act 1996 on the ground that he had habitually and persistently and without any reasonable ground instituted vexatious proceedings in an Employment Tribunal and before the Appeal Tribunal and made vexatious applications in proceedings in both Tribunals."

31. On 28th July 2015 notice was sent to Mr Iteshi that the tribunal's hearing of the charge against him would take place on 16th October 2015. In advance of that date, Mr Iteshi sent to the tribunal an undated and unsigned witness statement, which he rightly described as mirroring much of what he had said in his letter of 24th September 2014. He maintained his denial that he had committed any act of professional misconduct or any act capable of being a breach of Core Duty 5. He said –

> "I know that this trial is focused on the specific fact that I was restricted under section 33 and not about what happened that led to my so-called restriction, but it would be unfair not to consider the interesting background of my case."

He then went on to repeat that he had only ever used legal means to challenge discriminatory acts against him, and alleged that the Employment Tribunals and courts had in each case chosen "to brazenly subvert or manipulate the facts of my complaint to reach conclusions that could only be described as fraudulent". He accused the Ministry of Justice (which he said had not yet replied to his letter of September 2010) of having "embarked on the campaign to discredit me".

The disciplinary tribunal:

32. When the disciplinary tribunal convened on 16th October 2015, there was no appearance by Mr Iteshi. Provision is made for such a circumstance in rule E148 of the Disciplinary Tribunals Regulations 2014, which provides:

> "If a Disciplinary Tribunal is satisfied that the relevant procedure has been complied with and the defendant has been duly served (in accordance with rE216 of these Regulations) with the documents required by rE102, rE104, and rE125.2.c (as appropriate) but that defendant has not attended at the time and place appointed for the hearing, the Tribunal may nevertheless proceed to hear and determine the charge(s) or application(s) relating to that defendant if it considers it just to do so, subject to compliance with rE180.1 in respect of that defendant if the Disciplinary Tribunal finds any charge or application proved."

33. The tribunal reviewed the documents to confirm that Mr Iteshi had been served with notice of the date, and were satisfied that he had (and indeed, Mr Iteshi does not now dispute that he knew of the hearing date). The tribunal had been provided by Mr Iteshi with a postal address and an email address but not with a telephone number. An officer of the tribunal sent an email to Mr Iteshi at 1041 on 16th October 2015 in the following terms:

> "Please can you advise if you intend to appear at the tribunal today which was scheduled to start at 1030? Do you have a telephone number we can contact you on?"

No response was received to that email. The tribunal proceeded to hear and determine the matter in Mr Iteshi's absence.

34. The disciplinary tribunal's findings and decision were recorded in two documents, copies of which were sent to Mr Iteshi on 19th October 2015. In the first, the tribunal recorded that Mr Iteshi was a regulated barrister subject to Core Duty 5, and noted that the onus was on him to keep himself up to date with the regulations of his profession. They then recited the order of Mitting J dated 12th March 2014 and said that the finding, conclusion and order of Mitting J

> "has satisfied the tribunal that the making of such an order in these terms falls within the meaning of 'behaviour by which the trust and confidence of the public in the legal profession will be diminished'. We find that this is behaviour that breaches Core Duty 5."

35. The tribunal's decision was expressed in the following terms:

> "We conclude that Mr Iteshi should be disbarred and expelled from the Hon Soc of the Middle Temple for the following reasons.
>
> Mr Iteshi has absented himself from the proceedings. In those circumstances the relevant procedure under regulation rE148 has been complied with and the findings and sentence have been made in Mr Iteshi's absence in accordance with regulation rE148.
>
> As to mitigating factors, we take into account that Mr Iteshi has no previous findings against him and no matters have been drawn to our attention that suggest Mr Iteshi has breached the order made by Mitting J.
>
> As to aggravating matters, we consider Mr Iteshi's actions to constitute a serious and persistent departure from professional standards; serious harm has been caused to the administration of justice, the reputation of the Bar and there is a continuing risk to the reputation of the profession (notwithstanding that he is not a practising barrister): and a persistent lack of insight into the seriousness of his actions as to the administration of justice and the reputation of the Bar. Mr Iteshi has today failed to appear without explanation.
>
> We have seen nothing to suggest that Mr Iteshi has in any way recognised the seriousness of his actions, the last information we have from Mr Iteshi being his unsigned statement of June 2015."

36. The second document was a pro forma sheet which sets out a non-exhaustive list of possible mitigating and aggravating factors. On this sheet, the tribunal had marked as applicable to this case one mitigating factor, namely "10: previous good character", and three aggravating factors, namely "(F) Persistent conduct/conduct over a lengthy period of time"; "(G) undermining of the profession in the eyes of the public"; and "(Q) failure to attend a Tribunal without explanation".

37. A fuller report of the proceedings before the tribunal was prepared in accordance with rule E181 of the Disciplinary Tribunals Regulations 2014, and was signed off by the tribunal's chairman on 20th October 2015. It reported the circumstances (summarised above) in which the tribunal had decided to proceed in Mr Iteshi's absence, and summarised the case presented against Mr Iteshi by Mr Aylwin on behalf of the BSB. It is apparent from that summary that in the course of the hearing Mr Aylwin had

brought to the tribunal's attention, and had responded to, four objections which Mr Itehsi had raised in correspondence and in his unsigned statement. These were:

i) That at the time of Mitting J's order, Mr Iteshi had no extant proceedings;

ii) That Mr Iteshi argued that it would be unfair to apply the Core Duties to events which occurred before those Duties came into effect in 2014;

iii) That Mr Iteshi contended that he had not been given adequate notice of the coming into effect of the BSB Handbook;

iv) That Mr Iteshi disputed whether the Core Duties could have applied to him in the light of the fact that the activities which led to the order of Mitting J had not occurred during the provision by him of legal services to third parties.

38. Mr Aylwin also addressed the tribunal about a possible argument – albeit one which Mr Iteshi had not raised – that being subject to an RPO could not amount to "behaviour" within the meaning of Core Duty 5.

39. The Chairman's report shows that after the tribunal had reached and announced their decision that a breach of Core Duty 5 had been proved to the criminal standard of proof, they were addressed by Mr Aylwin in relation to sentence:

> "29. Mr Aylwin explained that the Defendant had a previously unblemished record.
>
> 30. Mr Aylwin fairly pointed out that the BSB did not have any evidence that the Defendant had sought to disobey the order made by Mr Justice Mitting and that if the Defendant had been in attendance he would urge the Tribunal to consider that he could do no more than comply with the order.
>
> 31. Mr Aylwin did not seek to make submissions in relation to sentence on behalf of the BSB.
>
> 32. Mr Aylwin, whilst not advocating the approach, pointed out that if the Tribunal were considering disbarment as a sanction the Tribunal would have the power to adjourn in order to allow the Defendant a further chance to address the Tribunal with any mitigation he wished to have taken into account."

40. The report set out the tribunal's reasons for their decision to disbar Mr Iteshi. These were in substantially the same terms as those I have quoted above, save that in listing the aggravating features found by the Panel it expressed the first of them in the following terms:

> "The Defendant's conduct leading to the making of the restriction order was persistent and over a lengthy period of time."

41. The tribunal's reasons for declining to adjourn the proceedings before sentencing were expressed as follows:

> "We have rejected the option of allowing an adjournment in order for Mr Iteshi to advance any mitigation in relation to sentence as we are satisfied that Mr Iteshi was appropriately served with notice and documentation ahead of this hearing. In addition, in his own albeit unsigned witness statement he had noted that the ultimate sanction would be disbarment and so he was fully aware of this as an option and the seriousness of the proceedings."

Mr Iteshi's appeal to the High Court:

42. Mr Iteshi issued a notice of appeal on 6th November 2015. He set out 15 grounds of appeal. Several of those grounds overlap one with another, and it is not necessary for me to deal with each of them separately. It is however appropriate to set them all out in the terms which Mr Iteshi used:

> "1. Bias: both the BSB and the Tribunal Chair lack the neutrality and independence and have vested interests and reasons to victimise, humiliate and destroy the life of the appellant. There is equally an appearance of bias. The appellant's history with the respondent and some judges be taken into consideration.
>
> 2. There was no real or significant breach of any Core Duty as found by the Tribunal. No breach occurred except for a BSB that has so lost direction it works to victimise individual barristers.
>
> 3. Even if there was an appearance of the breach, it cannot apply because it would be obnoxious, oppressive and grossly unjust to apply a provision that came into effect in 2014 on something that concerns events that ended in around 2011 when the appellant last made any claim or appeal.
>
> 4. It will be contrary to Natural Justice to apply the core duties on event wholly dependent of things that happened nearly 3 years before its introduction.
>
> 5. It is contrary to public interest and public policy to allow the obnoxious decision of the Tribunal considering the background of the appellant's grievances against the BSB and the judicial system and considering the fact that no one has ever addressed the appellant's several complaints against judges. Equally to be considered are the circumstances surrounding the appellant's Restriction under section 33 of the Employment Tribunals Act 1996.
>
> 6. The Tribunal erred in holding that the appellant ought to have been aware of the new developments in the profession he had been significantly ostracised from and not allowed to actually use to earn a living. The Tribunal ought to have

considered the fact that Non-Practising barristers in the appellant's position were in effect ostracised and not allowed anything other than keeping the title of 'barrister'.

7. To apply such an onerous Code of Duty on Non-Practising barristers must be grossly unjust and wrong both legally and morally. Non-Practising barristers ought to have been properly notified not expected to go humiliating themselves in the premises of a profession that has quite clearly practically excluded them.

8. The Tribunal erred in considering the circumstances that led to the said Restriction of the appellant without equally giving any consideration to the appellant's side of the circumstances or events that led to the said Restriction. The appellant's viewpoint/response ought to have been properly acknowledged even if they appeared foolish or insane.

9. It is a gross infringement of my Convention rights under Articles 3 and 6. The appellant avers that both the act of instituting the disciplinary charge and the obnoxious decision of the Tribunal inconsideration of the whole background of the appellant's case, amount to inhuman and degrading treatments. The appellant further avers that his right to fair hearing has been grossly infringed by the self-evident bias of the BSB and the Tribunal.

10. There was no good reason for the action of the BSB and the Tribunal.

11. The grounds for punishing the appellant appeared to have been made up or embellished to justify destroying an "enemy". It cannot be right to accuse a person who is crying out against inappropriate behaviours by judicial officers of behaving inappropriately by reasons of making such allegations even though no attempt has been made by any independent body to look into the allegations he made.

12. Proportionality: even if there can be found any breach (which is doubtful), the punishment is grossly disproportionate and obnoxious.

13. The Tribunal failed to give adequate reasons for radically departing from the sentencing guidelines to impose such an onerous penalty.

14. The Tribunal failed to justify embarking on the hearing without the appellant's presence in view of the unusual penalty it intended to impose.

> 15. It is contrary to the interest of justice and public policy to impose such a heavy penalty on an unblemished person who happened to be strongly critical of the BSB and the judicial system"

43. In his oral submissions to me, Mr Iteshi emphasised his belief that he has been unfairly treated and persecuted for no reason. He clearly feels very strongly about this. He became somewhat upset in the course of his submissions. He expressed his anger that the more recent of the two photographs which illustrated the Evening Standard article had been obtained by what he regards as a trick: he said he was invited to meet a reporter for what he believed would be an opportunity for him to explain his position, but the reporter quickly brought that meeting to an end, and with hindsight he thinks it was no more than an opportunity for the newspaper to photograph him. He said that the BSB had set out to humiliate him, and he regarded the Evening Standard article and photograph as another example of the humiliation he had suffered.

The submissions:

44. The grounds of appeal, and the oral submissions made by Mr Iteshi, raise seven issues.

45. First, was it fair to apply the new Code to non-practising barristers? Mr Iteshi submitted that it is unfair to expect a non-practising barrister to keep himself up-to-date with the regulation of the profession in the same way, and to the same extent, as would be expected of a practising barrister. That is particularly so, he argued, because as a non-practising barrister he felt himself to a substantial extent excluded from the profession.

46. Secondly, does the new Code apply to conduct occurring before it came into effect? Mr Iteshi submitted that it would be grossly unfair to invoke the new Code, on the basis that the charge related to the making of the RPO in March 2014, when in substance he was being punished for his conduct of proceedings in the Employment Tribunals and Employment Appeals Tribunal before the new Code came into effect. The bringing of the charge was one aspect of his submission that he had been subjected to inhuman and degrading treatment and that his Convention rights had been infringed.

47. Thirdly, was the tribunal biased? Mr Iteshi's submissions in this regard raised two broad complaints. First, he alleged actual bias, and argued that it is wrong for the BSB itself to determine whether a barrister is in breach of the Core Duties. He accused the BSB of deliberately waiting for the Handbook to come into effect and then unjustly disbarring him for matters which occurred before it came into effect: this, he argued, was victimisation of him because he had complained about the Bar Council's policy in relation to pupillages. He strongly criticised, as an example of such victimisation, the enquiry which was made by the PCC of the Ministry of Justice to establish whether or not any of the Employment Tribunal actions was still extant at the time of the decision to charge him. Secondly, he argued that he has repeatedly been the victim of unjust and unfair orders against him by Employment Tribunals and the Employment Appeal Tribunal, and on that ground alleges that the tribunal – chaired by a circuit judge – had the appearance of bias. In relation to apparent bias, he

submitted (and I accept) that the test to be applied is that stated by Lord Hope in Porter v Magill [2001] UKHL 67 at paragraph 103:

> "The question is whether a fair-minded and informed observer, having considered the facts, would conclude there was a real possibility that the tribunal was biased."

48. Fourthly, did Mr Iteshi have a fair hearing? Mr Iteshi submitted that this is "a straightforward case of gross impropriety" by the BSB. He complained that they and the tribunal have adopted an inconsistent approach to the issue of whether his conduct in the various Employment Tribunal actions was or was not relevant to the allegation against him of professional misconduct. He complained that there has never been any independent assessment of his claims in the Employment Tribunals.

49. Fifthly, was the tribunal wrong to find that Mr Iteshi was in breach of Core Duty 5 on the ground that he was made subject to an RPO? Mr Iteshi's submissions in this regard raised two points. First, he challenged the finding that he was guilty of "behaviour" after the new Code had come into effect in 2014, arguing that his being made subject to the RPO could not amount to "behaviour" and that in reality the conduct for which he was being punished had occurred before 2014. Secondly, he argued that there was in any event no breach of Core Duty 5 because –

i) the relevant proceedings before Employment Tribunals and the Employment Appeal Tribunal were proceedings in which he was acting in his own right, and not as a barrister representing another person;

ii) by the time Mitting J heard the application for an RPO, Mr Iteshi was no longer engaged in any proceedings or appeals; and

iii) there was no suggestion that he had breached the RPO since it was made against him.

50. Sixthly, should Mr Iteshi have been given a further opportunity to attend or make submissions as to sanction? He submitted that he did not attend the hearing because he was feeling unwell and stressed at the time of the hearing (both because of the disciplinary proceedings and because of problems in his personal life) and felt frustrated at the way he had been treated. He did not wish to delay matters by asking for an adjournment. He would however have attended if he had thought he might be disbarred. He would have wanted to make submissions in mitigation. In particular, he would have wanted to submit to the tribunal that his case could not be regarded as a case of gross misconduct: for example, there was no suggestion that he had acted dishonestly. In this regard he relied on Parkinson v Nursing and Midwifery Council [2010] EWHC 1898 (Admin) as an example of disciplinary proceedings in which the sanction of erasure from the register was justified because there had been a finding of dishonesty. He also relied on Sukul v BSB [2014] EWHC 3532, in which the court concluded that Mr Sukul (who had been disbarred in his absence) should have been given an opportunity to make representations before the sanction was decided. Mr Iteshi summarised his position in these terms:

> "I thought they would decide against me but didn't think they would disbar me."

51. Lastly, was the tribunal wrong to order disbarment? Mr Iteshi referred in his submissions to the Council of the Inns of Court's publication "Sentencing Guidance in respect of Breaches of the BSB Handbook", revised in July 2015. He suggested that a warning would have been the appropriate sanction. He submitted that the imposition of the sanction of disbarment was wholly disproportionate, and that in this respect also he had been subjected to inhuman and degrading treatment and his Convention rights had been infringed. He relied on the fact that a barrister who is made bankrupt is not thereby guilty of professional misconduct, arguing that a bankrupt barrister was more likely to shake public confidence in the profession than he was.

52. Mr Aylwin's submissions were first, that the Handbook applies to non-practising barristers and that ignorance of its contents cannot avail a barrister charged with professional misconduct. Secondly, that the charge was based upon the fact that Mr Iteshi had been made subject to the RPO in March 2014 and therefore related to behaviour after the new Code had come into effect. The various proceedings in the Employment Tribunals were not the subject of the charge. Thirdly, that the BSB is independent of the Bar Council, and there was no basis for the allegations of actual or apparent bias. Fourthly, that the tribunal were entitled to treat Mr Iteshi's absence as voluntary and to proceed with the hearing accordingly. In any event, it did not appear that Mr Iteshi would have had anything to add to his written submissions if he had attended, save perhaps as to sanction. The conduct of the hearing in his absence was entirely fair. Fifthly, Mr Aylwin submitted (as he had done to the tribunal) that what might be called passive behaviour was capable of being professional misconduct. He drew a comparison with a barrister being made subject to a sentence of imprisonment: that fact alone would be "behaviour" amounting to professional misconduct, without reference to the circumstances which had led to the sentence of imprisonment. Sixthly, that the tribunal were entitled to proceed to consider sanction without adjourning to afford the absent Mr Iteshi a further opportunity to make representations about sentence. The case of Sukul could be distinguished, he argued, because there the absence was involuntary. Lastly, Mr Aylwin submitted that in reality disbarment was almost inevitable in the circumstances of this case. He pointed out that sanctions other than disbarment could only have an effect for a limited period, whereas the RPO is of indefinite duration. The profession would be brought into disrepute if a time could come when Mr Iteshi would again be able to call himself a barrister even though he had brought upon himself the continuing sanction of an RPO.

Discussion:

53. Having summarised the competing submissions, I turn to my conclusions.

54. As to the first of the seven issues I have identified, it is clear that the Handbook applies to non-practising barristers, and that Mr Iteshi was subject to Core Duty 5 at the time when he was made subject to the RPO. There is in my view nothing unfair or reasonable in expecting every member of the profession, including a non-practising member, to inform himself or herself of the professional standards which he or she is required to meet.

55. As to the second issue, it is important to focus upon the particulars of offence given in the charge of misconduct. The allegation which was brought against Mr Iteshi was based upon the fact that he was made subject to the RPO on 12th March 2014, when

the new Code was in force. True it is that the conduct which caused Mitting J to make the RPO occurred at earlier dates, before the new Code was in force. But the specific allegation which the tribunal had to consider related to something which happened at a time when the new Code undoubtedly was in force. Mr Iteshi's submissions on this issue were, therefore, misconceived. They do however have some resonance in relation to the fifth issue, to which I will shortly come.

56. As to the third issue, I am unable to accept Mr Iteshi's submissions. He was unable to point to anything which supported them, and was in substance relying on the mere fact that he had repeatedly been an unsuccessful litigant in the Employment Tribunals and Employment Appeals Tribunal. Contrary to his submissions, the tribunal was independent of the BSB. There could be no appearance of bias arising merely from the fact that it is the body charged with the determination of allegations of professional misconduct. Applying the test in Porter v Magill, it cannot be said that an informed observer would have any grounds for believing that there was a real possibility that the tribunal, or any member of it, was biased against Mr Iteshi simply because a number of judges in the Employment Tribunals and Employment Appeal Tribunal had previously made rulings against him in the proceedings which he had commenced. Nor can it be said that the fact that Mr Iteshi has previously challenged the Bar Council in proceedings relating to the pupillage requirements gave rise to any appearance of bias.

57. Mr Iteshi appeared at one stage to argue that there was apparent bias simply because he has been made subject to an RPO, and thus by definition has been repeatedly unsuccessful in his litigation. I reject that submission. If he had grounds of appeal against any of the rulings and decisions which went against him in the Employment Tribunals, then he had rights of appeal. If his appeals to the Employment Tribunal failed, as they did, that failure is not a ground for alleging apparent bias on the part of the tribunal.

58. As to the fourth issue, Mr Iteshi has been unable to persuade me that his hearing was in any way unfair. When he did not appear on the day fixed for the hearing, the tribunal properly took steps to ensure that Mr Iteshi had been served with notice of the date. They were entitled to find that he had, and indeed Mr Iteshi does not dispute that he had. No application was made to them for an adjournment. The decision to proceed in Mr Iteshi's absence was therefore entirely proper. It is apparent from the summary I have given above of the chairman's report that Mr Aylwin was scrupulously fair in presenting the case for the BSB in relation to the allegation of breach of Core Duty five, and equally fair in the submissions which he made when the tribunal came to consider sentence. It seems to me that Mr Aylwin ensured that the points which would properly have been made by Mr Iteshi, had he been present, were appropriately considered by the tribunal.

59. As to Mr Iteshi's complaint that there has never been any independent assessment of his criticisms of the judges who have previously ruled against him in proceedings before the Employment Tribunals and Employment Appeal Tribunal, it must be remembered that I am concerned with the tribunal's decision, not with any previous decisions. The tribunal's decision related to the making of the RPO by Mitting J, and Mr Iteshi cannot use this appeal as a form of collateral attack on Mitting J's findings.

60. As to the fifth issue, Mr Iteshi's principal point was that he has been disbarred on the basis of conduct which occurred before the Core Duties came into effect, and yet was found to constitute a breach of one of those Core Duties. The point is superficially attractive. It is however important, as I have already indicated, to focus on the allegation which was brought against Mr Iteshi and found proved by the tribunal. That allegation relates not to the prior conduct, but to the making of the RPO.

61. Mr Iteshi sought to answer that point by his submission that being made subject to an order by a court or tribunal cannot amount to "behaviour" for the purposes of Core Duty 5. I reject that submission. I accept that in the majority of cases "behaviour" connotes active conduct. But it can in my view also include inactivity (for example, a barrister repeatedly failing to complete paperwork within a reasonable time, or at all), and it can include – as here – being made subject to a restriction or sanction as a result of some earlier actions or failures to act. The relevant behaviour in this case was that on 12 March 2014 Mr Iteshi became subject to the RPO. I have no doubt that being made subject to an RPO is behaviour which is capable of amounting to a breach of Core Duty five. Indeed, I find it difficult to imagine circumstances in which it would not do so.

62. With respect to the members of the tribunal, I think that the reference to an aggravating feature of "persistent conduct/conduct over a long period of time" (see paragraph 36 above) and the passage in the chairman's report which I have quoted in paragraph 40 above may unfortunately have blurred the distinction between the conduct which underlay the making of the RPO and the behaviour which was relied on as professional misconduct. It may be that those references were intended only to express the point that when Mr Iteshi was made subject to an RPO, that was not an order which was made against him on the basis of an isolated lapse or failing on his part. But even if there was a blurring of the distinction in either or both of those respects, that does not alter my conclusions that being made subject to an RPO is behaviour which is capable of amounting to a breach of Core Duty 5, and that the tribunal were entitled to find that it did constitute a breach of Core Duty 5 in the circumstances of this case.

63. Mr Iteshi also submitted that in January 2014 the Handbook introduced for the first time requirements as to the conduct of non-practising barristers. He strengthened that submission by referring me to a document which appears to have been a guidance note published by the BSB entitled "What you need to know about the new Code of Conduct", which says this of the Core Duties:

> "Although these are a new feature they build on rules that were in the previous Code. However, they now apply to all barristers, not just practising barristers (and therefore unregistered barristers are required to comply with the Core Duties)."

64. Although Mr Iteshi did not refer me to the Handbook in this respect, I think he would also wish to rely on rule I12, which states - :

> "rI12 This first edition of the Handbook came into force on 6 January 2014 and replaced the eighth edition of the Code of

> Conduct including its various Annexes (which came into effect from 31st October 2004).
>
> rI13 Subject to rI14 below, in respect of anything done or omitted to be done or otherwise arising before 6 January 2014:
>
> .1 Parts 2 and 3 of this Handbook shall not apply;
>
> .2 the edition of the Code of Conduct or relevant Annexe in force at the relevant time shall apply; and
>
> .3 any reference to Part 2, Part 3 or Part 5 of this Handbook shall include reference to the corresponding Part of the edition of the Code of Conduct or relevant Annexe which was in force at the relevant time."

65. I found the extract from the guidance note, which Mr Iteshi provided to me after the hearing, a somewhat puzzling statement. It is inconsistent with paragraph 301 of the old Code (quoted in paragraph 7 above), and with the distinction between that paragraph, which applies to all barristers, and para 302 of the old Code, which applies to practising barristers. The explanation may lie in the fact that the guidance note is dated June 2013, and appears to relate to a draft of the new Code which preceded, and in some respects differed from, the Code which came into effect in January 2014. Be that as it may, paragraph 301 of the old Code clearly proscribed behaviour of a kind which could bring the profession into disrepute. Paragraph 304, quoted above, speaks of "the requirements for practice as a barrister and the rules and standards of conduct applicable to barristers", which in my view clearly distinguishes between the requirements of practising barristers and the standards of conduct applicable to any barrister. Thus Mr Iteshi's complaint that he could not be expected to keep up with the changes in the regulations was a little disingenuous: this is not a case in which it could be said that behaviour which had previously been acceptable was suddenly prohibited after January 2014.

66. As to the sixth issue, it is clear that the tribunal considered the possibility of an adjournment to allow Mr Iteshi to make further representations before they decided on the appropriate sanction. Their reasons for concluding that they should proceed to sentence were entirely proper reasons. As they correctly stated in their chairman's report, Mr Iteshi's unsigned witness statement showed that he was aware of the prospect of disbarment as the most severe sanction available to the tribunal. It may be, as he submitted to me, that he never contemplated that such a severe penalty would in fact be imposed. Nonetheless, it was in my view incumbent upon him to attend the hearing if he wished the tribunal to take any further submissions into account before determining the appropriate sentence. In my view, the decision in Sukul does not assist Mr Iteshi: that case, as Mr Aylwin submitted, can be distinguished on its facts.

67. As to the final issue, I can see no grounds for challenging the tribunal's decision that disbarment was the appropriate and necessary sanction. As with all professional disciplinary bodies, the primary concern of the tribunal was not to punish Mr Iteshi but to maintain public confidence in and respect for the profession of barrister: see paragraphs 13 and 14 above. They were perfectly entitled to conclude that public confidence and respect would be severely diminished if a barrister, albeit non-

practising, remained entitled to put himself forward as a member of the Bar when he had been made subject to the serious measure of an RPO.

68. Although Mr Iteshi submitted that the sanction imposed on him was not in accordance with the published Guidance to which I have referred, he did not identify any specific section of it in order to make good that submission. I have been unable to find anything in the Guidance which supports his submission. The Guidance sets out suggested starting points for the sentencing exercise in relation to various types of breach of likely charges, but it makes clear that it is neither a comprehensive guide for all forms of breach nor in any event prescriptive about the penalty to be imposed in particular circumstances. There is nothing in the Guidance which specifically covers the circumstances of this case. None of the examples of particular types of misconduct covers a similar factual situation, or provides an obvious factual comparator.

69. In my judgment, the tribunal correctly applied the principles, and the sanction of disbarment was one which they were entitled to impose. It cannot be said that the order for disbarment was inhuman and degrading treatment, or otherwise a breach of Mr Iteshi's Convention rights. Of the range of possible sanctions which I have summarised in paragraph 12 above, a number could not be imposed in this case because Mr Iteshi did not practise as a barrister. Realistically, therefore, the sanctions other than disbarment which were available to the tribunal were a fine, a reprimand or words of advice. The tribunal were entitled to conclude that those lesser sanctions were inadequate to preserve public confidence. It must be remembered that the RPO imposed by Mitting J is of indefinite duration, and therefore any sanction less than disbarment would risk the loss of public confidence and respect which would follow if Mr Iteshi continued to be able to call himself a barrister despite having been made subject to the RPO.

Conclusion:

70. I recognise that my decision will be a heavy blow for Mr Iteshi. I am however unable to find that the tribunal reached a wrong decision, or that their decision was unjust because of a serious procedural or other irregularity in the proceedings before them. Mr Iteshi brought upon himself the serious measure of the RPO. The tribunal were entitled to find that being made subject to that RPO was behaviour which amounted to a breach of Core Duty 5, and they were entitled to conclude that the sanction of disbarment was necessary and appropriate.

71. For those reasons, this appeal fails and is dismissed.

72. I invite written submissions as to any consequential orders.