APPEAL TO THE VISITORS TO THE INNS OF COURT
ON APPEAL FROM THE DISCIPLINARY TRIBUNAL
OF THE COUNCIL OF THE INNS OF COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2013

Before:

THE HONOURABLE SIR STEPHEN STEWART

MR GODWIN BUSUTTIL

DR. ROSEMARY GILLESPIE

Between:

RICHARD ST.CLAIR GAINER

- and -

THE BAR STANDARDS BOARD

Miss Joanna Smith QC (instructed by **Mr St.Clair Gainer**) for the **Appellant**

Mr Timothy Bowden (instructed by **The Bar Standards Board**) for the **Respondent**

Hearing date: 26 September 2013

DECISION

Decision

1. Mr Richard St.Clair Gainer ("the appellant") appeals to the Visitors to the Inns of Court against a decision of the disciplinary tribunal dated 7th October 2011.

2. The charge sheet against the Appellant contained three charges:

Charge 1

Statement of Offence

Professional misconduct pursuant to paragraph 901.4 and contrary to paragraph 202(b) of the Code of Conduct of the Bar Council of England and Wales (8th Edition) ("The Code of Conduct").

Particulars of Offence

Richard Gainer, a barrister who held a practising certificate for the year 2009, failed to complete the prescribed 12 hours of continuing professional development during that year, contrary to paragraph 5(a) of Annexe C of the Code of Conduct, and, having been informed of the need to complete the hours by letter of 8th June 2010, failed to take the necessary action to cure the non-compliance by extended due date of 1st November 2010.

Charge 2

Statement of Offence

Professional misconduct pursuant to paragraph 901.4 and contrary to paragraph 202(b) of the Code of Conduct of the Bar Council of England and Wales (8th Edition) ("The Code of Conduct").

Particulars of Offence

Richard Gainer, a barrister who held a practising certificate for the year 2009, failed to submit details of the continuing professional development undertaken by him in that year on the prescribed form by 31 January 2010, contrary to paragraph 7 of Annex C of the Code of Conduct, and, having been informed of the need to submit those details by a letter of 08 June 2010, failed to take the necessary action to cure the non compliance by the extended due date of 01 November 2010.

Charge 3

Statement of Offence

Professional misconduct pursuant to paragraph 901.2 of the Code of Conduct of the Bar Council of England and Wales (8th Edition) ("The Code of Conduct").

Particulars of Offence

Richard Gainer, having been given 28 days to pay a financial penalty of £300 imposed upon him by letter on 08 June 2010 in accordance with paragraph 901.1, failed to pay the said financial penalty by the extended due date of 01 November 2010.

3. The hearing before the disciplinary tribunal took place on 5 October 2011. The appellant did not attend and was not represented. The first matter which the tribunal dealt with was the Appellant's non attendance. The decision records the following:

"5. The Panel was referred to a series of file notes detailing telephone messages from the Defendant to the Panel. He indicated that he was seeking an adjournment, as he had a medical appointment for 2pm on 5 October 2011. No explanation was given as to why he could not attend in the morning prior to any appointment, and no medical evidence was provided. He had previously failed to attend a hearing convened on 6 September 2011.
6. The BSB sought to proceed in the Defendant's absence. It was noted that he had filed to comply with the order of 6 September 2011 in three respects: he had not supplied medical evidence explaining why he had not attended that hearing; he had not supplied medical evidence explaining his absence on 5 October; and he had not supplied the synopsis and medical evidence referred to in his communication of 8 August 2011.
7. Service was provided in accordance with Regulation 14. Permission to proceeding in absence was granted."

4. Having considered the documentation the charges were found proved.

5. The sentence and reasons of the disciplinary tribunal were:

"**11**. On charges of 1 and 2, the Defendant is to be suspended from practice until he complies with the requirements to complete 12 CPD hours in respect of 2009 and submits his CPD form to the BSB for 2009. Suspension is to take effect from promulgation of sentence by Mr Gainer's Inn of Court. On charge 3 no separate penalty was imposed, but the outstanding fine is to be paid within 28 days of the period for appeal expiring, following promulgation of the sentence by Mr Gainer's Inn.

12. These penalties were imposed on the basis of the history on the Defendant's part of failing to comply with extensions, procrastination and delay. He also has a

history of previous disciplinary findings which, while not relating to CPD, are of some relevance.

13. The Defendant is to pay costs of £502.50 within the same period as the fine, which is the subject matter of charge 3, is to be paid."

6. The Appellant does not appeal the fact that the charges were found proved. He does appeal the sentence. After an initial petition to appeal, Sir Anthony May, in his capacity as directions judge, ordered the Appellant to serve written particulars of the grounds of his appeal in a particular form. This was done by email dated 19th January 2012. The grounds of the appeal are that the sentence was too severe and disproportionate for the following reasons:

> **(1)** In the circumstances set out fully in my petition of appeal I was unable to attend the hearing before the disciplinary tribunal, which proceeded in my absence. The disciplinary tribunal was thereby deprived of hearing evidence and submissions as to mitigation which would otherwise have been presented in detail.
>
> **(2)** In particular, the disciplinary tribunal did not hear evidence and submissions on the mitigating factors outlined in the Sentencing Guidance Rules (version 1, April 2009) at Annex 1 and in particular, it did not hear evidence and submissions to the effect that I was and am willing to apologise, that the breach was unintentional (arising by reason of a genuine mistake), that I had every intention of cooperating with the investigation, that I am of previous good character and have been in practice for 28 years, that I have sought advice from the Bar Council's Professional Ethics helpline, that I was under extremely challenging personal circumstances and that I had good references. Had it done so it would have taken a different view.
>
> **(3)** The penalties were expressly stated to have been imposed on the basis of a history of "failing to comply with extensions, procrastination and delay" (paragraph 12 of the reasons) which was plainly regarded as an aggravating factor. Had the disciplinary tribunal heard my evidence and submissions as to my medical history and the reasons for delay, it would have taken a different view."

7. A chronology is attached to this decision. That chronology ceases in October 2011. Although there were subsequent documents added by agreement to the appeal bundle, Miss Smith QC who appeared for the Appellant did not press reliance upon those, having regard to the Hearings before the Visitors Rules 2010 paragraph 14(6) which provides:

"Evidence that was not before the disciplinary tribunal whose decision is being appealed may be given at the hearing only in exceptional circumstances and with the consent of the Visitors."

8. Miss Smith QC fairly pointed out the personal and health problems under which the Appellant had been labouring during 2010 and up to the date of the disciplinary tribunal hearing. After the initial BSB letters of 1 March 2010 and 29 March 2010 (chronology items 4 and 5) the BSB wrote to the Appellant imposing the fine of £300 on 8 June 2010 (chronology item 6). On 29 June 2010 (chronology item 7) the Appellant telephoned the BSB and said that his father was terminally ill and that he was spending a lot of time with him and his mother. He also mentioned (and this is of some relevance in itself) that he had thought he could carry over 12 excess CPD hours from 2008 to 2009. It is clear from the attendance note of 6 September 2010 (chronology item 10) that the Appellant's father had then recently died. He indicated that he had set up a programme to complete his CPD at that point. We do not propose to go through the chronology of late 2010 to early 2011 which is self explanatory. By letter of 25 February 2011 (chronology item 22) the Appellant sent two sick certificates from his general practitioner showing that he had depression and suggesting that he could work so long as he was capable of fulfilling his responsibilities to his clients. These certificates were dated 18 October 2010 for 2 months and 21 January 2011 for a further four months. By a letter dated 28 March 2011 (chronology item 24) the BSB decided that the complaint should form the subject of charges before a disciplinary tribunal.

9. On 6 June 2011 and 8 August 2011 attendance notes (chronology item 25 and 27) record the Appellant as saying that he was still ill. On 6 September 2011 the disciplinary hearing was adjourned on the basis of the information set out in the file note of that date (chronology item 28). In the document headed "disciplinary tribunal – interim report" signed on 7 September 2011 the following appears:

"5. The matter is adjourned until 5 October 2011. That hearing will not be rearranged on the basis of inconvenience to Mr Gainer as he has given the tribunal no alternative dates when he is available and has been unavailable when contact attempts were made. The BSB is to write to Mr Gainer to explain this.
6. Mr Gainer is to provide medical evidence supporting his absence on 6 September. The 5 October hearing will not be adjourned in the absence of compelling medical evidence supporting Mr Gainer's inability to attend.

7. The "synopsis" and medical evidence referred to in his communication of late August 2011 are expected to be before the tribunal prior to the 5 October hearing…"

10. Miss Smith QC took instructions during the hearing before us as to whether the interim report was received by the Appellant. He was mentioned as a person to whom it should be sent. He was not sure but felt that he may have received it but his state of health was such that he wouldn't really have taken in the contents. In that regard however we do draw attention to item 30 of the chronology in which Margaret Hilson made a file note that the Appellant "will send written evidence in relation to his prognosis and dates when he is available as soon as possible." That, it is accepted, he did not do.

11. Before the disciplinary tribunal hearing of 5 October 2011 was the information contained in the attendance note in the chronology items 31 – 35. We do not propose to repeat those. Miss Smith QC criticizes the disciplinary tribunal for proceeding with the hearing in the Appellant's absence. She submits that paragraphs 5 and 6 of the decision letter were harsh. Whilst we recognise that other disciplinary tribunals may have adjourned, we do not find that it was wrong to proceed. Nevertheless we have heard full submissions on the critical parts of the decision letter namely the "sentence and reasons" which we have set out in paragraph 5 above. It is to those that we now turn.

12. Miss Smith QC criticizes the tribunal's comments (paragraph 12) that there is a history on the Appellant's part of failing to comply with extensions, procrastination and delay. Mr Bowden on behalf of the BSB pointed out that the BSB had given seven extensions of time and that all that was before the tribunal were two medical certificates and the attendance notes of the Appellant's reports in relation to his father's illness/death and then his subsequent continuing illness. He submitted that the evidence before the tribunal did not excuse the failure:

(1) to do the 2009 CPD hours

(2) pay the £300 fine imposed and

(3) to respond to requests made by the BSB

We agree with Mr Bowden's submissions.

13. Miss Smith QC also criticized the disciplinary tribunal relying (paragraph 12) on the history of previous disciplinary findings as being "of some relevance". For reasons set out below we find that the previous disciplinary hearings were relevant.

14. In the document "Sentencing Guidance: Breaches of the Code of Conduct of the Bar of England and Wales" guidance is given as to appropriate sanctions in any given case. We recognise that this guidance does not interfere with our powers to impose whatever sanctions are appropriate in the circumstances of individual cases. At section E.2 Breach of Practising Requirements it is made clear that "the requirements include completion of continuing professional development (CPD)… Obtaining insurance cover." Five common circumstances are set out. After some discussion between the Visitors and Miss Smith QC it appeared to be common ground that, by reason of the Appellant's professional misconduct in October 1999 (chronology item 2) relating to insurance cover, the most relevant common circumstance was "e. Previous disciplinary history of failing to meet practising requirements (including previous suspension). "The starting point for such circumstance is "medium to long suspension conditional on requirements being met." The common circumstance above e is "d Repeated failures to meet practising requirements (but no previous disciplinary hearing history of this)" for which the starting point is "d Short suspension (usually conditional)." In the text preceding the table appears this:

> "Range of sanctions: the starting point for each charge should be a low level fine towards the top end …the starting point for persistent offenders should be a short conditional suspension – the condition being the barrister should meet the practising requirement by a specified date. Immediate suspension should be considered where the barrister had previously been subject to a conditional suspension for a similar offence."

It is correct that the Appellant had not been subject to a previous conditional suspension but the text is describing a range and some specific instances of possible conduct within that range and does not appear to us to affect the table in which the Appellant clearly falls within common circumstance e.

15. There are aggravating and mitigating factors in section E.2 which also make reference to a list of commonly applicable aggravating and mitigating factors set out at Annex 1 to the sentencing Guidance. Annex 1 makes it clear that "the ….. list is not exhaustive. Where a factor is not listed, please tick "other"…"

16. As regard mitigating factors Annex 1, item 13 states "unusual personal circumstances that provide a reasonable explanation for the behaviour in particular bereavement, relationship breakdown and divorce…" Miss Smith QC points out that the disciplinary tribunal did not tick or ring this mitigating factor. We believe that they were wrong to do so. Whilst the mitigation did not excuse the Appellant's conduct, and whilst it did not clearly cover the whole of the period of default, nevertheless it is clear that the Appellant had had to cope with the very serious terminal illness of his father and from the Autumn of 2010 onwards had suffered from depression which put constraints on his ability to work normally. We take this mitigation fully into account.

17. As regards aggravating factors, the disciplinary tribunal ringed letters F, M, P and Q. For reasons set out in the following subparagraphs, we conclude that the tribunal made some further errors:-

(1) (1) F "Persistent Conduct – Conduct over a lengthy period of time" – we do not believe this should be taken into account. The relevant conduct was failure to comply with the 2009 CPD requirement. It is correct that the Appellant failed to deal with this despite extensions, but had he done so within the extension period, he would not have found himself before the disciplinary tribunal.
(2) M "Previous Disciplinary Findings for Similar Breaches" – we should not take this into account since this aggravating factor already places the Appellant in category e. It should not therefore be double counted. It is not clear how the disciplinary tribunal approached the categorisation. Had they not considered this to be a category e case, then in those circumstances it was relevant. The 2004 disciplinary proceedings (chronology item 3) was not "for similar breaches".
(3) P "The Failure to Respond Promptly to Communications from the BSB, or Behaviour that Frustrates the Administration of the Complaint." – Whilst there was mitigation, nevertheless there was ample evidence in the chronology of the Appellant's failure to respond properly to communications from the BSB.
(4) Q "Failure to Attend a Tribunal without Explanation" – Strictly this should not have been ringed since explanations had been provided. However the explanations were not sufficient and the Appellant had not complied with the requirements of the interim decision of 7 September 2011 or even, if he was not in a fit state fully to appreciate the contents of that letter, with his promise to send written evidence as recorded in the file note of 7 September 2011 (chronology item 30).
(5) It seems clear from paragraph 12 of the Sentence and Reasons of the disciplinary tribunal that the disciplinary finding of July 2004 (chronology item 3) was taken into account. In our judgment this could properly be taken into account but it would come under "R Other".

18. We therefore have to consider this matter afresh. Having determined that this was a category e circumstance, we have to weigh the mitigating factor and the aggravating factors which we shall properly take into account as listed above. Clearly this is not a numerical exercise. Further we do not lose sight of the fact that the previous breaches were in 1999 and 2004. Despite the number of aggravating factors, we are of the opinion that the mitigation reduces the appropriate sanction to that of a category d circumstance for which the starting point is a short suspension (usually conditional). In those circumstances the determination we make is as follows:

(1) Appeal allowed.

(2) Sentence imposed by the disciplinary tribunal on 5 October 2011 be quashed.

(3) The sentence imposed is:
The Appellant shall before 1 January 2014:
   a. comply with the requirement to complete 12 CPD hours in respect of 2009
   b. submit his duly completed CPD for 2009 to the Bar Standards Board
   c. pay the outstanding financial penalty of £300 imposed on him by letter of 8 June 2010.

(4) Failure to comply in full with the requirements in paragraph (3) above will result in immediate suspension from practice from 1 January 2014 to midnight on 31 March 2014.

(5) No order as to costs save that the costs order of £502.50 made on 5 October 2011 shall stand. Payment of the sum of £502.50 be made by 4pm 31 March 2014.[1]

[1] Reasons were given in a short oral ruling for this decision on costs.