



The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

Report of Finding and Sanction

Case reference: PC

2022/0558/D3

Thomas David Davidson

The Director-General of the Bar Standards Board

The Chair of the Bar Standards Board

The Treasurer of the Honourable Society of the Middle Temple

Disciplinary Tribunal

Thomas David Davidson

1. In accordance with an appointment made by the President of the Council of the Inns of Court contained in a Convening Order dated 26 October 2016, I sat as Chairman of a Disciplinary Tribunal on 21 November 2023 to hear and determine 2 charges of professional misconduct contrary to the Code of Conduct of the Bar of England and Wales against Thomas David Davidson, barrister of the Honourable Society of the Middle Temple.

Tribunal Members

2. The other members of the Tribunal were:

Ms Melissa West (Lay Member)

Mr John Foy KC (Barrister Member)

Charges

3. The following charge was dismissed:

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9 Gray's Inn Square,
London
WC1R 5JD
T: 020 3432 7350
E: info@tbts.org.uk

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Thomas Davidson, a practising barrister, behaved in a way which was likely to diminish the trust and confidence which the public places in him or in the profession, in that, on 7 February 2022 at Salisbury Magistrates Court, while representing a defendant during a trial before a Bench consisting of three Lay Magistrates, during his closing speech, he adopted a German accent and pretended to be a German person of authority in a stereotypical manner, which conduct was discriminatory, offensive and unnecessary.

4. The following charge was found proven:

Thomas Davidson, a practising barrister, behaved in a way which was likely to diminish the trust and confidence which the public places in him or in the profession, in that, on 7 February 2022 at Salisbury Magistrates Court, following the conclusion of a trial during which he had represented a defendant before a Bench consisting of three Lay Magistrates, and after the Chairperson raised with him the issue of his having used a German accent during the proceedings and telling him that this conduct had been inappropriate, Mr Davidson looked at the Bench and said "Jawohl" at the same time as raising a hand in a Nazi salute, which conduct was seriously offensive and discreditable.

Parties Present and Representation

5. The Respondent was present and was represented by Mr Martin Forde KC. The Bar Standards Board ("BSB") was represented by Mr Winston Jacob of counsel.

Preliminary Matters

6. The BSB sought permission to adduce hearsay evidence in the form of an email from Mr Ryan Seneviratne dated 5 December 2022, on the basis that Mr Seneviratne was [REDACTED] unable to attend the hearing. Upon Mr Forde KC indicating that he had no objection to the admission of the evidence, the Tribunal gave permission for the evidence to be admitted.

Pleas

7. Mr Davidson denied both charges.

Evidence

8. The Tribunal was provided with a bundle of documents prepared by the BSB. The Tribunal was also provided with a written witness statement of Mr Davidson dated 22 September 2023 and with three written testimonials to his good character.

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9. The Tribunal heard oral evidence on behalf of the BSB from Ms Sarah Haden (the Legal Adviser to the Bench sitting on 7 February 2022) and from Mr Clive Newell, Mr Tim Foster and Ms Madeleine Nicholls, the three lay members of that Bench. The Tribunal also considered the hearsay evidence of Mr Seneviratne, who was prosecuting counsel that day. The witnesses were cross-examined by Mr Forde KC. The panel then heard oral evidence from Mr Davidson, who was cross-examined by Mr Jacob.

Findings

Charge 1

10. In relation to charge 1, the Tribunal found as facts, on the balance of probabilities, that at the hearing on 7 February 2022 Mr Davidson used a stereotypical German accent in the course of his submissions to the Bench. All four of the BSB's witnesses were consistent in their evidence on this point, and it was also supported by the hearsay evidence of prosecuting counsel in the case. The Tribunal did not accept Mr Davidson's explanation that he spoke in a "European" or alternatively a "French" accent, which it did not find to be credible, or his explanation that he was referring not to Germany but to the rules of civil law.

11. The next question is whether the proven facts show that there was a breach of CD5. CD5 provides:

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

12. The Tribunal did not find this question easy. Ultimately it is a matter for the judgment of the Tribunal, applying their common sense and knowledge of the world in reaching their assessment, as accepted by Choudhury J in **Kwiatkowski v Bar Standards Board** [2022] 1800 (Admin) at [24]. The Tribunal finds by a majority that Mr Davidson's conduct did not cross the boundary so as to breach CD5. The majority was satisfied that Mr Davidson's conduct was unnecessary (as he accepted) but that it was not intended to offend, rather that it was a misplaced attempt at humour. That was how it struck two of the witnesses. In the majority's view, adopting a stereotypical German accent would be regarded by a reasonable and fair-

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mindful member of the public as in poor taste, but not as likely to diminish the trust and confidence placed by the public in him or in the profession. In the majority's view, if Mr Davidson had simply apologised when the matter was (appropriately) raised by the Bench, then the matter would have gone no further. The minority member took a different view, which shows that it is a nuanced judgment.

13. The Tribunal therefore found Charge 1 not proven.

Charge 2

14. The Tribunal was satisfied, on the balance of probabilities, that Mr Davidson did say "Jawohl" and at the same time raise hand in what appeared to be a Nazi salute. The Tribunal did not find that he goose-stepped, clicked his heels or said "Sieg Heil".

15. The Tribunal placed most weight on the email which Ms Haden wrote the day after the incident (page C5 of the bundle), and upon the hearsay email from Mr Seneviratne (page B22), which is in very similar terms to Ms Haden's evidence. The Tribunal considered that their evidence was likely to be reliable and was not undermined by the fact that the other witnesses gave slightly different versions of events. The Tribunal considered that Mr Newell's recollection of Mr Davidson saying "Sieg Heil" was mistaken, but probably prompted by a consciousness of Mr Davidson having invoked a stereotypical Nazi officer. The Tribunal noted that Ms Nicholls did not recall Mr Davidson saying "Jawohl" but considers that her evidence generally was affected by the passage of time, particularly in relation to her recollection of Mr Davidson goose-stepping. The Tribunal considered that it was inconceivable that no-one else would recall Mr Davidson goose-stepping if that is what he had done. But her evidence did reinforce the general impression that Mr Davidson was invoking the Nazi officer stereotype.

16. Mr Davidson himself showed to the Tribunal how he had raised his arm high in the air. While such a gesture might not in isolation be perceived as a Nazi salute, when taken in conjunction with the word "Jawohl" it seemed entirely plausible to the Tribunal that Mr Davidson was invoking a Nazi officer stereotype. The Tribunal did not find Mr Davidson's initial explanation that he had merely shrugged his shoulders to be credible, in view of his own evidence.

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17. Mr Forde submitted that the Tribunal could take account of the good character evidence when reaching a view of the facts. The Tribunal did not accept this submission. The fact that a person has a long and blameless record does not mean that they will not succumb to a moment of madness. It seemed to the Tribunal that this is what happened. Mr Davidson's conduct was spontaneous: it was not premeditated. However, it was intended to be, and was, offensive and disrespectful to the Bench, who had acted entirely reasonably in voicing their concerns.
18. Mr Forde conceded that if the Tribunal found the factual basis of the charge to be proved, this would amount to misconduct and a breach of CD5. The Tribunal concurs with that view. Mr Davidson's conduct was clearly something which would be likely to diminish the trust and confidence which members of the public would place in him or in the profession.
19. It is accepted by both counsel that any finding of misconduct in a case involving speech is an interference with the Article 10 right of free speech and must therefore be justified. **Kwiatkowski**, above, shows that the essential questions are whether the interference is necessary and proportionate: see [69]. The Court referred at [73] to the Tribunal's view that enforcing compliance with CD5 is necessary for the protection of the reputation and rights of others. The Tribunal respectfully concurs. The Court also agreed with the Tribunal in that case that there is a pressing social need to ensure that barristers do not conduct themselves in a way that would undermine public confidence in barristers and the profession, that the disciplinary process is important in that regard, and that barristers as members of a regulated profession can legitimately be expected to conduct themselves to a higher standard than ordinary members of the public in their professional dealings.
20. The Tribunal respectfully agrees with those views. The conduct of Mr Davidson took place in court in the course of his professional obligations as a barrister. It is appropriate for this Tribunal to recognise the serious character of that conduct by making a finding of misconduct.
21. As to proportionality, in **Kwiatkowski** at [78] to [79] the Court said that once the Tribunal had reached the view that the conduct was sufficiently serious as to amount

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to professional misconduct, a finding to that effect is clearly proportionate. The Tribunal concurs.

22. The Tribunal accordingly found that Charge 2 was proven on the balance of probabilities.

Sanction and Reasons

23. After delivering its finding on the charges, the Tribunal heard further submissions on sanction from both the BSB and Mr Forde on behalf of Mr Davidson. The Tribunal's attention was drawn to the BTAS Sanctions Guidance dated 1 January 2022, and it has had regard to the provisions of the Guidance.

24. The Tribunal determined that the appropriate Misconduct Group was Group I, Behaviour towards Others.

25. None of the factors identified as relevant to Culpability and Harm for this group obviously applied in this case. With regard to the General Factors in Annex 2, the Tribunal noted that Mr Davidson's conduct was intentional but unplanned and was a one-off incident.

26. In relation to seriousness, the Tribunal determined that this was at the lower range, as there was limited or no harm.

27. As to aggravating factors, the Tribunal noted that Mr Davidson's conduct comprised rudeness and disrespect to a court of law: it was not merely misplaced humour. No apology was offered at the time, and although an apology was offered later, it did not accept the facts as the Tribunal has now found them to be. Accordingly, Mr Davidson showed a lack of insight into his conduct. He is also a very experienced and senior barrister.

28. As to mitigating factors, the Tribunal found that there was no evidence that the members of the Bench were harmed or even offended. No member of the public was harmed or even present. The Tribunal also found that the evidence of Mr Davidson's good character should carry some weight. The Tribunal did not consider that there was any risk of repetition.

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29. Accordingly, the Tribunal determined that in all the circumstances the appropriate sanction was a reprimand and a fine of £250. The Tribunal also ordered Mr Davidson to pay £1750 on account of the BSB's costs within 28 days.

Dated: 24 November 2023

Zoe O'Sullivan KC

Chairman of the Tribunal

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