The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

Report of Finding and Sanction

Case reference: PC: 2017/0455/D3

Martin Diggins

The Director-General of the Bar Standards Board

The Chair of the Bar Standards Board

The Treasurer of the Honourable Society of Middle Temple

Disciplinary Tribunal

Martin Diggins

1. In accordance with an appointment made by the President of the Council of the Inns of Court contained in a Convening Order dated 2 June 2019, I sat as Chairman of a Disciplinary Tribunal on 26 September 2019 to hear and determine one charge of professional misconduct contrary to the Bar Standards Board Handbook against Martin Diggins, ("the Respondent") a barrister of the Honourable Society of Middle Temple.

Panel Members

2. The other members of the Tribunal were:

   Colin Wilby (Lay Member)
   Brian McCluggage (Barrister Member)

Parties Present and Representation

3. The Respondent was present and was represented by Mark Simpson QC. The Bar Standards Board ("BSB") was represented by Simon Clarke of counsel.

The hearing before us

4. At the hearing on 26 September 2019 we heard submissions from Mr Clarke of counsel for the Bar Standards Board and Mr Mark Simpson QC for the Respondent. Each of them had submitted written submissions in advance of the hearing. We are grateful to both of them for their assistance. We record particular thanks to Mr Simpson who appeared pro bono.

5. No oral evidence was called by the parties and the parties agreed that we should decide the case solely by reference to the slim bundle of documents that were contained in the BSB bundle for the hearing.

6. At the end of the hearing we announced our decision and explained that our full reasons would be contained in the eventual Report.

Plea

7. The Respondent denied the charge of professional misconduct contrary to Core Duty 5 of the Bar Standards Handbook.

The Charge

8. Mr Martin Diggins is charged with professional misconduct contrary to Core Duty 5 of the BSB Handbook. Core Duty 5 provides:

> "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."

9. The particulars of the alleged offence are that:

> "Martin Diggins, an unregistered barrister, behaved in a way which is likely to diminish the trust and confidence which the public placed in him or in the profession, contrary to CD5, in that on 25 October 2017 he tweeted: "Read it. Now; refuse to perform cunnilingus on shrill negroids who will destroy an academic reputation it has taken aeons to build."

10. On 26 October 2017 Middle Temple received an email with a copy of the screenshot. A few minutes later the Director of Education Services forwarded that complaint to the Assessment Team at the Bar Standards Board.

11. The Bar Standards Board raised a formal complaint on the 13th December 2017. On 3 January 2018 the BSB wrote to the Respondent and asked for his comments on the complaint.

12. The Respondent was invited to respond to that complaint, and, on 25th January 2018, he provided an 11-page note in which he accepted that he tweeted the comment complained of and provided information in relation to how the tweet came to have been made. In the letter the respondent denied that the tweet was either "sexist" or "racist" as alleged (see paragraphs 27 – 33 of the letter).

13. On 6 June 2018 the Professional Conduct Committee of the Bar Standards Board considered the complaint and decided that the complaint should form the subject of a charge before a three-person Disciplinary Tribunal of the Council of the Inns of Court.

14. On 26 February 2019 there was a hearing of the application made by Martin Diggins to strike out the charges before HH Judge Sleeman. That application was refused, and the judge gave directions for the hearing before a disciplinary tribunal.

The Facts

15. It would seem that the underlying facts in this case are agreed:

    a. The words alleged to have been used were in fact those of the Respondent; and

    b. He published those words in a tweet on 25 October 2017.

16. The tweet was posted in response to an Open Letter entitled "*Decolonising the English Faculty*" which stated that it was written as a result of a meeting that took place amongst students at Cambridge University about the need for "*the faculty to decolonize its reading lists and incorporate postcolonial thought amongst its existing curriculum*".

17. We have been provided with relatively little evidence in relation to the context of the tweet. The complainant did not give evidence nor did the Respondent. The tweet itself indicates that it was addressed to the twitter accounts of Cambridge University and the Cambridge University Student Union Women's Officer. It is common ground that the tweet was not taken down and that the Respondent has not apologised for the tweet. It is also common ground that the tweet was not a protected tweet but could be read by anyone on Twitter.

The tweet itself indicates that it was commented upon by two individuals and liked by two individuals.

18. The tweet indicates that it was made by the Respondent and anyone clicking on the name of the Respondent on the tweet would be taken to the Respondent's website. That website states that the Respondent is a Barrister and contains a dictionary definition of Barrister as "*a person called to the bar and entitled to practise as an advocate, particularly in the higher courts.*"

The parties' submissions

19. In their written note, the BSB argued that the question for the Tribunal was:

> "Are we satisfied, to the Criminal standard, that the publication of those words amounted to behaviour likely to diminish the trust and confidence which the public placed in Mr Diggins as a barrister or in the profession?"

20. In oral submissions at the hearing Mr Clarke accepted that we also had to be satisfied that this breach of Core Duty 5 amounted to professional misconduct by reference to the guidance given in Walker v Bar Standards Board, case no PC 2011/0219. In that case Sir Anthony May gave the judgment of the Visitors of the Inns of Court in relation to an appeal from a finding of professional misconduct. In the course of that judgment Sir Anthony May stated, at paragraph 17, that "*the concept of professional misconduct carries resounding overtones of seriousness, reprehensible conduct which cannot extend to the trivial.*" The question is whether the conduct was "*particularly grave*"' - paragraph 32 of the judgment of Sir Anthony May.

21. Mr Clarke submitted that because the tweet contained a link to the Respondent's website which indicated that the Respondent was a barrister the tweet engaged the BSB's responsibilities as a regulatory body. Mr Clarke went on to say that the question for us was whether or not the tweet was seriously offensive and fell within the guidance in Walker. He submitted that there were three limbs to Walker: was the conduct a momentary error, was it an error committed with forethought and was the conduct essentially inadvertent?

22. Mr Simpson QC urged us from the outset to view the tweet as an act of a private individual which was unrelated to the Respondent's professional role. He argued that it was important to see a bright line between the actions of a barrister as a private individual and their actions in a professional role. This was a tweet in response to an argument about what should be

taught in Cambridge University and it was entirely unrelated to the Respondent's profession as a barrister. The BSB had no role in policing such activities.

23. Mr Simpson went on to argue that if we were against him on that point then we should conclude that the tweet was not "*seriously offensive*" and was not one that crossed the threshold of diminishing "*the trust and confidence which the public places in the profession*". Mr Simpson also argued that it could be not characterised as "*particularly grave*" or to reach the level of seriousness necessary for it to be characterised as professional misconduct.

24. Both parties asked us to approach the tweet in accordance with the judgment of the Supreme Court in Stocker v Stocker [2019] UKSC 17 [2019] 2 WLR 1033. That case concerned the question as to whether a Facebook post that stated that the claimant had "*tried to strangle her*" was defamatory. Lord Kerr, with whom Lord Reed, Lady Black, Lord Briggs and Lord Kitchin agreed, stated that when determining the meaning to be ascribed to words complained of in defamation proceedings the primary role of the court was to focus on how the ordinary reasonable reader would construe the words, being particularly conscious of the context in which the statement had been made. In allowing the appeal, the Supreme Court concluded that the trial judge had fallen into legal error by relying on the dictionary definition of the verb "*to strangle*" as dictating the meaning of the Facebook post.

25. At para 42-43 of his judgment Lord Kerr approved what Warby J had said in Monroe v Hopkins [2017] EWHC 433 (QB) [2017] 4 WLR 68 and that it was "*wrong to engage in elaborate analysis of a tweet*". In Monroe, at para 35, Warbly J had said

> "The most significant lessons to be drawn from the authorities as applied to a case of this kind seem to be the rather obvious ones, that this is a conversational medium; so it would be wrong to engage in elaborate analysis of a 140 character tweet; that an impressionistic approach is much more fitting and appropriate to the medium; but that this impressionistic approach must take account of the whole tweet and the context in which the ordinary reasonable reader would read that tweet. That context includes (a) matters of ordinary general knowledge; and (b) matters that were put before that reader via Twitter."

26. Lord Kerr also endorsed the comments of Nicklin J in Monir v Wood [2018] EWHC (QB) 3525 where at para 90, Nicklin J had said, "*Twitter is a fast-moving medium. People will tend to scroll through messages relatively quickly.*". Lord Kerr cited with approval Nicklin J's judgment at paras 90 and 92

> "It is very important when assessing the meaning of a Tweet not to be over-analytical. … Largely, the meaning that an ordinary reasonable reader will receive from a Tweet is likely

to be more impressionistic than, say, from a newspaper article which, simply in terms of the amount of time that it takes to read, allows for at least some element of reflection and consideration. The essential message that is being conveyed by a Tweet is likely to be absorbed quickly by the reader."

27. Mr Simpson argued that we should also bear in mind that Lord Kerr had cited with approval the approach of Eady J in a case concerned with online bulletin boards. In that case, Smith v ADVFN plc [2008] EWHC 1797 (QB) where he said (at paras 13–16):

> "13. It is necessary to have well in mind the nature of bulletin board communications, which are a relatively recent development. This is central to a proper consideration of all the matters now before the court.
>
> "14. … Particular characteristics which I should have in mind are that they are read by relatively few people, most of whom will share an interest in the subject matter; they are rather like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or 'give and take'."
>
> "16. … People do not often take a 'thread' and go through it as a whole like a newspaper article. They tend to read the remarks, make their own contributions if they feel inclined, and think no more about it."

28. In that last regard Mr Clarke disagreed that there was an analogy to be drawn with a bulletin board as the readership of Twitter was far larger.

Our conclusions

29. The question for us is whether we are satisfied to the criminal standard that that the tweet was "*likely to diminish the trust and confidence which the public places*" in the Respondent or in the profession, contrary to Core Duty 5, such as to amount to professional misconduct.

30. We have considered carefully the argument made by the Respondent that this was a tweet that was entirely unrelated to the Respondent's professional role as a barrister. The Respondent argued that other than in "*exceptional circumstances*" it was not the BSB's role "to police" a barrister's private life (paragraph 11 of Mr Simpson's Note). In support of that argument Mr Simpson referred us to gC27 of the BSB Handbook which stated:

> "Conduct which is not likely to be treated as a breach of Rules C8 or C9 or CD3 or CD5, includes (but is not limited to):
>
> .1 minor criminal offences;
> .2 your conduct in your private or personal life, unless this involves:

a. abuse of your professional position; or

b. committing a criminal offence, other than a minor criminal office."

31. We were also referred to gC25 of the BSB Handbook which states:

"gC25 A breach of Rule rC9 may also constitute a breach of CD3 and/or CD5. Other conduct which is likely to be treated as a breach of CD3 and/or CD5 includes (but is not limited to):

.1 subject to Guidance gC26 below, breaches of Rule rC8;

.2 breaches of Rule rC10;

.3 criminal conduct, other than minor criminal offences (see Guidance C27);

.4 seriously offensive or discreditable conduct towards third parties;

.5 dishonesty;

.6 unlawful victimisation or harassment; or

.7 abuse of your professional position."

32. In our view the fact that the Respondent's twitter "handle" directly took a user to a website in which the Respondent identified himself as a barrister crossed the public / private divide and therefore the BSB was correct to regard it as a matter that in principle called for investigation.

33. We take into account that that the tweet was not taken down and that it was directed to the Cambridge University as well as the Cambridge University Students Union Women's Officer. It was a tweet to the world at large. Consequently, we do not accept the Respondent's argument that there is an exact analogy between the tweet and a conversation in a bar which is "*often uninhibited, casual and ill thought out*".

34. It was argued that if we found against the Respondent in this case then it would set a concerning precedent. However, the findings we make are specific to this particular set of facts as they have been presented to us. It is not the responsibility of this Panel to set

guidance as to how the BSB might or might not approach other instances of offensive comments by barristers on social media. Such cases will invariably fall to be assessed on their individual facts and by reference to the particular context in which the comments have been made. Moreover, the approach that we have taken in this case is consistent with the guidance in the Handbook to which we have been referred.

35. On the basis of the material that is before us we are satisfied to the criminal standard that the tweet was "*seriously offensive*". In our judgment the reference to "*refuse to perform cunnilingus on shrill negroids*" was racially charged and derogatory to women. In reaching that conclusion we have followed the guidance of Stocker and formed an impressionistic view of the meaning of the tweet by reference to what evidence that there is as to the context of the tweet.

36. In our judgment the use of such language is indeed likely to diminish the trust and confidence which the pubic place in the profession. The public rightly expects the profession to promote equality and diversity and for its members to avoid language which is racially charged and derogatory to women. As to whether this is conduct that can be regarded as "*particularly grave*" or otherwise "*serious*", we have concluded that such language is indeed particularly grave. It was not suggested that this was a "*momentary and uncharacteristic lapse*" as was the case in Walker (see para 37). In Walker the barrister had committed an error in cross-examination that was described as a "*mistake, a slip, which was blurted out and to that extent it was not intentional*" (para 32). The barrister immediately accepted that he gone too far, made an immediate retraction and apology in open court and volunteered a further apology to the witness in private (see para 33). All of which contrasts with the situation with which we are concerned in this case. Mr Simpson told us that the tweet was made in anger. We were also told that the tweet has not been taken down and that the Respondent has not apologised for it. Moreover, as we noted at the outset the Respondent's position is that it was neither sexist nor racist.

37. The line of seriousness, as Sir Anthony May said in paragraph 37 of Walker, is a question of judgment. Having regard to all of the evidence before us and taking into account the submissions we have heard we are satisfied to the requisite standard that the line was crossed in this case.

38. We turn now to question of sanction.

Sanction and Reasons

39. We have considered the submissions of both Mr Clarke and Mr Simpson in relation to sanction. Both are agreed that the Sanctions Guidance offers limited assistance in connection with the circumstances of this particular case. However, they invite us to consider sanction by reference to the guidance in relation to Discourtesy at page 50 of the 4th edition of the Sanctions Guidance. Both say that this case falls within box A as being an isolated incident. Mr Clarke says that an aggravating feature was the Respondent's lack of remorse.

40. Mr Simpson told us that the appropriate sanction would be a reprimand. The guidance indicates that for matters falling within box A the starting point should be reprimand possibly accompanied by a low level fine.

41. The Sanctions Guidance indicates at p32 that a low-level fine is one up to £1,000.

42. We have taken all of those points into account, together with our findings in relation to why the Respondent has been found guilty of professional misconduct. This was an isolated incident, but we are mindful that the Respondent has shown no remorse for what has occurred, nor has he demonstrated any insight. In our judgment the appropriate sanction is a reprimand and a fine of £1,000. Accordingly, our order is that:

    (a) Martin Diggins, a barrister called to Middle Temple on 24 November 1992, is reprimanded by this Tribunal; and
    (b) That the Respondent shall pay a fine of £1,000 to the Bar Standards Board within 28 days of the expiry of any appeal period.

Approved: 02 October 2019

Jonathan Glasson QC
Chairman of the Tribunal