Report of Finding and Sanction

Case reference: PC 2019/0057/D5

Robert Kearney

The Director-General of the Bar Standards Board
The Chair of the Bar Standards Board
The Treasurer of the Honourable Society of the Inner Temple

Disciplinary Tribunal

Robert Kearney

1. In accordance with an appointment made by the President of the Council of the Inns of Court contained in a Convening Order dated 23 November 2020, I sat as Chair of a Disciplinary Tribunal on 21 December 2020 and 19 March 2021 to hear and determine 3 charges of professional misconduct contrary to the Code of Conduct of the Bar of England and Wales against Robert Kearney, barrister of the Honourable Society of the Inner Temple.

Panel Members

2. The other members of the Tribunal were:

   Isabelle Watson (Barrister Member)
   Naomi Davey (Barrister Member)
   Sarah Baalham (Lay Member)
   John Walsh (Lay Member)

Charge

3. The following charges were proved:

Charge 1

Statement of Offence

Professional Misconduct, contrary to Core Duty 3 of the Code of Conduct of the Bar of England and Wales (9th Edition) contained in Part 2 of the Bar Standards Board Handbook (1st Edition).

Particulars of Offence

Robert Kearney, a barrister and BSB regulated person, failed to act with integrity in that during the course of a mini pupillage between 26 and 28 January 2015 with Person A, in which he was in a position of trust, he engaged in the conduct set out in Schedule A towards Person A, such conduct taken either individually or together being inappropriate and of a sexual nature.

Charge 2

Statement of Offence

Professional Misconduct, contrary to Core Duty 5 of the Code of Conduct of the Bar of England and Wales (9th Edition) contained in Part 2 of the Bar Standards Board Handbook (1st Edition).

Particulars of Offence

Robert Kearney, a barrister and BSB regulated person, 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 during the course of a mini pupillage between 26 and 28 January 2015 with Person A, in which he was in a position of trust, he engaged in conduct set out in Schedule A towards Person A, such conduct taken either individually or together being inappropriate and of a sexual nature.

Charge 3

Statement of Offence

Professional Misconduct, contrary to rC8 of the Code of Conduct of the Bar of England and Wales (9th Edition) contained in Part 2 of the Bar Standards Board Handbook (1st Edition).

Particulars of Offence

Robert Kearney a barrister and BSB regulated person, behaved in a way which could reasonably be seen by the public to undermine his integrity in that during the course of a mini pupillage between 26 and 28 January 2015 with Person A, in which he was in a position of trust, he engaged in conduct set out in Schedule A towards Person A, such conduct taken either individually or together being inappropriate and of a sexual nature.

Schedule A

Robert Kearney made the following comments, or words to that effect:

i] that he kept his nails short because you can't finger women with long nails;

ii] asked Person A if she had ever had sex in her parents' house and the details about it;

iii] told Person A that eating pineapple makes semen taste better;

iv] said to Person A she should wear skirts and heels instead of trousers and asked her what her bra size was;

v] leant into Person A when the two were alone inside a lift, smelt her neck and asked her what perfume she was wearing;

vi] B also spoke about sex with his wife and was physically too close to Person A.

Parties Present and Representation

4. The Respondent was present and was represented by Mr Simon Csoka QC. The Bar Standards Board ("BSB") was represented by Ms Harini Iyengar, Counsel.

Preliminary Matters

5. Mr Csoka applied for the hearing to be in private. He said that Mr Kearney has previously appeared before a tribunal in a similar matter and it was sensationalised in the media causing him and his family substantial embarrassment and a significant

impact on his income. Ms Iyengar replied that it is an important point of principle that hearings take place in public and that no exceptional arguments have been put forward.

The Tribunal considered the application and said that in normal circumstances we sit in public, this accords with the principle of open justice and it is important that it is applied in professional misconduct tribunals. There needs to be exceptional circumstances to justify a departure from open justice. The application is based upon undue embarrassment and sensationalism. In our judgement this is not a sufficient reason to justify a departure from this important principle and we will sit in public. It is our view that when we hear the evidence the identity of the complainant may be anonymised. The application is therefore refused.

6. Mr Csoka applied to have the proceedings dismissed on the basis that an incorrect procedure had been followed by the BSB and a fair hearing was impossible and in doing so referred to his skeleton argument. Ms Iyengar said that the procedural rules had been applied in accordance with the factual content and referred to her skeleton argument.

   The Tribunal considered the application that the initial application was flawed in a number of respects and that rule rE32 of the BSB Handbook was not complied with. A complaint was made about the process of delegation and how it occurred. We do not find any merit in that point, we have looked at the potential effect on fairness. We looked at whether the complaint had been alleged on a false premise and in line with a criminal offence. We find that no criminal offence has been referred to. Also relied upon was the short time limit for these proceedings. The alleged conduct arose in 2015 and it was not until the latter part of 2018 when it was referred to the regulatory body. The submission is that the appropriate tests have not been applied properly. We have looked at the tests and overall fairness to both parties. It is submitted that no proper investigation was carried out in the short time available and the Respondent was not, for instance, given an opportunity to respond and neither were potential witnesses spoken to. We are satisfied overall that the investigation was fairly and properly conducted and that the PCC reached a proper judgement. The application to stop the proceedings is refused.

7. Mr Csoka QC made an application for a dismissal of the proceedings by reason of abuse of process and in doing so referred to his skeleton argument.

   The Tribunal considered the application that the proceedings amount to an abuse of process because of failures in the investigation particularly those who may be key witnesses. We have been careful not to apply the processes applied in the criminal or employment law, but we have considered analogies. The issue is that the Respondent has indicated that he does not recall the complainant and that a number of witnesses were not spoken to who should have been. AG ref no 1 of 1990 is the leading case on abuse of process and it is a course to be taken to amount to an abuse of process and it is entirely reliant on judgement. In this context of this hearing, we have taken into account all relevant matters and we are in a position to either include or reject certain evidence. It is submitted that it is unfair to proceed on the evidence primarily because of the delay and the effect upon the Respondent's evidence and potential defence. The BSB says that we should be cautious in applying any other jurisdiction to this case and we agree. The question for us is whether there can be a fair hearing given potential gaps in the evidence. When we apply the principle that this is an unusual jurisdiction, we are not in any sense satisfied that we should stop the proceedings. We conclude that we are perfectly capable of assessing all matters that have been referred to us on behalf of the Respondent. The application therefore to stay the process must be refused.

Pleas

Evidence was heard from:

8. Ms A.
   Ms A's Boyfriend.
   Ms A's Mother.
   Ms A's Aunt.
   Mr Kearney.

Day 2:

19 March 2021

9. The Tribunal heard evidence on day 1 and would now hear submissions.

Submissions

10. Ms Iyengar made closing submissions and referred to her written opening. Mr Csoka QC made closing submissions.

Findings

11. The Tribunal retired to consider their decision. It was a unanimous decision. The Respondent Robert Kearney was called to the Bar in 1996 and has practised in criminal law on the Northern Circuit from Lincoln House chambers and faces 3 charges arising out of incidents involving a mini pupil in January 2015. The 1st charge is that he failed to act with integrity contrary to CD 3 in that he was in a position of trust and engaged in inappropriate sexual conduct. Second that he behaved in a way contrary to CD 5 liable to diminish trust and confidence in the profession and 3rd that he was seen to undermine the integrity of the profession contrary to Rule rC8. We must consider each charge separately but the nature is such that if we are satisfied to the required standard that the facts have been proved it should follow that all charges are found save for excluding specific parts in the schedule. If one is not found proven, he cannot be guilty of any. The undisputed facts are these: At the end of January 2015 the complainant whom I shall refer to as Ms A undertook a mini pupillage with the Respondent in Manchester. At the time she was a second-year law student at Manchester University. I will describe how she came to meet the Respondent. Initially when the complaint was made her recollection was that it was in the summer of 2014 but on checking records it must have been January 2015 those being the dates in the charges. In our judgement nothing turns on this, it in no way affects one way or another our view of her evidence. These incidents are a long time ago and delay is one of the issues that we must address in assessing the evidence. Before the evidence was heard, two preliminary points were made on behalf of the Respondent first that the investigation was flawed and second that the proceedings ought to be stayed for abuse of process because it was impossible for the Respondent to have a fair hearing on account of the substantial delay.

We ruled against the Respondent on both submissions but said that we must and would take account of the delay in assessing the evidence that we had heard. I start by setting out the fundamental and core principles that we must apply. First the burden of proof is on the BSB at all stages in exactly the same way as it is upon the prosecution in a criminal trial. Second the standard of proof applicable is that of the criminal standard in other

words we must be sure that the charges are proved. Being sure means that is it not enough to say that we are suspicious and because the events occurred before 2019 the criminal standard of proof applies. We also need to direct ourselves in much the same way as a jury on the effects of delay and I set it out because I want it to be clear as to what we have had regard. Delay may make witnesses accounts unreliable, the passage of time can distort, people think that they may recall or become convinced that they recall events happening in a particular way. Objective evidence may show that they are entirely mistaken. This generalisation needs to be applied with precision to the facts and the decision that we must make. An utterly honest witness and convinced in their own mind can be mistaken due to the passage of time. Delay can put the Respondent at a serious disadvantage in answering the charges. Witnesses may have died who could have assisted, we heard that this was the case for one particular barrister although it is not suggested that he was an eye-witness. Even if a witness were able to be located and available they may have no recollection of events, no reason to note an incident and a further factor that we must bear in mind is that the Respondent's evidence is in effect a denial save for one incident where he might have asked the complainant about which perfume she used. We have these matters very much in mind and also bear in mind that it is important that one does not become too fanciful or speculative and must be real. We have all this in mind, and it is a backdrop to our assessment.

Let me begin with the complainant's evidence. Ms A in January 2015 was a law student at Manchester University. In the previous summer she met the Respondent whilst working as a waitress in the same building as the Respondent's chambers. Also, in there is the Neighbourhood Bar. They spoke and she told him that she was a law student, an aspiring barrister, he gave her his card and offered to help her find a mini pupillage. They had not met before. Before she had undertaken the mini pupillage, she had already undertaken two others in two other sets of chambers and had marshalled with a judge. They all appear to have taken place without incident. It is also worth noting that Ms A has family connections with the Bar. Her grandfather is a now retired circuit judge, her aunt is at the self-employed Bar in Manchester and in crime but at different chambers to the Respondent although she knows him. Reference was also made to a family friend who is a High Court Judge. The importance is that she is familiar with the unedifying banter that was part of the way of life in the criminal bar. Gallows humour affects all professions. She at least understood that as part of the way of life whether good or bad and said that she understood the crude humour of barristers. She said that she had been around it all

of her life, but it had never caused her to feel unsafe. At the time she made no formal complaint and only in November 2018 did she do so. The reasons why may not really assist us as to whether we can rely on her evidence. The fact is there was delay nearly 4 years later when she told the BSB. She read a report in the press about another incident involving the Respondent. We have been particularly careful not to enquire into this, for fear of prejudicing a fair hearing but it was that that triggered her complaint. We are all familiar with the "Me Too" phenomenon. Usually a public figure is accused. In truth the phenomenon is nothing new, those of us practising in criminal law have encountered much of it, including School Teachers. We have to guard against the possibility that in this situation the others that came forward may make complaints which if not deliberately false or malicious for instance motivated by compensation, may still be unreliable, exaggerated or convinced that something innocuous has taken place on a more sinister character. We have addressed the issue of delay.

The evidence arising out of this is that at the time or around the time, the complainant complained to several people two of whom have given evidence in this hearing. The first was her mother and the second was her then boyfriend, now her husband. She complained albeit in general terms that the Respondent's behaviour was sleazy, and she felt uncomfortable. She did not complain specifically about the matters that we are having to adjudicate on. Her general complaint is important in our view. It may not provide independent supporting evidence of what she says but it does show consistency and disposes of any suggestion that the complaint that she eventually made in November 2018 has been a recent invention or fabrication or that a long time afterwards she has put an interpretation on it that is not warranted.

Her mother gave her advice which she now regrets. I do not think that we should in any way tell her to reproach herself for that, the same for the others she told. The advice that her mother gave her was this, that it would be best to ignore it, don't laugh and tell him that it made her feel uncomfortable and not to drink too much if she accompanied him for a drink after work. Similar advice came from the boyfriend, he was well aware of the difficulties in obtaining a mini pupillage and it is very valuable in getting a pupillage and tenancy. It was suggested that it may cause trouble. It is regrettable that this advice was given but one has to look at the context of how it was given. We have considered the family gathering where it was discussed, there is a lot of hearsay in the mother's

statement and we find that none of it assists us. I think we should look at what the complainant actually alleges.

We are all of the view that we need to concentrate on the specific allegations and ignore any suggestions for example in para 12 of her statement where she says that there were other inappropriate times. The trouble with that evidence is that it is too vague and unspecific. Likewise, in charge 2 there is reference to touching, this has not been made out on the evidence with the exception of one specific allegation. I am going to list them.

In paragraph 8 of her statement Ms A says that on 27 January 2015 when they were alone the Respondent said to her that he kept his nails short because you can't finger women with long nails. He asked her if she had had sex in her parents' house and the details. He mentioned eating pineapple and that it makes semen taste better. She said that she did not reply, and feigned ignorance of the innuendos.

On a separate occasion she thinks that in a robing room, he said to her that she should wear skirts and heels instead of trousers and he asked her about her bra size. It was not him telling her that she was inappropriately dressed for court.

Another incident occurred in the court building at Manchester crown square in the lift when he leaned towards her closely and asked her which perfume she was wearing.

In deciding this case we must concentrate on those six specific items in deciding whether the charges are proved. We have considered the complainant's evidence and observed her demeanour. We make allowances for the fact that it is not quite the same in these remote hearings. We also bear in mind demeanour generally; it can be misleading and is not the definitive test of reliability or truth and considering the risks about believing or disbelieving. We have had the advantage of observing her demeanour and we can say that she was consistent, and she was restrained. She did not exaggerate anything or claim to remember things that she couldn't, she was very specific in saying when she could not remember, and this is something that we bear in mind. We found her to be a reliable witness, we can certainly rule out any question that she is a liar or fantasist. This is by no means the end of the matter because we must consider what the Respondent has to say and any other evidence.

A lot has been made in the course of the proceedings about the culture of the criminal bar and the humour. It is not for this tribunal to pass judgement and what is now not

acceptable in 2021 may have been acceptable then. It is one thing to engage in that kind of banter amongst equals who can look after themselves, it is characteristic of the criminal bar. What is not acceptable is where there is disparity of power status and age. It is not acceptable to behave in that way towards a pupil or a mini pupil especially the latter because they may feel unable to complain about it. Such a person may also fear that a complaint would potentially impede their prospects. This was very much in her mind and in her family's mind too. The boyfriend said that he did not tackle it because he thought that it would not serve any purpose and we find his answer compelling. The fact that he did not complain does not detract from the evidence that he has given.

We then ask ourselves whether there is any supporting evidence for what the complainant says. The complaints made by her to her mother and boyfriend are not supportive evidence as they are not independent, but they do assist in showing consistency. We have heard the evidence of her Aunt; she is in practice in chambers in Manchester and knows the Respondent from having appeared in court with him. She is a rather important witness for two reasons. First, she dealt with some texts with the Respondent around 27 January 2015 and we have been provided with a screenshot of them. The texts without wishing to sound prudish are somewhat unusual even in the course of light-hearted banter. I am going to look at the screenshots and regrettably will quote from them. 'I gather you have my niece with you on mini pupillage' then 'Yes but she can't talk at the moment she has a mouthful of my cock.' And 'She needs to learn the art of love making.' Aunt: 'Glad you are teaching her all you know.' What are we to make of this? First, the Respondent says that it is just light-hearted rather coarse unwise banter between two friends and equals at the bar. No one suggests that it was true or had ever occurred. But what it is capable of indicating is what one might call a low level sexual interest and also bearing in mind the specific reference in that text to oral sex it is capable of providing some support for the things that the Respondent is alleged to have said in particular the reference to eating pineapple. The Respondent does not deny the content of the text but says that we don't have the context of a whole chain of messages, but we have those words. It is to say at the least, a somewhat unusual thing to say when it is coupled with a reference to that mini pupil.

A second aspect of the Aunt's evidence is this. At the time she dismissed it as crude banter. She became aware later on in general terms of what the Respondent was alleged to have done. Much was made of the conflict between Mum and Aunt as to who said

what, but we are not sure that this is particularly significant. Some time afterwards there was a party at Lincoln House Chambers to celebrate a member taking silk. The aunt tackled the Respondent during the party about the complaint. The Respondent disputes it. He says the layout of the chambers is different to that described by the aunt and they couldn't have had the discussion in the clerks' room. On one view this may be significant. She says he became distressed but did not say he was innocent but neither did he expressly say that he had done anything wrong. He does not recall the conversation. We don't think that it is necessary or fair to express a conclusion as it is not an expression of guilt and we don't consider it appropriate to place any weight on his distressed state. It is at best equivocal. It cannot assist us by way of supporting evidence.

This addresses the evidence for the BSB.

We turn to what the Respondent says. His case is that he in effect totally denies any misconduct as alleged with perhaps 2 exceptions where he seeks to explain his actions putting a diff gloss on it. He said that the talk about fingernails, there may be some confusion with a conversation that he had with an opponent in a sex case where the accused had had an unattractive appearance. The problem with this is it doesn't appear that it was said whilst the complainant was present, and she may have attributed it to her. The other matter is that he says that he may have asked her at some stage about the perfume that she used, and it went no further, that he did not get inappropriately close to her. It has not actually been suggested that as far as the defendant with dirty fingernails was concerned that the complainant has erroneously put a gloss on it and directed it towards her and equally if he had just asked her about her perfume, this would not be subject to a charge. It has to be seen in the context of other events.

We considered the reactions to the other charges; he says a total denial. We are sure that the complainant is not a liar or a fantasist, and we have considered if her version is consistent and any supporting evidence. Even if we are sure that she is honest we have to set it against what the Respondent says. Are we sure that we can reject what he says to the criminal standard and we remind ourselves that he has to prove nothing. If we are in a position that despite the strength of the evidence, we are not sure that we can reject R's denial, he must have the benefit of the doubt. The Respondent says that he does not recall having her as a mini pupil. This is surprising because she had dual family connections, and this doesn't happen all of the time. It was a stance that he has maintained throughout. Do we find this to be satisfactory? We are bound to say with the

best will in the world that we do not find his recollection satisfactory. Indeed it is something that verges on the evasive in our view and so we then ask ourselves what the Respondent has said, we consider carefully the submissions that his Counsel has put forward on his behalf in particular the delay and he urged upon us that the complainant doesn't recall what type of cases she witnessed. I agree that a prudent mini pupil would keep a note, but does it affect our view of the evidence? He urges upon us that there is a lack of clarity and it goes no further than saying she felt uncomfortable. He said that there was a serious inconsistency between mum and aunt and urges us against prejudicing the Respondent in relation to the text because on any view it was misjudged and ill advised. He said that it was inconsistent with what is being alleged and that the aunt had warned him off but this argument cuts both ways. It can be said that R was someone who was prepared to take a risk on that or having been warned decided to ignore it and continue. Mr Csoka urges that we should bear in mind that the context of the text messages is no longer available at or around the same time. He said that asking for a reference is inconsistent with the allegations, but we have already said that we do not attach any weight to that.

We are then left asking ourselves what is the ultimate question, are we sure looking at the whole of the evidence and we bear in mind the Respondent's character witness evidence many of whom are female and are quite frank about his sense of humour. We bear in mind the delay and consequences but we are left with clear evidence from the complainant, supported in our view from that text message which was from the Respondent, we bear in mind what the Respondent has said but we are sure that the Respondent's evidence is unconvincing on many points and it does not leave us in any reasonable doubt about the accuracy of the complainant's account and accordingly we find each of the charges proved. We do not find proved a general allegation that he had been sleazy on other occasions or that there had been physical touching other than standing too close in the lift when asking about her perfume. This was totally inappropriate and unacceptable behaviour to show to someone who was a mini-pupil and for whom he was in a position of authority. Each and every one of these charges is found proved.

Submissions on Sanction

12. Ms Iyengar drew the Tribunal's attention to the Sanctions Guidance 2015, pages 7-9 and Sexual Misconduct, page 53, Annex 1 Aggravating and Mitigating Factors.

13. Mr Csoka made submissions on the Respondent's behalf.

Findings and Sanction

14. The tribunal having found proved the 3 charges that arise out this behaviour towards Ms A in 2015, we outlined the acts that we are satisfied he had done towards her. We have to consider an appropriate sanction. We start by referring to Lord Bingham in Bolton v The Law Society and the reputation of the profession. When we look at the aggravating and mitigating features, we think many overlap and do not conveniently fit into pigeon holes. We look for examples for instance whether there is an element of pre-meditation and we think that there is some and this is gleaned from the text message. It undermines the profession and the effect on the complainant. She was a young woman aged 19 and the effect was that she did not want to practise at the bar in Manchester and this was a direct consequence due to the Respondent's conduct towards her. In a sense it is discriminatory behaviour because she was a young woman and there was a disparity of power and this feeds into aggravating features. He was quite a senior member of the Bar approaching 20 years call, in his late 40's and she was simply a young student. He was in a position to behave in this way and he thought he could without anyone doing anything about it. Regrettably, he showed a complete lack of insight whist we accept he is entitled to put the BSB to strict proof. Bearing in mind that he has an earlier disciplinary finding from 2018, it arose out a of a drunken episode in October 2017 when he used grossly obscene lang towards a young pupil. In terms of mitigating features, we take into account the character references. They have a limited effect and must be seen in the context of the finding. They have been frank and have described him as inclined towards a sense of humour that left quite a lot to be desired.

    When we consider the effect on the reputation of the profession, we are bound to take a serious view. Anyone doing a mini pupillage is entitled to think that they will not be subjected to this type of conduct and we have to take a serious view of it. Although it happened over a period of 3 days it had a serious effect on the complainant, and it would have a serious effect on the reputation of the Bar. We think looking at the Sanctions Guidance that it merits a short period of suspension. A fine gives the wrong impression and the public may equate it with a minor road traffic offence. We bear in mind when considering the length of the suspension and have given consideration to

the criminal bar at the moment and the nature of his practice and what has happened to it because of current circumstances. At the end we come back to Lord Bingham who said that the reputation of the profession is more important than the effect on the individual. In all the circumstances the least penalty we think we can impose is six months suspension and £3,000 costs, payment of which will be decided between the Respondent and the BSB. We are going to couple it with advice to the Respondent that he should not take on any more pupils, mini pupils or those looking for work experience. This is a unanimous decision. The usual rules of appeal apply.

Approved: 25 March 2021

HH Andrew Goymer
Chairman of the Tribunal