The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

Report of Finding and sanction

Case reference: PC2020/0974/D3

Mr Feliks Kwiatkowski

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

Feliks Kwiatkowski

1. In accordance with an appointment made by the President of the Council of the Inns of Court contained in a Convening Order dated 30th September 2021, I sat as Chairman of a Disciplinary Tribunal on 1st and 2nd November 2021 and again on 27 January 2022 to hear and determine one charge of professional misconduct contrary to the Code of Conduct of the Bar of England and Wales against Mr Feliks Kwiatkowski ("the Respondent" or "Mr Kwiatkowski"), a barrister of the Honourable Society of Middle Temple.

Panel Members

2. The other members of the Tribunal were:

   Ms Sarah Baalham (Lay Member)

   Ms Hayley Firman (Barrister Member)

Charges

3. The Respondent was charged as follows:

   > "Professional misconduct, contrary to Core Duty 5 of the Bar Standards Board's Handbook (9th edition)."

4. The particulars of offence were described as follows:

> "Feliks Jerzy Kwiatkowski a barrister, acted 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 25 November 2019 at Worthing County Court during discussions with opposing counsel, Person X, Mr Kwiatkowski made one or more of the comments set out below, such comments, individually or cumulatively being inappropriate and/or offensive, namely
>
> i. Described the witness statement, drafted and signed by the female Chartered Legal Executive who had instructed Person X, as that of a "hysterical woman", or words to that effect;
> ii. Stated that his comments as set out in charge 1(i) above "was just fact", or words to that effect
> iii. Stated "I have been practising since before this century. When more women joined the profession, the ground shifted. You do get stupid and unreasonable men in the profession, but the ground shifted – the number of incidents of overegging the pudding and just going overboard in a routine situation multiplied", or words to that effect;
> iv. When Person X sought clarification from Mr Kwiatkowski whether he was referring to women as being "intemperate" he said "yes, that word, intemperate" or words to that effect."

Parties Present and Representation

5. The Respondent was present and was represented by Mr Marc Beaumont of counsel. The Bar Standards Board ("BSB") was represented by Ms Elizabeth Fox of counsel at the substantive hearing and by Mr Winston Jacob of counsel at the hearing to determine sanction. We are grateful to all counsel for their written and oral submissions.

Preliminary issue: application to stay the proceedings

6. At the outset of the hearing the Respondent made an application on notice to stay the proceedings. The Respondent argued that we should stay the proceedings on the basis that to proceed would be an abuse of process by the BSB and/or on the basis of estoppel res judicata. The application was opposed by the BSB.

7. Both parties had submitted written arguments in relation to the application and we heard further submissions at the hearing. Having retired to consider the application, we decided unanimously to dismiss the application, with reasons to follow in due course.

8. Our reasons are now set out in this report.

9. In order to explain our reasons, we need first to set out the relevant procedural background.

The procedural history

10. The incident that we are concerned with occurred in the waiting room outside a court room in Worthing County Court on the morning of 25 November 2019. The Respondent and Person X had a conversation outside court in relation to a contested application that had been made by the Respondent's client. Person X's client had served a witness statement opposing the application and it was that witness statement which was the subject of the conversation that formed the basis of the charge that was brought by the BSB.

11. On 2 December 2019 Person X made a report under rC66 of the Rules in the Bar Standards Board's Handbook. That rule provides:

> "Subject to your duty to keep the affairs of each *client* confidential and subject also to Rules rC67 and rC68, you must report to the *Bar Standards Board* if you have reasonable grounds to believe that there has been serious misconduct by a *barrister* or a *registered European lawyer*, a *BSB entity*, *manager* of a *BSB entity* or an *authorised (non-BSB) individual* who is working as a *manager* or an employee of a *BSB entity*."

12. In her report, Person X stated:

> "I would like to report the comments made to me by Mr Feliks Kwiatkowski of Piccadilly Chambers on 25 November 2019 in the waiting room at Worthing County Court. I consider that they may amount to serious misconduct, on taking advice from my Head of Chambers, but in any event consider that they are misconduct. I have attached my note of the conversation which was made the same day. I have contacted the other barrister mentioned in that note, who overheard the conversation. He has informed me that he also made a note of the conversation at the time due to his concerns and is happy to assist if required. I consider the comments made bring the Bar into disrepute and constitute sex discrimination. They were made in the earshot of others, and repeated after I had asked him to stop. I informed Mr Kwiatkowski by email on 29 November 2019 that I intended to make a complaint but informed him I do not wish to correspond further – I was informing him as a courtesy."

13. An initial risk assessment was undertaken by a member of the Conduct and Assessment Team ("CAT") on 26 February 2020, which provided a rating suggesting that a referral to the Investigations & Enforcement Team should <u>not</u> be made. This risk assessment was, however, reviewed by Mr Tucay, Head of CAT, following the receipt of a "*service complaint*". This review, in which Mr Tucay conducted a subsequent risk assessment, returned a rating which indicated a referral was appropriate. In their skeleton argument in relation to the abuse of process application, the BSB say "*the Head of CAT has the power to initiate a review of a report at his own volition. It was also clarified that Mr Tucay considered the impact of the respondent's comments about women on the*

information provider. In short, he took a different view to the member of CAT who initially assessed the risk."

14. The review by Mr Tucay was prompted by a Services Complaints Form which Person X submitted on 15 March 2020. In that complaint Person X expressed her concerns that she had received no response to two emails in which she had asked for an indication of the outcome of her referral and no response to a telephone call she had also made to the BSB asking for an update. Person X's Complaint Form was forwarded to Mr Tucay on 17 March 2020, and he responded to Person X in an email dated 5 April 2020. In that email he explained that the BSB do not normally update barristers on the outcome of reports made under rC66 but "*fully accepted*" that her emails should have received a response. He went on to say that, exceptionally, he had decided to inform her of the outcome of the report because of "*the nature of the report and that you were personally impacted by the conduct you reported*". He informed Person X that the matter was being referred to the Investigation and Enforcement Team for investigation.

15. On 9 June 2020 Mr Kwiatkowski was notified by the BSB that an allegation had been made about his professional conduct. Mr Kwiatkowski acknowledged the notification in an email dated 15 June 2020. Mr Kwiatkowski sent a substantive response to the BSB on 31 July 2020.

16. On 25 September 2020 Mr Kwiatkowski was informed by the BSB that the complaint was going to be referred to the Independent Decision-Making Body panel ("IDP") who would consider the matter and then make a decision. He was informed that the IDP had the power to decide whether to pass a case on to a Disciplinary Tribunal, impose an administrative sanction, or to dismiss some or all of the allegations. He was asked to provide any financial information that would be relevant if the IDP were minded to impose a fine. Mr Kwiatkowski was also told that someone from the BSB would be in touch "*in due course*" with the date for the IDP hearing.

17. On 28 September 2020 Mr Kwiatkowski asked for clarification of the request for financial information and what he was "*expected, or entitled, to do in relation to the IDP meeting*". Later that day the BSB replied explaining that details of incomings, outgoings and savings would count as financial information. The BSB also explained that the Panel would consider all of the documentation "*which had been provided to you in support of the allegations and your response received on 31 July.*"

18. On 18 November 2020 a five-person IDP considered the case which was referred on the basis of breaches of Core Duty 3 (Duty to act with integrity), Core Duty 5 (Duty not to behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession) and rC8 (a barrister must not "*do anything which could reasonably be seen by the public to undermine […] your integrity (CD3)*". The IDP dismissed the alleged breaches of CD3 and rC8 but referred the allegations in relation to a breach of CD5 to a three-person tribunal on charges of professional misconduct. It is common ground that the IDP were not informed of the initial risk assessment decision.

19. Mr Kwiatkowski only became aware of the initial risk assessment decision in 2021. On 25 May 2021, Mr Beaumont, acting on behalf of Mr Kwiatkowski, submitted to the BSB a series of questions and requests for disclosure. This email included a request to "*explain the delay between the date of [Person X's] first contact with the BSB and the date that the BSB first wrote to my client. Please provide reasons for the delay*".

20. On 24 June 2021 the BSB replied stating:

> '[Person X's] report was considered by an Assessment Officer in the Conduct & Assessment Team and was initially closed. In accordance with our policies, Person X was not informed of the outcome of the decision to close the case. Person X made a service complaint in March 2020 as she had not heard from the BSB about her report. Whilst investigating the service complaint the Head of Conduct & Assessment, Mr Tucay considered it appropriate for the matter to be reviewed. During this review, Mr Tucay amended the risk assessment which indicated that the BSB should investigate, and the case was reopened. The case was accepted for investigation by the Investigations & Enforcement Department on 24 April 2020. Following a review of the documentation and some further enquiries with the witnesses the BSB sent the Summary of Allegation to your client on 9 June 2020'.

21. In further correspondence dated 15 July 2021 and 16 September 2021 the BSB stated that the Head of CAT has the power to initiate a review of a report at his own volition. It was also clarified that Mr Tucay considered the impact of the respondent's comments about women on the information provider.

22. On 18 October 2021 the Respondent submitted an application for the proceedings to be stayed because of the failure to inform him of the initial risk decision assessment. Having considered the application, we decided that we should hear the application at the outset of the two-day hearing.

The parties' submissions in brief

23. It was common ground that we had the power to stay the proceedings, although there was a dispute as to what the outcome would be of such a stay. The Respondent argued that the outcome would be for us to remit the case for consideration by an Independent Decision-Making Panel. The BSB argued that we had no such power but accepted that if we stayed the proceedings, it would be incumbent on them to re-consider the case. Given our conclusions on the merits of the application itself, the issue as to what would be the outcome if we accepted the application does not need to be resolved.

24. The Respondent argued that the initial risk assessment was "a decision made on the merits" and gave rise to an estoppel. Furthermore, the failure to inform him of the initial risk assessment decision as well as the failure to inform the IDP of that decision was an abuse of process. The Respondent submitted that the failure was so unfair and wrong that we should not allow the BSB to proceed with the case. He argued that it amounted to "*serious prosecutorial misconduct*". The Respondent submitted that the conduct fell within (ii) of the criteria set out by Lord Dyson JSC in *R v Maxwell* [2010] UKSC 48 at [13]:

> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case."

25. The BSB's grounds for opposing the application were summarised in Ms Fox's skeleton argument as follows:

> "a. It is not BSB policy to inform the subject of a report about a decision to dismiss a report made pursuant to rC66;
> b. A review of a previous decision to dismiss a report is well within the BSB's powers, as illustrated both by BSB policy and the Enforcement Regulations 2019;
> c. The decision of the IDP is independent of any recommendation to refer the matter to them, as is the decision to be taken by this three-person Tribunal;
> d. Even if the respondent's position – that he ought to have been informed about the previous dismissal – were accepted by the Tribunal, it is submitted that any mischief caused by his lack of knowledge has been fully remedied by the respondent exercising his right to bring an application relating to an abuse of process. He is therefore able to have a fair hearing."

26. The BSB pointed to rE61 of the Handbook as the basis for Mr Tucay's reconsideration of the complaint. That provision states:

> "The Commissioner or an Independent Decision-Making Panel may reconsider an allegation which has been disposed of by the Commissioner or an Independent Decision-Making Panel respectively where
> .1 new evidence becomes available which leads it to conclude that it should do so or

.2 for some other good reason".

27. The Commissioner is defined in the Handbook as "*the person who is empowered within the executive of the* Bar Standards Board *to carry out the functions and exercise the powers as indicated within the* Handbook*".* There is no definition or guidance as to what constitutes "*some other good reason*".

Estoppel res judicata

28. In *Allsop v Banner Jones Ltd (t/a Banner Jones Solicitors)* [2021] EWCA Civ 7, [2021] 4 All ER 397 at [21] Marcus Smith J said:

> "A *res judicata* is a decision pronounced by a judicial or other tribunal with jurisdiction over the cause of action and the parties, which disposes, once and for all, of all the fundamental matters decided, so that, except on appeal, they cannot be re-litigated between persons bound by the judgment. A party to a *res judicata* will be estopped, as against any other party, from disputing the correctness of the decision, except on appeal. This is known as 'cause of action estoppel'. The same is true – save to a narrower extent – of 'issue estoppel'. A final decision will create an issue estoppel if it determines an issue in a cause of action as an essential step in its reasoning."

29. At [24]-[25] Marcus Smith J stated, "*it is important to differentiate final decisions from interlocutory decisions and appeals from decisions at first instance*".

30. The Respondent relied upon *R (Coke-Wallis) v ICAEW* [2011] UKSC 1 and *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 but both cases are distinguishable from the facts here. *Coke-Wallis* establishes that the findings of a disciplinary committee can give rise to the principle of *res judicata*. It is not concerned with a decision such as the initial risk assessment decision. In *Thrasyvoulou* the issue was whether or not a planning inspector's determination in favour of an appellant in an appeal against an enforcement notice gave rise to an estoppel. Again, the facts here are very different.

31. In our judgment the initial risk assessment decision that is in issue cannot be characterised as a final decision and therefore the principle of *res judicata* has no application to the arguments advanced on behalf of the respondent.

Abuse of process

32. The Respondent argued that the failure to disclose to him and to the IDP the initial risk assessment fell within the second category of cases identified in *Maxwell*. Lord Dyson JSC explained the basis for the court to grant a stay in relation to such a category as follows:

> "In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of justice and propriety (per Lord Lowry *in R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74G) or will undermine public confidence in the criminal justice system and bring it into disrepute (per Lord Steyn in *R v Latif [*1996] 1 WLR 104, 112F).
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> 14. In *Latif* at pp 112—113, Lord Steyn said that the law in relation to the second category of case was settled. As he put it:
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> > "The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *Reg v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42. Ex p Bennett was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in *Ex p Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."
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> 15 The same principles have also been applied by the Court of Appeal when quashing a conviction on the grounds that it considers the conviction to have been unlawful by reason of an abuse of process. An example of such a case is *R v Mullen* [2000] QB 520 where the defendant was tried and convicted following his illegal deportation to England."

33. In our judgment the conduct of the BSB in failing to disclose the initial risk assessment cannot be characterised as being such that it offends our sense of justice for the proceedings to continue. To use the language of *Latif,* it would not undermine public confidence in the regulatory regime for the Bar or bring it into disrepute for the proceedings to continue. The conduct complained of stands in stark contrast to instances where a defendant has been tried and convicted following his illegal deportation or where a defendant had been forcibly abducted and brought to this country to face trial in

disregard of extradition laws. It also stands in contrast to the conduct in *R (McCarthy) v The Visitors to the Inns of Cour*t [2015] EWCA Civ 12, a case which was relied upon by the Respondent. In that case the BSB had failed to disclose a statement of the principal witness against a barrister in proceedings which led to the barrister being disbarred. The Tribunal made their decision in complete ignorance of that statement and its non-disclosure was the live ground of appeal before the Visitors. Burnett LJ (as he then was) described what happened as "*extraordinary*" (see [17] of his judgment). The non-disclosure of the initial risk assessment is of a wholly different order and cannot in our judgment warrant a stay in the proceedings.

Plea

34. The charge was put to Mr Kwiatkowski, and he denied the charge.

Evidence and submissions

35. The BSB called evidence from Person X and Witness A, a barrister who was also present at the hearing in Worthing County Court. The Respondent then gave evidence.

36. Having heard the evidence, the parties made closing submissions which concluded at 4 p.m. on Tuesday 2 November 2021.

37. At the end of the closing submissions, we announced that we intended to reserve our decision.

38. This is our unanimous decision.

The evidence

39. We have carefully considered the documentary evidence submitted by the parties as well as the witness statements that were prepared for the hearing together with the oral evidence we have heard. We set out below a summary of the main features of the evidence that we think will assist the parties in understanding our findings.

Person X

40. In her witness statement, Person X exhibited the note that she made on 25 November 2019 which was a record of her conversation and which she also appended to her original report to the BSB. The Note stated:

> "I met Mr Kwiatkowski when he arrived at court at IOAM for a IOAM hearing — we initially discussed the case for around five to ten minutes. I made reference in the

course of those discussions to my (female) instructing solicitor's[1] witness statement. He then described the witness statement as that of a "hysterical woman". I said that he was free to make criticism of the tone of the statement but said that I felt that when someone uses the phrase "hysterical woman" to describe a legal professional they are in rather unpleasant territory.

He explained to me that this was just fact. He then said the following: "I have been practising since before this century. When more women joined the profession, the ground shifted. You do get stupid and unreasonable men in the profession, but the ground shifted — the number of incidents of overegging the pudding and just going overboard in a routine situation multiplied."

I told him I was making a note of his comments (which I was) and that I found them sexist and inappropriate. I asked him for the name of his Head of Chambers. He told me it was Laurence Jones.

He then told me that he was simply stating fact. He then began to tell me a story relating to a previous court case, and I interrupted him, telling him I was happy to discuss the case, but I had no interest in listening to examples to back up his claim that women were incompetent. He said he was not calling women incompetent. I corrected the word to intemperate and he said yes, that was the word, intemperate.

He again explained that this was just fact, and he had a lot of experience of women being more unreasonable. He again began to tell me about an example of women being unreasonable — I told him again that I had no interest in listening to his attempts to justify sexist and offensive claims, and that I would see him when we were called into court.

I then moved to sit elsewhere in the waiting room as I was fairly shaken and did not want to say anything I regretted. I sat next to [Witness A]. I do not think we have met before, although we may have done. I asked him if he had overheard the conversation and he said that he had heard most of it, remarking that it was incredible, or something to that effect. I then asked if I could take his name and Chambers and if he would be willing to confirm he had heard the conversation, and he agreed. I have since emailed him, asking him if he would be willing to make a brief note of the conversation that he could remember. I asked for his advice, and he suggested speaking to my Head of Chambers. We then chatted for a while before I and Mr Kwiatkowski were called into Court. I did not discuss his comments with Mr Kwiatkowski's further and all our other conversations were regarding the case. In court, he was not particularly pleasant but did not repeat the comments or make any similar comments."

41. On the day of the hearing, we were also provided with a copy of Person X's contemporaneous notes made at court. Those primarily related to the application and parts had been redacted on the grounds of legal professional privilege. The notes referred to the conversation with the Respondent in the following terms:

[1] In the evidence there are various references to the statement of Person X's "instructing solicitor". In fact the statement was from Chartered Legal Executive but nothing turns on that.

> "When more women joined the profession, the ground shifted. You do get stupid and unreasonable men in the profession, but the ground shifted – incidents of overegging the pudding and just going overboard in a routine situation multiplied. Head of Chambers is Laurence Jones.
>
> Told him I did not want to listen to his examples of women being incompetent. He said he didn't mean incompetent. I said intemperate, and he said yes."

42. In oral evidence Person X explained that she moved away from Mr Kwiatkowski because she "felt shaken" because, whilst she had heard comments about women from members of the Bar which she considered inappropriate, she had never encountered someone who explained at such length and so calmly why they thought women were ill-suited to the legal profession. She said that Mr Kwiatkowski seemed determined to keep telling her examples to back up his views about women. Person X found the experience "*unpleasant*" and said that she did not want to listen to him. She said that she "*did not want to get into a spat when she was angry and before they went into court.*" Person X said that if he had anything else he wanted to discuss about the case then she was happy to do so. She explained that the Respondent's tone was not unpleasant, even if the words were. She said that there was no shouting.

43. Person X was asked in cross-examination about the fact that the reference to "*hysterical woman*" was not in the contemporaneous note made at court. She explained that she was not taking a note at that point. She said that she only started taking a note of the things that "*struck her*". She said that it was "*not appropriate*" to say that the author, a professional woman, was hysterical. Person X accepted that she was angry, but she did not think that she answered the Respondent crossly. She merely told him that she thought what he was saying was unacceptable. She accepted that she interrupted the Respondent a few times. Person X told the Respondent that his comments were sexist and inappropriate and that she was not just going to sit there and listen to him telling her such things.

Witness A

44. Witness A was contacted by Person X by email on the afternoon of 25 November 2019. She explained that she had followed Witness A's advice and contacted her Head of Chambers who suggested that she ask Witness A to make a note of the conversation. On 28 November 2019 Witness A replied and stated:

> "I actually at the time made a note of what I overheard. I didn't hear the entirety of the conversation, but clearly heard your opponent (in a discussion with you) describing female lawyers as generally being "intemperate", after which you said

you weren't going to sit and listen to him talk in that way to you (and you moved seats).

If you do need to get me involved, then I would be more than happy to. This sort of thing should not happen from fellow members of the profession in 2019!"

45. In his witness statement Witness A explains that whilst in the waiting room he overheard what became "*a robust conversation*". He said that he considered that the "*manner in which the male barrister was conducting himself and speaking to the female barrister overstepped the mark and as such attracted more of my attention than may otherwise have been the case. From my perspective, it went beyond a professional public disagreement between two members of the profession and strayed into one of a more hectoring/ bullying nature. Indeed, at one point the male barrister described female lawyers as generally being "intemperate" (I was so struck by the comment that I noted this word down in my blue book at the time - I no longer have the blue book but did when I sent the email which I reference below). It was at this point that the female barrister... said that she was not going to sit and listen to him talk to her like that, stood up, and came in sat at one of the seats next to me.*"

46. In cross-examination Witness A said that he was unable to comment on whether Person X herself would have regarded herself as having been bullied or hectored. He could only speak from his perspective which was that he perceived it to be bullying or hectoring. He made the note concerning the remark that women were "*intemperate*" because he found the comment "*very inappropriate*". He said that Person X seemed upset by the conversation and that was why she had come to sit by him.

Mr Kwiatkowski

47. In his witness statement the respondent said "*I understand that much may turn on the questions as to what exactly I said in the key event. As a barrister, I'm well aware of the risks involved in trying to recollect with precision things people said at certain points in the past. I am therefore wary of placing in evidence my recollection of my specific phraseology. But since this case has been brought against me, it seems to me that I should simply ask the prosecution through its witnesses to establish exactly what I'm supposed to have said*". Notwithstanding that position the Respondent did in fact answer detailed questions about exactly what was said.

48. In his statement the Respondent said that after having made "*several short, quiet and negative remarks about [Person X's instructing solicitor's] qualities as a professional, only one of which included the assertion that she was "hysterical"*". He explained that he

genuinely believed that the "*unfounded allegations*" made by Person X's solicitor were "*disgraceful*". The Respondent accepted "*I did say words to the effect that there had been changes since more women had come into the profession.*" He drew a distinction between the Bar and the solicitors' profession, stating, "*However, it is my opinion that the increase of female members in the solicitors' profession has led to a sea change in approaches to work*". He justified his use of the word "*hysterical*" by reference to a report of a speech made by the Lord Chief Justice in 2020 in which he used the word "*hysterical*" in relation to criticism of judicial review. The Respondent also stated that whilst the recruitment of more women into the profession has brought with it a "*more empathetic approach*", he considered that "*one feature of this change is, in my experience, that female solicitors and ancillary staff, particularly at entry level in affected areas of practice, can be overemotional and can 'overegg the pudding', going over-board in routine situations. Whilst it is a generalisation, of course, I do find that women tend to be more emotional than men. That is, I believe, a biological fact rather than an insult. I would like to know if the BSB refuses to accept this, because, if so, I shall have to instruct a neuro-biological expert*".

49. Mr Kwiatkowski said that the passages in the witness statement were "*an example of over-egging the pudding. I accept that this is a personal view based on personal experience. I also accept that I may be wrong. However, it was and is my genuinely held opinion. I did not intend anything I said to sound sexist or otherwise offensive. As I have said, I am not a misogynist and I welcome women into both branches of the profession.*" He says that he recalls saying something about "*over-egging the pudding*" but that it is "*not right to present these words as a coherent individual passage" because Person X "did not permit me to be coherent*". The Respondent says that ""'*Having described women as over-emotional, I probably did use the word "intemperate", but I cannot remember*". He says in relation to Person X going to sit elsewhere that this was "*an understatement, because she scrambled off her seat and moved at considerable speed a good distance across the waiting room.*" He says that Person X was twitching, her eyes became wild and bulging and her face was flushed. He said he was astonished. Finally, he stressed that he *"never intended to upset [Person X]. I would never have anticipated that a fellow barrister might conceivably have reacted in the way that she did to attempts to have a discussion about professional matters. I did, nevertheless, leave her genuinely upset. For that, I repeat my sincere apologies. The incident has brought home to me the extent to which sensibilities have changed since I was called to the Bar and this is most certainly a point that I shall bear in mind in future*".

50. In his evidence in chief the Respondent said that he was not a misogynist. He did not set out to upset Person X. The Respondent said that "*he was very sorry that I fed her peanuts. I didn't know she had a peanut allergy. We are all working on a peanut farm*".

51. In cross-examination, the Respondent denied that he intended to belittle all female lawyers. He stated that he worked with "*solid female lawyers*" a lot. The Respondent said that in speaking with Person X about the witness statement he "*moved with fear and trembling to the issue of whether the gross allegations of dishonesty against my people were going to be pursued.*" He said that when it became clear that they were not going to be pursued he became cross and "*muttered*" what he said were "*several harsh descriptions of*" the witness statement maker's professionalism, including an allegation that that part of the statement was hysterical. He said he could not recall whether he tagged the word "*woman*" to it but that he did not see what difference that made.

52. The Respondent said that Person X then started in on him. He said that he wanted to make it clear that he was not blowing hot air, he was being serious, and he stood his ground. He may have used the terminology "*just fact*" or he may have said "*I am just being factual*' – he could not put it with precision of recollection by today. He said that the words in particular 3 of the particulars of offence were not used in the way they had been described. The Respondent said that Person X would not let him lay out properly what was in his mind and took the discussion to outright hostility very quickly. He insisted that he was just being factual but Person X "*went South very quickly*". She raised her voice and would not let him get anything out that was coherent. The result was that the panel were being presented with bits and pieces of what he was trying to say, recollected as best she could, stitched together like Frankenstein's monster.

53. The Respondent denied talking about the profession as a whole, he was talking about the solicitor end of the "*afflicted zones of civil practice*". He said that Person X's solicitor's statement was much worse than '*over-egging the pudding'*. The Respondent referred to an International Bar Association study which he said indicated that women tended to feel the stresses and do the wrong things under those stresses. He gave an example of a Solicitors' Disciplinary Tribunal hearing concerning a female solicitor and commented that that he was sure that "*that lady was not born a crook but that the poor lady just cracked."* He said that this was not only his opinion, but also that of the IBA.

54. The Respondent said that Person X was closing him down very aggressively and he could not get coherent sentences or phrases out. It was not that he could not get a word in

edgeways, but it was getting towards that. He was perplexed that Person X seemed to believe that he was being unreasonable in the extreme. He was trying to tell her that the incident was not unique, and he had seen it both recently in this general sphere of operation and he had seen the same behaviour patterns in another field of afflicted practice in the late 1980s. He said that felt he was entitled to hold these views, and say them out loud, and that if people thought otherwise then they were free to contradict him.

55. The Respondent accepted that theoretically the word hysterical might cause offence but said that whether it was legitimate for offence to be taken was another question entirely.

56. The Respondent said that he had provided the BSB and the IDP with an apology for upsetting Person X. However, he thought it was wholly inappropriate that anyone should be asked to apologise for any view that they held.

57. The Respondent said that Witness A had no right to take any meaning out of what he overheard. He said that he had not seen Person X go and sit next to Witness A. He said that after Person X had spoken with him, she had gone to sit elsewhere. He accepted that he might have raised his voice to her.

58. The Respondent was asked whether or not Person X's behaviour was that of a woman over-egging the pudding. He said that Person X may have thought that she was within her rights to get cross with him but that he did not know Person X well enough to say whether her behaviour was that of a woman over-egging the pudding.

59. He accepted that he did not know the maker of the statement whom he had described as hysterical, but he said that he did know what should be on the paper of a professional witness.

The legal framework

Core Duty 5

60. 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."

The standard of proof

61. Pursuant to rE164 of the Enforcement Regulations 2019 we must apply the civil standard of proof when deciding the charge of professional misconduct which has been brought against the Respondent.

The issues to be determined

62. Having found the material facts, we must determine whether the facts amounted to a breach of Core Duty 5 and, if so, whether they amount to professional misconduct. The issue for us is whether the facts found are "*likely to diminish the trust and confidence which the public places*" in the Respondent or the profession "*such as to amount to professional misconduct*".

63. The BSB submitted that we might garner assistance from gC25 which includes a non-exhaustive list of "other possible breaches of CD3 and/or CD5", specifically including at gC25.4: "*seriously offensive or discreditable conduct towards third parties*"

The threshold for a finding of misconduct

64. Both parties declined to invite us to follow the approach set out in obiter remarks of the Divisional Court in *Beckwith* [2020] EWHC 3231 (Admin) at [21] and agreed that it was necessary to assess the question of misconduct by considering the seriousness of the conduct in question.

65. The correct approach to the consideration by a Disciplinary Tribunal of the question of professional misconduct was considered in detail by Warby J (as he then was) in *Khan v Bar Standards Board* [2018] EWHC 2184 (Admin). Having considered the decision of the Visitors to the Inns of Court (presided over by Sir Anthony May) in *Walker v Bar Standards Board,* PC 2011/0219, 19 September 2013, and *Howd v Bar Standards Board* [2017] EWHC 210 (Admin), Warby J held at [36]:

> "The authorities make plain that a person is not to be regarded as guilty of professional misconduct if they engage in behaviour that is trivial, or inconsequential, or a mere temporary lapse, or something that is otherwise excusable, or forgivable. There is, as Lang J put it, a "high threshold". Only serious misbehaviour can qualify. I am not sure that the threshold of gravity is quite as rigid or hard-edged as Mr Beaumont suggests. I do not believe that in *Walker* Sir Anthony May was seeking to crystallise an exhaustive definition of professional misconduct. Rather, he was reaching for a touchstone to help distinguish the trivial or relatively unimportant from that which merits the "opprobrium" of being labelled as professional misconduct. Nor do I read Lang J's decision in *Howd* as seeking to set out precise parameters for what can and cannot qualify as professional misconduct. Indeed, in the passage cited she used three separate

terms, "reprehensible, morally culpable or disgraceful". I think it is perhaps unhelpful for this principle to be tied too firmly to particular phraseology. But even on the footing that the right test is that of "seriously reprehensible" it seems to me that, when Mr Khan's behaviour is properly evaluated, it comfortably meets this standard, and that this is in effect the approach which the Tribunal adopted."

66. Both parties also relied upon the judgment of Warby J in *Diggins v Bar Standards Board* [2020] EWHC 467 (Admin), [2020] IRLR 868. At [86] Warby J held that "*the question whether conduct crosses that line of seriousness is one of judgment*". See also [37] of the decision of Sir Anthony May and the Visitors in *Walker*.

Article 10 of the European Convention on Human Rights

67. Article 10 is a qualified right. Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

68. In relation to the application of Article 10 to this case, both parties once again relied upon the judgment of Warby J in *Khan* and in *Diggins*.

69. At [63] of his judgment in *Khan* Warby J stated:

> "In my judgment a, if not the, central function of the BSB's regulatory regime is "the protection of the reputation and rights of others". Core duty 5, which the Tribunal found to have been breached in this case, is expressly aimed at maintaining public confidence in barristers and the profession generally. That is a reputational matter. Other barristers have a proper and legitimate interest in ensuring that their reputations are not tarnished by association with those who misconduct themselves professionally. But this duty is also concerned with the rights of others which include, importantly, the rights of those who employ barristers. They are entitled to expect adherence to high ethical standards."

70. At Para 74(4) pf his judgment in *Diggins*, Warby J made clear, referring to authorities cited in *Khan* at [59], that: "*an interference can only be justified if it is prescribed by law, and pursues a legitimate aim, and it is convincingly established that the measure in*

question is necessary and proportionate in pursuit of that aim. The legitimate aims specified in Articles 8(2) and 10(2) are to be construed strictly. "Necessary" does not mean indispensable, but nor is it to be treated as synonymous with "useful", "reasonable" or "desirable". And the test of necessity requires the party charged with the interference to persuade the court that the measure at issue corresponds, and is proportionate, to a "pressing social need"".

Our findings of fact

71. We remind ourselves that our task is to find the facts on the civil standard of proof. Mr Beaumont submitted that we should also remind ourselves of the notion of having regard to inherent probabilities which Lord Nicholls of Birkenhead attempted to capture in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586. He also reminded us of the observations of Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse* [2013] EWCA 3560 (Comm) that in complex commercial claims, the existence of substantial amounts of contemporaneous documentation will often provide a more reliable source of evidence than the recollection of witnesses proffered in a courtroom many years later.

72. In our judgment we are able to make the following findings of fact on the civil standard of proof.

73. *First*, we find that the Respondent, described the witness statement, drafted and signed by the female Chartered Legal Executive who had instructed Person X, as that of a "*hysterical woman*". There was no dispute as to the use of the word "*hysterical*" and we accept Person X's evidence that the Respondent described the statement as that of a "*hysterical woman*". In making this finding, we place reliance on Person X's note made on the day of the incident which contained this phrase and on our overall assessment of the credibility of Person X. We found Person X to be an impressive witness who gave her evidence lucidly (as was accepted by Mr Beaumont in his closing submissions). From start to finish we consider that Person X has simply been concerned to record what happened accurately and to bring to her regulator's attention the concern that she felt at the comments that were made by the Respondent. Additionally, we note that the Respondent himself did not deny that he had said "*hysterical woman*".

74. *Second*, we find that the Respondent stated that his comments that the statement was that of a "*hysterical woman*" was "*just fact*" or words to that effect. Again, we place

reliance in making this finding on the basis that this was what Person X recorded in her Note made on 25 November as well as our findings as to Person X's overall credibility.

75. *Third*, we find that the Respondent stated the following words (or words to that effect) "*I have been practising since before this century. When more women joined the profession, the ground shifted. You do get stupid and unreasonable men in the profession, but the ground shifted – the number of incidents of overegging the pudding and just going overboard in a routine situation multiplied*". Those words were recorded in the contemporaneous note made by Person X during the conversation with the Respondent on the day in question and we have no reason to doubt their accuracy. They were also contained in the Note prepared later that day. Moreover, the Respondent accepted that he did say words to the effect that there had been change since women came into the profession. Nor did he challenge that he had said the words set out in (iii) of the particulars of offence.

76. *Fourthly*, we find that when Person X sought clarification from Mr Kwiatkowski whether he was referring to women as being "*intemperate*" he said "*yes, that word, intemperate*" or words to that effect. The Respondent did not dispute that he had used such words and indeed that was what Person X recorded in her contemporaneous note and the Note made later on the day in question. We also accept Witness A's evidence that he was so struck by this comment that he recorded it in his blue book.

77. It follows therefore that we find the facts as alleged in the particulars of offence to be proved.

78. We have considered whether or not the Respondent is correct in saying that we have received a distorted picture (described by him as "Frankenstein's monster") by looking only at the allegations in the particulars of offence rather than the totality of what was said. We do not accept that argument. We find the facts as proved to be consistent with the overall evidence given by Person X as to the totality of the conversation which we accept.

Was the Respondent's conduct a breach of Core Duty 5?

79. In considering this question we observe at the outset that there was no need at all for the Respondent to express his views as to women being "*intemperate*" and having an adverse effect on the legal profession at all in the context of his discussion with Person X. That was discussion in a public place, within earshot of at least one other member of the Bar

and potentially of other lawyers and members of the public. The Respondent could properly have discussed his concerns about the witness statement without giving free rein to his views on women being "*over-emotional*" and on women lawyers having an adverse impact on at least part of the profession.

80. In our judgment the Respondent's conduct was undoubtedly a breach of Core Duty 5. The views that he was expressing were sexist and discriminatory. As Person X commented in her Note, made on the day in question, the Respondent was making "*sexist and offensive*" claims during his conversation with Person X. We agree with Witness A who said in his evidence that he found the remark that women were "*intemperate*" as being "*very inappropriate*". As Witness A explained in his oral evidence, what struck him by the comment was that the Respondent was describing "*a whole demographic of the profession*" in such a way. What he heard was such as to prompt to suggest that Person X seek the advice of her Head of Chambers. In our judgment, Witness A was right in his observation made in his email of 28 November 2019, "*[t]his sort of thing should not happen from fellow members of the profession in 2019!"* (emphasis as per the original).

81. The public rightly expects the profession to promote equality and diversity and for its members to avoid language which is sexist and discriminatory. Using the language of gC25 we find the Respondent's conduct to have been "*seriously offensive or discreditable conduct towards third parties.*" Accordingly, we find that the Respondent's conduct does indeed represent behaviour which is likely to diminish the trust and confidence which the public places both in the Respondent and in the profession.

Was the Respondent's breach of Core Duty 5 sufficiently serious to be characterised as "misconduct"?

82. We have considered whether or not the Respondent's conduct was sufficiently serious so as to be characterised as misconduct. We recognise that this is a high threshold and requires us to conclude that the conduct was "*seriously reprehensible*".

83. This was not a case of a "*mistake, a slip, which was blurted out and to that extent it was not intentional*" (para 32 of *Walker*). Moreover, whilst we accept that the Respondent has apologised for any distress caused to Person Y, he has remained firmly of the view that what he said was entirely justified. He remains implacable in his belief both as to the correctness of the views that he was expressing as well as his right to express them in the context of the discussion that took place on 25 November 2019.

84. The line of seriousness, as Warby J observed in *Diggins*, 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. The Respondent's conduct was "*seriously reprehensible*" and "*grave*".

The Respondent's Article 10 rights

85. In the BSB's skeleton argument, Ms Fox accepted "*that the respondent's comments amount to speech which is protected by article 10(1) of the ECHR. Any imposition of sanctions in respect of his comments will therefore interfere with his right to freedom of expression, and it must be justified pursuant to article 10(2) ECHR.*" Whilst we agree that any sanction we impose will need to be proportionate in accordance with Article 10(2) of the ECHR we do not consider that our consideration of Article 10 is confined to the consideration of sanction as a finding alone of misconduct would constitute an interference with the Respondent's Article 10(1) rights.

86. Mr Beaumont provided us with a detailed skeleton argument in which he argued strongly that any finding against the Respondent would violate the Respondent's freedom of expression that is protected by Article 10 of the ECHR. He argued that it is not for the BSB or disciplinary tribunals to "*try to police the personal opinions of barristers*". He argued that "*Mr Kwiatkowski's reported views on the impact on personal injury work of more women joining the solicitor's profession may be wrong. They may be repugnant to some. However, he is reported to have made that observation as an expression of his own opinion.*" He drew a distinction between the "*undisputedly vile*" language used by the barrister in *Diggins* and the language here which he says requires the panel to form a *"value judgment about his expression of a personal opinion.*"

87. We do not accept Mr Beaumont's arguments which we consider miss the central point in this case. This case is not about "*policing the personal opinions of barristers*" as a matter of generality. It is concerned with the question as to whether or not expressing sexist and discriminatory language, in the course of a discussion outside court, in a public waiting room and in the context of a discussion with a fellow barrister, is of such seriousness so as to amount to misconduct. We have found that such conduct breached Core Duty 5 and was sufficiently grave to constitute professional misconduct.

88. Mr Beaumont placed particular reliance on the judgment of Collins J in *Livingstone v Adjudication Panel for England* [2006] 2533 [2006] HRLR 1416, and the decision of an IDP in the case of *Holbrook*.

89. In *Livingstone* the former Mayor of London had been disciplined for conduct when leaving an official event. Collins J quashed the decision of the Standards Board, holding that Mr Livingstone was not acting in his official capacity when he made the remarks in question. He was not performing his functions as Mayor. Collins J concluded that the Standards Board's decision relied on an overly broad interpretation of rules against bringing the office of Mayor into disrepute and that the relevant provision of the rules in question did not apply to what Mr Livingstone had said. The facts are notably different here. The Respondent's comments were made directly in the course of his professional work as a barrister, about to go into court, discussing a case with his professional opponent.

90. We note also Warby J's rejection of the argument he should adopt the reasoning in Livingstone in his judgment in *Khan* at [61]-[63]. Core Duty 5, which we have found to have been breached in this case, is expressly aimed at maintaining public confidence in barristers and the profession generally. Enforcing compliance with that duty is necessary for the "*the protection of the reputation and rights of others*".

91. We have not found the decision of the IDP in *Holbrook* of any real assistance to us. The findings (which we understand are subject to appeal) turn on that Panel's evaluation of a series of tweets made by a barrister in which he expressed his views on the Equality Act. Each case will turn on its individual facts and we have to determine this case by consideration of the particular facts as we have found.

Our finding

92. For all of the foregoing reasons, we find that the Respondent's breach of Core Duty 5 amounted to professional misconduct.

93. We will now proceed to consider the question of sanction and any related application. We invite the parties to agree a time estimate and to liaise with BTAS so that a suitable date can be fixed. Our provisional view is that the hearing could be fairly and satisfactorily conducted remotely but the parties are invited to indicate their views. As part of that hearing we will also hear argument as to whether or not the witnesses' identities should be anonymised when our report comes to be published.

Our findings on sanction

94. On 27 January 2022 we convened by Zoom to hear submissions on sanction as well as to hear the BSB's application for costs. We also heard submissions as to whether the identities of the witnesses in this case should be anonymised. The hearing had been listed for half a day but there was insufficient time for us to deliver our finding in the time that had been allocated.

95. This is our unanimous decision on sanction, costs and anonymisation of witnesses.

Which Version of the BTAS Sanctions Guidance should we apply?

96. At the outset an issue was raised as to which of the versions of the BTAS Sanctions Guidance we should consider. Regulation rE204 of the Disciplinary Tribunal Regulations states:

> "After hearing any representations by or on behalf of the respondent(s), the Disciplinary Tribunal must decide what sanction to impose on a respondent, taking into account the sentencing guidance and must record its sanction in writing, together with its reasons."

97. The BSB argue that we should "*take into account*" Version 6 of the Guidance whilst the Respondent argues that we should use Version 5. Version 6 of the Sanctions Guidance came into effect on 1 January 2022 whilst Version 5 was applicable from 15 October 2019 up until the end of 2021.

98. At paragraph 1.2 of Version 6 of the Guidance it states:

> "The Guidance comes into effect on 1 January 2022 and is applicable to all sanction decisions taken by panels on or after that date regardless of when the proved misconduct occurred or when the finding of misconduct was made."

99. We note however that paragraph 1.4 of the Version 6 Guidance states:

> "It must be stressed the Guidance is just that, it is not intended to fetter panels' discretion to impose sanctions that are appropriate and proportionate in the individual circumstances of a case. Panels must exercise their own judgement when deciding on the sanctions to impose and give reasons in all cases for doing so. If panels depart from the Guidance, it is essential that clear written reasons are given for the departure."

100. Mr Jacob for the BSB accepted that it was open to us to apply the Version 5 Guidance in the exercise of our discretion if we considered that there were good reasons to do so, notwithstanding the terms of paragraph 1.2 of the Version 6 Guidance. In our judgment

there are good reasons to apply the Version 5 Guidance in circumstances where, had we been able to list this matter in December 2021, we would have applied that Version. It is happenstance that the matter comes to be listed in January 2022 and we think it would be unfair to apply the later Version. We are fortified in that opinion by the fact that the circumstances in this case do not fall neatly within the "misconduct groups" in Version 6 or the various categories in Version 5 such that whichever Version we considered we would consider sanction by reference to the general principles which are similarly set out in both Versions.

101. As such we do not have to determine whether or not taking into account Version 6 would be contrary to Article 7 of the ECHR (Mr Jacob argued that it would not be whilst Mr Beaumont said that Article 7 does not apply to disciplinary proceedings.)

The appropriate sanction – the parties' submissions

102. In his skeleton argument, Mr Jacob said:

> "The BSB considers that Misconduct Groups C (Discrimination, non-sexual harassment and bullying) [44-46] and I (Behaviour towards others) [57-59] may be relevant to the Tribunal's consideration of the proven misconduct in this case"

103. He also noted:

> "Sanctions Guidance, version 5, Section II, provided guidance in relation to the starting points for sanctions in respect of the most common breaches of the Handbook. B.6 (Discrimination and harassment) [43-44] was analogous to the current Misconduct Group C. There was no equivalent to Misconduct Group I. However, an aspect of this was probably incorporated into C.8 (discourtesy) [54]."

104. Mr Jacob also helpfully referred us to those parts of both Versions of the Guidance which set out the purpose and principles of sanctions, matters for us to consider and general factors regarding culpability and harm as well as aggravating and mitigating factors.

105. Mr Beaumont made wider ranging submissions and after the hearing he also submitted an "Addendum note on Mitigation". A number of Mr Beaumont's submissions were not directed at sanction but rather to criticisms of our findings of misconduct. In the summary that follows we focus on those submissions that were directed at sanction.

106. Mr Beaumont said that the Respondent was a private man. He told us that the Respondent was not a misogynist and pointed to the fact that the Respondent had a daughter as proof of the fact that he was not misogynistic. He said that the Respondent does not "*lack insight. He has apologised but stands on his human rights.*" Mr Beaumont

explained that the process of a public hearing on this matter was a form of punishment in and of itself. Mr Beaumont reminded us that we needed to be satisfied that any sanction was proportionate given that there was an interference with the Respondent's Article 10 rights.

107. When directly asked, Mr Beaumont submitted that the appropriate sanction was "*advice as to conduct*". He emphasised that the advice should be "*how to read the room correctly*" and "*to be sensitive to your surroundings*". In his Mitigation note he suggested "*Gentle, well-intended advice as to future conduct*".

108. We asked Mr Beaumont whether or not he wished to make any submissions in respect of the Respondent's means (no evidence having been filed on that issue). Mr Beaumont said that a financial penalty was inappropriate but that if we were minded to impose a financial penalty then we should take into account that the Respondent had modest means. We do not see any need for details of those means which Mr Beaumont provided to be set out in this report, but we have taken them into account.

Our decision on sanction

109. In our judgment the circumstances here do not fit neatly into the categories of breaches of the Handbook identified in Section B of Part II of Version 5 of the Guidance. Although we have found that the remarks that the Respondent made were "*sexist and discriminatory*" (see paragraph 80 above), we do not think the facts here sit comfortably within the description of "*unlawful discrimination and harassment*" which is set out om B.6, pages 43-44

> "Unlawful discrimination and harassment is likely to be a breach of Core Duty 8 (a barrister must not discriminate unlawfully against any person) and is likely to be charged under Part 2 of the Handbook, section C2, rule C12 (2.C2.rC12); a barrister must not discriminate unlawfully against, victimise or harass any other person on the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, disability, gender re-assignment, sexual orientation, marital or civil partnership status, pregnancy, maternity, age, religion or belief."

110. As we have made clear in our Findings, we have not been concerned to police "the personal opinions of barristers" as a matter of generality. Our findings, and the sanction that we impose, are concerned with the question of whether or not expressing sexist and discriminatory language, in the course of a discussion outside court, in a public waiting room, and in the context of a discussion with a fellow barrister, is of such seriousness as to amount to misconduct (see paragraph 87 above).

111. Equally the facts do not sit squarely within C.8 which deals with discourtesy:

> "Discourtesy, in most cases, will be directed towards a Judge or Magistrate but can also involve conduct towards a lay client or other individual involved in the proceedings. Discourtesy is likely to be charged under Core Duty 5. When considering discourtesy, it will be important to consider the circumstances of the act and whether or not it was an isolated incident as opposed to repeated acts of discourtesy in the face of repeated warnings from the Judge or Magistrate."

112. We observe that the Respondent was not charged under Core Duty 8 (a barrister must not discriminate unlawfully against any person) but equally to describe the circumstances simply as "*discourtesy*" would be apt to mislead. We note that if we had found this to fall within B6 ("*Unlawful discrimination and harassment*") then it would be categorised as "*an isolated incident which had a limited impact on the complainant*" where the starting point would be a medium-level fine, whilst if it fell within "*discourtesy*" then it would fall into the "*isolated incident within proceedings*" category where the starting point is a reprimand, possibly accompanied by a low-level fine.

113. Finding only limited assistance in the specific categories of the Sanctions Guidance, we remind ourselves of the purpose and principles of sanctions – see paras 3.1-3.2 of the Guidance:

> "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."

114. We also remind ourselves of the need to impose a sanction that is proportionate: see para 3.4 of the Guidance:

> "In deciding what sanctions (if any) to impose, the decision maker should ensure that the sanctions are proportionate, weighing the interests of the public with those of the practitioner or authorised body. Proportionality is not a static concept and will vary according to the nature of the breach and the background of the individual barrister or authorised body. For example, a first time breach of the practising requirements would rarely, if ever, warrant a suspension or disbarment

> but a similar breach, having been committed many times without remorse or any attempt to remedy the situation, might warrant consideration of suspension or disbarment. Repeated breaches of relatively minor provisions of the Handbook may indicate a significant lack of organisation, integrity, or insight on the part of the barrister or authorised body which could represent a risk to the public and undermine confidence in the profession. Sanctions should be reflective of the seriousness and circumstances of the conduct e.g. where the incentive for breaching the Handbook was for financial gain the sanction should reflect that. The sanction imposed should be no more onerous than the circumstances require, the lowest proportionate punishment should be imposed in any particular case. The decision maker should consider the totality of the breaches when considering proportionality."

115. In respect of mitigation (see Annex 1 of the Guidance): we take into account that the Respondent has no previous history of breaches of the BSB Handbook as well as the two character references which were provided on the Respondent's behalf. We take into account that this was an isolated incident.

116. In respect of aggravating factors: we consider that the facts here have the effect of undermining of the profession in the eyes of the public, that the events clearly caused Person X some distress and that the Respondent has not shown any remorse for the events. As we noted above, he apologised for any distress caused to Person X, but remains implacably of the view that he did nothing wrong.

117. In our judgment the appropriate sanction, having regard to all of the foregoing factors, is to impose a reprimand and a low-level fine. A low-level fine in Version 5 of the Guidance is one up to £1,000. Having regard to the submissions that have been made to us as to the Respondent's means, we discount the fine which we would otherwise have imposed of £750 to £500.

Costs

118. rE244 provides that we may "*make such Orders for costs, whether against or in favour of a respondent, as the Disciplinary Tribunal or Directions Judge shall think fit*".

119. The BSB have applied for their costs in the sum of £3,360. That includes a brief fee for Mr Jacob of £1,000 which is the same brief fee claimed for Ms Fox in respect of the two-day hearing. We would disallow Mr Jacob's full brief fee given that the hearing on 27 January was only concerned with sanction and was listed for half a day. We would also disallow the "*initial instruction fee*" for Ms Fox. We would summarily assess the costs at £2,500 in total.

120. We note that in *Matthews v Solicitors Regulation Authority* [2013] WHC 1525 (Admin) the High Court held that means should be taken into account when tribunals consider costs and fines combined.

121. This case was properly brought by the BSB as is demonstrated by our findings. In the exercise of our discretion, we would have awarded the BSB costs in the sum of £2,500 but we discount that very significantly having regard to the financial penalty we have imposed already and the Respondent's means. As a consequence, we award the BSB costs in the sum of £500.

Anonymisation of witnesses

122. We had invited the parties' views as to whether the witnesses should be anonymised in the published version of this Report. We note that Person X was anonymised in the charge sheet that had been published showing the listing for this case.

123. The BSB were neutral in relation to whether or not the identities of the witnesses should be anonymised but drew to our attention emails from both witnesses in which they set out reasons for requesting anonymity. Mr Beaumont objected to the witnesses being anonymised, noting that the Respondent's identity would be in the public domain.

124. rE235 provides that we must prepare a report in writing on the charges "*and the reasons for those findings and the sanction*". rE243 and rE243A provides that the finding, sanction and report of a Disciplinary Tribunal must be published save that where the charges are dismissed then an anonymised summary of the report is to be published except where a panel is satisfied that is not in the public interest for the summary to be published. Nothing is specified in relation to the identification or otherwise of witnesses. The BTAS Publication Policy does not provide any guidance on the anonymisation of witnesses.

125. In our opinion the identities of the witnesses are not necessary to understand our reasons for the decisions we have made in this case. Moreover, a disciplinary tribunal is dependent on the co-operation of witnesses as we have no power to compel their attendance. Unless it is necessary for some reason to provide the identity of a witness (or if the witness is content for their identity to be disclosed) then in our opinion it is appropriate to anonymise them. We have made the decision in relation to anonymity by reference to the specific facts of this case, but it may be that BTAS may wish to consider developing guidance on this issue.

Sanction

126. Mr Kwiatkowski has been reprimanded by the Tribunal.

127. Mr Kwiatkowski shall pay a fine of £500 to the Bar Standards Board within 28 days of the expiry of any appeal period (or by monthly instalments if agreed by the Bar Standards Board).

128. Mr Kwiatkowski shall pay £500 in costs to the Bar Standards Board within 28 days of the expiry of any appeal period (or by monthly instalments if agreed by the Bar Standards Board).

Dated: 10 December 2021 (Findings on Charge); and

7 February (Findings on Sanction)

Jonathan Glasson QC

Chairman of the Tribunal