The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

THE BAR TRIBUNAL AND ADJUDICATION SERVICE Case No: 2021/4441

BETWEEN

JON HOLBROOK

Appellant

-and-

BAR STANDARDS BOARD

Respondent

DECISION AND REASONS

Introduction

1. This is an appeal by the Appellant, Jon Holbrook, against a decision of an Independent Decision-making Panel ("**the IDP**") to impose an administrative sanction on him[1]. The administrative sanction consisted of a warning and a £500 fine in respect of a single Tweet he posted on 17 October 2020.

The appeal hearing: parties present and representation

2. The appeal was heard on 26 November 2021. The Appellant was present and represented himself. The Bar Standards Board ("**the BSB**") was represented by Jonathan Auburn QC. The Panel wishes to express its thanks to both for the courteous and helpful way in which the issues before it were presented.

[1] Pursuant to an application by Mr Holbrook and following a remote hearing, it was directed by the Chair of the Bar Tribunal Service that the hearing of the appeal should be held in public (Directions dated 19 November 2021).

Materials

3. The Panel did not hear any live evidence. Rather, it was referred to the decision of the IDP dated 5 August 2021 ("**the IDP Decision**"), to correspondence from before and after the IDP Decision, and to the other materials contained in the hearing bundle.

4. The Panel heard submissions on behalf of the Appellant and the BSB and it was referred to extensive case law. The appeal hearing was listed for one day. At the conclusion of oral submissions and questions from the Panel, the hearing was adjourned part-heard in order to allow for the Panel's deliberations, the date for re-convening to be notified in due course.

5. Over the course of the adjournment, the parties exchanged and served on the Panel two further cases in which relevant decisions, post-dating the appeal hearing, had been handed down. The Panel has read and taken these cases, as well as those referred to at the hearing, into consideration in reaching its decision in this matter.

The decision under appeal

6. The IDP was asked to consider eighteen tweets made by Mr Holbrook. One of these – a tweet on 17 January 2021 – was the subject of "Allegation 1", while the other 17 were the subject of "Allegation 2" which was in the following terms:

> "*Between 25 March 2019 and 1 November 2020 B posted seventeen tweets which were designed to demean or insult others including Muslims, homosexuals and women, and which tweets may be considered distasteful or offensive by others.*
>
> *The language, content and tone of the tweets appear to show a potential breach of CD5 (behaviour likely to diminish the trust and confidence the public place in* [Mr Holbrook] *or the profession) and could potentially be seen to undermine* [Mr Holbrook's] *integrity and/or independence under rC8 of the BSB Handbook.*"

7. The IDP dismissed Allegation 1 in its entirety and Allegation 2 in so far as it related to the tweets numbered 1-13 and 15-17. That left tweet fourteen, the details of which are as follows:

7.1. It was posted on 17 October 2020, the day after the beheading of a history teacher in France.

7.2. It read:

> "*Free speech is dying & Islamists & other Muslims are playing a central role. Who will lead the struggle to reinstate free speech as the foundation of all other freedoms?*"

7.3. It was a response to a tweet from Roshan M Salih which read:

> "*#CharlieHebdo must be shut down immediately by French authorities. This racist, Islamophobic rag is causing community relations to completely break down with its repeated provocations. They are literally crying fire in a crowded theatre. Freedom of speech isn't worth civil war.*"

8. The IDP concluded that, in respect of tweet 14, there was sufficient evidence of a breach of CD5 but not rC8 of the BSB Handbook. The IDP's reasoning was that:

> "*The Panel considered that the ordinary reasonable reader would understand the tweet to mean that the Muslim community was to blame for curtailing free speech. The Panel considered this would not only cause offence but could promote hostility towards Muslims as a group. The Panel considered that such behaviour was likely to diminish the trust and confidence that the public place in* [Mr Holbrook] *or the profession and that there was therefore evidence of a breach of CD5 of the Handbook.*"

9. As referred to above, the sanction imposed by the IDP was a warning and a fine of £500. The fine was paid by Mr Holbrook.

10. By a letter dated 5 September 2021, Mr Holbrook appealed against the IDP Decision.

Grounds of appeal

11. The grounds of appeal are as follows:

11.1. The administrative sanction was unlawful under the Equality Act 2010 which protects "philosophical belief";

11.2. The administrative sanction was unlawful under the common law and human rights law that protects freedom of speech;

11.3. The IDP's conclusion that CD5 was breached because the relevant tweet "*would not only cause offence but could promote hostility towards Muslims as a Group*":[2]

(a) Sets the bar too low for bringing either Mr Holbrook or the profession as a whole into disrepute;

(b) Is not set out in the BSB Handbook, is ultra vires and not prescribed by law;

(c) Breached natural justice as Mr Holbrook was not given a chance to respond to it; and

11.4. The IDP's procedure breached Mr Holbrook's right to a fair trial under article 6 of the European Convention on Human Rights ("ECHR") and common law.

[2] The IDP Decision at page 1-8.

12. Mr Holbrook also sought to argue that the very act of sanctioning him was itself discriminatory and unlawful. This did not, however, form a distinct ground of appeal and the Panel prefers to focus on the matters which made up the grounds of appeal and which are dealt with individually below.

Nature of the appeal

13. This appeal is a review of the IDP's original decision, not a re-hearing: BSB Handbook, rE55. The question for the Panel is whether the IDP decision was wrong in that its conclusion rested on an error of principle or fell outside the bounds of what the IDP could properly and reasonably have decided.[3]

Ground 1

The arguments

14. Mr Holbrook states that his centre-right, pro-assimilation and pro-free speech views which "*came together to inform*" the tweet in question are expressions of a "*philosophical belief*", satisfying the criteria set out in *Grainger v Nicholson*[4] and, as such, are protected under the Equality Act 2010 as a protected characteristic. He argues that the reason for the imposition of the administrative sanction in this case was "*because of or related to that belief*"[5] and that it is consequently unlawful under section 13 of the Equality Act because it amounted to "*less favourable treatment*" (per Mr Holbrook's written submissions).

15. The BSB accepts that the tweet was the expression of a protected characteristic (Mr Holbrook's belief described above) but argues that it is not open to Mr Holbrook to argue that the imposition of an administrative sanction constitutes direct discrimination contrary to section 13 of the Equality Act. It said that the Equality Act mandates that proceedings relating to contravention of the Act be brought in

[3] See *Beckwith v SRA* [2020] EWHC 3231 at ¶13.
[4] [2010] IRLR 4.
[5] *Forstater v CGC Europe* UKEAT/0105/20/JJ.

accordance with the procedures laid down in that Act and that a discrimination claim is exactly that, a claim – requiring disclosure, witness statements and a trial for its determination – rather than a ground of appeal. As to this, the BSB relies on the Court of Appeal's decision in *Adesotu v Lewisham BC*[6].

16. Despite the preliminary objection referred to above, the BSB goes on to argue that, in any event, Mr Holbrook has not clearly set out a case of direct discrimination because he fails to identify a comparator (i.e. a person receiving more favourable treatment.) The BSB asserts that direct discrimination requires a real comparator ("A" compared with "B"), with evidence of the treatment afforded to each of A and B.

17. The BSB also says that the reason for the IDP's actions in this case was not based on the relevant belief. The BSB's case is that the IDP sanctioned Mr Holbrook not because of his political beliefs but because his tweet would offend and ran the risk of contributing to hostility towards Muslims. The answer to the question of why the sanction was applied, Mr Holbrook says, is determinative of the issue of whether there is a proper comparator. The BSB disagrees with this on the case law.

18. The BSB also responds to Mr Holbrook's submission that, following *Forstater*[7] and *Grainger*, political beliefs are worthy of respect provided they are not an affront to Convention principles "…*in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest forms*"[8]. The BSB's position is that the case law only goes so far as to establish that the views Mr Holbrook has expressed are worthy of protection as beliefs, a point which it accepts. It does not, the BSB says, establish any basis for prohibiting the BSB from sanctioning discriminatory speech.

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[6] [2019] EWCA Civ 1405.
[7] *Forstater v Centre for Global Development* UKEAT/0105/20/JJ.
[8] *Forstater*, per Choudhury J at para 79.

Discussion

19. Without intending any disrespect to the arguments raised between the parties as to whether the Equality Act gave rise to a ground of appeal rather than requiring that the relevant issues be brought in the form of a discrimination claim, the Panel did not consider it necessary to deal with that point. This is because, even assuming the points in question can found a ground of appeal, the Panel did not consider that Mr Holbrook has been discriminated against in this case.

20. The "essential question" in assessing any such submission is whether the act complained of, in this case the IDP's finding that CD5 had been breached and its sanctioning of Mr Holbrook, was done because of a protected characteristic (per Underhill LJ in *Page v NHS*[9]). Mr Holbrook's case is premised on the assertion that the IDP were "*sanctioning me for my beliefs*" simply because the statement which was the subject of the sanction was one of a political belief[10].

21. However the Panel does not agree with this submission. To the contrary, the reasons provided by the IDP in support of its decision indicate that it acted on the basis of its conclusion that Mr Holbrook's mode of expression was offensive and might contribute to hostility to Muslims, rather than on the basis simply that he held the belief underlying the tweet. The Panel does not accept Mr Holbrook's argument that the consequences of the tweet cannot be separated from the belief the tweet expressed. Although the IDP's reasons are short, they clearly show that the analytical exercise conducted by the IDP focussed on what the "*ordinary reasonable reader would understand the tweet to mean*" and the effect that ordinary meaning was likely to create. This is very different from a determination that a sanction should be applied simply because of the belief held by the maker of the tweet. There is nothing to support an argument that the IDP proceeded on this basis.

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[9] [2021] EWCA Civ 255 at para 68.
[10] See, for example, Mr Holbrook's amended skeleton argument, paragraphs 19 and 20.

22. It follows that the Panel does not find that the protected characteristic (belief) in this case was the reason the act complained of (the sanction) was done. Accordingly, there was in the Panel's view no discrimination on the grounds of a protected characteristic in this case. We also noted that we were not provided with any convincing analysis of the existence of a comparator on the basis that Mr Holbrook disputed that it was necessary to do so. Given our conclusions as to the reason for Mr Holbrook's treatment, it is not necessary for us to reach any conclusion on that point.

Ground 2

The arguments

23. Mr Holbrook's second ground of appeal is that the IDP's acknowledged interference with his Article 10 ECHR rights to freedom of expression was unjustified because it did not pursue a legitimate aim and was not necessary in a democratic society.

24. Mr Holbrook also asserted (albeit as a separate ground of appeal, Ground 3a) that the conclusions of the IDP as to why CD5 had been breached set the bar too low where the relevant breach of CD5 engaged a barrister's freedom of expression.

25. It seems to the Panel that these two points – Grounds 2 and 3(a) – need to be taken together as they are two aspects of a composite argument in that, if the IDP was correct to conclude that, despite Mr Holbrook's right to freedom of expression, CD5 was breached, then that would be relevant to (or even determinative of) the question of whether the interference with Mr Holbrook's Article 10 right was justified. Accordingly, in the paragraphs which follow the Panel first sets out the arguments advanced on these Grounds before turning to the discussion of them.

26. Starting with the arguments made by the parties on Ground 2, the BSB identifies the IDP's aim as being (a) to "*protect the…rights of others*" (per article 10(2)), in particular British Muslims, from being subjected to "…*speech which causes offence*

and may promote hostility towards them, or on the basis of their religion"[11] and (b) the "*regulation of a profession, namely the Bar*".[12]

27. Mr Holbrook acknowledges that the former was an aim of the BSB. However, he argues that it was not a legitimate one, both because Muslims have no right to be protected from political criticism and because, in their stated aim, the IDP failed to address the need for a compelling justification before sanctioning political speech. Mr Holbrook argues that freedom to make political speech is of the very highest importance and caselaw has established that the thresholds of "causing offence" and possible promotion of hostility are insufficient to meet the threshold for justifiable interference with it.

28. Mr Holbrook acknowledges that interference may be legitimate in some contexts, including in relation to expression of a political belief in circumstances where the manner of such speech employs gratuitous and offensive abuse, such as in *Diggins v BSB*[13], but states that this does not apply to the terms of the tweet in question, which was purely political in content.

29. Against this, the BSB argues that the case law does not provide that only interference with political speech which is grossly offensive is permissible or is capable of being found to pursue a legitimate aim under article 10(2).

30. A further point of dispute between the parties relates to the requirement in article 10(2) ECHR that any penalty imposed in respect of the exercise of freedom of expression must be, amongst other criteria, "*necessary in a democratic society*". Mr Holbrook also refers to his right to freedom of expression only being capable of being interfered with where there is a "*…pressing social need…proportionate to the legitimate aim pursued…*" as referred to by Lord Bingham in *R v Shayler*[14]. Mr

[11] BSB Skeleton Argument at paragraph 56.
[12] BSB Skeleton Argument at paragraph 60.1.
[13] [2020] EWHC 467.
[14] [2003] 1 AC 247.

Holbrook argues that the IDP's sanction did not satisfy these requirements. His reasons were (in summary) that other legal protections exist – Mr Holbrook cited by way of example laws criminalising hate speech and harassment – -and that they require a higher threshold for permissible interference than the lower standard applied by the IDP in this case.

31. The BSB provides a number of responses to support its argument that the imposition of a sanction was necessary in a democracy. In particular, it says that the speech in question was offensive precisely because Mr Holbrook himself singled out "*Islamists and other Muslims*" for criticism in his tweet; that the sanction applied was of the lowest level available and that this appropriately reflected the threshold the IDP applied; that the sanction would have been imposed in secret had it not been publicised by Mr Holbrook himself; that a regulator is permitted find a breach of professional standards in circumstances which do not amount to a crime and that care is needed in transposing broad statements as to the value of free speech between legal contexts.

32. The BSB also argues that it is wrong to draw from extensive case law quoted by Mr Holbrook that a generalised immunity from professional discipline is conferred in respect of expressions of political speech. It counsels caution against drawing across from other jurisdictions (e.g. crime) and points out that being a member of a regulated profession is a privilege which comes with scrutiny and responsibility. Accordingly, there is, it says, a difference between regulated professionals and non-regulated members of society in terms of the scope to speak in terms which cause offense. Ultimately, the question turns on the factual assessment of whether trust and confidence in the barrister or the profession has been impugned. If it is adjudged that the speech in question has done so, then the professional may properly be sanctioned for that, notwithstanding that the motivation is an expression of political beliefs.

33. The Panel was also referred to *Page v NHS Trust Development Authority*[15] in which Underhill LJ dealt at ¶101 with the extent to which the freedom to manifest a belief can be limited as follows:

> *But I say "up to a point" because the freedom to express religious or any other beliefs cannot be unlimited. In particular, so far as the present case is concerned, there are circumstances in which it is right to expect Christians (and others) who work for an institution, especially if they hold a high-profile position, to accept some limitations on how they express in public their beliefs on matters of particular sensitivity. Whether such limitations are justified in a particular case can only be judged by a careful assessment of all the circumstances of the case, so as to strike a fair balance between the rights of the individual and the legitimate interests of the institution for which they work.*

34. As regards Ground 3(a), Mr Holbrook relied, in particular, on the following features of the IDP decision – the conditional use of the word "could", the choice of "hostility" over "hatred" and the subjective trigger of causing offence and possible hostility – as indicating that the threshold was set too low by the IDP to constitute a breach of CD5 particularly when judged against the limits referred to above on the interference with the freedom of expression.

Discussion

35. CD5 provides that as a barrister "*You must not act in a way which is likely to diminish the trust and confidence which the public places in you or in the profession.*"

36. The scope of this duty is fleshed out in guidance in the BSB Handbook. Although the guidance as to the circumstances which might amount to a breach of CD5 is non-exhaustive and is intended as "guidelines" rather than "tramlines", it explains that a breach of CD5 is likely to be found amongst other things when there is conduct which is "*seriously offensive or discreditable conduct towards third parties.*"

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[15] [2021] EWCA Civ 255.

37. As regards the relationship between this duty and posts on social media, the BSB has produced some Social Media Guidance which provides that:

> "*Comments designed to demean or insult are likely to diminish public trust and confidence in the profession (CD5)…You should always take care to consider the content and tone of what you are posting or sharing. Comments that you reasonably consider to be in good taste may be considered distasteful or offensive by others.*"

38. In the Panel's view, the central issue in this case is where the line is drawn between speech which breaches CD5 and speech which does not. This requires analysis of (i) the scope of freedom of expression and the circumstances in which it can be interfered with and (ii) the effect of the BSB's guidance referred to above.

39. The starting point is that, as Mr Holbrook argues, there is a "…*hierarchy of free speech values*…" (per Warby J in *Khan v BSB*[16]) under which "*mere gossip*" (e.g. as in *Khan*) ranks low in the hierarchy and therefore "…*the need for a compelling justification for interference is correspondingly less*…". Warby J contrasted gossip with speech which was said to serve a higher public interest purpose.

40. As to the position of political speech, Mr Holbrook referred during the hearing to the decision of Julian Knowles J in *Miller v College of Policing*[17] at first instance where the Judge relied on the dicta of the ECHR that:

> "…*there is little scope under article 10(2)…for restrictions on political speech or on the debate of questions of public interest.*"

41. We have, following the hearing, been referred to the Court of Appeal's decision in *Miller*[18] in which the President said at [73]:

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[16] [2018] EWHC 2185 (Admin).
[17] [2020] EWHC 225 (Admin) at 252, relying on *Vajnai v Hungary* (No. 33629/06, judgment of 8 July 2008).
[18] [2021] EWCA Civ 1926.

> *As the judge said when discussing the actions of Humberside Police, the Strasbourg court has made clear that there is wide protection for all expressive activities by virtue of a very broad understanding of what constitutes an interference with freedom of expression. That is particularly so in the context of political speech and debate on questions of public interest and the Strasbourg court has emphasised that there is "little scope under article 10(2) of the Convention for restrictions on political speech or on the debate of questions of public interest": see Vajnai v Hungary, App no 33629/06, [2008] ECHR 1910 at [47]*

42. Mr Holbrook accepts however, that the right to political speech is not entirely unfettered and would lose its highly protected status where the manner of expression of the political view involves gratuitous personal abuse, derogatory racist or sexist language, such as was found in the tweets examined in *Diggins v BSB*[19], or "*grossly offensive and disparaging*" Facebook posts which were "*targeted and misogynistic*" such as was found to be the case in a 2018 Tribunal decision[20]. Mr Holbrook asserted that no such gratuitous abusive language was present in his tweet.

43. The BSB did not demur from this. However, it argued that "*The BSB…is not required to set the standards of speech at the same level as that found in other areas of law for other purposes, such as the criminal law…*" (per paragraph 60.3 BSB's skeleton argument) and that the IDP did not create its own fetter on free speech but was merely acting within the BSB's policy set out in its Social Media Guidance referred to above.

44. The Panel accepts that breaches of professional standards may occur without the commission of any crime, particularly following the change in the rules requiring proof only to the civil standard in such cases. However, given the importance ascribed to freedom of expression in the authorities referred to above (and many of the others to which we were referred at the hearing), it follows that, for the expression of a political belief to be such that it diminishes the trust of the public in the particular

[19] [2020] EWHC 467 (Admin).
[20] *Richard Miles*, PC 2018/0372/DS.

barrister or in the profession as a whole will require something more than the mere causing of offence. At the very least, the relevant speech would have to be "*seriously offensive"* or "*seriously discreditable*" as suggested in the BSB Guidance. Even in such cases there would have to be a close consideration of the facts to establish that the speech had gone beyond the wide latitude allowed for the expression of a political belief, particularly where the speech was delivered without any derogatory or abusive language and the objection was taken to the political belief or message being espoused, rather than the manner in which that belief or message was being delivered.

45. The Panel also concludes that the BSB's Social Media Guidance has to be read bearing in mind the hierarchy of free speech values referred to above. As referred to above, that Guidance cautions barristers that CD5 is likely to be engaged by statements which were *"…designed to demean or insult…"* and also contains the general advice that practitioners should *"…always take care to consider the content and tone of what you are posting or sharing. Comments that you reasonably consider to be in good taste may be considered distasteful or offensive by others*". While this is, no doubt, sensible advice, the reference to comments being considered offensive by others does not, in the Panel's view, water down the protection afforded to freedom of expression in the political sphere.

46. Further, even if the Panel had accepted that the Guidance could be said to set the relevant standard or threshold for interference (which the Panel finds it does not for the reasons set out above), the terms of the Guidance were not reflected in any of the reasons given by the IDP for its finding that trust and confidence had been diminished by the tweet, thereby breaching CD5 and warranting a sanction. There was no finding that Mr Holbrook intended to insult or demean any person or group by his tweet.

47. Turning to the application of the principles described above, the Panel conclude that the case law on the circumstances in which freedom of expression can be interfered with dictate that the baseline for a breach of CD5 should be set higher than merely

that a comment would simply offend. This is reflected both in cases such as *Khan* and *Diggins* and indeed in the language of the Handbook guidance (in particular, the words "*seriously offensive*" and the alternative formulation of "*seriously … discreditable*"). In these circumstances, the IDP's finding that the tweet would cause offence fell short of establishing the type of conduct necessary for a breach of CD5 when the right to freedom of expression was engaged.

48. The Panel was also satisfied that the IDP's finding "*could promote hostility*", expressed conditionally, fell short of the seriousness of offensive or discreditable conduct indicated by the case law and the Handbook guidance.

49. In reaching this conclusion, the Panel did not find it necessary to determine whether the IDP erred in its reading and interpretation of the relevant tweet because the Panel was agreed on the outcome even applying the reading determined by the IDP. Had such a determination been necessary however, the majority of the Panel would have upheld the IDP's findings as to the effect of the tweet whereas the minority would have held that it was not open to the IDP to conclude even that the tweet would cause offence or could promote hostility.

Private or professional conduct?

50. There is a further aspect as to the threshold for a breach of CD5 which seems to the Panel to support the conclusion is has reached above. Drawing on Elias LJ's judgment in *R v The General Medical Council ex p. Remedy UK Limited*[21] ("*Remedy*") Mr Holbrook contends that, in the context of professional discipline, conduct taking place outside the course of professional practice only attracts sanction where it involves "*…conduct of a morally culpable or otherwise disgraceful kind…which brings disgrace upon the* [barrister] *and thereby prejudices the reputation of the profession*".[22] He says that his tweet did not have that characteristic.

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[21] *R (Remedy) v GMC* [2010] EWHC 1245 (Admin).
[22] Remedy at paragraphs 37(1) and 36(6).

51. Mr Holbrook also referred to *Beckwith v SRA*[23] for the proposition that professional rules (in that case, those applying to a solicitor) could only reach into private life when conduct that is part of a person's private life realistically touches on his or her practice of the profession or the standing of the profession.

52. As the Panel understood the position, the BSB accepted the distinction between conduct inside and outside the course of professional practice. Although its written submissions adverted to the fact that Mr Holbrook's Twitter handle expressly identified him as a barrister[24] and it was pointed out that he practiced in the field of public law, it was not seriously contended for that the tweet in question was in the exercise of his professional practice.

53. In its oral submissions on the point, the BSB argued that the nature of the tweet as a comment made in a public domain by a regulated person is enough to affect the standing of the profession in the eyes of the public. There is, it said, no basis for concluding that the IDP reached its conclusion that the tweet diminished trust and confidence as a result of any misunderstanding as to what Mr Holbrook was doing by his tweet. All that the appeal requires of this Tribunal is to assess whether or not the IDP were in error in reaching their conclusion and, if not, then no interference with their decision is permissible.

54. In considering this point, the Panel noted that the distinction between private and professional life is, unlike in cases such as *Beckwith* (which concerned physical events outside of the workplace), not so easily drawn in respect of comment on Twitter, the very purpose of which is the making of overtly public statements.

[23] [2020] EWHC 3231 (Admin).
[24] BSB Skeleton Argument at paragraph 62 (c).

55. However, it was not necessary in this case to determine precisely what sort of comment on social media would fall outside of a barrister's private life and within his or her professional practice given the points made in paragraph [53] above.

56. Turning therefore to the substance of this point, in the case of Mr Holbrook's tweet, the IDP did not find (for example) racist content, or otherwise identify any feature of the tweet as being "*dishonourable…disgraceful*" or attracting "*some kind of opprobrium",* or otherwise justifying "*moral censure or involve conduct which would be considered disreputable for a* [barrister]" (per Sedley LJ in *Remedy* para 37(6)) and 55 respectively). Its findings that the tweet "…*would not only cause offence but could promote hostility towards Muslims as a group…*" fall short of that sort of condemnation.

57. *Remedy* was concerned with the standard for misconduct (and therefore fitness to practice) to be found, rather than the standard for a lesser finding simply that professional rules had been breached (as is the case, here given that the IDP did not make a finding that Mr Holbrook had committed professional misconduct). However, in the Panel's view, the high threshold described in *Remedy* reinforces the conclusion reached above that the threshold established by the IDP for a breach of CD5 in the context of political speech was too low.

Conclusion on Grounds 2 and 3(a)

58. Accordingly, for the reasons given above, the Panel finds that the IDP erred in law by applying too low a threshold in reaching its conclusion that the tweet breached CD5. The IDP did not conclude that the relevant tweet was seriously offensive or seriously discreditable within the terms of the BSB Guidance and, given the protection afforded to freedom of speech, the Panel does not consider that it was reasonably open to the IDP to conclude that CD5 was breached or that, even if CD5 could be breached simply by political speech which would cause offence, then the application of a sanction was necessary in a democratic society or proportionate.

59. In these circumstances, the Panel considers that Mr Holbrook's appeal should be allowed on these grounds (i.e. ground 2 and ground 3(a)).

Ground 3

60. Mr Holbrook's third ground of appeal relates to the "charge of causing offence and possible hostility towards Muslims" being a paraphrase of the IDP's conclusion as to the effect of the relevant tweet. This ground of appeal was broken down into three points.

(a) The charge sets too low a threshold for bringing either Mr Holbrook individually or the Bar generally into disrepute.

61. This argument and the BSB's response to it has been considered above.

(b) The charge is not set out in the BSB Handbook, is ultra vires and not prescribed by law

62. The IDP identified CD5 (diminishing the "*trust and confidence which the public places in you or the profession*") as having been breached. Mr Holbrook says that the only relevant provision in the BSB Handbook describing conduct breaching CD5 which could be relevant to his situation is the section of "Other conduct" which is "*seriously offensive or discreditable conduct towards third parties.*"

63. Mr Holbrook argues that neither this nor the BSB's Social Media Guidance document [25] (which indicates that in relation to social media use "*Comments designed to demean or insult are likely to diminish public trust and confidence in the profession*") are satisfied by the IDP's conclusion that the tweet would have caused offence and the possible promotion of hostility towards Muslims. He asserts that the BSB has therefore exceeded its statutory powers.

[25] Which is not incorporated into the Handbook and which Mr Holbrook denies forms part of the regulatory framework.

64. The BSB responds by distinguishing between the finding made by the IDP (namely the limited finding that there had been a breach of CD5) and the reasoning in support of that conclusion (i.e. the explanation regarding the offence and potential hostility caused by the tweet). Mr Holbrook, it says, wrongly elides these matters to suggest that he has been "charged" with a matter outside of the BSB's statutory powers.

65. The Panel agreed with the BSB's analysis on this point and rejects Mr Holbrook's appeal on this point. The "charge" against Mr Holbrook was that he had breached CD5. Mr Holbrook can have no complaint about this. The fact that the BSB Handbook and the Social Media Guidance do not use the precise terms to describe the breach of CD5 adopted by the IDP would have been of no assistance to Mr Holbrook had the Panel agreed with the decision of the IDP. Neither the BSB Handbook nor the Social Media Guidance are intended, in the Panel's judgment, to set out all of the circumstances in which CD5 might be breached.

(c) The introduction of the charge by the IDP breached natural justice, as he was not given a chance to respond to it:

66. Mr Holbrook states that, by letter from the BSB dated 12 April 2020, he was charged on the basis that his tweets were "designed to demean or insult" individuals, but this charge was subsequently dropped. He was then informed, he says, of a reframed charge of "causing offence and possible hostility towards Muslims" by letter on 9 August 2021 which also informed him of the IDP's decision in respect of it. He asserts that he was not afforded an opportunity to address the IDP on this charge, including as to what he contends is the plain meaning of the tweet. He also argues that it was unfair that he was not afforded a right to be heard ahead of the IDP's decision being taken.

67. In response, the BSB's case is that the allegation he was notified of in the 12 April letter and the breach that was identified in the 9 August letter were the same,

namely a breach of CD5. The IDP explained the reasons it had reached the conclusion that there had been a breach, but the provision of the IDP's reasons did not amount to bringing a different allegation to the one Mr Holbrook had been notified of.

68. Again, the Panel agreed with the BSB's analysis and rejects Mr Holbrook's appeal on this point. While it is correct that the BSB's letter from April 2021 and its subsequent Case Report which was provided to the IDP did refer to tweets (including the Tweet) which were, it was alleged, designed to demean or insult others, it went on to say that the same tweets "*may be considered distasteful or offensive by others*" and stated that the language, content and tone of the tweets appeared to show a potential breach of CD5. In the Panel's view, while it might have been better if the BSB had set out a separate case in respect of the each of the seventeen tweets and how each was said to give rise to a potential breach of CD5, the conclusion reached by the IDP fell within the "charge" which it was asked to consider.

Ground 4

69. The final ground of appeal is that the procedure breached Mr Holbrook's right to a fair trial under article 6 of the ECHR and common law. Mr Holbrook argues that the IDP's determination engaged article 6 and that its procedure breached his rights under that article because the IDP was not, in fact or in appearance, independent of the BSB (who brought the charge); and there was no disclosure of relevant documents, no public hearing and no oral argument. These defects are not cured, Mr Holbrook asserts, by the availability of appeal or judicial review because the IDP is a tribunal of fact against which there is no right of challenge.

70. The BSB responds by arguing that article 6 is not engaged in this appeal. It relies on *A v United Kingdom*[26] and *R (Thompson) v The Law Society*[27] which it says establish

[26] (1984) 6 EHRR CD 583.
[27] [2004] EWCA Civ 167.

that a decision to reprimand a professional does not amount to a determination of their civil rights and obligations if the person's right to continue practising their profession is not at stake. Further and in any event, the BSB says that the rights of appeal and the ultimate oversight by a court of competent jurisdiction mean that there is no substance to Mr Holbrook's complaint regarding lack of independence by the IDP, and that there are no requirements or presumptions in favour of any of the procedural requirements contended for by Mr Holbrook.

71. As to the BSB's first point, Mr Holbrook seeks to distinguish the authorities relied on by the BSB on the basis that the central issue in this case is not the curtailment of his right to practice, but of his right to speak freely.

72. The Panel considered that Mr Holbrook's points conflated his arguments regarding the curtailment of his civil right to freedom of political expression caused by the imposition of any sanction by the IDP, and the separate point as to whether he was entitled to an oral hearing and the other article 6 factors he identifies as having been missing from the IDP's process.

73. The Panel were unable to accept Mr Holbrook's argument that the IDP's determination was of his civil rights to free speech. The question that was being determined by the IDP was whether or not Mr Holbrook had committed a breach of his professional rules. In respect of this, while Mr Holbrook offered a defence of freedom of political speech (and the IDP accepted that he had a right to such speech), the nature of the defence did not in the Panel's view mean that the case inevitably falls within Article 6.

74. In considering these issues the Panel noted that case law on article 6 - in particular *R (Thompson) v The Law Society*[28] and *A v United Kingdom*[29] - taken together with the analysis by the BSB of the case law relied upon by Mr Holbrook[30] (which the Panel

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[28] [2004] EWCA Civ 167.
[29] (1984) 6 EHRR CD 583.
[30] *Le Compte, Van Leuven and de Meyere v Belgium* (1982) 4EHRR 1; *P (A Barrister) v General Council of the Bar* [2005] 1 WLR 3019; *R (McCarthy) v BSB* [2015] EWCA Civ 12.

accepts is the correct analysis of those cases) has regard to the nature of the potential outcome in order to determine whether the article 6 rights are engaged rather than considering the matters in issue in the underlying dispute.

75. If Mr Holbrook's arguments on this ground were correct, the distinction that is very clearly drawn and set out in an unqualified way in case law would not work and the result would be that any case involving free speech whether before an IDP or otherwise would require an open, article 6 compliant, hearing. But the distinction the case law draws does not depend on the nature or substance of the various rights that are engaged in the substance of the dispute. It turns instead on whether the possible outcome is determinative of the right to practice.

76. Accordingly, the Panel rejects Mr Holbrook's appeal on ground 4. It is right to note however, that the nature of the procedure in this case inevitably meant that this Panel was able to receive more detailed and focussed submissions on tweet 14 than the IDP which was asked to deal compendiously with seventeen different tweets. Further, by contrast with the process before the IDP, this Panel benefitted significantly from hearing the detailed oral arguments of the parties on subjects which are not straightforward.

Conclusion

77. For the reasons given above, the Panel allows Mr Holbrook's appeal on Grounds 2 and 3(a) but rejects the appeal on the other grounds. As a result, the sanction applied by the IDP must be set aside, including the repayment of £500.00 paid by Mr Holbrook by way of fine together with £100.00 paid by way of administrative fee in order to bring this appeal.

Lyndsey de Mestre QC
Thomas Williams
Kathryn King
25 March 2022