

DECISION ON PENALTY OF THE DISCIPLINARY TRIBUNAL

A COMPLAINT AGAINST GORDON JACKSON KC

BY RUTH CRAWFORD KC *qua* TREASURER OF THE FACULTY OF ADVOCATES

Introduction

[1] On 8 June 2023 this Tribunal allowed in part an appeal by Mr Jackson against a decision of the Complaints Committee of the Faculty of Advocates (the Committee) which upheld a complaint by the Treasurer of the Faculty of Advocates and by Rape Crisis. We upheld the Committee's findings that Mr Jackson had breached an advocate's duty to the court by publicly naming two of the complainers in the trial *HM Advocate v Alexander Salmond*. We refer to that decision for its terms.

[2] Mr Jackson was acting as one of two senior counsel to Mr Salmond in that trial. On 12 March 2020, during the first week of the trial, Mr Jackson boarded an evening train from Edinburgh to Glasgow. He sat opposite a woman identified as "FV" who he knew. He then engaged in conversation during the course of the journey. That conversation, or at least part of it, was recorded on a mobile phone by a fellow passenger who was sitting about two rows away from Mr Jackson. The footage was sent to the Sunday Times which proceeded to give considerable prominence to the story.

[3] Since we preserved the finding of the Committee that in the course of the conversation Mr Jackson breached his duty to the court by naming two of the complainers in that trial, we now have to decide how to categorise that conduct and decide on an appropriate sanction for it.

[4] The first question is whether the conduct can properly be described as "unsatisfactory professional conduct" or "professional misconduct" in terms of the Faculty

of Advocates' Disciplinary Rules 2019. Paragraph 3 of those Rules defines unsatisfactory professional conduct as:

“...conduct that is not of the standard that could reasonably be expected of a competent and reputable advocate, that does not amount to professional misconduct, and that is not merely inadequate professional services.”

Professional misconduct is defined as

“any conduct which is a departure from the standards of competent and reputable advocates and that would be regarded by such advocates as serious and reprehensible”.

[5] The naming of two of the complainers was against a background in which the court had made a Contempt of Court Order prohibiting the naming publicly of the complainers. The Committee was unable to conclude that the order had been breached in respect of the part of the complaint that this Tribunal has upheld upon the basis that they were unable to conclude that anyone overhearing the conversation would understand that the named persons were in fact complainers. We did not disturb that finding.

[6] Accordingly, this Tribunal must focus on the conduct which involved the naming of two persons who were in fact complainers in circumstances when Mr Jackson knew that the court had prohibited such conduct. At paragraph 43 of our decision we stated:

“It remains the position that by naming two complainers on this train in the presence of others and in the circumstances described by FV, Mr Jackson acted with reckless indifference to the order of the court and created a material risk that the protection afforded by the court would be compromised”.

[7] In the circumstances, we are unable to conclude that this amounts only to unsatisfactory professional conduct but consider that it plainly amounts to professional misconduct. Mr Jackson named two complainers in a public place in which other members of the public were present during a discussion about the Salmond trial. He did so openly and afforded a member of the public the opportunity to record the conversation on a mobile phone. FV herself stated that she was shocked by Mr Jackson's conduct. In compromising

the anonymity of complainers in what was a highly public trial in the knowledge that the court had made an order to secure anonymity was, in our view, a serious and reprehensible departure from professional standards with which all advocates must comply.

[8] We have regard to the submission that Mr Jackson did not intend to act in breach of duty to the court and did not intend to share the names of the complainers with members of the public. Nevertheless, as Mr Duncan accepts, it is not necessary that intention to fall below the requisite standard be shown. We have found that Mr Jackson's conduct showed a reckless indifference to maintain the anonymity secured by the order. His conduct created a material risk that the names of the complainers would be overheard by members of the public contrary to Mr Jackson's duty to the court.

[9] We therefore conclude that the conduct is serious and goes well beyond the threshold of unsatisfactory professional conduct and is properly categorised as professional misconduct.

[10] We then have to consider the question of sanction for that behaviour. We accept that in doing so we should consider all the sanctions that are available to us in terms of the disciplinary rules. Rule 83 is engaged for present purposes by virtue of Rule 56b. This allows a Disciplinary Tribunal in upholding an appeal to "substitute or vary any of the penalties imposed by the Complaints Committee (including imposing any of the penalties referred to in paragraph 83 below)."

[11] The penalties set out in Rule 83 range from a written direction without conditions to expulsion from the membership of the Faculty. They include formal written reprimand or severe written censure, a fine of up to £15,000, suspension from practice and suspension from membership of the Faculty. Although these penalties extend further than those

available to the Committee, we do not consider it necessary to go beyond the range of penalties it could have imposed.

[12] It ought to have been obvious to Mr Jackson that to name complainers publicly posed a real risk to the order of the court and was contrary to his duty as an advocate. He was involved in a trial in which there was intense public interest. By naming complainers he materially risked the names of these complainers getting into the public domain. We consider that his culpability is high.

[13] We must also have regard to the harm caused by that conduct. Damage to public confidence in the anonymity of complainers in criminal trials in Scotland is inevitably caused in circumstances such as these. There was a material risk to the complainers of being identified. Significant trauma would thereby be inflicted on them, knowing that names had been publicly spoken. They had to experience the treatment in the media of Mr Jackson's actions. In addition, damage to the administration of justice occurs when anonymity is seen to have been breached. It makes the co-operation of witnesses in the court process less likely.

[14] We consider that any sanction imposed requires to reflect not only the degree of culpability of the member of Faculty, but also the public interest in maintaining confidence in the profession and trust in the Faculty and its disciplinary processes. The sanction must also reflect the need for the Faculty to assist in ensuring that court orders designed to protect anonymity in the criminal process are effective and fully respected by its members.

[15] We consider that there is a strong element of public interest in this Tribunal dealing with the matter in such a way as to assist in building confidence of complainers and the public generally that actions which undermine the protection which courts offer to participants will be dealt with in a serious manner by the Faculty. We also consider it

necessary in this case to select a disposal which will give a signal to the profession in order to deter others from acting in this way, so that orders of the court will be respected.

Accordingly, there is a significant public interest element in the sanction to be imposed which relates to confidence in the profession and the administration of justice. There is also a punitive element albeit indirect and secondary.

[16] Mr Duncan advanced a number of circumstances to which he submitted we should have regard. He referred to the Bar Tribunals and Adjudication Service Sanctions guidance of January 2022, paragraph 6.35. This gives guidance as to how the selection of sanctions in complaints in England might be approached. In paragraph 6.35 it stated that:

“suspension is a public protection sanction that should only be imposed where there is ongoing risk to the public, which includes clients and/or professional colleagues.”

Mr Duncan submitted that there is no such risk here. Implicit in that submission was that the “ongoing risk to the public” could emanate only from the wrongdoer. We do not agree.

We note that in paragraph 6.16 of that guidance, where the levels of fine are being dealt with, a high fine of between £15,000 and £50,000 is said to be applicable in “serious misconduct that does not warrant a suspension to protect the public interest” (emphasis added). We consider that the sanction of suspension is not limited to cases where there may be a risk of repetition by the individual wrongdoer but may be appropriate where it may act as a deterrent to others in the future and thus advance the public interest in anonymity of complainers. In any event, we are not bound by the guidance issued by the regulator in England. In our view suspension can be imposed when it is necessary to maintain public confidence in the public office of Advocate and to deter others. We also have regard to the submission that this behaviour amounts to an “unprecedented” lapse by Mr Jackson in what has been a long and distinguished career culminating in his election as Dean of Faculty. We

accept that he is genuinely remorseful. We have had full regard to the testimonials and other information submitted on Mr. Jackson's behalf. Nevertheless, we have concluded that this is serious and reprehensible conduct and his culpability is high. The harm caused is significant. We also are conscious of the effect that these proceedings and the attendant publicity has had and will have on Mr Jackson personally and upon his practice. But we also have to take account of the effects alluded to above upon the complainers in this case.

[17] Mr Duncan also submitted that Mr Jackson had accepted throughout the possibility that he did use the complainers' names when speaking with FV. That is correct. He said that Mr. Jackson was accustomed to speaking to her in matters of "defence strategy". We have some difficulty in accepting that this was the aim of the conversation standing the terms of the statement of FV paragraphs 4 and 5. However, we accept that Mr Jackson had no intent that names of complainers should be made public.

[18] In deciding what is a fair and proportionate penalty in the circumstances and balancing all the factors as best we can, we have concluded that no sanction short of suspension from practice would adequately reflect the serious nature of this conduct, the harm caused to the complainers, the need to deter in the future and the damage done to the confidence of the public and the complainers in the standing of the Faculty and its members as persons who must act with discretion at all times. Mr Jackson was Dean of the Faculty at the time and, in that position, he was required to lead by example.

[19] In selecting the appropriate period of suspension we have considered this matter independently from the sanction imposed by the Committee (5 months suspension from practice). The Committee required to select a sanction in respect of the whole of the first head of complaint and we are concerned only with the first part. We have had to examine that conduct and form our own view as to what length of suspension is appropriate in all

the circumstances. Having regard to all the factors mentioned above, we have concluded that suspension from practice for a period of 15 weeks is the appropriate penalty in this case. Although the Committee suspended Mr. Jackson for a period expressed in months, we consider that one expressed in weeks is appropriate and would avoid the period from starting or finishing midweek. That period of suspension from practice will commence on 1 October 2023. It will end 15 weeks thereafter. We delay the suspension to allow Mr Jackson and his Clerk a reasonable time to make the necessary arrangements in respect of his ongoing practice to minimise the impact on those he currently represents.

[20] In relation to publicity, we do not think that the entry in the Faculty of Advocates' register would provide the public sufficient information about the nature of the conduct and the reasons why the Tribunal reached its decisions. Rule 63 allows the Tribunal to order "any additional publicity it thinks fit". We consider it important that there is public access to the full terms of the decisions of the Tribunal in this case so that the background circumstances of the complaint and the Tribunal's reasons for its decisions can be seen. We hope that this will further public understanding of the disciplinary process which the Faculty of Advocates has in place. Accordingly we order that this decision and our decision of 8 June 2023 should be available on the Faculty's website in full.

[21] This decision is the unanimous decision of the Tribunal.

Should either party be dissatisfied with the manner in which this complaint has been dealt with, they have a period of 6 months of the date of this decision to refer the matter to the Scottish Legal Complaints Commission (in terms of <https://www.legislation.gov.uk/asp/2007/5/section/23>), whose contact details are as follows:

Scottish Legal Complaints Commission
Capital Building

12-13 St Andrew Square

Edinburgh, EH2 2AF

Tel: 0131 201 2130

Fax: 0131 201 2131

Email: Enquiries@scottishlegalcomplaints.org.uk