EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122171/2018

Hearing by Cloud Video Platform on 30 June and 1 July 2021

Employment Judge S MacLean

Miss S Houlihan	**Claimant** **Represented by:** **Mr C Edward, Advocate** **Instructed by:** **Mr J McCormack, Solicitor**
WW & J McClure Limited (In Administration)	**First Respondent** **Represented by:** **Mr I Wheaten, Barrister** **Instructed by:** **Mr A Philp, Solicitor**
Mr A Robertson **C/o WW & J McClure Limited**	**Second Respondent** **Represented by:** **Mr I Wheaten, Barrister,** **Instructed by:** **Mr A Philp, Solicitor**
Mr S Moore **Co WW & J McClure Limited**	**Third Respondent** **Represented by:** **Mr I Wheaten, Barrister** **Instructed by:** **Mr A Philp, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that (a) the claimant was a disabled person between 21 October 2017 and 12 June 2018 in terms of section 6 of the Equality Act 2010; and (b) the claimant made disclosure of information which were qualifying disclosures in terms of section 43B of the Employment Rights Act 1996.

REASONS

Introduction

1. This preliminary hearing was conducted remotely by Cloud Video Platform to determine the following issues:

   (a) Whether the claimant had a disability between 21 October 2017 when she pled guilty to professional misconduct and 12 June 2018 (when her employment was terminated) in terms of section 6 of the Equality Act 2010 (EqA).

   (b) Whether in terms of section 43B of the Employment Rights Act 1996 (ERA) disclosures of information made by the claimant were qualifying disclosures.

2. The claimant was present and gave evidence. She was represented by Mr Edward, Advocate who was instructed by Mr McCormack, Solicitor. Mr Wheaton, Barrister represented the respondents. The second and third respondents were present throughout. They did not give evidence.

3. While dealing with preliminary matters Mr Edward mentioned that he understood that the first respondent had gone into administration. Mr Wheaton confirmed the position. He represented the respondents and he said in reality, the claims were against the second and third respondents. None of the parties had informed the Tribunal's office of the appointment of the administrator on 29 April 2021. I referred to the Insolvency Act 1986 section 43(6). No legal proceedings can continue without the consent of either the administrator or the Court.

4. Following an adjournment, I was informed that the first respondent consented to the preliminary hearing continuing. I asked for this to be confirmed in writing. I was assured that it would be. In these circumstances and having the claimant, Mr Edward, Mr McCormack, Mr Wheaton the second respondent and the third respondent present, with their agreement I proceeded on the basis that the administrator had consented to the preliminary hearing continuing and and written confirmation of this was being sent to the Tribunal's office.

The Issues

Disability Status

5. The claimant alleges acts of discrimination from around 21 October 2017 when she says that she was pressurised to plead guilty to professional misconduct to around 12 June 2018 when her employment terminated.

6. The issues that I had to determine were:

   (a) Did the claimant have a mental or physical impairment? The claimant asserts that she had a mental impairment (chronic and severe Adjustment Disorder with depressive symptoms from around 2016).

   (b) Did the impairment cause a substantial adverse effect on the claimant's ability to carry out normal day to day activities?

   (c) Is the effect long term in that it has lasted 12 months; it is likely to last for at least 12 months; or is likely to last the rest of the life of the person affected?

Protected Disclosures

7. The claimant alleges that she made seven disclosures. In relation to each alleged disclosure the issues that I had to determine were:

   (a) Was there a disclosure of information?

   (b) Did the disclosure tend to show, in the reasonable belief of the claimant, one of the matters listed at section 43B(1)(a)–(f) of the ERA?

(c) Was that disclosure in the reasonable belief of the claimant in the public interest. In considering the question of "reasonable belief" I require to consider whether the claimant had a belief (a subjective test) and whether that belief was reasonable (an objective test).

The Law

Disability Status

8. Section 6 EqA defines disability as a physical or mental impairment which has a substantial long term adverse impact on the individual's ability to carry out normal day to day activities.

9. Section 212(1) EqA provides that "substantial" means more than minor or trivial.

10. Schedule 1 Schedule of the EqA gives further details on the determination of liability. For example paragraphs 2(1) provide in relation to long term effects that it is long term if an impairment has lasted at least 12 months, is likely to last at least 12 months or is likely to last for the rest of the life of the person affected. Paragraphs 2(2) provides that if an impairment ceases to have a substantial adverse effect on the person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur. Paragraph (5) that impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are taken to correct it and but for that it would be likely to have that effect.

11. Account must be given to the Guidance on matters to be taken into account in determining the question relating to the definition of disability (2011) (the Guidance) and the Equality and Human Rights Commission's Code of Practice on Employment (the Code).

12. *Goodwin v The Patent Office [1999] ICR 302* provides guidance on how the Tribunal should consider the evidence by reference to four questions. *Pattison v Commissioner of Police of the Metropolis [2007]* ICR 1522 and *Cruikshank v VAW Motorcast Limited [2002] IRLR 24* are authority for when

considering if an impairment has an effect on a claimant's normal day to day activities it is appropriate to consider the effect on the claimant's ability to cope in her job. In *Saad v University Hospital Southampton NHS Trust Education England [2014] UKEAT* the EAT considered the impact of workplace related activities including ability to communicate with colleagues, access the workplace and concentrate in determining whether the day to day impact of the ability to carry out day to day activities.

Protected Disclosures

13. For a disclosure to be protected under the ERA it must be a disclosure of information (conveying facts); be a qualifying disclosure: one that in the *reasonable* belief of the worker making it, that it is in the public interest and tends to show that one or more of the six "relevant failures" has occurred or is likely to occur.

14. The relevant failures are set out in section 43B which includes: that a person has failed, is failing or is likely to fail to comply with a legal obligation (section 43(B)(1)(a); that a miscarriage of justice has been occurred, is occurring or is likely to have occurred (section 43(B)(1)(c)).

15. *Eiger Securities LLP v Korshunova* UKEAT/0149/16/DM Slade J said: ….."the ET should have identified the source of the legal obligation to which the claimant believed Mr Ashton or the respondent were subject and how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more that a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgment the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached."

16. *Blackbay Ventures Ltd t/a Chemistree v Gahir* UKEAT/0449/12 requires identification of which detriments were because of which specific disclosures.

Evidence

17. I heard evidence from the claimant. She was a credible and reliable witness The parties had prepared a joint set of productions to which I was partly referred. Neither the second respondent or the third respondent gave evidence to challenge the claimant. Mr Edward and Mr Wheaten provided outline written submissions on which they addressed me orally.

Facts

18. I have set out facts as found that are essential to my reasons or to an understanding of the important facts of the evidence about the separate issues that I had to determine.

Disability Status

19. The first respondent is a private limited company operating as a firm of solicitors specialising in wills and executries. Before incorporation the first respondent existed as a partnership. The second respondent is managing director and a majority shareholder. The third respondent is a director and shareholder.

20. The claimant is a solicitor enrolled in the Roll of Solicitors on 20 February 1991. For the majority of her legal career, she has worked with the respondents.

21. Around February 2014 the claimant became aware of a complaint by the son of an elderly client. The complaint was investigated by the Law Society of Scotland (the Law Society). Around October 2015 a report was issued recommending the matter be treated as one of unsatisfactory professional misconduct.

22. From around October 2015 the claimant started to suffer from problems sleeping; the intensity varied over time depending on what was happening. She would go to bed, fall asleep. She would then wake multiple times during the night and then get up at a “ridiculous time” but would not be able to do anything. She would pace up and down.

23. The claimant took the complaint seriously. She instructed a solicitor, Mr McCreath. The investigations continued. The claimant went to work. The stress of the investigation, the pressure of her workload and her disturbed sleep took its toll on the claimant. She was emotional and tearful. She had to leave work early on occasions.

24. The claimant has been diagnosed with a chronic and severe adjustment disorder (DSN-5) with depressive symptoms and anxiety symptoms from around 2016 which was continuing at March 2019.

25. Around December 2016 the Law Society decided to instigate internal disciplinary proceedings against the claimant for professional misconduct. The claimant was served with proceedings in January 2017.

26. From early 2017 the claimant would find herself crying at work. The claimant was not coping with the stress of the complaint and heavy workload. On a number of occasions, she was too upset to work and left work early. On one occasion she was upset and went to a local café and did not return to work. The claimant would get up, go to work come home and lie in bed ruminating. She could not concentrate on anything other than work, the Law Society and what had happened in relation to the complaint.

27. By the summer of 2017 the claimant, who lived on her own, was not eating or cooking properly. She started losing weight. She only did household chores when she absolutely had to. She stopped driving. She planned routes so that she would avoid meeting people.

28. The claimant avoided socialising. She lost interest in her usual activities. The claimant stopped attending her book club and withdrew from her mother and sister because she did not feel well enough. The claimant was crying and did not want to been seen that she was not managing.

29. By October 2017 the claimant had obsessive thinking and was distrustful of her colleagues and legal advisers. She felt abandoned. She panicked at the sight of emails and letters. She lacked confidence and had difficulty making decisions.

30. Around 21 October 2017 the claimant went on a prearranged holiday with her mother and sister. The claimant barely slept. She was unable to participate in any activities and was continually tearful. Her mother thought that she might harm herself. The claimant was not functioning. She was barely able to get up each morning and dress.

31. The claimant attended a hearing of the Solicitors' Discipline Tribunal (SSDT) on 30 October 2017. She was overwhelmed with the despair. She was crying on the train journey home.

32. The claimant attended work in early November 2017 but was unable to work. She could not concentrate on her work. She was then absent from work because of her ill health from 9 November 2017 until she was dismissed.

33. The claimant retreated to her bedroom, was unable to get up and avoided the day.

34. The claimant attended a meeting at her solicitor's office on 1 February 2018. The second respondent, the third respondent and their solicitor were also present. The claimant broke down almost immediately. The claimant was crying inconsolably.

35. The claimant could not get out of bed unless forced to do so. She stopped attending to shopping, household chores, socialising and eating. She did not watch television. She was unable to concentrate. She was overwhelmed by negative thoughts and was unable to open mail or answer the telephone.

36. In March 2018 the claimant had to prepare a written script so that she remembered what points she wished to raise at the grievance meeting.

37. On 20 March 2018 the claimant consulted with Dr Gary MacPherson, Clinical Psychologist who advised that in his opinion the claimant experienced a severe Adjustment Disorder with mixed depressive and anxiety symptoms with panic symptoms form around 2016. The condition does not occur overnight but he considered that the onset of the stress and anxiety symptoms were from 2016 and increasing in severity. He recommended Cognitive Behavioral Therapy (CBT).

38. By April 2018 the claimant was so unwell that she had to move in with her elderly parents. She did not get out of bed, do washing or cooking. When the claimant returned home around ten days later her mother continued to cook for her.

39. In May 2018 the claimant began CBT sessions with her community psychiatric service. This was initially for eight sessions to be held every three weeks but was later extended to ten weeks.

40. Around the time of her dismissal in June 2018 the claimant was struggling to get up each day. She was crying. She could not speak or look at people. The claimant shopped at night to avoid meeting people.

41. The claimant continued CBT following her dismissal and was prescribed medication in July 2018 to assist her sleeping.

Protected Disclosures

42. Around 2013 the first respondent employed a small number of solicitors and engaged a large team of non-legally qualified Estate Planning Consultants (the EPC) who worked on a commission basis.

43. Around 28 November 2013 a non-legally qualified EPC who had since May 2011 worked for the first respondent on a commission basis attended a meeting with an elderly client living in a nursing home. The EPC completed a form: an Estate Planning Fact Find about the client containing information about the client's assets, address and indicated that the client had capacity. It did not indicate the basis of that assessment. The Fact Find was marked as received on 29 November 2013 and uploaded to the first respondent's computer system. Email correspondence about the client's health condition was not scanned onto the system by the EPC. On 9 December 2013 the claimant first became aware of the client. She reviewed correspondence prepared by an administrator and a new Will which was being sent to the client for approval. The client was admitted to hospital in December 2013. The EPC arranged for the Will to be signed on 20 January 2014. The client gave amended instructions in relation to the Will that he had just signed. The

claimant became involved. She was aware that the client had been in hospital, there had been a change in instructions and correspondence was being sent to only one beneficiary. The client was discharged from hospital in January 2014. The EPC met the claimant on 29 January 2014 the client signed the Will and protected Trust Deed.

44. Following a complaint to the Law Society and investigations over the course of a number of years, in 2017 the Law Society decided to instigate internal disciplinary proceeding against the claimant for professional misconduct in relation to the supervision of employees acting for her in relation to the preparation and execution of a Will (the Richards case).

45. The claimant instructed the services of William McCreath, Solicitor and Margaret Hughes, Advocate to defend her in the Law Society disciplinary proceedings. The respondents initially fully supported her. The claimant attended the majority of the meetings with the legal representatives alone. The second and third respondents accompanied her when necessary and would leave the meetings when appropriate. The second respondent attended about five times; the third respondent attended about once or twice.

46. On 19 October 2017 the claimant attended a consultation with Mr McCreath and Ms Hughes. The claimant was advised for the first time to consider pleading guilty to professional misconduct. An Article by the second respondent in the Glasgow Herald was cited as being unhelpful to her case. She was told that the second respondent would not make a good witness.

47. The claimant and the second respondent attended a meeting with Mr McCreath on 20 October 2017. The claimant was again advised to plead guilty. It was proposed that an opinion from Senior Counsel be obtained to which the second respondent agreed. After leaving the meeting the claimant said to the second respondent that she was not pleading guilty.

48. The claimant had a long-standing arrangement to go on a cruise with family members between 22 to 28 October 2017. The hearing of the Scottish Solicitors' Discipline Tribunal (SSDT) was fixed for 30 and 31 October 2017.

She relied on the second respondent to cancel the opinion of Senior Counsel and ensure that the case was prepared for the SSDT hearing.

49. The second respondent spoke at some length to Mr McCreath. The second respondent sent an email to the claimant on 21 October 2017 advising that Mr McCreath remained concerned about the risk that the claimant's evidence might not be accepted which would make things worse. The second respondent said that Mr McCreath thought he could agree a soft landing from which she and the first respondent could recover quite quickly. The second respondent said that he would have a consultation with "Bill, Maggie or Lord Davidson or any combination perhaps on Monday but probably Tuesday. Nothing will happen until then. So try to make the best of your holiday. I will keep you advised of all developments good or bad."

50. The claimant's mental health was poor. She felt that if she did not plead guilty to professional misconduct, financial and other support would be withdrawn by the respondents.

51. At the SSDT hearing on 30 October 2017 the claimant withdrew her defence to the complaint and plead guilty. The SSDT pronounced an interlocutor finding the claimant guilty of professional misconduct in respect that she failed to adequately supervise employees acting on her behalf in relation to the preparation and execution of a Will and that she failed to act in the best interests of her client by failing to make or ensure that the appropriate steps were taken to establish her client's capacity to give instructions and prepare a then execute the Will. The claimant was censured and fined.

52. The SSDT's found in its judgment that the first respondent's system was that a solicitor (on this occasion the claimant), was allocated to supervise the EPC.

53. Around 1 November 2017 the claimant returned to work. She met with the second respondent and third respondent to express concerns about the business model and the possibility of further complaints to the Law Society. The claimant believed that if business model was not right for the client in the Richards case then it there was not right for all clients. The second respondent did not accept there needed to be a change in the way of working. The third

respondent said that he was worried that it could easily have been him who was subject to a complaint.

54. The second respondent agreed to a meeting to discuss this on the third respondent's return from holiday some three weeks later. The claimant left the room crying. The third respondent commented to her that the problem lay with the second respondent treating everything as business as usual. The following day the claimant was asked to feature in a photograph opportunity with the Glasgow Herald. The claimant subsequently became unfit for work through illness. The meeting never took place. The claimant did not return to the first respondent's employment.

55. On 11 December 2017 the claimant wrote to the second and third respondent enclosing her latest medical certificate stating that she continued to suffer from work related stress (the Grievance Letter). The letter continued:

*"You are both well aware the strain I have been under for a number of years in regard to the volume of work I am expected to perform, the responsibility I am expected to assume, exacerbated greatly by dealing largely on my own with the complaint from the Law Society. In that regard I appreciate that you have both all along accepted the complaint was not truly directed at me but at the firm and the firm remains responsible for payment of all expenses including the fine imposed. However it is my professional reputation that has suffered, performing the work in accordance with the firm's policies. It is obvious that your last minute change in attitude to the complaint arose from a desire to protect the name of the firm and not me, all at a time when I needed support most. When I attempted to return to work, the day following the tribunal, you Andrew took the view it was business as usual while you Stewart were sh***ing yourself.*

An appeal to the Court of Session is possible albeit expensive and time consuming. I have spoken with the Dean of the Faculty of Advocates. Factors in my appeal would include defective representation by William McCreath and the pressure I was placed under to admit my conduct amounted to

professional misconduct. I shall make a final decision on this when the Judgment is issued and I hope to be feeling stronger."

56. On 14 March 2018 Stephanie Hutton conducted a grievance meeting (immediately followed by a welfare meeting) with the claimant. Ross Anderson took minutes (the Grievance Meeting Minutes). Craig Jenkin accompanied the claimant. They were all employees of the first respondent. The grievance was not upheld.

57. The claimant wrote to the first respondent appealing against the grievance decision issued by Miss Hutton on 21 March 2018 (the Grievance Appeal Letter).

Disclosure One

58. The Grievance Meeting Minutes record that the claimant said that she was not the supervisor of the Richards case. Her capacity was merely that of a 'checker'. She likened her role to that of Ms Hutton, Mr Jenkin and Mr Anderson and others. The claimant was to check that the Will matched the instructions of the Fact Find. Checking capacity was the role of the second respondent who was responsible for raising any concerns he had with the EPC. The second respondent was responsible for checking the Richards' Fact Find and for the supervision of the EPC. The third respondent had approved the Disposition and had also checked the Fact Find and failed to raise concerns.

59. In the Grievance Appeal Letter the claimant stated,

> *"5.* Andrew Robertson had sight of the Fact Find at the outset. He always saw the Fact Finds. The fact that there is no evidence on the file that Andrew saw the Fact Find simply demonstrates that he did not record anything. He worked that way. My notes were always in the file. There is an acknowledgement of the Fact Find in the file. This was issued by his team. It was issued by a trainee under his supervision. I am not sure if he is now denying this was sent or it was sent without his knowledge or without his permission. Additionally, Andrew Robertson has

confirmed on a number of occasions that he was dealing with the IHT but again by his own admissions is not recorded. Nothing can be taken from the fact that he did not record his own dealings on the file. In preparation for the Proof he contacted the IFA who at that time worked for the firm and who Andrew Robertson had instructed to see the client and the signing appointment with Colin Yule. I am not sure if he is now denying this? Andrew Robertson was the overall supervisor in each case. The EPCs and therefore Will and Power of Attorney and Trust cases were all supervised by him. He looked at each and every Fact Find, reviewed it, sent it back with comments or allowed it to be loaded on to the system. It is entirely incorrect to say he was not involved in this case at the outset.

6. Stewart Moore's role was as a document checker – as was mine. He had no less overall responsibility than me for the file. He was checking a Disposition – a document for a client to sign – and read against the background on the file. Stewart Moore should have ensured that he was satisfied re capacity if he was not allowed to rely upon Andrew Robertson having already addressed and checked it."

Disclosure Two

60. The Grievance Meeting Minutes record that the claimant said that she felt that Mr McCreath, the second and third respondents contrived to have her plead guilty.

61. In the Grievance Appeal Letter the claimant stated,

"7 and 8 My change of plea; it was in Andrew Robertson's phone call to me on Saturday 21st and his email to me copying in Stewart Moore which says,

"I have spoken at some length with Bill today…

Bill remains concerned that there is a risk if we go ahead that your evidence might not be accepted and that would make things worse. He thinks he could agree with the "soft landing" from which you and we

could recover quite quickly. I will have a consultation with Bill, Maggie, Lord Davidson or any other combination…"

This is clear pressure being brought to bear and also evidence he was having meetings behind my back with those supposedly advising me alone on the complaint against me which he is not entitled to. My advisors were appointed to deal with my interests. The firm's interests were obviously a separate matter. Clearly he was involving the firm's interests with my advisers – making his priorities clear. My advisers made no preparation for proof despite my instructions to the contrary. Bill McCreath's withdrawal (at the eleventh hour) was extremely prejudicial to my case. Both he and Andrew Robertson knew that and it was used as a tool to pressure me into pleading."

Disclosure Three

62. In the Grievance Letter the claimant stated,

"An appeal to the Court of Session is possible albeit expensive and time consuming. I have spoken with the Dean of the Faculty of Advocates. Factors in my appeal would include defective representation by William McCreath and the pressure I was placed under to admit my conduct amounted to professional misconduct."

63. The Grievance Meeting Minutes record that the claimant said that she had reflected on the idea of pleading guilty and had decided not to do so. She thought that it would be better for the Tribunal to hear all the facts of the case and make a decision. She asked Mr McCreath to prepare the second and third respondent as witnesses. She saw no merit in obtaining counsel's opinion. The claimant realised during her holiday and on her return that the second and third respondent had not prepared for Proof and had instructed counsel for an opinion. She felt her well being had suffered as a result of being pressured to plead guilty.

64. The claimant referred to being pressured in her Grievance Appeal Letter as narrated above (paragraph 61).

Disclosure Four

65. In the Grievance Letter the claimant referred to defective representation by Mr McCreath as narrated above (paragraph 55).

Disclosure Five

66. The claimant is recorded in the Grievance Meeting Minutes as stating when she returned to work the second respondent said that no changes had been made to the practices of the firm and that she made her feeling on this "forcefully" known". The claimant said that the second respondent said that it was "business as usual" and at this point the third respondent shouted that the second respondent had to deal with this as it could quite easily have been him (the third respondent). The second respondent eventually conceded that they would meet up to discuss this when the third respondent returned from holiday. The claimant was aggrieved that she was expected to work in the same fashion as before and that she was expected to appear in a photo for the Glasgow Herald.

67. When asked to clarify the points the Grievance Meeting Minutes record the claimant confirming that the second respondent had specifically used the words "business as usual" and that the third respondent should across the room, "I'm sh****ng myself as it could have been me". The second respondent initially refused to entertain and notion that the firm policy had to change but eventually agreed to a meeting when the third respondent was back form holiday.

68. In the Grievance Appeal Letter the claimant stated,

> "9. The discussion was not lengthy and it reached no conclusions. I insisted that the outcome of the tribunal meant that no one was checking these fact finds properly as this was not the job of the checkers. At that time Stewart Moore became agitated. He commented it could have been him who had been subjected to prosecution. The unspoken part was that we had all been reliant on whoever was responsible for checking the fact finds as they came in and in this instance it was Andrew Robertson. He

> was not willing to accept that or any changes to the system should be made. I persuaded him to have another meeting upon Stewart Moore's return from holiday but he insisted nothing was to change until then. Stewart Moore commented to me that our position lay in the fact Andrew Robertson was threatening everything as "business as usual". He was concerned that no changes were to be made."

Disclosure Six

69. The Grievance Meeting Minutes record the claimant stating that the second respondent had a conversation with her solicitor without her authority. He also said that he would deal with "Bill, Maggie and Lord Donaldson".

70. In the Grievance Appeal Letter the refers in relation to the prosecution to her being the client, not the firm. She attended the majority of the meetings with legal representatives about the prosecution alone. The second and third respondents accompanied her when necessary and would leave the meeting when appropriate. The second respondent attended about five times; the third respondent about once or twice. The claimant wrote, "This did not prevent them from seeking meetings outwith my presence". Later in the Grievance Appeal Letter the claimant details this as narrated above (paragraph 61).

Disclosure Seven

71. In the Grievance Appeal Letter the claimant narrated her concern about the fact-finding process. This is set out above (paragraph 68)

Discussion and deliberations

Disability Status

72. The claimant was in my view a credible and reliable witness. She gave her evidence in a dignified manner even though the preliminary hearing was conducted remotely by video with everyone present having their cameras switched on.

73. I did not understand the respondents to be suggesting that the claimant was not genuinely suffering from stress but that this was a reaction to difficulties at work rather than a mental impairment.

74. The first question is whether or not the claimant had an impairment either physical or mental. It was agreed that the relevant period was October 2017 to June 2018.

75. Mr Edward asserted that she had a mental impairment (chronic and severe Adjustment Disorder with mixed depressive, anxiety and panic symptoms). He referred to the examination by Mr Macpherson in March 2018; the claimant's GP records referring to the claimant's ill health up to and beyond her dismissal; and the claimant's impact statements describe ill mental health beyond her dismissal.

76. Mr Wheaton referred to the fit notes provided by the claimant for "work related stress". He accepts that Mr Macpherson's medical diagnosis was an Adjustment Disorder but that is almost entirely attributable to work related stress. Mr Wheaton said that this was a temporary impediment and in removing her from the workplace the claimant has no disability.

77. I appreciated that stress is not a mental illness or disability. I accepted that initially the claimant's stress was work-related because it arose out of an investigation by the Law Society. While this dominated the claimant's thoughts the claimant's stress-related illness went beyond an adverse reaction to workplace circumstances as the claimant had depressive and anxiety symptoms and had difficulty copy with everyday matters. I was satisfied that the claimant had a mental impairment.

78. The second question is whether this impairment caused a substantial adverse effect on her ability to carry out normal day to day activities. Mr Edward referred to the claimant's evidence and Mr Macpherson's report which Mr Edward said were substantial adverse effects of the claimant's normal day to day activities. In contrast Mr Wheaton said that the claimant had not indicated how she was unable to carry out her day-to-day activities even during the relevant period. He referred to all the things that the claimant was able to do:

boat trips with Mr Watson to whom she spoke on the telephone; she was keeping busy as a form of interrupting negative thinking; she was able to do her shopping and did things when she had to; she was able to engage with the respondents in an internal grievance, prepare notes for meetings and appeal the decision. Even if the claimant was unable to carry out her day- to-day activities for a short period of time due to the acute stress of the proceedings.

79. I am satisfied that the effect was both adverse and substantial (in the sense of being more that than minor or trivial). While the claimant attended work, instructed her representatives; participated in her the internal grievance and disciplinary procedures these activities related to the complaint about which she had become consumed. The claimant's evidence of the effect of the impairment I accepted. She had difficulty sleeping, not eating or cooking properly; not driving and avoiding socialising. Collectively I considered this to be more that minor or trivial. Taking all the evidence into account I consider that the claimant has proved this issue.

80. The next question was whether the effects have been long term. Mr Wheaton argued if the claimant was unable to carry out her day- to-day activities it was or a short period of time due to the acute stress of the proceedings. I did not agree. The claimant has been diagnosed with Adjustment Disorder with onset from 2016. While the claimant's difficulty sleeping fluctuated to an extent depending on what was happening, I concluded that there was increasing severity from early 2017. The claimant spoke her anxiety over the proceedings and the consequences for her. The effects continued beyond the termination of her employment despite CBT and medication. I was satisfied that this aspect of the definition had also been met.

81. I concluded that the claimant had discharged the onus on her to prove that she falls within the terms of section 6 of the EqA at the relevant time, having regards to the Guidance and case law. I therefore concluded that she was a disabled person at the relevant time.

Protected Disclosure

82. There were seven alleged disclosures which I considered separately.

Disclosure One

83. I agreed with Mr Edward that at the Grievance Hearing and in the Grievance Appeal Letter the claimant disclosed that the second respondent saw the Fact Finds, reviewed them, sent them back with comments or allowed them to be uploaded on the system. He had overall supervision of the EPCs. The third respondent's role was as a document checker and he should have checked capacity if he was not allowed to rely on the second respondent having checked it.

84. I then considered if the facts disclosed tended to show, in the reasonable belief of the claimant, one of the matters listed at section 43B(1)(a)–(f) of the ERA.

85. Mr Edward said that the claimant believed that there was no protection for clients. This was a necessary corollary of the finding by the SSDT. Her evidence was that clients were not being cared for properly. She stated, "if it was not right for this client it was not right for all". There were breaches of a legal obligation and breach of contract with a client to safeguard his interests. The breach of obligation to a client is also likely to be professional misconduct. The claimant's evidence was that SSDT had already found that a failure to supervise was professional misconduct. Given those findings the claimant's belief was reasonable. In addition, the Law Society of Scotland Practice Rules 2011 state that a solicitor must act in the best interests of a client. Failure to do so may be treated as professional misconduct.

86. Mr Wheaton said that this was at odds with the fact that the claimant pled guilty to the charge of failing to properly supervise in the Richards case; the Fact Find; and failure to pick up on the red flag issues identified at the SSDT hearing. The claimant's evidence was that she was entitled to rely on the fact that the second respondent had checked the Fact Find. The claimant could not possibly believe that assertion. As a qualified solicitor she had a duty to the client at the point where any concerns that she had or ought to have had about the contents of the Fact Find. This allegation is simply seeking to shift

the blame having already pled guilty to failing to supervise the file as a supervising solicitor.

87. I considered that the facts disclosed by the claimant showed that she believed that the second respondent supervised the EPCs and was responsible for checking all Fact Finds before they were uploaded on to the operating system. The claimant disagreed with the SSDT's finding that in the Richards case she supervised the EPC during the Fact Find. She had no involvement in the Fact Find. Her involvement was after the Fact Find was uploaded on to the operating system. She supervised the preparation and execution of the Will. The third respondent's involvement was with the Disposition. The second respondent dealt with inheritance tax. The claimant believed that this showed that there was a breach of an obligation to safeguard clients' interests which is likely to be professional misconduct.

88. The claimant knew that she was not involved until 9 December 2013 after the first meeting with the client and the Fact Find was uploaded onto the operating system. It was in my view reasonable for her to believe that she was not supervising the EPC at least until the Fact Find was uploaded onto the operating system. Given the findings of the SSDT the claimant had reasonable grounds for believing that there was a breach of an obligation to the client to safeguard his interests and failure to supervise as the Fact Find was uploaded on to the operating system without checking what assessment had been made about the client's capacity.

89. I considered that the disclosure concerned the supervision (or lack of) by solicitors of non-legally qualified EPCs during the Fact Find process. This affected not only the claimant, but other solicitors engaged by the first respondent relying on the Fact Finds and potentially other clients. I considered that disclosure one was in the public interest and a qualifying disclosure.

Disclosure Two

90. Mr Edward said that at the Grievance Meeting and in the Grievance Appeal Letter the claimant disclosed information that Mr McCreath, the second respondent and the third respondent contrived to have the claimant plead

guilty. I agreed that the claimant disclosed facts about the consultation on 19 October 2017 and the subsequent events that lead to her pleading guilty at the SSDT hearing.

91. I then considered if the facts disclosed tended to show, in the reasonable belief of the claimant, one of the matters listed at section 43B(1)(a)–(f) of the ERA.

92. Mr Edward referred to the claimant's evidence that she believed that a finding against her by the SSDT was a miscarriage of justice since she had pled guilty to something that was not her responsibility. She considered that the SSDT had heard the wrong facts and circumstances; and she was being blamed for something she had not done. She believed that Mr McCreath, the second respondent and third respondent met behind her back. Mr McCreath had been engaged by her for two years and there had been no hint of the claimant not defending the complaint. There was no new evidence. Given the evidence on the operating system of the first respondent is reasonable to believe that a miscarriage of justice may have occurred.

93. Mr Wheaton argued that this allegation was not sustainable because the claimant had discussions with Mr McCreath on 19 October 2017 indicating that the second respondent and the third respondent were not present. It was irrational on the claimant's part to assert that there was a conspiracy behind her back by Mr McCreath and the respondents to pressure her into pleading guilty if she felt that she was not guilty. She asserts that there was a miscarriage of justice. However, it was entirely within her gift to plead guilty or not guilty. There was no miscarriage of justice that could have taken place. The claimant was unable to indicate which breach of obligation she felt there was, or she just felt it was wrong. This does not meet the *Eiger* test. Whilst the claimant did not identify the precise provision, she needed to provide more than a feeling that things were simply wrong.

94. I did not doubt that the claimant believed that Mr McCreath and the respondents considered by mid-October 2017 that she should plead guilty to professional misconduct and there were discussions taking place at which

she was not present. I had difficulty understanding why the claimant considered that they were contriving to have her plead guilty and that this tended to show that there had been a miscarriage of justice. The claimant appointed Mr McCreath. It was he who instructed Ms Hughes, Advocate. They advised the claimant to plead guilty in October 2017 at a meeting which she attended without the respondents. It was the claimant who informed the respondents of that advice. There was no suggestion that before that advice was given the claimant believed the respondents to have been "contriving" with Mr McCreath. It was the respondents who were willing to obtain an opinion from Senior Counsel. The claimant was then on holiday and it was she who asked the second respondent to be involved. The claimant attended the SSDT hearing in October 2017. I was not satisfied that the claimant reasonably believed that Mr McCreath and the second respondent contrived to have her plead guilty and that was a miscarriage of justice. Disclosure Two was not a qualifying disclosure.

Disclosure Three

95. It was accepted that at the Grievance Meeting the claimant said that she was pressed into pleading guilty and in the Grievance Appeal Letter the claimant refers to being pressed into pleading guilty. I was satisfied that there was a disclosure of information.

96. I then considered if the facts disclosed tended to show, in the reasonable belief of the claimant, one of the matters listed at section 43B(1)(a)–(f) of the ERA.

97. Mr Edward referred to the claimant's evidence that she believed that the finding of the SSDT was a miscarriage of justice since she had pled guilty to something that was not her responsibility. The SSDT had heard the wrong facts and circumstances. She was being blamed for something she had not done. The claimant believed that there had been a miscarriage of justice because she considered she had been pressurised to plead guilty. She believed she had been made a scapegoat and that her mental state was so bad that she did not care what she was pleading guilty to. This is backed by

the terms of her medical report. She stated at the time of the SSDT hearing in October 2017 that she was overwhelmed with despair.

98. Given that the evidence on the first respondent's operating system, Mr Edward said that it was reasonable to believe that a miscarriage of justice may have occurred. The claimant's evidence was that allowing a miscarriage of justice was professional misconduct. That was clearly her belief. Also, a solicitor who pressurises a person into pleading guilty in order to protect their own interests would plainly be guilty of professional misconduct. In addition, the Law Society of Scotland Practice Rules 2011 states that a solicitor must be trustworthy and act honestly at all times. Failure to do so may be treated as professional misconduct.

99. I was satisfied that when making the disclosure the claimant felt pressured by Mr McCreath and the respondents to plead guilty. The advice was given in close proximity to the SSDT hearing when the claimant was going on leave abroad. She believed that the respondents would withdraw financial and other support. It was however she who instructed Mr McCreath that she was pleading guilty and she attended the SSDT hearing to make the plea.

100. I was not satisfied that the claimant had a reasonable belief that this was a miscarriage of justice or a breach of a legal obligation. The legal advice was from an experienced solicitor and advocate appointed by her. There was nothing to suggest that either Ms McCreath or Ms Hughes were protecting their own interests or that of the respondents. The respondents were willing to obtain an independent opinion from Senior Counsel. Indeed, if there were reasonable prospects of a not guilty verdict that would have been a preferrable outcome to the claimant and the respondents. I concluded that Disclosure Three was not a qualifying disclosure.

Disclosure Four

101. It was accepted that in the Grievance Letter the claimant referred to factors in her appeal would include defective representation by Mr McCreath.

102. The claimant's evidence was that she believed that Mr McCreath was meeting the second respondent behind her back and that Mr McCreath was acting to protect the first respondent and not her. She said that this amounted to defective representation and professional misconduct.

103. While I was satisfied that this was what the claimant believed I was not convinced that the belief was reasonable. As indicated above the claimant instructed Mr McCreath. She was also represented and advised by Ms Hughes. They advised the claimant about her prospects of success before the SSDT hearing. The claimant involved the second respondent at the meeting with Mr McCreath the following day. She also confirmed to the second respondent that he was to cancel the opinion of Senior Counsel and prepare for the SSDT hearing. The second respondent told her about the discussions he had with Mr McCreath around 21 October 2017. The claimant's availability to speak to Mr McCreath was then restricted. While I understood the reasons why the claimant went on annual leave it was her decision to do so knowing the proximity to the SSDT hearing. While the timing of the advice was unfortunate, I did not consider that the claimant had reasonable grounds for believing that Mr McCreath's actions amounted to professional misconduct. I therefore concluded that Disclosure Four was not a qualifying disclosure.

Disclosure Five

104. Mr Edward said that at the Grievance Meeting and in the Grievance Appeal Letter the claimant said that she was expected to continue working in a manner which had been criticised by the Law Society.

105. I was satisfied that the claimant said that there had been no changes to the practices when she returned to work after the SSDT hearing and despite her concerns the second respondent said that it was business as usual. The third respondent felt said that the second respondent had to deal with it. He felt that it could have been him in the claimant's position. The second respondent was persuaded that a meeting should be arranged when the third respondent returned from holiday in three weeks. In the Grievance Appeal Letter the

claimant referred to no one checking the Fact Finds properly as it was not the job of the checkers and that the solicitors were reliant on whoever was responsible for the Fact Finds when they came in. This was disclosure of information.

106. Mr Wheaton argued that the allegation of the claimant being expected to continue to work in a manner which had been criticised by the Law Society is not one that the claimant could have reasonably held nor was it any breach of a legal obligation by working in this way. Mr Edward said this was disclosure of information which the claimant believed tended to show that there was no protection for clients and there was a breach of legal obligation to clients.

107. I accepted that the claimant was worried about the second respondent's response to her concerns about the business model following the SSDT hearing. I considered that she believed that "business as usual" would mean that clients would be exposed and not care for properly. From the claimant's evidence the third respondent was also concerned that it could have been him who had been prosecuted as he had relied on the Fact Find. The issue appeared to be a need for clarity about who was actually responsible for supervising EPCs and in particular supervising and checking the Fact Find before it was uploaded to the operating system. The second respondent's response was that there should be no change. It was agreed that a meeting to discuss this would take place on the third respondent's return form holiday. The current arrangements continued and the claimant was asked to be involved with an article in the Glasgow Herald.

108. While a meeting was to take place in three weeks this was for further discussion; the second respondent had not accepted that a change was required. Meantime the claimant was to continue working as before. I was satisfied that in these circumstances that the claimant's belief that she was expected to continue working in a manner which had been criticised by the Law Society was reasonable.

109. The disclosure of information concern actions or inactions by practicing solicitors. The behaviour disclosed is of the nature where it had actually

affected the first respondent's clients and had the potential to affect future clients. The claimant's belief that the disclosures of the behaviour of solicitors were in the public interest is a reasonable belief. It is a public interest in the making of such disclosures.

110. I was therefore satisfied that this (disclosure five) was a protected disclosure.

Disclosure Six

111. I was satisfied that in the Grievance Appeal Letter the claimant disclosed that the second respondent met Mr McCreath without being entitled to.

112. The claimant said that the second respondent had met with Mr McCreath behind her back without her consent or knowledge to protect the first respondent. She felt that she had been made a scapegoat. Mr McCreath was instructed to represent her and not the respondents. The second respondent had been given instructions to pass to Mr McCreath. She stated that the second respondent had an obligation not to speak to her solicitor without her consent. The second respondent knew that Mr McCreath had a duty of confidentiality to her. He also knew that Mr McCreath had a conflict of interest.

113. Mr Edward argued that those beliefs amounted to a reasonable belief of professional misconduct. The second respondent is likely to have breached the implied term that an employer will not act in such a way as to breach the trust and confidence of an employee. In addition, the Law Society of Scotland Practice Rules 2011 state that a solicitor must be trustworthy and act honestly at all times and failure to do so may be treated as professional misconduct. The claimant had in the circumstances a reasonable belief that the second respondent was in breach of that duty.

114. Mr Wheaton said that this was an allegation that the claimant could not possibly have believed in given that she gave instructions to Mr McCreath to speak to the second respondent while she was on holiday to have Mr McCreath proof the witnesses. It was difficult to see how the claimant could complain that the second respondent spoke to Mr McCreath without being entitled to do so. In cross examination the claimant said that the legal

obligation that was breach was a fiduciary obligation owed to an employee by an employer. She who was not able to say where this obligation came from. This is another matter she felt was just wrong.

115. As indicated above I considered that while the claimant believed that the second respondent was meeting Mr McCreath behind her back I was not convinced that it was reasonable for her to believe that he was doing so without her knowledge and consent; that there was professional misconduct or a breach of a duty of trust and confidence. The second respondent had attended a meeting with the claimant and Mr McCreath on 20 October 2017. The claimant was going on annual leave; she left the second respondent to progress matters the preparation for the hearing in her absence. He informed the claimant by telephone and email of his discussion on 21 October 2017 with Mr McCreath. The claimant did not preclude the second respondent from contacting Mr McCreath while she was on holiday. I was not satisfied that this was a qualifying disclosure

Disclosure Seven

116. In the Grievance Appeal Letter the claimant said that the outcome of the SSDT was that no one was checking the Fact Finds properly as this was not the job of the checkers.

117. The claimant said that she believed that there was no protection for clients and was worried that nothing was being done to change that as a result of a finding of guilt and that everyone was being expected to work in the same way. She said that at a meeting the second respondent said it was business as usual. He asked her to appear in an article in the Glasgow Herald about the system of work. I considered that this was a disclosure of information about the breach of legal obligations for a solicitor to act in the best interests of their clients.

118. Mr Edward argued that the claimant's belief that there was a breach of legal obligations was reasonable. The SSDT had already found a failure to supervise was professional misconduct. That was a failing of the first respondent's system of work which was not going to change. Given the

findings of the SSDT that belief was reasonable. Also the Law Society of Scotland Practice Rules 2011 state that a solicitor must act in the best interests of a client and that failure to do so may be treated as professional misconduct.

119. Mr Wheaton said that the allegation that no one was performing fact finding properly resulting in a likely breach of legal obligations cannot be one that is reasonably believed. The claimant's evidence was that the second respondent completed checks on all the Fact Finds. This was undermined by the claimant's own solicitor giving mitigation to the SSDT saying that he had seen the training manual for the first respondent and was assured that all relevant responsibilities upon the staff whether they were solicitors or not. Mr McCreath had also stated that there was no risk of repetition of the misconduct on the claimant's behalf. The claimant could not reasonably believe that the assertion that nobody was completing fact finding properly was true.

120. I was satisfied that the claimant believed that the second respondent (or a trainee under his supervision) looked and reviewed the Fact Find prepared by the EPC in the Richards case. I was also satisfied that the claimant believed that the second respondent saw, reviewed or commented on every Fact Find although he did not record this on the file before they were upload on the operating system. The claimant believed that the solicitors checking documentation once the Fact Finds were uploaded on the operating system proceeded on the basis that the EPCs had been supervised in this task.

121. I then considered whether this belief was reasonable. During the SSDT hearing Mr McCreath assured the SSDT that there would be no repetition of the misconduct on the claimant's behalf. The claimant met with the second respondent and third respondent to discuss her concerns about the first respondent's work practices. She knew that she did not supervise the Fact Finds. From what the claimant said the third respondent had concerns about his position as he too relied on the Fact Finds. In the absence of any reassurance and the position adopted by the second respondent I considered that the claimant's belief was reasonable.

122. The disclosure of information concern actions or inactions by practicing solicitors engaged in what were or likely to be matters amounting to professional misconduct and breaches of obligation towards the clients. The behaviour affected current clients and future clients and it could affect other solicitors. The disclosure of such behaviour was therefore in the public interest. The claimant's belief that the disclosures of the behaviour of solicitors were in the public interest was a reasonable belief.

123. I was therefore satisfied that this (disclosure seven) was a protected disclosure.

Employment Judge: Shona MacLean
Date of Judgment: 31 August 2021
Entered in register: 03 September 2021
and copied to parties