

**BEFORE AN APPEAL PANEL
OF THE COUNCIL OF THE INNS OF COURT**

**On appeal from a decision of
an Independent Decision-making Panel**

In the matter of an administrative sanction

MR JON HOLBROOK

Appellant

and

BAR STANDARD BOARD

Respondent

DIRECTIONS

1. The Appellant, Jon Holbrook, by email dated 27 October 2021 and supporting skeleton argument dated 26 October 2021, seeks the directions of the BTAS Directions Judge in anticipation of his appeal hearing currently listed on 26 November 2021.
2. The matter was referred to me on 12 November 2021.
3. I have been assisted by the written skeleton of the Appellant and the skeleton argument of Mr Auburn QC dated 10 November 2021 on behalf of the BSB, together with oral submissions from both the Appellant and Mr Auburn by remote hearing on 18 November 2021.
4. The Appellant's Notice seeks directions as follows:
 - a. That the Appellant has permission to rely upon the attached Amended Notice of Appeal (which includes an additional 4th ground).
 - b. That the BSB files and serves a fully pleaded Reply to the Amended Notice of Appeal by 4pm on 17 November 2021.
 - c. That the BSB discloses all correspondence between it and BTAS relating to this appeal by 4pm on 17 November 2021.
 - d. That the final hearing on 26 November 2021 is to be in public.
5. In the event, BSB has conceded that point 4.a. may be argued at the Appeal hearing; Mr Holbrook has conceded that Mr Auburn's skeleton argument is sufficient to identify the case against him and so no further direction under 4.b. is needed.

6. This Appeal arises from the decision of the Independent Decision Making Panel, notified to the Appellant on 9 August 2021, to impose an administrative sanction (warning) and a fine of £500 upon the Appellant in relation to a single tweet out of a number which had been the subject of complaint, the IDMP finding that that single tweet 'was likely to diminish the trust and confidence that the public place in you or the profession and that there was therefore evidence of a breach of CD5 of the Handbook.'
7. The Appellant appealed that sanction by notice dated 5 September 2021.

Relevant Rules

8. BSB Handbook Part 6 Definitions:
 - a. 'Administration Sanction' means the imposition of an administrative warning, fixed penalty fine or other administrative fine up to the prescribed maximum, or any combination of the above in accordance with Section 5.A.
 - b. 'Applicable person' means persons who were unregistered barristers or BSB regulated persons at the time of the conduct complained of (including, for the purposes of Part 5 of the Handbook only, persons who would have fallen within the definition of BSB regulated persons but for the fact that, at the time of the conduct complained of, they had their authorisation or licence suspended or revoked, or were subject to a sentence of suspension or disbarment, or were subject to a disqualification order (as the case may be) that has subsequently been overturned on appeal).

BSB Handbook Part5: A3

9. rE22.3 - Where an allegation has been referred to an Independent Decision-Making Panel under rE19.5 the Independent Decision-Making Panel has the power to decide that, on the evidence before it, the conduct alleged did constitute a breach of the Handbook (on the civil standard of proof) and that the breach should be dealt with by an administrative sanction.
10. rE25 - In exercising its powers under Section 5.A, the Commissioner or an Independent Decision-Making Panel must have regard to the Bar Standards Board enforcement strategy and any published Bar Standards Board policy and guidance that appear to be relevant.
11. rE26 - Pursuant to rE19.3 and rE22.3 above, the Commissioner or an Independent Decision-Making Panel may impose an administrative sanction on an applicable person where there is sufficient evidence on the balance of probabilities of a breach of the Handbook by that applicable person.
12. rE27.1 - The Commissioner or an Independent Decision-Making Panel may only impose an administrative sanction on an applicable person pursuant to rE26 where the Commissioner or an Independent Decision-Making Panel considers that to impose an administrative sanction is proportionate and sufficient in the public interest.
13. rE28 - In determining the level of administrative sanction to be imposed, the Commissioner or an Independent Decision-Making Panel must have regard to any published Bar Standards Board policy that appears to the Commissioner or an Independent Decision-Making Panel to be relevant.

14. rE29.1 - The maximum level of a fine which can be imposed by the Commissioner or an Independent Decision-Making Panel under rE19.3 and rE22.3 is £1,000 (one thousand pounds) where the fine is to be imposed on an applicable person who is not a BSB entity.
15. rE30 - Any decision to impose an administrative sanction will be recorded and may, where appropriate, be considered for continued monitoring and supervision but will not be disclosed to any third parties except in accordance with Section A.7 of these regulations.

BSB Handbook Part 5: A7

16. rE63 - The Bar Standards Board must keep reports and allegations assessed or investigated under these regulations confidential. The Bar Standards Board must not disclose the fact that a report exists, or details of the report or of its treatment as an allegation or otherwise, or of its disposal save as specified in this Section 5.A, or as otherwise required by law.
17. rE64 - Disclosure may be made:

.1 for the purpose of the Bar Standards Board's regulatory assurance, supervision or authorisations functions; or

....

.4 where the applicable person consents; or

.....

DETERMINATION OF ISSUES RAISED

Proposed Direction 4.c.

18. The Appellant seeks disclosure of all correspondence between the BSB and BTAS. The basis of this application is that in correspondence between BSB and the Appellant the BSB has used the word 'advised' in relation to its contact with BTAS [Holbrook skeleton argument dated 26 October 2021 para 9]. The BSB use of the word 'advised' by BSB is unhelpful language. In context, it is to be properly understood to mean 'informed' or 'told' in the sense of passing over relevant information to assist the BTAS Administration Officer to make the necessary arrangements for a panel to be appointed to determine the issues in the case. BTAS is a properly established and wholly independent Tribunal. BTAS is wholly independent from BSB. BSB has no power or authority to advise BTAS in any sense of giving advice as to what decisions to make or steps to take in this case or any other. BTAS has no locus in terms of the original IDMP decision. BTAS is wholly separate to and independent from the IDMP Panel. The BTAS Panel that has been appointed to hear this Appeal is properly constituted and will make its own independent decision after a full rehearing of the issues *inter partes*. There is absolutely no question of the BSB acting in any advisory capacity to BTAS. The poor use of language is no basis to order disclosure of all routine administrative communications between BSB and BTAS as to the making of arrangements for the Appellant's appeal hearing. Proposed Direction 4.c. is refused.

Proposed Direction 4.d.

19. The Appellant applies to have the final hearing of his appeal heard in public. In making his submission, he relies upon on Article 6 and the Civil Procedure Rules, r39. For the reasons

below, I do not have to determine whether or not either of those provisions are applicable to these proceedings and it can be left over for full argument before the Appeal Panel.

20. Counsel for the BSB points to the policy reasons for the default position that administrative sanction cases and any consequential appeals to be heard in private. It is in the nature of administrative sanction cases that they are at the lower end of the regulatory process and primarily non-disciplinary in nature. The primary function of such sanctions are to ensure future compliance with professional obligations and duties rather than punishment and any directly punitive elements to the sanction are kept within strict and low limits. These sanctions are not such as to be career ending for a barrister. Inevitably therefore a barrister that falls foul of such a sanction may wish to continue in his/ her professional career and has an interest in the publicity for any such finding to be minimal. As the process at first instance is of a less formal nature, by way of additional protective right for any barrister who is sanctioned at this level, there is an unfettered right of appeal and any appeal hearing takes the form of a full rehearing of the case. Again, any barrister who is dealt with in such a manner, whether winning or losing the appeal, is likely to want to keep any publicity relating to the matter to a minimum so that any improvement to his/ her working practices can be made without adverse impact upon his/ her professional reputation. The BSB submits that to allow any appeal of this type to be heard in public risks fettering future barristers subjected to administrative sanction from exercising his/ her appeal rights for fear of adverse publicity. The BSB position extends this point to a blanket policy for all cases at this level and in argument, Mr Auburn adopted the position that though it could not be said that no administrative sanction case should ever be heard in public, he could not postulate an example of one which might cross the threshold for a public hearing.
21. The appellant in this case does not wish to avail himself of confidentiality. Indeed, as he wishes to exercise his perceived political rights of free expression the Appellant positively seeks the publicity of his hearing.
22. A3 rE30 and A7 rE63 sets out the basis of the duty to confidentiality. rE30 is derived from that section in the rules that deals with administrative sanction and expressly identifies section A7 as the basis/ criteria for decisions on confidentiality. A7 rE64 sets out those factors which permit the BSB to go outside the confidentiality default position. A7 rE64.4 foresees a removal of confidentiality where an applicable person consents. There are no other provisions, express or implied that imposes an overriding duty of confidentiality to administrative sanctions cases that matches the policy adopted by the BSB.
23. The Appellant in this case has clearly consented to the removal of confidentiality as he is entitled to do within the rules.
24. In any event, confidentiality has been breached by the original complainant in the matter and by the Appellant after the first instance decision. To that extent, the mischief that the BSB is concerned to protect against has already suffered from extensive reporting of these proceedings in the legal and national press. Little can be achieved by seeking to keep the appeal hearing in private where both complainant and Appellant seem highly likely to reveal the appeal decision publicly in any event.
25. The concern of the BSB re future Barristers is a matter for the BSB to address as it sees fit. A simple measure would be an addition to the explanatory notes sent to a potential appellant that the default position of any appeal is a preservation of confidentiality unless the barrister him/ herself chooses to waive it.

26. The rules provide for an Appellant to consent to publicity. This appellant does consent. His appeal shall be heard in public. BTAS will make the necessary arrangements.

DIRECTIONS

27. The Appeal Hearing in the case of Jon Holbrook, case no: 2021/4441/A, listed on 26 November 2021 shall be heard in public.

HHJ Jonathan Carroll
Chair, Bar Tribunal Service.

19 November 2021