SRA v Ryan Beckwith and the regulation of the private lives of solicitors

17 February 2020

In October 2019, the Solicitors Disciplinary Tribunal (SDT) upheld professional misconduct allegations against Mr Ryan Beckwith, an ex-magic circle partner. The Tribunal's reasons were published on 30 January 2020.

According to Mr Beckwith's legal team, this was a case of *"consensual sexual activity after a normal evening in the pub between two solicitors"*, and therefore of no regulatory interest. The Tribunal disagreed, considering his behaviour to be *"very serious"*, and thereby warranting a substantial fine of £35,000. At the time of writing this article, it is possible either side may appeal.

Mr Beckwith's case is clearly capable of attracting strongly divergent views. It's also been the subject of considerable press attention and social media comment. Some may view the complaint within the context of the #MeToo movement, and applaud the bravery of Mr Beckwith's junior colleague in coming forward ("Person A" in the judgment); others may approach it as an unwarranted interference by the regulator in the private lives of apparently consenting adults.

In this article we are **not** going to take a position on this spectrum of views or address the wider issues of morality and culture that arise in Beckwith's case. They are very important and deserve discussion and introspection but they are not for us, on this occasion.

We do want to look at what Beckwith's case can say about the future, specifically how a solicitor should behave in his or her private life and the extent to which the SRA and the Tribunal should adjudicate upon that privacy. These are important issues of principle.

The allegations

Mr Beckwith was accused of sexual misconduct on two occasions involving Person A. He and Person A were at the same firm. He was Person A's supervising and appraisal partner. The first incident took place during a work event, the second after one.

The SRA alleged that Mr Beckwith had breached Principles 2 and 6 of the SRA Code of Conduct 2011. These are:

- Principle 2 – act with integrity
- Principle 6 – behave in a way that maintains the trust the public places in you and in the provision of legal services

These Principles also appear in slightly modified form at Principles 2 and 5 of the new SRA Principles, introduced in November 2019.

Article 8 rights

The first issue considered by the SDT was whether or not it had the right to interfere with Mr Beckwith's Article 8 rights under the European Convention on Human Rights, for respect for private and family life.

This was argued extensively by the lawyers for the SRA and Mr Beckwith, each dealing with whether such an interference would be lawful, ie proportionate, in accordance with the law, in pursuit of a legitimate aim, and sufficiently foreseeable.

The issue is of some potential legal importance, as the activities the subject of allegation were said to fall within Mr Beckwith's private life. The same argument could in theory therefore be deployed by solicitors in numerous other contexts.

The first aspect is whether the SRA and SDT could adjudicate on solicitors' private lives. Common-sense suggests that there must be some situations involving a private activity by a professional that are amenable to regulatory intervention.

Furthermore, paragraph 5.1 of the Application Provisions to the Principles in the SRA Code of Conduct 2011, expressly states that Principles 1, 2 and 6 apply to activities falling *"outside practice, whether undertaken as a lawyer or in some other business or private capacity."*

According to Mr Beckwith however, the interference with his Article 8 rights was not sufficiently foreseeable, and if it was not foreseeable then it was unlawful.

He pointed to the absence of clarity and explanation in the SRA's published materials indicating when it might intervene in private matters. He also argued that if Person A was consenting, how could it be sufficiently foreseeable that the SRA had the right to police private sexual activity between lawyers? His case in this respect is captured in the following extract from the judgment, *"Absent criminal behaviour how could activity which might be described as common amongst the professions and the public be reasonably foreseeable as attracting regulatory intervention?"*

As for the SRA, they said the wide drafting of Principles 2 and 6 did not mean that their application was insufficiently certain as flexibility was a necessary attribute of regulations protecting the public reputation. Flexibility also reflected the "self-regulation" expected from lawyers to conform to the ethos of the profession.

In other words, there had to be a balance struck between specificity of rule-making leading to foreseeability on the one hand, and flexible somewhat imprecise rules that could cater for a wide variety of behaviours on the other, and the SRA had struck that balance correctly.

Despite the extensive arguments coming from either side, the SDT dealt with this preliminary point with short shrift. As made clear by the Application Provisions, the Principles applied to private conduct and the SDT regularly interfered with Article 8 rights. It did not consider that private conduct needed to amount to criminal conduct before there could be legitimate interference: *"...in the circumstances of this case, such interference was both proportionate and necessary to maintain public trust in, and the reputation of, the profession."*

It is not our intention to consider here whether the ultimate decision on this is right or wrong. What we see as lacking, however, is detail from the SDT on what the specific *"circumstances of the case"* were, that made the interference legitimate. The SRA had opened the door to the SDT to consider the issue, pointing to the close connection between the allegations and Mr Beckwith's professional life and the strong public interest in ensuring that people have confidence that they will not be subjected to inappropriate behaviour. However, the SDT did not deal with these arguments, thereby giving *more* weight to Mr Beckwith's argument that the interference was unforeseeable and lacked clarity.

Integrity

Then came the matter of deciding on the alleged breach of Principles 2 (integrity) and 6 (public trust in the profession).

RPC has previously blogged on the difficulties in pinning down the meaning of "integrity" (in Principle 2). On the one hand, integrity is an indispensable quality of a professional; on the other, it is a difficult word to use when formulating charges of professional misconduct.

In dealing with the issue, the SDT quoted the guidance of Lord Justice Jackson, as set out in *Wingate and Evans v SRA*, namely that integrity was *"a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from the own members... [Professionals] are required to live up to their own professional standards... Integrity connotes adherence to the ethical standards of one's own profession."*

The SRA and Mr Beckwith disagreed however over the application of Wingate, and whether the case demonstrated that integrity could be extended to private life.

Mr Beckwith quoted Wingate to suggest that the duty does not require professional people to be *"paragons of virtue"* and that *"professional integrity is linked to the manner in which that particular profession professes to serve the public"*. The SRA obviously disagreed with this position.

As for Principle 6, Mr Beckwith argued that public confidence in the profession could not be undermined by consensual sexual activity and the commission of a "*mutual mistake in drink*". He said Principle 6's definition explicitly linked the conduct to the way the profession served society. In response, the SRA quoted Wingate on Principle 6, saying that it was "*directed to preserving the reputation of, and public confidence in, the legal profession.*" The SRA also disagreed with Mr Beckwith's point that the fact that Wingate only cited examples of misconduct in professional situations meant that it could not apply to private life. However, the SRA accepted that there was a difference between private conduct affecting the reputation of the solicitor alone, and private conduct affecting the reputation of the profession.

Again, the SDT had a prime opportunity here to provide some much needed guidance on these interesting and important points. Again, it quoted the Application Provisions which state that Principles 1, 2 and 6 apply to private life. The Tribunal agreed with the SRA that despite the fact that Wingate's examples of conduct lacking integrity referred only to professional matters, this did not mean that private matters could not be considered by the regulator. According to the SDT, Mr Beckwith's conduct affected not only his personal reputation but also the reputation of the profession, and so could be considered by the Tribunal. Unfortunately it is not clear from the judgment why that conclusion was reached.

The central part of the judgment

The heart of the judgment can be found at around paragraph 25.190.

In assessing the allegation in relation to Principle 6, the SDT found that Mr Beckwith had failed to maintain trust the public placed in him by the way he conducted himself. It said that his conduct would not be expected of a solicitor by members of the public and would attract the "*approbation*" of the public ("*approbation*" is presumably a typographical error in the judgment, and should be replaced with "*disapprobation*").

In regard to Principle 2, the SDT found that Mr Beckwith's conduct had fallen below what was expected of him by the public and profession. In this part of the judgment, the Tribunal referred prominently to the fact that Mr Beckwith must have accepted that his conduct fell below the standards expected of a partner in his firm because he had accepted a final written warning from his firm. The Tribunal went on to observe that the standards employed at the firm were no higher than the standards of the profession in general. In the Tribunal's view therefore, Mr Beckwith had breached both Principles 2 and 6. However, the relevance of his acceptance of the final warning is then undermined by a later comment in the judgment, to the effect that the Tribunal's conclusion that he lacked integrity was based on the evidence it had heard, and not on the firm's assessment of Mr Beckwith's behaviour. It is a confusing aspect of the decision.

Conclusions from Beckwith's case

Pending any possible appellate consideration of Beckwith's case, there are some tentative lessons to be learned from it, as follows.

- The remit generally of the SRA and the SDT can extend to actions in a solicitor's private life.
- The Wingate interpretation of the concept of "integrity" is not limited to 'professional' conduct and can also apply to actions in a solicitor's private life.
- Consensual sexual activity between a solicitor and another person is capable of being "inappropriate", and therefore a breach of SRA Principles.
- A firm of solicitors' internal standards of conduct and behaviour may provide a source of evidence for the ethical standards to be expected more generally of the profession.
- A solicitor's acceptance of an internal disciplinary sanction may amount to evidence, for the SDT's purposes, that h/she accepted that his/her conduct had fallen below the standards required under the SRA's Principles.
- These particular factual circumstances amounted to a breach of Principles 2 and 6, and so justified the description "very serious" for the purposes of sanction.

We referred to our conclusions above as "tentative" because it seems to us that so much is left unexplained by the SDT's reasoning.

Our point can be amply demonstrated by the SDT's treatment of the issue of consent. It will be recalled that Mr Beckwith's case was that this was a drunken consensual sexual encounter. He argued that Person A's consent was central to any consideration of the quality of his alleged misconduct and therefore a determination on the issue of consent was necessary. Meanwhile, the SRA argued that it was unnecessary for the Tribunal to make any findings on the issue of consent.

Pausing there, it seems to us that there is an air of unreality to both sets of submissions here. We suggest that if a member of the public were to have described to them the outline of the facts in Beckwith's case, the very first question that person would ask is, 'Did Person A consent?' It is impossible, we suggest, to form any kind of assessment of the nature of Mr Beckwith's behaviour without first addressing that point. However, it is debatable whether consent was a "central issue",

as Mr Beckwith contended. We have no difficulty in imagining scenarios involving a solicitor's consensual sexual activity that are still failures of integrity (eg sex with a vulnerable client; where improper inducements or pressure is applied, etc).

Be that as it may, the Tribunal's treatment of the issue of consent is obscure. It said that it was up to the SRA to decide how to put its case, it would not consider matters that had not been alleged, and that *"[it] did not find that a failure to raise consent as an issue in this matter meant that it was unable to consider whether [Mr Beckwith's] conduct was in breach of the Principles as alleged."* That seems to duck the point entirely; we are doubtful that is correct.

Wider application

Ultimately, it seems to us that the decision in Beckwith represents something of a lost opportunity to clarify the extent to which a solicitor's private life can be examined, and how the Principles will be applied. The profession needs to understand and anticipate how and when the regulator will intervene in private domain activity. These are issues that are by no means limited to sexual misconduct cases. Their application is perhaps even more unpredictable in the context of social media use and other areas of public discourse.

The SRA, perhaps recognising the grey areas involved, and seemingly increasingly keen to monitor them, has begun to provide guidance on these difficult issues. For example, it has published a warning notice on offensive communications as well as a Topic Guide specifically on the subject of social media. Interestingly, the warning notice states that the SRA receives the majority of complaints about social media use in solicitors' personal lives. It warns solicitors to be aware of their professionalism if they have identified themselves as a solicitor, and even if they do not caution that anonymity is not guaranteed, as a post may be traced back to them. Solicitors must *"at all times be aware of the content you are posting and the need for professionalism."* And we thought that Wingate said that solicitors did not have to be *"paragons of virtue"*...

The Topic Guide makes crystal-clear that it will look at communications outside a work context, and also somewhat worryingly states that *"regulated individuals are expected to act at all times with honesty and integrity. This includes in communications that are, or are intended to be, private, and whether or not the sender is identifiable as a regulated person."* The Topic Guide usefully goes on to list aggravating and mitigating factors for bad social media use, including whether the communication caused harm, was isolated, out of character, was abusive or threatening etc. The most serious issues will be referred to the SDT.

The new SRA Enforcement Strategy also provides guidance on what areas of private life will be examined, yet is ambiguous in parts. *"Our key role is to act on wrongdoing which relates to an individual or a firm's legal practice. We will not get involved in complaints against a solicitor which relate solely to, for example, their competence as a school governor or their involvement in a neighbour dispute. However, our Principles set out the core ethical values we require of all those we regulate and apply at all times and in all contexts – and apply both in and outside practice (as the context permits)."* On one hand the SRA won't get involved, but on the other it will, but only where Principles are engaged. It goes on the say that the SRA is concerned about conduct in private lives if it risks the delivery of safe legal services in the future – *"the closer any behaviour is to professional activities, or a reflection of how a solicitor might behave in a professional context, the more seriously we are likely to view it."*

It is obvious that the regulator is becoming increasingly engaged with policing solicitors' private lives and has published some useful guidance on the subject. What is perhaps still lacking is a coherent and easily digestible rule on the SRA's remit and the application of its Principles. This is an issue that is affected by social changes and trends: social media has made what was once private public, and the #MeToo movement is likely to have a large effect on what lands on regulators' desks. It may or may not be healthy for the SRA and SDT to increase their focus on solicitors' private lives, but if they do, the reasoning behind their decision making should be clear and their rules coherent.

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