Crossing the line

Post-*Beckwith*, John Gould provides an update on the regulation of conduct outside of practice

IN BRIEF

▶ *Ryan Beckwith v Solicitors Regulation Authority*: putting the correct questions on the table for the approach to conduct which is not in the course of providing legal services.

It was a bold move to offer a two-part commentary on the regulation of conduct outside of practice just when the Divisional Court's decision in *Ryan Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin) was on the horizon (see 'Misconduct outside of legal practice', 170 *NLJ* 7907, p14; Pt 2, 170 *NLJ* 7911, p15). By great good fortune, I seem to have largely escaped major error and can go forward with my nine lives intact to talk about what the law is rather than what I think it should be.

Beckwith is an important decision which is not going to be appealed. The approach to conduct which is not in the course of providing legal services, particularly where sex is involved, has not had a secure foundation for years. No judgment provides an answer for every permutation of facts which may arise in the future, but this one has at least put the correct questions on the table.

Mr Beckwith's night out

The allegations against RB arose following his female associate's (A) leaving party in 2016. The allegations (not all of which were successful before the Solicitors Disciplinary Tribunal (SDT)) were that he initiated or engaged in sexual activity with A in a way which was in breach of Principle 2 (act with integrity) and Principle 6 (behave in a way which maintains public trust in you and the provision of legal services). Essentially this was alleged to have occurred because he was A's senior who appraised and reviewed her; that he knew or ought to have known that she was so drunk that she was vulnerable or her decision-making was impaired; that she had not invited RB into her home, had not allowed him in with a view to sex and that he knew or ought to have known that his conduct amounted to an abuse of position and/or it was 'inappropriate'.

The SDT's findings were that RB was in a position of authority over A and he knew she was drunk so that her decision-making ability was impaired. RB himself was also found to have been influenced by intoxication. A was not found to be vulnerable and RB had not entered her home without being invited but did know he wasn't being invited in for sex. RB had not abused his authority but had acted 'inappropriately'. The facts found by the SDT had to be the basis of the court's legal analysis.

Was it serious?

The court decided that for conduct to be the subject of regulatory sanction (whether inside or outside practice) it must be sufficiently serious. It did not accept that in a rules-based system, such as that which applies to solicitors, there was a preliminary condition requiring the finding of something called 'professional misconduct'. As the court acknowledged, however, the words might be used descriptively in relation to the seriousness and culpability that are a required element of a breach of most regulatory rules.

Was the conduct relevant to practice?

The court accepted the need for conduct outside of practice to be considered in the context of its relevance to professional practice. The court's chosen route to relevance was through the rules for solicitors applied in the context of the statutory scheme under which they were created. To the extent that there are ethical standards applying outside of practice, they must be found in the rules.

There is no freestanding concept of 'professional misconduct' outside of the rules. Outside conduct must be a breach of a rule and that rule must be interpreted in the context of what is required of solicitors in practice. In addition, the court indicated that relevance to practice is not to be assumed but rather that it must be demonstrated for allegations to be made good.

The court's analysis of the requirements of Art 8 of the ECHR (respect for private life) provided the clearest statement of the need for relevance independent of the statutory scheme:

> '54. There can be no hard and fast rule either that regulation under the Handbook may never be directed to the regulated person's private life, or that any/every aspect of her private life is liable to scrutiny. But Principle 2 or Principle 6 may reach into private life only when conduct that is part of a person's private life realistically touches on her practise of the profession (Principle 2) or the standing of the profession (Principle 6). Any such conduct must be qualitatively relevant. It must, in a way that is demonstrably relevant, engage one or other of the standards of behaviour which are set out in or necessarily implicit from the Handbook. In this way, the required fair balance is properly struck between the right to respect to private life and the public interest in the regulation of the solicitor's profession.'

Relevant rules

There is no general principle that professional rules do not apply to outside conduct, but many rules are expressly limited to conduct within practice. The usual approach has been to allege that outside conduct breaches, Rule 2 (integrity) or Rule 6 (public trust). I explored the problems of applying these rules to outside conduct in my previous articles. They both tend to be used in a way which is circular—this conduct is 'inappropriate', therefore it damages public trust, therefore it breaches

Rule 6. As the court confirmed both rules are largely descriptive of conduct without in themselves providing a legitimate and transparent basis for characterising the conduct in question as being in breach of rules.

Having correctly identified the mercurial and circular nature of rules relating to integrity and public trust, the court embarked on a search for other rules which might be more readily applied and the breach of which could fairly be said to have had the effect of damaging public trust or demonstrating a lack of integrity.

This search reflected the substantial problem of establishing a basis of legitimacy and certainty for judgments about conduct outside practice. Freestanding assessments of the 'appropriateness' of conduct outside of practice by tribunals or regulators in individual cases are neither legitimate, in the sense of reflecting an accepted or recognised standard (such as dishonesty), nor sufficiently predictable or certain. It is for the tribunal to decide if the line has been crossed in an individual case but not where the line lies.

Although it is clearly correct that each rule must be considered in the context of the rules as a whole, it is difficult to see why allegations of breaches of Rules 2 and 6 should be considered on the basis of some other alleged rule breach such as that of taking advantage or abuse of position. If that were the gravamen of the complaint that is what should have been charged.

In any event, the approach only moves the question of relevance further down the line as one is then forced to ask whether the particular, say, taking advantage outside of practice, is relevant to practice. This tends to lead to an assertion that it clearly is or clearly isn't and sure enough the court's view was:

> 'Seriously abusive conduct by one member of the profession against another, particularly by a more senior against a more junior member of the profession is clearly capable of damaging public trust in the provision of professional services by that more senior professional and even by the profession generally.'

This approach to relevance was based on the 2011 Rules which were those which applied to the case, but now the SRA has moved strongly away from providing the detailed rules and content upon which the court's approach would have to be based.

Allegations based on integrity & trust

I personally continue to doubt that allegations based on lack of integrity or undermining trust (even in the context of the broader rule book) are sufficiently certain to be primary allegations at all in relation to conduct outside of practice, unless the basis upon which the conduct is alleged to be relevant to practice is also particularised. The judgment suggests that the basis of relevance of the outside conduct must be found qualitatively in the rules applying to practice generally. If there is a rule prohibiting abuse of position, that gives legitimacy to a finding that an abuse of position outside practice is relevant.

I would explain this a little differently. If the core of relevance is damage to reputation as a lawyer and an inference of a higher risk of a rule breach in practice, the fact that similar conduct in practice would amount to a breach of a rule could provide a basis to infer that a higher risk existed or that trust could be damaged.

The result

Mr Beckwith's appeal was successful because the tribunal's findings of fact did not, in the court's view, provide a basis in the context of the rule book generally to base a finding of a lack of integrity or damaging public trust on a free floating view that his actions were 'inappropriate'.

What does it mean?

Conduct outside of practice may amount to a breach of professional rules but to do so it must be demonstrably relevant to a person's reputation as a lawyer or to their legal practice. The conduct must have a qualitative nature which links it to conduct referred to in, or implicit from, professional rules. An example would be the abuse of a position of power (Rule 1.2 of the Solicitors Code of Conduct). This provides one legitimate basis under the statutory scheme for relevance to be assessed. It is not for a tribunal or the regulator to proceed simply on the basis of their own view of what is or is not 'appropriate' or even disgraceful. Although the court did not have to consider them, there are other legitimate foundations for the characterisation of outside conduct as breaches of Rules 2 or 6, such as the commission of criminal offences or findings of unlawful discrimination. There is, of course, no rule explicitly forbidding the commission of criminal offences.

Allegations which are in substance the statement of facts and the assertion that those facts demonstrate a lack of integrity or undermine public trust should now be insufficient. It is necessary to demonstrate relevance and provide certainty by reference to the quality of the conduct in the context of other rules or law which show why the conduct may legitimately be subject to regulatory interest.

Although one might not fully agree with the court's route from the principles of integrity and trust through other rules to relevance and legitimacy, the need for a demonstrable linkage is now firmly established. **NLJ**

John Gould is senior partner of Russell-Cooke LLP and author of *The Law of Legal Services, Second Edition* (2019, LexisNexis) (*John.Gould@russell-cooke.co.uk; www.russell-cooke.co.uk*).