**APPEAL TO THE VISITORS TO THE INNS OF COURT**
**ON APPEAL FROM THE DISCIPLINARY TRIBUNAL**
**OF THE COUNCIL OF THE INNS OF COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2014

**Before** :

**MR JUSTICE SILBER**
**MR KENNETH CROFTON-MARTIN**
**MS AMANDA SAVAGE**

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**Between :**

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| **RICHARD CRAVEN** | **Appellant** |
| **- and -** | |
| **THE BAR STANDARDS BAR** | **Respondent** |

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**Hugh Tomlinson QC** (instructed by **Clarke Willmott LLP**) **for the Appellant**
**John Wilson QC** (instructed by **The Bar Standards Board**) for the **Respondent**

Hearing date: **22 January 2014**

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# DECISION

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE SILBER

**Mr Justice Silber:**

1. Mr Richard Craven ("the appellant"), who is a Barrister, was charged by the Bar Standards Board ("BSB"), with:

> "Professional misconduct contrary to paragraph 301(a)(iii) and pursuant to paragraph 901.7 of the Code of Conduct of the Bar of England and Wales (8th Edition)" (" the Code").

2. Paragraph 301 (a)(iii) of the Code provides that:

> "A barrister must have regard to paragraph 104 and must not:
>
> (a) engage in conduct whether in pursuit of his profession or otherwise which is: ….
>
> (iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute:"

3. The particulars set out in the Charge were that:

> "Richard Craven, an employed barrister, engaged in conduct which was likely to bring the legal profession into disrepute contrary to paragraph 301(a)(iii) by sending an email to two pupils and another lawyer on 27 October 2011 quoting or repeating a comment about a female solicitor that 'we should open her up. I don't just mean a little stab in the leg. I mean do the cunt'. "

4. The full wording of the offending email, which is the subject matter of the charge, is that :

> "FWD for intelligence sharing. And its amusement value in ML dissing Rebecca. "She comes down onto our manor, mugging us off, we should open her up. I don't just mean a little stab in the leg, I mean do the cunt"

5. On 25 September 2013, this charge was found proved by a majority (4-1) of members of the Disciplinary Tribunal of the Inns of Court. ("the Tribunal"), but it did not find another charge against the appellant proved.

6. The appellant has appealed against the finding that this charge was proved, but he does not challenge the sanction that was imposed on him.

**The facts**

7. In October 2011, when the offending email was sent, the appellant, who had been called to the Bar in 1995, was working as an employed barrister at the Essex Office of a firm of solicitors called David Phillips and Partners ("DPP"). Among those working in the Essex Office of that firm was a salaried partner of that firm, Ms Rebecca Blain, who had previously worked in DPP's Liverpool office. There is no dispute that the appellant wrote the email, which is the subject matter of the charge, and that he sent it to the three named recipients on the email. They were first, the appellant's pupil, Hannah Beer; second, another pupil in that firm, Charlie Ann Sherrif; and third, another lawyer at the Essex office of DPP, Martin Khoshdel who was then shortly to commence a pupillage at DPP, but who was then working in that firm as a paralegal.

8. The email was sent from the appellant's own computer using his home email address. There was evidence that those recipients of the email were all interested in and knowledgeable about gangster films including a film entitled "Bonded by Blood". The statement in the email was not an exact quote from that film, but it is clear that the appellant used a quote from this film which he then amended. The original quote from the film, which was an exchange between two male characters face to face[73], is set out in paragraph 6 of the appellant's own statement. The words used in the film were:

> ""I don't know nothing about you, you cunt…If you don't open up that fucking box right now, or you do open it up and it's just an old exhaust pipe. Then I'm gonna open you up yeah. I'll cut you right here and now. I don't mean no little stab in the leg either. I'll slice your fucking face open and cut your nose off. I mean that's what I do".

9. This has been adapted by the appellant in the email to relate to a female colleague and instead it stated;

> ' FWD for intelligence sharing. And its amusement value in ML dissing Rebecca. "She comes down onto our manner, mugging us off, we should open her up. I don't just mean a little stab in the leg. I mean do the cunt'

10. Initially the appellant denied that the email referred to Ms Blain. He stated in his Response to the charge that " the email does not contain a comment about a female solicitor" even though it referred to "dissing Rebecca" namely disrespecting Rebecca. In the closing submissions before the Tribunal, the Appellant (though his counsel) however eventually and belatedly conceded that the word "she" in the email and the reference in it to "I mean do the cunt" was a reference "clearly [to]Rebecca Blain" [105], and also the reference to the "manor" in the email was to DPP's Essex office at which the appellant and Ms Blain worked. It is common ground that the appellant has never intended to injure Ms Blain.

11. The background to this email was that there was much unhappiness caused to the appellant and some of his colleagues by Ms Blain, who had moved to the Essex office of DPP from its Liverpool office. According to the appellant, "she was sent down there to remove all the staff from that office so that Liverpool staff could be parachuted in because they did not have any work"[53]. The appellant admitted that Ms Blain was a partner in DPP and therefore his employer or at least his line manager. He also explained that in the contract that he and another lawyer had with DPP, it was agreed that they could choose what work they did and that they therefore had "first choice of all work".[54]

12. His evidence was that on 20 October 2011, Ms Blain had stated that she would decide what work each of the solicitors and barristers in DPP's Essex would do. The appellant considered that this policy decision constituted a breach of his contract because it would have serious adverse financial consequences for him as it would lead to a reduction in his salary. So his evidence was that Ms Blain had a "vested financial interest in not giving work to him" and to his colleague Steven Pidcock, who had similar contractual rights to those of the appellant. The appellant's evidence was that he was therefore "very resentful and very annoyed" with her approach [55].

13. On 26 October 2011, the appellant was not appearing in Court, but his evidence is that he was told by Mr Khoshdel, another employee of DPP, that Ms Blain had allocated herself a case at Wood Green. The appellant stated in his witness statement that he was also told by Mr Mervyn Lambert, a fee earner at the Woolwich office of DPP, that Ms Blain had deleted the appellant's name from the diary for the PCMH of Martin Bent and that instead she had substituted her name as the lawyer who would handle this court hearing. Mr Lambert had briefed the appellant as he considered that it was a serious case requiring a senior advocate.

14. According to the appellant, a major row followed and while he was very angry, he sent the offending email which is the subject matter of the complaint, and it had the heading of the name of Martin Bent, who was, as I have explained, the person whose case the Appellant considered that he should have handled but which Ms Blain had transferred to herself.

15. The appellant explained that he had a DPP office email address and a private email address, but because of the deficiencies in the DPP system, some of his work would be sent to his home email address, which was the one used for the email which is the subject-matter of the charge against the appellant.

**The Hearing before the Tribunal**

16. At the hearing before the Tribunal, the appellant gave evidence and he was cross-examined. The Tribunal also permitted the counsel for the BSB, Mr Joel Bennathan QC, to cross-examine Ms Hannah Beer and Mr Steven Pidcock whose witness statements had been adduced on behalf of the Appellant.

17. In his closing submissions, Mr Bennathan contended that a way of testing whether the Tribunal was sure that the conduct of the Appellant was likely to bring the profession into disrepute might be to think what a reasonable observer might make of the Appellant's conduct. Such a reasonable observer. he explained, should not be either particularly prudish and shocked by bad language, or so insensitive that no abuse could possibly strike him or her as improper, while bearing in mind, on the one hand, a respect for the right of freedom of speech and, on the other hand, the rights of the professionals' obligation.

18. He explained that the circumstances against which the appellant's conduct should be considered in relation to the charge of bringing the profession into disrepute included the mitigating facts, which would tend to suggest that the appellant's conduct did not bring the profession into disrepute. Those mitigating factors were first, that the words in the email were not meant to be taken literally so as to constitute a genuine threat to take a knife and do Ms Blain mischief, second that people do swear under pressure, and third that the matter was not entirely public.

19. Mr. Benathan contended that there were six factors which pointed the other way and showed the seriousness of the situation. First, the statement in the email was made in a work context to pupils. Second, it was made about a fellow professional, while third it was passing on the views of Mr Lampert who was another lawyer working at BPP. The fourth factor was that it emanated from an email address, which the appellant used for professional purposes even though it was also his private address. Fifth, the

email adapted the quote so that it applied to Ms Blain, and finally it was a "deeply odiously violent email" stating in effect of Ms Blain that "she is a cunt".

20. In response Mr Owen Williams, the advocate then appearing for the appellant, contended that the Tribunal could not be sure that the BSB had made out their case. He submitted that the appellant was not calling Ms Blain a cunt. He attached importance to the fact that the emails were sent to the recipients' home addresses and not to their DPP email addresses. So he said that the sending of the emails constituted a private act in respect which the Appellant had an expectation of privacy.

21. Mr Williams also pointed out that there was no complaint about the email from any of the recipients or any evidence from Ms Blain. He stressed that Ms Beer, who was a recipient of the email, had said the email had not lowered her opinion of the Appellant. He queried how the email had got into the public domain at all. He accepted that this was not a case, which turned on freedom of expression under the Human Rights Act 1998, and he contended that the charge should be dismissed.

22. In reply Mr Bennathan contended that it was unnecessary that the Tribunal investigate how the email came before it, because there had been no application to exclude it on the basis that it had been some how unlawfully obtained.

23. Having adjourned to consider the matter, the Tribunal then gave its decision explaining that it applied the burden of standard of proof applicable to the criminal standard namely that they had to be sure that the charge was proved. The Chairman noted that the quotation had involved a change of gender from "he" to "she" with Ms Blain being referred to by her forename. He explained that the Tribunal was not concerned as how the email entered the public arena as there had been no challenge to it having been obtained improperly.

24. There was then consideration to whether it was a public document or not bearing in mind first that it was sent out of hours, second that it was not sent to Ms Blain, third that it was sent on a private email even though the appellant did have a DPP email address and chose not to use it. There were, according to the Tribunal, public elements to the email because first it was sent in a work context, second it was sent to work colleagues, third it came from an email address which the Appellant regularly used for work, and fourth it was sent by email which meant that it always ran the risk that it might resurface or become available in another way.

25. In any event, the Tribunal concluded that the issue of whether or not the email was private was not decisive, because it was sent by a pupil supervisor to two pupils and a prospective pupil. That relationship was significant bearing in mind that pupils should be trained to treat work colleagues with respect in spite of any personal disagreements or dislike and a pupil supervisor should be aware of his duty to act as a role model.

26. The Tribunal then concluded by stating that:

> "We have applied the test, would a reasonable observer, one who is not prudish, consider that a pupil supervisor behaving in this way brings the Bar into disrepute? We have by a majority come to a conclusion that it is a matter which would bring the Bar into disrepute and we therefore conclude that count 1 is made out".

## The Appellant's submissions

27. Mr Hugh Tomlinson QC, counsel for appellant, contends that the question for the Tribunal was whether the sending of the email in question was likely to bring the profession into disrepute. He contends that this question should be answered in the negative and makes two basic submissions in support of this contention.

28. His first submission is that the sending of the email to three recipients from a *private* email was not "likely to bring the legal profession into disrepute" and it was not *likely* to effect the reputation of the profession at all. Mr Tomlinson's starting point is that the conduct as charged was required to have a "public" impact. He points out that paragraph 301 of the Code provides three alternative charges in relation to the conduct of a barrister. The offence in paragraph 301(a) (iii) relates to "public confidence" which entails impact on the public and so is unlike paragraph 301 (a) (i) which has no public element and which simply requires the conduct to be "dishonest" or "otherwise discreditable". He also contends that the element of "disrepute" necessarily means that the conduct has to have a public impact or be likely to do so.

29. Turning to the facts, Mr. Tomlinson submits that, although the email or its contents, if communicated publicly, would be likely to bring the profession into disrepute, the email sent by the appellant was a *private* email, which could not be read by third parties. In answer to the contention of the BSB that the email was not private because the appellant used this email address for work purposes, he submits that this does not prevent it being a private email account nor does the fact that it was sent out of hours to work colleagues using an email address sometimes used for work purposes. The fact that there was a professional element to the email does not render a private email public.

30. Mr. Tomlinson contends that for the charge to be proved, the disreputable conduct has to be likely at the time it took placed to have a public impact on the legal profession. The mere fact that there is "risk" that something may happen do not satisfy this requirement. He proceeded to state that the BSB had not established that, at the time it was sent, the email would *likely* to become *public*. In those circumstances, the Tribunal should have dismissed the charge and the mere fact that there was risk that it *might* become public did not mean that the charge was proved.

31. His second submission is that the imposition of a professional disciplinary sanction for the sending of the email was, in the particular circumstances of this case, a disproportionate interference with the appellant's rights to a private life and to freedom of expression under respectively Articles 8 and 10 of the ECHR. Mr. Tomlinson also submits that it is not necessary or proportionate for a professional disciplinary body to impose sanctions on the sending of the abusive private emails of this kind in these circumstances especially since there was no suggestion that any actual harm had been caused to others or that there was a risk for future harm. He contends that in any event, there was no clear and convincing justification for the interference of these rights under the ECHR of the Appellant.

32. In response, Mr John Wilson QC, counsel for the BSB, disputes that under paragraph 301 (a)(iii) the conduct of the barrister concerned has to be of a public nature, because all that is necessary is for the appellant:

> "to have engage (d) in conduct whether in pursuit of his profession or otherwise which is … (iii) likely to …otherwise bring the legal profession into disrepute".

33. His case is that the task of the Tribunal was to have regard for the intrinsic nature of the conduct and what the informed observer was likely to think of it. In that connection, Mr Wilson contends that there were sufficient elements of the appellant's conduct in relation to the email as to justify the decision of the Tribunal bearing in mind first, that the email related to a case which Ms Blain had taken over in the course of DPP's practice; second, that the email was sent to work colleagues, third, it came from a email address regularly used for work, and fourth, it was sent to pupils and a prospective pupil of his employers about an employer of both the Appellant and those pupils.

34. Finally he pointed out that the appellant had no control over what the recipients might wish to do with the email or what they might have told other members of the public about it especially it was not stated to be either confidential or privileged.

**Discussion**

*(i) The Nature of the Offence*

35. It is necessary to consider the requirements of the charge and, in particular, whether the offending behaviour, which in this case was the sending of the email, had to have an impact on the public. Mr. Tomlinson contended that it had to have such as impact, because all the consequences in paragraph 301(a) (iii) involved an impact on the public. The charge is not made out if the conduct in question is private and unlikely to become public. So he says that even if an email which is highly offensive to a partner in a large law firm is sent to all the employees of that law firm,that is a private matter with the consequence that it cannot constitute the offence specified in paragraph 301(a) (iii).

36. We are unable to accept this submission because that paragraph covers three separate offences. The third offence, which is the basis of the charge against the appellant, deals with conduct not covered by the first two limbs of paragraph 301(a)(iii). The first two offences in that paragraph relate, in the words of paragraph 301(a), to conduct "likely to diminish *public* confidence in the legal system or the administration of justice", but there is no reference to the public in the third offence - which is that faced by the appellant. That offence relates to the charge of engaging "in conduct ..which is. ..likely to …otherwise bring the legal profession into disrepute" .

37. In other words, this third limb of paragraph 301(a)(iii) is specifically drafted so that it does not refer to the public, but instead the offence is concerned with bringing the profession into disrepute. It follows that rather than focussing on the public, it is concerned with the intrinsic nature of the conduct. No doubt, if it had been intended that the impact on the public was to be a necessary ingredient of the offence as advocated by Mr. Tomlinson, this would have been specifically stated in the carefully crafted offence, but that is not what has been stated.

38. Mr. Tomlinson also contends that the "disrepute" in the third limb involves "reputation" which by implication means the "public" reputation. We cannot accept

that because there is no reason why the term "bring into disrepute" should be limited to a public matter. Bad behaviour within a set of Chambers or within a firm is capable of being such as to "bring the legal profession into disrepute". There is no valid argument to the contrary .

39. We are also unable to accept the submission that the charge should have been, and should now be, dismissed, because this was a private communication or the appellant had a reasonable expectation of privacy especially as the email was sent from his home email address to the home email addresses of the recipients. This submission ignores the facts first, that this email related to a work matter, concerning how the case of Martin Brunt was dealt with by a partner in the firm employing the appellant; second, that it was sent to fellow employees of the appellant's employers; third, the appellant had a working relationship with his supervisee to whom he owed duties of setting an example ; fourth, he used his home email address, which he and his colleagues regularly used for the work activities of DPP; fifth, the email was not stated to be confidential; and sixth, there was always a risk that the email would resurface or become available to people other than the recipient.

40. It is also said that the Tribunal in finding that there was a *risk* that the email might resurface did not satisfy the correct test of being "*likely* to bring the legal profession into disrepute". Whilst we agree that a *mere risk* of bringing the legal profession into disrepute would not show that a charge had been proved, in deciding if the conduct of the Appellant constituted a breach of the final limb of paragraph 301(a) (iii), it is necessary to focus on the conduct (and, in this case, the words used) and then to ask itself whether a reasonable observer would conclude that the Appellant behaving in this way was "*likely* to ..bring the Bar into disrepute". In other words, in our view, the word "*likely*" in 301(a)(iii) relates to the likelihood that a reasonable observer would form the view that the conduct was disreputable, and not the likelihood of the conduct becoming known about.

41. In fact when giving its decision, the Tribunal applied a more stringent test of whether the Appellant "behaving in this way *brings* the Bar into disrepute"[119] ; in other words it substituted the higher standard test of whether the Bar was actually brought into disrepute rather than the test of whether it was "likely" to do so.

42. So we are unable to accept any of the submissions that the Tribunal failed to apply the correct test, save that it applied a more stringent test than was required in one respect for the reason set out in the previous paragraph.

*(ii) Articles 8 and 10 ECHR*

43. Mr Tomlinson complains that the email was "plainly private and confidential" and was, prima facie, protected by Article 8. As we have set out above, the email was unsolicited and was sent to three work colleagues, who were members of the public, relating to an essential part of DPP's business, namely the allocation of cases within the firm. Further it was not stated to be confidential, and there was nothing to show that the recipient could not or should not pass it on to others or tell others about it or its contents. The subsequent use of the email did not constitute an interference with the appellant's article 8 rights.

44. In any event, even if that use by the BSB of this email prima facie constituted an infringement with the appellant's article 8 rights, then we consider that this use was in accordance with the law, necessary in a democratic society for the protection of the rights of those who wish to use members of the Bar and wish them to have high levels of behaviour, as well as being proportionate. For those additional reasons, there would have been no interference with the article 8 rights of the appellant.

45. The article 10 claim put forward by Mr Tomlinson must also be rejected, as we do not consider that the proceedings constitute an infringement of the appellant's article 10 rights. Even if that is wrong and they did constitute such interference, such interference was in accordance with the law, necessary in a democratic society, particularly for the protection of the reputation of others, namely the legal profession. In addition, it was proportionate. Thus there was no infringement with the article rights of the appellant

*(iii) Conclusion*

46. In summary, the issue for the Tribunal and for us was whether sending this email to the three recipients about a female partner in the firm constituted conduct, which in the wording of the charge against the appellant "was likely to bring the legal profession into disrepute".

47. We unanimously consider that we are sure that this was a clear case in which the appellant's conduct was likely to bring the Bar into disrepute. The appellant as a supervisor had the duty first to train pupils to treat colleagues and superiors in their firm with respect (even when they disagreed with them), and second to act as a role model. It was totally unacceptable to send this form of email to these pupils and (in the case of Mr. Khoshdel), a paralegal and prospective pupil, which abused Ms Blain, even though there was no wish to physically injure her. In essence, the appellant was setting a very bad example when he should have been showing the recipients that they should treat their work colleagues and superiors with appropriate respect.

48. For those reasons, our unanimous conclusion is that we are sure that the charge is proved and the appeal must be dismissed.