

## CASE REPORTS

# It's not all her fault – it's them too

*Francis Dingwall*

**Do the principals in a firm need to look more carefully at whether they are putting staff – or individual principals – under too much pressure?**

The decision of the Solicitors Disciplinary Tribunal (SDA) in *SRA v Tunstall*, 11289-2014, published on 29 July 2015, was an extraordinary one that leaves serious questions unanswered.

Where a junior solicitor is under intense pressure, is it any wonder that she succumbs and slips if she is working for principals who fail adequately to supervise and manage her? In what circumstances will the SRA place

responsibility for a solicitor's misconduct on the shoulders of those responsible for supervising her?

### **SRA v Tunstall: the decision**

Claire Tunstall was a two-years qualified solicitor working in a small office, handling clinical negligence litigation. She fell behind in her work and, when problems came to light, she admitted that in one case that she was handling, she had:

- fabricated a letter admitting liability from an NHS trust;
- fabricated a medical expert report and a counsel's opinion (by cutting and pasting from other reports/opinions);
- sent the client £2,000 which she claimed was an interim payment from the NHS Trust – the money came from office account after she had transferred costs received on another client's matter to this file; and
- made false time entries.

She had also made false time entries on three other matters to cover up the fact that she was not progressing them. In

another case, she had told the client that she had recovered £4,150 damages when, in fact, she had accepted an offer of £3,000. The client had been putting pressure on her to get more. She made up the balance of £1,150 from money in office account and misled the partner to whom she submitted the cheque for signature.

Ms Tunstall accepted responsibility for her acts but she said she had acted in blind panic under immense pressure. The SDT accepted that she had been struggling to cope to the extent that she contemplated having an accident so that she wouldn't have to go to work any more. Among the circumstances which emerged were the following.

- Ms Tunstall's supervising partner, who was the only partner located at the office, was frequently away two to three days a week. He left standing instructions that the other partners were not to be told this. Ms Tunstall felt she could not speak to the other partners.
- She had been given 130 files to handle when she had first qualified and saw about 10 new clients a week.

- She spent much of her time working on the partner's files in his absence.
- She was left to deal with the staff on her own and there were some turbulent working relationships to the extent that on one occasion there was a physical fight.
- She claimed that her supervising partner had told her that she would be made redundant if she did not meet her targets and that the clinical negligence department would be closed if she complained.
- She claimed that she was allowed no time off following the breakdown of her marriage. The partner allegedly had told her not to be dramatic about it and to get on with her work.
- Although there was a file review system requiring the review of five files a month, they were done 'in a job lot'.

The SDT made no finding of dishonesty against her (an issue worthy of an article in itself). It did not strike her off, but instead suspended her indefinitely, leaving open the possibility that in the future she might apply to have the suspension lifted. The SDT evidently did not take the view that it is a fundamental qualification for being a solicitor that you are a strong enough character to be capable of taking ownership of your mistakes and speaking up, even in the face of your client's displeasure and your superior's disapproval.

## There are numerous cases in which the SDT has punished principals for failing to supervise a fee earner

In the course of the judgment, the SDT made some striking observations on the issue of supervision and management:

*'She had been given wholly inadequate support and had found herself in a very difficult position ...*

*[She] was not properly supervised by the partner in charge of the office. She had been dealing with a heavy caseload ... She had been working in a difficult environment, being placed in the invidious*

*position of being expected to deal with difficult staff management issues, which was wholly inappropriate for one of her level of experience. Her difficulties were compounded by the fact that she was unable to discuss the absence of her supervising partner with other partners of the practice and this limited her ability to seek assistance from them. The Respondent had been placed in an unenviable and wholly unacceptable position where she was in the middle of a conflict of interest situation between the partners ...*

*She had simply been trying to keep her head above water in extremely difficult circumstances.'*

### Where responsibility lies in a law firm

Ms Tunstall accepted responsibility for her conduct, but the SDT found that her conduct was to some extent determined by circumstances outside her control. If the principals fail in their obligations of supervision and management, are they to be held responsible for the misconduct of their staff?

The starting place is rule 8.1(a) of the SRA Authorisation Rules 2011:

*'An authorised body and its managers must ensure that any obligations imposed from time to time on the authorised body, its managers, employees ... are complied with.'*

'Managers' means the principals (a member of a limited liability partnership, a director of a company, a partner in a partnership).

Principle 8 in the SRA Handbook requires the principals to 'run your business ... effectively and in accordance with proper governance and sound financial and risk management principles'.

Outcome 1.4 of the SRA Code of Conduct 2011 requires that 'you have the resources, skills and procedures to carry out your clients' instructions' and outcome 1.5 requires that 'the service you provide to clients is competent, delivered in a timely manner'.

Outcome 7.8 requires that 'you have a system for supervising clients' matters, to include the regular checking of the quality of work by suitably competent and experienced people'.

There are numerous cases in which the SDT has punished principals for failing to supervise a fee earner who has committed wrong. For example, in the case of *SRA v*

*Ixer and Another*, 10796-2011, where the fee earner failed to blow the whistle on a multiple mortgage fraud, the principal was fined £3,000. The SDT found that:

*'There was inadequate control of the firm's client bank account ... The [principal] had relied on and trusted the [fee earner] as a result of which he had exercised a light touch in supervising her. ... There was no meaningful checking of files handled by the [fee earner] ... There had been no spot checks and there was no evidence of regular discussions concerning workload or any issues with files ...'*

In that case, the fee earner did not appear to defend herself. In light of the decision in *SRA v Tunstall*, one can envisage that, in the face of allegations of misconduct, a fee earner might well claim that he or she was put under too much pressure by the principal and that the principal ignored the fee earner's pleas for help.

### Pointing the finger

In the case of *SRA v Roberts and Others*, 11008-2012, as in *SRA v Ixer*, a fee earner failed to blow the whistle on a multiple mortgage fraud. Initially, he claimed that:

*'I worked largely without supervision but all of my work was officially supervised by the partners and was offered for inspection regularly. The partner responsible for supervising my work was [the third respondent]. The partners were approving all the work I did for [the firm] and saw all incoming and most outgoing mail on my files during my employment.*

*During my time at [the firm] I was never given any formal training of any kind.*

*... I shall fight to clear my name as I only ever acted under instructions and the authority of the [three partners]. If orders are to be made against me then they should also be made against them.'*

The fee earner was the son of one of the partners and the only concession he made to family loyalty was to name one of the other partners as his supervisor.

Fortunately for the partners, by the time of the hearing the fee earner had changed his tune, stating that the three partners:

*'do not deserve any sanctions to be made against them as a result of my negligence on a number of conveyancing files. They were not aware precisely of what I was doing ...'*

Nonetheless, the three partners were fined: £4,000 for the father and £2,000 each for the other two partners.

## Sink or swim

Even where the principals in a firm recognise the need to protect staff from extreme pressure, do they recognise the issue when it arises within the management of the firm? In some law firms, a partner is expected to be capable of standing 'the heat in the kitchen'. The expectation is that partners are significantly above average; after all, that is how they made it to partnership and how they justify their income. A typical client citation in Chambers UK, of a partner in an international firm who is both head of the private equity practice and managing partner of an office, makes the point:

*'He is somewhat superhuman – he can travel between two cities in one day and offer brilliant advice in both!'*

Is any human superhuman? Take the example of *SRA v Saxl*, 10715-2011.

Ms Saxl missed a limitation period but, instead of coming clean to the client, Mrs S, she told her that the case was progressing.

Ms Saxl:

- had obtained first class honours in her Law Society finals;
- had taken over as managing partner when the firm was in widespread chaos;
- was the driving force in obtaining Lexcel for the firm;
- had taken responsibility for the family and criminal departments and overseen the closure of the financial services practice;
- had taken over as senior partner when the former incumbent retired suddenly;
- had run an investigation into a partner's alleged fraud.

But we are all only human. As the SDT put it:

*'Something had to give, and in this case it was Mrs S's matter ... The Tribunal was satisfied that overwork and taking on an excessive share of the management responsibilities were the root causes of what went wrong in this case.'*

Equally, in the last 12 months the writer has seen two SRA investigations of a principal in a firm for failing to supervise staff where the principal was struggling in the face of difficult domestic circumstances. In one case, the principal's wife died suddenly, leaving him trying to care for two small children. In the other case, the principal's wife was being treated for cancer, this time with three

small children to care for, as a result of which the principal developed depression and found it very difficult to balance family and work commitments. Not surprisingly, their work suffered. Unlike in Ms Saxl's case, it was the management and supervision that they struggled to cover.

What of partners known to be going through a difficult divorce? Or partners who exhibit symptoms of stress? Or who are alcoholics or drug-abusers?

## My brother's keeper

Did the other partners just stand by and watch Ms Saxl sink under the burdens she took on? Did they genuinely think she could cope?

In the case mentioned above of the principal who suddenly found himself the primary carer of three small children, he felt unable to disclose his difficulties to the firm's senior partner because she was an unsympathetic character.

## In some law firms, a partner is expected to be capable of standing 'the heat in the kitchen'

In each case, the question arises of whether the other principals in the firm should take some of the responsibility for what went wrong in the firm. There is a balance to be struck between (1) misconduct as the personal responsibility of the individual, and (2) misconduct as an almost inevitable result of pressures from which that individual should have been sheltered by the managers of the firm.

## The lessons to be learned

Where individual fee earners get into trouble (and you cannot control whether or when that may happen), they might blame the principals for putting them under too much pressure. Whether or not the fee earner does so, the SRA is likely to look closely at the conduct of those responsible for supervision and management. This may include the COLP and the COFA, who are responsible for taking reasonable steps to ensure that the principals have appropriate systems in place.

The principals in the firm and the COLP and the COFA will need to be able to demonstrate that they had in place suitable systems of supervision, training and appraisal. That may be the easy part if the firm has a good compliance manual: it may be harder to demonstrate that the systems were actually functioning and regularly monitored. It may be helpful to use tools such as Legal Risk's Compliance Calendar Toolkit for Law Firms.

If and when the SRA comes knocking and asks to speak to the principals, in our experience the principals go into the meeting in the fond belief that they are helping the SRA to investigate the conduct of the fee earner who has got into trouble, not themselves. In one case, a partner was so ill prepared that, when the SRA investigator asked him when he had started doing file reviews, he gave a date three years after he had actually started doing them, and two years after the fee earner's alleged misconduct started. This alone brought allegations down not only on his head, but on the head of the firm's managing partner. Principals would do well to take expert advice before speaking to the SRA.

And the SRA might also investigate those responsible for the management of the firm where a principal gets into trouble. Does the firm recognise that partners can get out of their depth? What systems does the firm have in place for monitoring whether the partner is waving or drowning? And, if drowning, what systems are there for throwing them a lifebelt? Again, can the firm demonstrate that the systems are actually operated?

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## Next issue

The next issue will be published in November. Some of the topics covered will include:

- Data and subject access requests
- SRA Handbook version 15
- Cyber risks
- AML update
- Book reviews