Neutral Citation Number: [2022] EWHC 1729 (Admin)

Case No: CO/1093/2021
Appeal No. C0010932021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
ON APPEAL FROM THE SOLICITORS DISCIPLINARY TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/2022

Before :

MR JUSTICE KERR

- -

Between :

LINDA LU **Appellant**

- and -

SOLICITORS REGULATION AUTHORITY **Respondent**

- -
- -

The Appellant appeared in person
Mr Rory Mulchrone (**Mr Michael Collis** on 6 July 2022) (instructed by **Capsticks LLP**) appeared for the **Respondent**

Hearing date: 25 May 2022

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Approved Judgment

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MR JUSTICE KERR

Mr Justice Kerr :

Introduction

1. This appeal by the appellant (**Ms Lu**) is from a decision of the Solicitors Disciplinary Tribunal (**the tribunal**) published on 26 February 2021, in disciplinary proceedings brought by the respondent (**the SRA**) against Ms Lu. Ms Lu was *acquitted* of any misconduct. The appeal concerns the tribunal's approach to open justice and to the anonymity of persons mentioned in the tribunal's decision and relevant to the allegations it had to determine.

2. The tribunal agreed to sit in private and decided to anonymise two complainant firms of solicitors, relevant individuals employed by them and, for some reason, a barrister and an expert witness whose roles were not particularly controversial. The tribunal so decided of its own accord, without any application from those concerned. However, the tribunal refused to agree to Ms Lu's request that her identity be withheld from the public domain.

3. At the hearing before me, held in public, with some misgivings I gave a *temporary* direction preserving the status quo and prohibiting publication of Ms Lu's name and that of the two firms, their relevant employees and the barrister. Before the draft of this judgment was made final, the two firms and four individuals were able to (and most did) make representations as to whether their anonymity should be preserved in this judgment. Ms Lu's should not be.

4. I am prepared, not without hesitation, to continue the anonymity of three relevant individuals within the two complainant firms. This is because they are likely, as against their employer, to have a contractual right to anonymity in respect of allegations made by or against them internally within the context of their employment; albeit that contractual right is far from conclusive, does not bind the court and might well have to yield to open justice.

5. I have found this appeal difficult. It shows the problems we are experiencing in our justice system with the notion of open justice. We repeatedly stress its importance, yet increasingly undermine it by the creeping march of anonymity and redaction. Parties, witnesses and ordinary workers - for example, a case worker at the SRA in this case - are routinely anonymised without asking the court or giving the matter much thought.

6. A common misconception is that if the identity of a person in legal proceedings is not directly relevant, there is no public interest in that person's name being known. The justice system thrives on fearless naming of people, whether bit part players or a protagonist. Open reporting is discouraged by what George Orwell once called a

"plague of initials"[1]. Clarity and a sense of purpose are lost. Reading or writing reports about nameless people is tedious.

7. The applicable principles are clear at the highest level. The common law principle of open justice is well known. The jurisprudence on articles 8 and 10 of the European Convention is quite well known. Procedural rules such as CPR 39.2 which reflect the law correctly, work reasonably well if properly applied. Yet, the inexorable trend seems to be towards less open justice and more anonymity. I doubt that this is a good direction of travel for the law.

Facts

8. I can take some of the facts from the decision of the tribunal. I will omit as much detail as possible. Ms Lu qualified as a solicitor in Scotland in 2015. The tribunal eventually rejected her contention that it lacked jurisdiction to discipline her, determining that she was an "RFL" (registered foreign lawyer) at the relevant times and, as such, subject to the disciplinary rules policed by the SRA and enforced by decisions of the tribunal.

9. Ms Lu became an associate in the London office of Cadwalader Wickersham & Taft LLP (**Cadwalader**), a US law firm. Cadwalader was referred to by the tribunal as "Y LLP". There, Ms Lu came into contact with, and in close physical proximity to, a senior work colleague, referred to by the tribunal and in this judgment as Person B.

10. Ms Lu's relations with Cadwalader, to put it neutrally, did not thrive. The reasons for that were and remain disputed. Ms Lu says the real reason was that she resisted harassment by a partner. She maintains that she passed her probation but was dismissed when she indicated a willingness to report the harassment to human resources ("HR").

11. It is agreed that Cadwalader terminated Ms Lu's employment by a letter of 17 August 2017 and that the reasons given in the letter, not accepted by Ms Lu as genuine, were performance related: refusal to accept work allocated, refusing to discuss work with her supervising partner, taking unauthorised leave and displaying an aggressive attitude in conversation with supervising attorneys.

12. In or about October 2017, Ms Lu became an associate at the London office of Pillsbury Winthrop Shaw Pittman LLP (**Pillsbury**), also a US law firm. Pillsbury was referred to by the tribunal as "X LLP". Ms Lu's employment did not go smoothly. On 17 January 2018, she raised a grievance against "Person C", a partner. On 15 and 26 February 2018, "Person A", a partner, provided statements to Pillsbury saying that Ms Lu had refused to carry out work.

13. On 27 February 2018, Ms Lu was suspended by Pillsbury pending an investigation. On 2 March 2018, she was asked to attend a disciplinary hearing on 7 March. Also on 7 March, she raised a grievance against 13 individuals at Pillsbury including Person A and the other partners who had provided statements criticising her. She alleged that the statements were false and misleading and constituted harassment.

14. On 29 March 2018, Pillsbury concluded, after enquiring into the matter, that Person C had not harassed Ms Lu. Pillsbury also looked into whether Ms Lu had been bullied

[1] *Homage to Catalonia*, Appendix 1, page 1 (in the Penguin Orwell Centenary edition; formerly chapter V).

and concluded that she had not been. On 29 March 2018, Pillsbury appointed Ms Judy Stone ("J" in the tribunal proceedings), a barrister in private practice, to investigate Ms Lu's grievance raised earlier that month. Ms Stone spoke to various people including Ms Lu. On 25 May 2018, Ms Lu appealed against the decision not to uphold her grievance against Person C.

15. On 15 June 2018, Ms Lu posted on her Instagram account the first post for which she was subsequently charged with misconduct by the SRA. I will call it the "corgi post" as it featured an image of the rear end of a corgi dog. The tribunal edited some of it out, though the full text was before it in a witness statement from Person A.

16. As edited in the tribunal's decision, it was economically rendered as follows:

> "Ever want to kick someone's c*** in so bad?! # diebitchdie f****** fat [name] Corgi can suck my d***".

17. The word "name" in square brackets denotes the omitted word "Debra" which is the first name of Person A. She and Pillsbury were concerned and offended because they believed the corgi post referred to her rather than to any dog.

18. Ms Kathleen Pearson, Pillsbury's Chief HR Officer, reported that and other potential disciplinary matters to the SRA on 30 July 2018, informally and without at that stage identifying Ms Lu. On 30 July 2018, Pillsbury dismissed Ms Lu's appeal against the decision not to uphold her grievance against Person C.

19. On 22 August 2018, the barrister Ms Stone produced her report. I have not seen it but according to the tribunal she had (in the tribunal's words) "difficulties" with Ms Lu's evidence, which she treated "with caution". Ms Lu "lacked candour".

20. Ms Stone preferred the evidence of nine people from Pillsbury against whom Ms Lu had complained. Some of the complaints about Person A were (this time in Ms Stone's words quoted by the tribunal) "inconceivable" or "highly implausible". She rejected Ms Lu's claim that Pillsbury's witnesses colluded to fabricate a basis for her suspension.

21. The second matter over which Ms Lu was later accused of misconduct was that two posts allegedly appeared on her Instagram account on 29 August and 23 September 2018. This led to what I will call the "abuse and threat posts" allegation. The two posts clearly related to Person B, Ms Lu's senior work colleague during her time at Cadwalader.

22. The abuse and threat posts (and the tribunal's description of them) were more detailed and complicated than the corgi post. Since the tribunal ultimately found that the SRA could not prove Ms Lu was the author of those posts, I need not set them out in full. They were deeply offensive to Person B and if penned by Ms Lu would without question have amounted to serious misconduct. The second post included what appeared to be a threat to Person B:

> "…it's only a matter of time before I take you down. I will do it when you least expect it to keep it fun."

23. In the light of Ms Stone's report, Pillsbury dismissed Ms Lu's grievance of March 2018 in a detailed letter of 27 September 2018. They also rejected a suggestion from Ms Lu that Ms Stone had been biased and unfair.

24. On 11 October 2018, Ms Pearson of Pillsbury spoke to Mr Nicholas Leach of the SRA about the matter. She followed up with an email the next day, attaching documents, including the corgi post, and informing Mr Leach that Pillsbury was commencing disciplinary proceedings against Ms Lu. She requested that the SRA should not contact Ms Lu until after the disciplinary process was complete, while undertaking to inform her that Pillsbury had notified the SRA.

25. Also on 12 October 2018, Ms Lu appealed internally against the decision to dismiss her grievance. At the time of these events, she was on paid leave as she had been since 27 February 2018. On 16 October 2018, Mr Adam Blakemore, a partner at Cadwalader and its compliance officer, reported Ms Lu to the SRA, relying on the abuse and threat posts of August and September 2018 and holding Ms Lu responsible for them.

26. At the end of November or early December 2018, Pillsbury revived the disciplinary process, citing the performance related matters alleged earlier (in the letter of 2 March 2018) and adding an allegation of misconduct in posting the corgi post in June 2018. The disciplinary hearing was to be heard on 17 December 2018 by an external HR consultant. However, the disciplinary process was overtaken by other events.

27. On 30 November 2018, Ms Lu emailed Pillsbury denying that the corgi post related to Person A. Ms Lu gave the account she later gave the tribunal:

> "… it concerned an acquaintance's dog who bit me and was then put down. I do believe I enjoy the freedom of speech and if such post did not violate the Instagram community guidelines, I doubt it would have breached the firm's social media policy when it was directed at an animal that has ceased to exist."

28. On 12 December 2018, the SRA sent purported screenshots of the abuse and threat posts to Ms Lu. In an email the same day, Ms Lu denied authorship. She asserted that the apparent presence of the posts on her Instagram account was faked and (as she later maintained in the tribunal, successfully) that she believed someone must have hacked into her account and sought to create a semblance of the posts appearing there in an attempt to taint her character.

29. On 3 January 2019, Pillsbury dismissed Ms Lu's appeal against the decision of 27 September 2018 to dismiss her second grievance brought in March 2018. Ms Lu then denied and rebutted the disciplinary allegations against her in a document dated 22 January 2019. The disciplinary process was not completed; negotiations took place with a view to Ms Lu parting company with Pillsbury.

30. This led to a settlement agreement signed in March 2019. I have not seen it. According to the tribunal, it provided for Ms Lu's employment to terminate on 13 March, with six months' pay in lieu. Pillsbury made no admission of liability. There was a waiver of any claims, presumably on both sides.

31. The SRA then considered Ms Lu's case and gathered evidence with a view to subjecting her to a disciplinary process. This seems to have taken about a year, since it was not

until March 2020 that witness statements were signed by Ms Pearson, Person A and Mr Blakemore, Cadwalader's compliance officer.

32. The SRA then served a "rule 12" statement on Ms Lu in March 2020, stating the allegations against her. There were two. They can be summarised as (1) posting the corgi post on 15 June 2018 and (2) posting the abuse and threat posts on 29 August and 23 September 2018.

33. A case management hearing took place on 12 October 2020, in private. There was an argument over whether the tribunal had disciplinary jurisdiction over Ms Lu. She denied jurisdiction on the basis that she was not an "RFL" (registered foreign lawyer). The SRA successfully argued that she was an RFL. That issue occupied much time and was not determined until later, but it is not relevant to this appeal; there is no longer any challenge to the tribunal's jurisdiction.

34. Ms Lu applied at the case management hearing for the cause list for the substantive hearing to be anonymised, for the substantive hearing to take place in private and for the tribunal's decision not to be published. She sought to keep the issues wholly outside the public domain. There was not enough time to hear and determine that application on 12 October 2020. It was adjourned to the substantive hearing date, 27 October 2020.

35. The hearing lasted four days, 27-29 October and 30 November 2020. Ms Lu appeared in person. The tribunal heard argument and evidence on all issues. On Ms Lu's adjourned application to keep the matter wholly outside the public domain, the SRA's position had shifted from neutrality to opposition. Mr Inderjit Johal, counsel for the SRA, accepted only that the hearing should be in part private and the judgment in part anonymised.

36. Subject to that limited concession, Mr Johal's submissions championed open justice. He did not accept anonymity for Ms Lu. He did not seek anonymity for Cadwalader or Pillsbury, nor for individuals from those firms. He referred to the applicable procedural rules (the Solicitors (Disciplinary Proceedings) Rules 2019 (**the SDPR**), to the common law principle of open justice, to article 8 of the European Convention and to case law.

37. Ms Lu's arguments centred on protecting her identity as a complainant alleging sexual harassment, included among her grievance allegations. She argued that the identity of those complaining of sexual harassment is always protected by the courts. She also relied on medical evidence to support her contention that her health and mental state would be endangered if her identity became known.

38. It appears from paragraph 56 (and following) of the "anonymised and unredacted" version of the tribunal's subsequent judgment that the chairman picked up on Mr Johal's references to probable allegations of sexual harassment against individuals who would not be giving evidence. The chairman wished to protect "persons who were not present to defend themselves".

39. Rule 35(5) of the SDPR, read with rule 35(2), does indeed provide for a tribunal to sit in private for all or part of a hearing, even without an application from a person affected, provided such a person would suffer "exceptional hardship" or "exceptional prejudice"; and provided the tribunal "considers that a hearing in public would prejudice the interests of justice" (rule 35(5)(b)).

40. Mr Johal said the chairman's concern was a "valid point". He noted and accepted the tribunal's distinction between Ms Lu, who would be present and able to defend herself, and others who would not be. He withdrew his objection to the whole of the hearing being held in private (paragraph 58). The chairman suggested that the same considerations would apply to publication of the judgment; ways could be found to protect the privacy of those not present.

41. The tribunal's decision on Ms Lu's application was at paragraphs 61 and 62. The cause list would no longer be anonymised. Ms Lu could not herself reach the threshold of "exceptional hardship" or "exceptional prejudice". Generally, the public and profession should know the identity of those subject to tribunal proceedings, and their outcome.

42. However, the hearing would be conducted wholly in private to protect the individuals whose privacy would be violated if the hearing switched from public to private session. The judgment would be made public but anonymised, by the same reasoning.

43. It is, possibly, implicit in the tribunal's reasoning that the affected individuals and the two US law firms, in the tribunal's view, met the standard of "exceptional hardship" and/or "exceptional prejudice" in rule 35; that Ms Lu did not; and that it would "prejudice the interests of justice" to sit in public to any extent or to allow publication of the names of the two firms and individuals.

44. There is, however, no reference in the decision to the position of Cadwalader and Pillsbury as partnerships, as distinct from the position of individuals working for those firms. Nor is there any mention of the position of Ms Stone, the barrister, who had done no more than accept a brief and perform the task she was briefed to perform. Nor is there any reasoning about why an information technology (**IT**) expert to be called by Ms Lu should not be identified by name.

45. At the conclusion of the hearing on 30 November 2020, pending publication of the tribunal's judgment, in so far as it was to be published, the tribunal reserved its judgment announced to the parties that Ms Lu was acquitted on both charges and that the tribunal proposed to make no order as to costs.

46. The tribunal issued a "memorandum" dated 3 December 2020 regarding logistical arrangements in respect of the judgment. This was in anticipation of a further management hearing which eventually occurred, as I shall explain, on 15 February 2021. The parties were to be given (as stated in the 3 December 2020 memorandum) a further opportunity to make submissions on anonymity and redaction at that case management hearing.

47. The "anonymity and privacy applications" part of the judgment was not to be included in the published version; not even, as I understand it, in a form that would protect the identity of the individuals and firms just mentioned. Only the parties would receive that part of the judgment, i.e. the part I have just (publicly) outlined. The parties were invited to "agree any additional points of anonymity or redaction that they wish the tribunal to consider".

48. An earlier memorandum concerning secrecy arrangements following the case management hearing held on 12 October 2020, was itself to be kept secret and not

disclosed beyond the parties to anyone without the consent of the tribunal. Thus, the tribunal treated the arguments about derogations from open justice as qualifying for the same level of derogation as the subject matter of those arguments.

49. The tribunal made a draft of its judgment available to the parties on or about 18 January 2021. A hearing on consequential matters was listed for 15 February 2021. At that hearing, the parties made further submissions on the draft judgment, touching again on anonymity and redaction of names.

50. In detailed submissions, Ms Lu tried unsuccessfully to persuade the tribunal to keep her name out of the public domain. She also made submissions to the effect that the tribunal had applied a double standard, requiring her but not the other affected individuals to meet the "exceptional hardship" or "exceptional prejudice" threshold.

51. In a later written ruling dated 26 February 2021, the tribunal recorded the parties' submissions in detail and ruled (at paragraph 44 and following) that it would stick to its earlier decisions on identification of Ms Lu, anonymisation of others and redaction of the main judgment. The tribunal had been ready to hear further submissions, but those submissions did not persuade the tribunal to change its earlier decision or reasoning.

52. The tribunal concluded its written decision by ruling that the content of that ruling, which I have just (publicly) outlined, should not be made public or disclosed beyond the parties except with the tribunal's consent. On the same date, 26 February 2021, the tribunal published its main judgment, but redacting out the arguments about anonymity and redaction, as I have already indicated.

53. The main judgment was entitled "redacted judgment of an application conducted remotely, heard in private". Within it, beneath paragraph 47, appeared the sub-heading "[a]pplication by the Respondent [Ms Lu] for anonymisation of the Cause List, for the decision (judgment) not to be published and for the entire hearing to be held in private". The text then proceeded to state that paragraphs 48-62 were "redacted" and continued with paragraph 63.

54. The evidence of the witnesses was rehearsed at length but it is very difficult at times to discern which witness is being referred to since the term "the witness" is used to denote the initials of the anonymised witness. Gender neutrality of language is at times observed, though not all the time. For example Ms Lu's IT expert, Mr Alistair Ewing, was referred to as "AE" but with masculine pronouns.

55. The tribunal found unproved the allegation that Ms Lu had intended the corgi post to refer to Person A. The SRA did not dispute that Ms Lu had been bitten by a dog on 15 June 2018, the date of the corgi post. The post was not found to be threatening to Person A.

56. The tribunal further found that the SRA had failed to prove that Ms Lu was the author of the abuse and threat posts. The tribunal criticised the quality of the evidence the SRA had deployed against Ms Lu, following Cadwalader's report of alleged serious misconduct by her. The case against Ms Lu was based on unverified hearsay. Person B had not been called. There was no audit trail to show that Ms Lu had posted the two posts.

57. The tribunal's main judgment was then published online, subject to the redactions I have mentioned and with Ms Lu named but the anonymity of Cadwalader and Pillsbury and the various individuals preserved. Ms Lu's identity as the acquitted accused has therefore been in the public domain since February 2021 (and indeed earlier, since the tribunal's cause list ceased to be anonymised at some point during the hearings in late 2020). The tribunal declined to make any order as to costs.

58. Ms Lu then appealed to this court on 19 March 2021, with solicitors. The appeal was against the decision of 26 February 2021 to "publish the name of the appellant … and information personal to her ..". She asked for that order to be "set aside". She also applied for interim relief, i.e. an order that "the judgment … identifying the appellant and her personal details be removed pending the hearing of any appeal". However, that application was not pursued.

59. The 11 grounds of appeal were prepared by Mr Tim Nesbitt QC, now sadly deceased. After that, the appeal progressed towards a hearing, though with developments along the way; namely, an application by the SRA to strike out the appeal, made in October 2021; and a very late application by Ms Lu (acting in person again) in May 2022 to amend her grounds of appeal.

Issues, Reasoning and Conclusions

Preliminary issue: jurisdiction

60. The SRA submits first that the court should (under CPR rule 52.18) strike out the appeal for the compelling reason that the court has no jurisdiction to entertain it. Mr Mulchrone submits that case law shows that the apparently untrammelled right of appeal under section 49(1) of the Solicitors Act 1974 excludes interlocutory case management decisions not attracting the formal requirements of section 48.

61. Mr Mulchrone submitted that only the acquittal and costs decisions were appealable under section 49; the operative decisions on anonymity and redaction, taken at the case management hearing on 15 February 2021, were not. They were case management decisions that could be challenged, if at all, by judicial review, despite the reluctance of the court to intervene by judicial review in domestic proceedings before they are complete.

62. No judicial review was brought within the time limit. If it had been, Ms Lu would have required the court's permission to proceed. The SRA would not, Mr Mulchrone said, have opposed permission on the ground that Ms Lu had a right of appeal under section 49(1) of the 1974 Act. However, he accepted that the SRA had itself appealed against an anonymity decision, in *Solicitors Regulation Authority v Spector* [2016] 4 WLR 16.

63. Mr Mulchrone relied on the reasoning of Simon Brown LJ (as he then was) in *Re a Solicitor (No.6119/92)*, the Times, 4 May 1994 (transcript pp. 14-15); of Garnham J in *Obi v Solicitors Regulation Authority* [2017] EWHC 3928 (Admin), at [26]; of Ouseley J in *Maitland Hudson v Solicitors Regulation Authority* [2017] EWHC 3478 (Admin), at [3]-[15]; and of Morris J in *Ali v Solicitors Regulation Authority* [2021] EWHC 2709 (Admin), at [101].

64. In my judgment, these submissions are not well founded. *Obi* was not an appeal under section 49 at all, but under section 41. *Re a Solicitor* and *Maitland Hudson* both concerned appeals against decisions that the case below should proceed and not be stopped. They were not about anonymity and redaction. In *Ali*, the issue was severance.

65. I agree with Ms Lu's submission that the relevant decision here was the one recorded at paragraphs 56 and 57 of the tribunal's memorandum dated 26 February 2021, under the heading "Decision and Directions of the Tribunal". The tribunal revisited the issues of anonymity and redaction on 15 February 2021 having made its full reasoning known to the parties in the draft judgment.

66. The reasoning in paragraph 56 shows those were not mere case management decisions, as in *Re a Solicitor*, *Maitland Hudson* and *Ali*. They were matters of open justice and human rights of the kind considered in *Spector*. The SRA's description of the decisions appealed against here as "administrative in nature" (paragraph 25 of its skeleton argument) is misconceived and wrong.

67. An appeal under section 49(1) lay against the decision that the directions on anonymity and redaction in the memorandum of 3 December 2020 "stand and continue to stand" (memorandum of 26 February 2021, paragraph 57.1). That decision was "an order of the Tribunal …. signed by the chairman …" within section 48(1).

68. To fall within that provision, it did not have to be an order making provision for any of the matters set out in section 47(2)(a)-(i) (striking off the roll, suspension, restoration to the roll, etc or costs). The list at (a)-(i) in section 47(2) is not exhaustive. Section 48(2) states that certain further steps must be taken where an order "which has been filed *includes* [my italics] provision for any of the matters referred to paragraphs (a)-(i) of section 47(2) …".

69. The order is required to be filed because it falls within section 48(1). An order under section 48(1) may therefore deal with matters outside the scope of (a)-(i) in section 47(2). So it did here. The appeal is competent and I refuse to strike it out. There is no compelling reason to do so. Simon Brown LJ's reasoning in *Re a Solicitor* does not apply to final decisions on anonymity, redaction and application of the open justice principle.

The substance of the appeal

70. The appeal is limited to a review of the decision below (CPR 52.21). Neither party suggested I should conduct a rehearing. The original eleven rather diffuse grounds of appeal raise three closely linked alleged errors: (i) wrongly refusing to anonymise Ms Lu's identity (covered in parts of grounds 1-3 and 8-11); (ii) wrongly refusing to redact out the content of Ms Lu's social media account (covered in parts of grounds 1, 2 and 4); and (iii) wrongly refusing to redact out Ms Lu's employment history (mainly covered in grounds 5, 6 and 7).

71. There are now four further grounds, subject to a very late application for permission to advance them. These raise three further issues: (iv) wrongly anonymising the two law firms and certain individuals (ground 13); (v) serious procedural irregularity, by allowing the case to proceed without adequate evidence (ground 14); and (vi) refusing

to order the SRA to pay all or part of Ms Lu's costs of the proceedings below (ground 15).

72. Both parties referred me to the usual cases on open justice, publication of decisions, anonymity and redaction of published decisions, arising both at common law and under the European Convention, particularly articles 8 and 10 and the balance between them. The learning is well known and I do not think it would assist for me to repeat it yet again here. I was also referred to the SDRP and the Judgment Publication Policy of May 2020, applicable in the tribunal.

73. Among the numerous authorities cited were *Scott v. Scott* [1913] AC 417; *Attorney-General v. Leveller Magazine Ltd* [1979] AC 440; section 12 of the Human Rights Act 1998; *In re S (a Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593; *Re Officer L* [2007] 1 WLR 2135; *Re Guardian News and Media Ltd* [2010] 2 AC 697; *Pink Floyd Music Ltd v. EMI Records Ltd; Practice Note* [2011] 1 WLR 770; *Bank Mellat v. HM Treasury (Liberty intervening) (No 2)* [2014] AC 700; *A v. BBC* [2015] AC 588; *Yassin v. GMC* [2015] EWHC 2955 (Admin); *SRA v. Spector* [2016] 4 WLR 16 (cited above); *Cape Intermediate Holdings Ltd v. Dring* [2020] AC 629; *Khuja v. Times Newspapers Ltd* [2019] AC 161; *XXX v. Camden LBC* [2020] 4 WLR 165; and *Newman v. Southampton City Council* [2021] 1 WLR 2900.

The tribunal's refusal to anonymise Ms Lu's identity

74. The appeal was originally supported in April 2021 by a skeleton argument from the late Mr Nesbitt. He submitted that the tribunal had not undertaken a proper balancing exercise at common law, weighing the value for open justice of disclosing Ms Lu's name against the risk of harm to her legitimate interests. The tribunal had applied the too high test in rule 35 of the SDPR of "exceptional hardship or exceptional prejudice".

75. Mr Nesbitt further submitted that the tribunal had not undertaken a fact specific balancing exercise "approaching the issue through the lens of Convention rights", i.e. by asking itself "whether there was a sufficient general, public interest in publishing a judgment without the Appellant's name … being anonymised to justify the incursion into her Article 8 rights that publication would involve".

76. He said the tribunal overlooked the point that Ms Lu had been acquitted of all charges, yet the publication of her name, given the subject matter of the judgment, "would risk having a serious impact on her future career". Ms Lu was a young, female, relatively junior lawyer. The tribunal, Mr Nesbitt argued, had failed to weigh the likely impact on her future career properly in the balance.

77. More broadly, Mr Nesbitt advanced the tenth ground of the appeal, which applied to all parts of the decision: it stated that the tribunal had failed:

> "to act consistently and treat the Appellant's application in the same way in which requests made on behalf of third parties (many of whom were male) were: the Tribunal should have adopted a consistent approach to all applications, and applying the same approach that it did to requests made on behalf of third parties should have also made the anonymisations / redactions requested by the Appellant".

78. At the hearing of the appeal, Ms Lu used a "replacement" skeleton argument in place of Mr Nesbitt's, though retaining some of its content. In relation to the original grounds

of appeal, the focus of her argument was that she had sought to have her name (and Instagram account) anonymised "in respect of the ***unrelated*** allegations by redacting them". The bold italics are Ms Lu's.

79. By the "unrelated" allegations, I understood her to mean allegations made both by her and against her. The allegations made by her were made in her complaints against various individuals in both the law firms. They included allegations of sexual harassment. The allegations made against her were the allegations of poor work practices that had led to termination of her employment by Cadwalader and the disciplinary matters raised against her by Pillsbury.

80. It is common ground that the tribunal did not adjudicate on these allegations. It did not need to. The making of those allegations formed the narrative backdrop to the SRA's case against Ms Lu, which was that she had committed misconduct by posting the corgi post and the abuse and threat posts. The submission of Ms Lu is that the other allegations by and against her are "unrelated" to that alleged misconduct and ought not to have been made public alongside her name.

81. As I understand Ms Lu's position by the time of the hearing before me, it was that she was no more able to defend herself against those unadjudicated allegations against her, than were the absent third parties against whom she had made allegations, also unadjudicated. Yet, the tribunal protected the identities of the third parties but not hers.

82. Viewed in that light, Ms Lu submitted, the balancing exercise, both when applying the common law principle of open justice and when weighing the competing considerations arising under articles 8 and 10 of the Convention, should have led to the tribunal protecting her identity and anonymity. Once it recognised that a derogation was justified in the case of the third parties, the same justification must exist for a parallel derogation to protect her identity.

83. Ms Lu echoed Mr Nesbitt's submission that the tribunal had not carried out the balancing exercise properly. It had not properly examined the competing interests, had not carried out a fact specific article 8 balancing exercise and had not found that the interference with her article 8 rights was justified under article 8(2) as necessary and proportionate. It had failed to weigh in the balance the likely adverse impact on her future career, notwithstanding her acquittal.

84. For the SRA, Mr Mulchrone submitted that the threshold for interference was high; the appellate court should defer to the evaluative decision of the specialist adjudicative body unless there was a clear error of principle or irrationality. Furthermore, such a tribunal is not expected to draft its decisions with the same degree of erudition and precision as a higher court such as the present one.

85. Mr Mulchrone submitted that the tribunal would have been wrong to ignore the reasoning of the Divisional Court in *Spector*. He reminded me of the importance the press rightly attach to names, by reference to Lord Rodger's utterance in *Re Guardian News and Media Ltd*, at [63] ("[w]hat's in a name? 'A lot', the press would answer"). And he reminded me of Nicol J's judgment in *Spector*, at [27] citing from Lord Steyn's speech in *In re S* at [30]:

> "the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction".

86. The tribunal's assessment and its decision to permit publication of Ms Lu's identity was properly reasoned and should be respected, he argued. There was no taint on Ms Lu's character arising from the acquittal. An order preventing publication of her name would put the tribunal in a difficult position; how should it respond to an enquiry from someone unaware of the proceedings but wishing to know if she had ever been subject to disciplinary proceedings?

87. Mr Mulchrone pointed to the Judgment Publication Policy which stated that in the light of the *Spector* case it was "unlikely" that an application for anonymity from an acquitted defendant would be granted; the principle of open justice was likely to prevail. Ms Lu bore the heavy burden of displacing that conclusion and the tribunal rightly found that she had failed to do so. The appellate court should not interfere with that evaluation.

88. Mr Mulchrone submitted that the tribunal was entitled to differentiate the position of the third parties whom it anonymised, on the basis that Ms Lu was before the tribunal but they were not. She had made serious allegations against individuals, including of harassment and intimidation. The allegations against her had nothing to do with those allegations and the third parties could not defend themselves against them.

89. I come to my reasoning and conclusions on this issue. First, there is no appeal against the decision to sit entirely in private. But I have concerns about the tribunal's decision to do so. Ms Lu favoured the tribunal sitting in private; Mr Johal, initially, did not. I do not need to decide but I think Mr Johal was right; the hearing should have been held mainly, if not wholly, in public. It appears from the judgment that sitting in private was convenient rather than necessary.

90. Next, I do not accept the submission of the SRA that the threshold for interference by an appellate court is the high one for which Mr Mulchrone contended, verging on a *Wednesbury* threshold of unreasonableness. Where open justice is at issue, the court in the appellate proceedings has a duty itself to deliver justice openly, subject to exceptions codified in CPR rule 39.2. By rule 39.2(4) (with my italics):

> "The court must order that the identity of any person shall not be disclosed if, *and only if*, it considers non-disclosure *necessary to secure the proper administration of justice and in order to protect the interests of that person*."

91. Mr Mulchrone's high threshold would cut across that duty. Where a balancing exercise has been done weighing the rival demands of article 8 rights to respect for a person's private life and article 10 rights to report proceedings freely and fully, the appellate court itself has a duty (being a body falling within section 6 of the Human Rights Act 1998) to uphold those rights and get the balance right.

92. That does not prevent the appellate court from according all the respect that is due to the assessment made by the tribunal from which the appeal is brought. The appellate court should do so. On the other hand, the appellate court must be free to decide that the lower tribunal's decision on the balancing exercise was wrong because the balance is clearly the other way.

93. Here, in my judgment the tribunal was right not to accept Ms Lu's invitation to protect her identity. The reasoning of the Divisional Court in *Spector* weighed heavily against doing so. While Mr Spector was found to have committed one minor act of misconduct of a venial or technical kind, he was in substance acquitted; and that was not enough to defeat the claims of open justice.

94. The same reasoning applies here. The tribunal's reasoning was not fully articulated but it was right not to accept the proposition that the *Spector* reasoning should be ignored because of the likely impact of the publicity on Ms Lu's future career, or because she is a female relatively junior lawyer who had made allegations including some of sexual harassment.

95. I do not accept that the making of allegations by and against Ms Lu had nothing to do with the charges of misconduct. Mr Nesbitt accepted that allegations made by Ms Lu were "background". They were more than that. They provided the context and a possible motive, both for posting the offending posts (on the SRA's case) and, on the other hand, for fabricating the abuse and threat posts (on Ms Lu's case).

96. The evidence that those allegations were made, by Ms Lu and against her, was admissible in support of both the SRA's case and Ms Lu's defence to it. It is commonplace for domestic and other tribunals to hear evidence about and write judgments about unadjudicated allegations and counter-allegations. They are not exceptional and should not readily lead to derogations from open justice.

97. As for the submission that the tribunal adopted an inconsistent approach to bestowing anonymity, I will return to that shortly. For present purposes, it is sufficient to say that if the tribunal was wrong to grant anonymity to the third parties, it does not follow that it should have redeemed itself by another wrong, shielding Ms Lu's identity from the public.

The tribunal's refusal to redact out the content of Ms Lu's social media account

98. Mr Nesbitt reiterated his arguments about publication of Ms Lu's name. If the Instagram account details were published, Ms Lu's name would be public because the account name revealed her name. Further, he submitted that the tribunal was wrong to reject Ms Lu's assertion that the account and the posts on it were part of her private life because she had, as the tribunal put it, "of her own volition created and developed a public Instagram facet to her life …".

99. Mr Nesbitt pointed out that access to a user's account is limited to "followers" of the account holder; the information is not widely available publicly. Further, Ms Lu had closed the account out of privacy concerns about a year before the hearing below. That she had operated it in the past with limited access to a relatively small class of followers should not have impelled the tribunal to discount the proposition that its contents could form part of her private life.

100. Ms Lu submitted at the hearing (and in her replacement skeleton argument) that the same reasoning applied as in the case of the argument about anonymising her name in the judgment. The details of her Instagram account would reveal her identity. A social media platform could include details of a person's personal affairs and they did not

become public property merely because they had been posted and the posts were then referred to in disciplinary proceedings.

101. Mr Mulchrone submitted that the tribunal had properly weighed the competing interests in the balancing exercise between article 8 and article 10 rights. With specific reference to Ms Lu's Instagram account, the tribunal was entitled to attach weight to the voluntary nature of posts and their accessibility to what the tribunal called "her numerous followers". Evidence referred to in the judgment suggested she may have had over 330,000 followers.

102. I think the tribunal's decision not to anonymise Ms Lu's Instagram account details was correct. The reasoning is, essentially, the same as already stated in relation to the previous issue. If Ms Lu's name and identity were correctly allowed to enter the public domain, the details of her Instagram account added little. The decision was justified on the simple ground that evidence of her account details was admissible and there was no good reason to suppress them.

103. Further, the tribunal was entitled to give weight to the voluntary nature of social media posts. While it is true that the account holder would not anticipate their use in subsequent disciplinary proceedings and does not choose to be subject to them, she does decide to place swathes of personal information in a semi-public domain of followers. Private text messages and emails are regularly admitted in evidence; social media posts are no different.

104. A person making an electronic communication should generally be expected to take the risk that its contents may become public by becoming relevant in litigation and thus disclosed publicly. Hence, the adage that you should not put in an email something you would not want to see on the front page of next day's tabloid newspaper. There are exceptions as formulated in the case law, but this case should not be one of them.

The tribunal's refusal to redact out Ms Lu's employment history

105. In the original skeleton, Mr Nesbitt contended that details of complaints made by and against Ms Lu, referred to as her "employment history", should have been redacted out by the tribunal to protect Ms Lu from future damage to her career. The tribunal had already decided to derogate from open justice by sitting in private and protecting the identity of the third parties; yet it had failed to apply the same logic to protection of Ms Lu, despite her acquittal on both counts.

106. The tribunal, Mr Nesbitt argued, had been wrong to say that the contested material was "an essential part of the comprehensibility of the judgment" and "accordingly should be placed in the public domain". The "workplace issues" were, said Mr Nesbitt, "at most – matters of background, which ultimately had little or no bearing on the Tribunals [sic] analysis of or findings about the matters it had to determine", which related narrowly to the Instagram posts.

107. That was wrong, Mr Nesbitt argued. The judgment could have been made comprehensible, he said, if "some of the material the Appellant asked to be left out of the published judgment were omitted". It was irrelevant that, as the tribunal observed, Ms Lu had herself placed the evidence about her employment history before the

tribunal. She could hardly do otherwise as she had to defend herself against the allegations; she was an accused, not a litigant by choice.

108. Mr Nesbitt complained (under the ninth ground of appeal) that the tribunal had slavishly relied on *Spector*. That case did not ordain that every defendant appearing before the tribunal must inexorably be identified. The *Spector* case was no substitute for a fact specific balancing exercise, which was not carried out, Mr Nesbitt argued. The decision in *Spector* said nothing about redacting out irrelevant and damaging employment history from a tribunal's decision.

109. Ms Lu in her replacement skeleton added the submission that there was no general public interest in publication of the workplace issues, which she again characterised as "unrelated" to the allegations (while Mr Nesbitt had called them "at most … background"). The allegations were not determined by the tribunal; their publication interfered with her right (under article 6 of the Convention) to a fair trial because those allegations were not properly determined at a fair and public hearing by an independent and impartial tribunal established by law.

110. Ms Lu complained that the tribunal ignored the common practice in other legal forums of observing "safeguards aimed at providing privacy and protection to the maker of the allegation" and that the rationale for that policy, especially in relation to young women, is obvious. She complained that the two firms had made extensive and false allegations against her and distorted her employment history. The tribunal then adopted inconsistent, conflicting and contradictory reasoning for anonymising the firms and the third parties but not herself.

111. Mr Mulchrone submitted that the tribunal's assessment was not flawed and that its assessment and conclusion should be respected. The tribunal was the best arbiter of what needed to be included in order to make its judgment comprehensible. It was entitled to decide that the employment history should be included, in the tribunal's words, "to avoid neutering the judgment and seriously undermining its usefulness to both the public and the profession."

112. Furthermore, Mr Mulchrone pointed out, the tribunal had sensibly not included any reference to "sexual" harassment in its published decision. It had omitted reference to any of the alleged harassment being sexual, presumably through sensitivity to the particular considerations that arise where complaints are made of sexual harassment by young female lawyers.

113. Again, I find no fault with the tribunal's decision to allow the contextual material to appear in the judgment. The tribunal was entitled to let readers of its judgment know what had been alleged by Ms Lu and what had been alleged against her by her accusers. It was relevant to the case against her and relevant to her defence against the charges. I have already explained why.

114. I think it would have been possible to draft the judgment in language that omitted those matters, without rendering the judgment incomprehensible. But there was no obligation on the tribunal to do so. The default position is that hearings are held in public and judgments published. Although, regrettably, the hearing did not take place in public here, the judgment should not exclude relevant material without adequate cause. Here, I find no adequate cause.

The tribunal's decision to anonymise the two firms and certain individuals

115. This subject has been touched upon already but it is necessary to return to it because Ms Lu asks the court to grant permission to add various further grounds including one numbered 13:

> "Wrongly and/or in error of law to have derogated from the principle of open justice by anonymising the SRA's witnesses and redacting the SRA's evidence, when no application for anonymisation / redaction to this effect was made, no competing demands were in place, no Article 8 rights were engaged and no requirement of the administration of justice was present to have justified such derogation; failing to consider the Appellant's Article 6 of the ECHR right to fair trial and the interference with her Article 6 right."

116. This complaint bears some resemblance to Mr Nesbitt's ground 10 complaining of a failure to act consistently; however, Ms Lu now seeks to formulate the complaint, as I understand it, as one of conducting an unfair trial in breach of article 6 of the Convention. The essence of the complaint is of a lack of even-handed treatment as between herself and the anonymised third parties.

117. The purpose of the proposed new ground 13 is to support a new head of relief sought, stated in Ms Lu's witness statement: "[p]ublication of the SRA's witnesses and those who gave hearsay statements in respect of Allegations 1.1 and 1.2". This is something like the antithesis of the relief sought when the appeal was brought, which was to anonymise her own identity.

118. As long ago as April 2021, Mr Nesbitt stated in his original skeleton (paragraph 53) that Ms Lu had made applications to the tribunal below to anonymise her identity and Instagram account details and redact out personal information concerning her employment history; and also an "alternative" application:

> "that the persons who provided statements / reports / witness statements to the SRA and the Tribunal (excluding the third party expert witnesses), who brought and participated in the Tribunal proceedings be published in the judgment".

119. Ms Lu now revives this attempt to lift the anonymity the tribunal directed in respect of these third parties. She does not explicitly mention the two law firms, but I take her request to include them. They are limited liability partnerships and thus legal persons. The relevant persons have not been named as interested parties or served with the application for permission to amend the grounds; but I have considered such comments on my draft judgment as they have made.

120. Ms Lu is making something of a volte-face. She no longer seeks to have her own identity removed from the public domain, where it has been by virtue of the published judgment since early 2021 (and in cause lists before that). She did not ask for the cause list for the appeal to be anonymised; nor did she ask the court to sit in private to hear the appeal; nor did she pursue her initial application for interim relief to protect her identity.

121. Ms Lu submits in support of this newly formulated ground that there was no justification for anonymising the third parties including those who gave hearsay evidence in the form of written statements containing (undetermined) allegations against Ms Lu, but who were not called to give oral evidence before the tribunal. She

submits that the protection of anonymity was not sought, their article 8 rights were not engaged and the tribunal's derogation from open justice to protect their identities was unjustified.

122. Ms Lu submitted that she enjoys the right under article 6 to a fair trial and under article 10 to freedom of expression. The right of the third parties to protection of their identity was weaker than Mr Spector's; like him, they merely participated in the proceedings as providers of evidence but, unlike him, they were not accused of anything or acquitted of anything. Unwanted publicity frequently attends litigation and is part of the price of open justice.

123. In support of this new ground, Ms Lu championed the importance of open justice; an irony not lost on the court. Derogations were a matter of evaluation not discretion; they should be exceptional; and the burden is on the party seeking a derogation to show that it is, exceptionally, justified. The tribunal's unjustified derogation from open justice by anonymising the third parties compromised the fairness of the trial; the anonymity order should be quashed.

124. Mr Mulchrone complained of the lateness of the application to amend; so late was it, he noted, that he had to work on it over the weekend (21-22 May 2022) before the hearing, before it was actually sealed and issued (on 24 May 2022). He was able, to his credit, to produce a full note of the SRA's arguments in opposition to the application for permission to amend. Ms Lu said that the lateness was due to the very late loss of the services of her counsel.

125. Mr Mulchrone submitted that the late application sought to raise completely new points which the SRA would have no opportunity to answer. In so far as fairness required an opportunity to respond with further evidence, that was plainly impracticable. Even where a new ground raised a "pure point of law", three criteria identified by Haddon-Cave LJ at [18] in *Singh v. Dass* [2019] EWCA Civ 360 at [18] needed to be satisfied.

126. The first is that the other party must have had adequate time to deal with the point; the second, that the other party has not acted to its detriment on the faith of the earlier omission to raise the point; and the third, that the other party can be adequately protected in costs.

127. Mr Mulchrone also submitted that the new ground 13 attacking the decision to anonymise the third parties did not appear to have been argued below. However, as Mr Nesbitt noted, Ms Lu clearly complained below of differential treatment and application of a double standard in the tribunal's consideration of anonymity. That is the essence of the complaint.

128. In relation to the proposed new ground 13, Mr Mulchrone repeated his submission (which I have rejected) that anonymity decisions are case management decisions not appealable under section 49 of the 1974 Act. He submitted alternatively that the tribunal was entitled to sit in private to protect the third parties from exceptional prejudice or exceptional hardship; and repeated his submission (in response to ground 10) that the tribunal was entitled to differentiate between Ms Lu and those not before the tribunal.

129. I am satisfied that the SRA was not prejudiced by the lateness of the amendment. It was the same argument as already made in the 10th ground of appeal. The only difference was that there was a new request for relief, in the form of an order lifting the anonymity of the persons to whom the tribunal had granted it. The SRA has not acted to its detriment on the faith of the earlier omission to raise the point; nor has it incurred significant costs arising from the point.

130. In my judgment, it is just to allow the amendment for those reasons and because there is a real issue as to whether the anonymity granted to the third parties was justified. The amendment is made very late but I take into account that Ms Lu has lost the services of two counsel since the appeal started; that the point is one that she did raise before the tribunal below; and that the new head of relief sought follows the logic of the 10th ground of appeal.

131. The third parties should, ideally, have been notified and given an opportunity to make representations in respect of this ground of appeal, even though they made none to the tribunal, as far as I am aware, and did not seek the anonymity bestowed on them. I therefore made available to them a draft of this judgment and considered their comments on the draft before finalising it.

132. I permit this ground of appeal to be raised also because this appellate court must conduct the appeal on the basis of open justice, unless otherwise provided under the Civil Procedure Rules (rule 39.2, discussed above). I would be hampered in performing my duty to conduct the appeal openly if I were to adopt anonymity decisions made by the tribunal which I do not consider were justified.

133. In my judgment, this new ground of appeal is well founded, as is the existing 10th ground of appeal, quoted above. I uphold both grounds. I do not consider that the anonymity orders made below were justified. Nor do I consider that I would be justified in continuing them in this judgment, applying the tests in CPR rule 39.2. However, I make an exception (with some hesitation) in the case of Persons A, B and C because of their contractual rights, as already stated.

134. The chairman took it upon himself to intervene in support of anonymity. It was sought neither by the third parties themselves nor by the SRA. Mr Johal's submissions had supported open justice. It was Ms Lu who wanted the hearing to be held in private. The chairman did not conduct a fact specific evaluation bringing intense focus to the factual position of the third parties and their rights under article 8. He merely mentioned their absence from the hearing.

135. The SRA had brought its case without calling the absent witnesses the tribunal took it upon itself to protect. They could have attended or been called as witnesses. The chairman did not make any clear findings that they would suffer exceptional hardship or prejudice if identified. Nor did he analyse why the reasoning in the *Spector* case should not be applied to accusers as well as accused, at any rate where the accused is acquitted.

136. In the ruling, the tribunal did not differentiate between the two law firms and the individuals, nor between the individuals against whom allegations were made and others such as Ms Pearson and Mr Ewing against whom no particular wrongdoing was alleged. Yet, the two firms were shielded from being accountable publicly for reporting

alleged misconduct and bringing accusations to the SRA which went before the tribunal and were then found not proved.

137. I see no good reason why Ms Pearson, Ms Stone, Mr Ewing and Mr Blakemore, should have been anonymised by the tribunal. They were individuals properly doing their jobs. Their role was not remarkable or particularly controversial. There was no reason not to apply the default position of open justice. They had no particular private or family life issues to protect. I can find no justification in rule 39.2 for continuing their anonymity in this judgment.

138. In my judgment, the sweeping anonymity orders in respect of the third parties ought not to have been made. Courts and tribunals should not be squeamish about naming innocent people caught up in alleged wrongdoing of others. It is part of the price of open justice and there is no presumption that their privacy is more important than open justice.

139. I do not shrink from naming Cadwalader and Pillsbury in this judgment. While I have narrowly decided to continue the anonymity of Persons A, B and C, the tribunal's decision to anonymise them was not adequately reasoned. My decision does not mean I would have made the same decision or that I endorse the tribunal's decision and reasoning on that point.

140. The fact that those persons were unrepresented; that allegations were made against them; and that the power under rule 35 of the SDPR existed, were not good and sufficient reasons to justify intervening, unasked, on their behalf. The decision to do so created a disturbing impression of unequal treatment, offering succour for the SRA's side of the case while denying it to the innocent accused.

141. The favour was extended to the corporate LLPs employing Persons A, B and C without adequate reason. Anonymity was applied, for no apparent reason, even to a barrister and an expert witness who had innocently and fortuitously become part of the narrative.

142. It is particularly unfortunate that while the tribunal granted "X LLP" (Pillsbury) anonymity, it went on to criticise the firm it was calling X LLP. That gave the impression of favour, according to Pillsbury the luxury of anonymity and shielding the firm from publicity despite the criticism. Thus, in the published decision at paragraph 196.54, the tribunal said this:

> "The Tribunal had a number of concerns about the investigation carried out by X LLP: the Tribunal was told that HI who was based abroad apparently found the post and drew it to the attention of WB also based abroad but in a different part of the world and to Person A in London. However, the Tribunal did not hear any evidence from HI. Person A had not seen the post before it was drawn to their attention. The investigation was carried out abroad and headed by WB even though the post related to Person A, who was based in London in the same office as the Respondent. Nobody in this country or those abroad investigating the matter spoke to the Respondent to get her explanation of the post. Instead this issue was tied in with a self-reporting exercise by the firm to the Applicant which related mainly to grievances that had been raised by the Respondent including relating to bullying and harassment. The Tribunal generally found the Respondent to be a credible witness in respect of allegation 1.1. The Tribunal found that if the firm had informed the Respondent and obtained her explanation rather than simply reporting it to the Applicant, the fact that she had been bitten by a dog on 15 June 2018 and had medical treatment on

> that day would have come out and the outcome might have been quite different from what transpired."

143. I am also concerned that the test for sitting in private in rule 35 of the SDRP, exceptional prejudice or hardship, including in cases where no application is made by the person affected, is out of tune with the common law principle of open justice and with the case law on balancing article 8 and article 10 rights. I hope the issue and the rule will be looked at again to avoid further difficulties of the kind that have arisen in this appeal.

The allegation of serious procedural irregularity

144. In her witness statement supporting the application for permission to amend the grounds, made as late as 20 May 2022, Ms Lu states that she has fresh evidence and that she wishes to deploy it to support an allegation verging on one of bad faith against the SRA. She seeks the court's permission to amend her grounds to add a new ground 14, in the following terms:

> "Unjustly to have allowed the proceedings to proceed when there were serious procedural irregularities, namely that: (i) the SRA had no digital evidence to prove the existence of the alleged online posts upon which Allegations 1.1 and 1.2 were brought and the SRA's witness evidence contained assumptions / inconsistencies / inaccuracies; and (ii) the SRA had not complied with notices served under Rules 28 and 29 of the Solicitors (Disciplinary Proceedings) Rules 2019 and Civil Evidence Act 1995, the SRA failed to prove the authenticity of the documents and the version of facts set out in the statements it sought to rely on."

145. This attempt to amend arises from evidence of emails obtained by Ms Lu from Cadwalader, by means of a subject access request. It is said that certain emails she thereby obtained, indicated that the SRA was aware when it decided to continue with the proceedings that the images it possessed of what purported to be screenshots of the incriminating posts, were not actual screenshots and could not be reliably linked to Ms Lu's Instagram account because the presence of posts on the account is temporary and the images relied on could not be reliably matched to the dates of the alleged posting.

146. In her skeleton argument for the appeal, Ms Lu submitted that the SRA "knew that it could not prove the alleged online posts existed or advance Allegation 1.1/1.2; it concealed this material information from the SDT [i.e. the tribunal] and the Appellant and continued to pursue the SDT proceedings". That was "a serious procedural irregularity, it misled the SDT, it affected the SDT's decision making on a number of issues, including anonymisation / redaction and costs".

147. I refuse to permit this ground of appeal to be added to the appeal. The application to amend is made very late. The SRA is prejudiced because it would need an opportunity to answer the serious allegation that it pursued a case it knew or should have known it could not win. An examination of this ground would involve something like an inquest into how the case was conducted below. It would be a complex and detailed exercise.

148. It is also very unlikely that there is any merit in the proposed new ground. The SRA was entitled to rely on the context and content of the posts as, at least, strong circumstantial evidence that Ms Lu was their author. Indeed, she admitted as much in the case of the corgi post. Her defence centred on her explanation for the post, namely that she had been bitten by a dog.

149. In the case of the abuse and threat posts, it was not an unreasonable starting point for the SRA to bring a case founded on the likelihood that the apparent author was also the real author. That this was not proved does not come near to condemning the SRA's decision to bring the charge on the evidence it had. I refuse permission to amend to add the new 14th ground of appeal.

The tribunal's refusal to order the SRA to pay all or part of Ms Lu's costs

150. Finally, Ms Lu asks the court's permission to amend to add a 15th ground of appeal, in the following terms:

> "Wrongly and/or in error of law to have refused to order the SRA to pay all or part of the Appellant's costs."

151. The essence of the complaint is that if the tribunal had been made aware that the SRA knew it had no case against Ms Lu, the tribunal would probably have ruled in her favour on the issue of costs, rather than making no award of costs. The court in this appeal should therefore reverse the decision to make no order as to costs and should substitute an award of costs in Ms Lu's favour.

152. The tribunal's decision not to award Ms Lu's costs seems to me to be properly reasoned on the information available to it. I do not find arguable merit in this ground independently of the content of the previous ground. The tribunal's decision in respect of costs was one for its evaluation and discretion and I do not find any arguable flaw in it. I refuse permission to advance this ground.

Concluding observations

153. For those reasons, the appeal succeeds in part. I uphold grounds 10 and 13 only. However, I do not find it necessary to go further and remit the matter, set aside the anonymity orders or require the tribunal to publish its decision in a different form. This judgment naming the relevant persons suffices, without the grant of further relief. The court's dissatisfaction with the decision appealed against is sufficiently demonstrated by the terms of this judgment.

154. The passage quoted above from the judgment shows how much less clear a heavily redacted decision is to the reader trying to make sense of it. No wonder reporters are deterred from reporting such decisions. The lack of clarity was compounded by the tribunal persistently referring (see published decision, paragraphs 106-194, *passim*) to an anonymised witness as "the witness".

155. This was done, the tribunal explained, in the interest of gender neutral terminology, but "the witness" was not even referred to by each witness's equally gender neutral initials. This makes it difficult to know to which anonymous witness, at first denoted by initials, the tribunal was referring without laboriously searching earlier in the decision.

156. Having held that grounds 10 and 13 of the appeal succeed, I have identified in this judgment the persons identified in it but not identified by the tribunal below. I decline to make any further order by way of remedy. On all other grounds, the appeal is dismissed. But the bringing of the appeal has raised some important issues, as I have mentioned.

157. In future, if in any appeal to this court from a domestic tribunal, a party asks the court to lift an anonymity order or other restriction on publication of information in (or in connection with) the judgment below, affected parties should be asked if they consent. Unless their written consent is obtained and can be provided to the court, they should generally be served with the papers as interested parties.