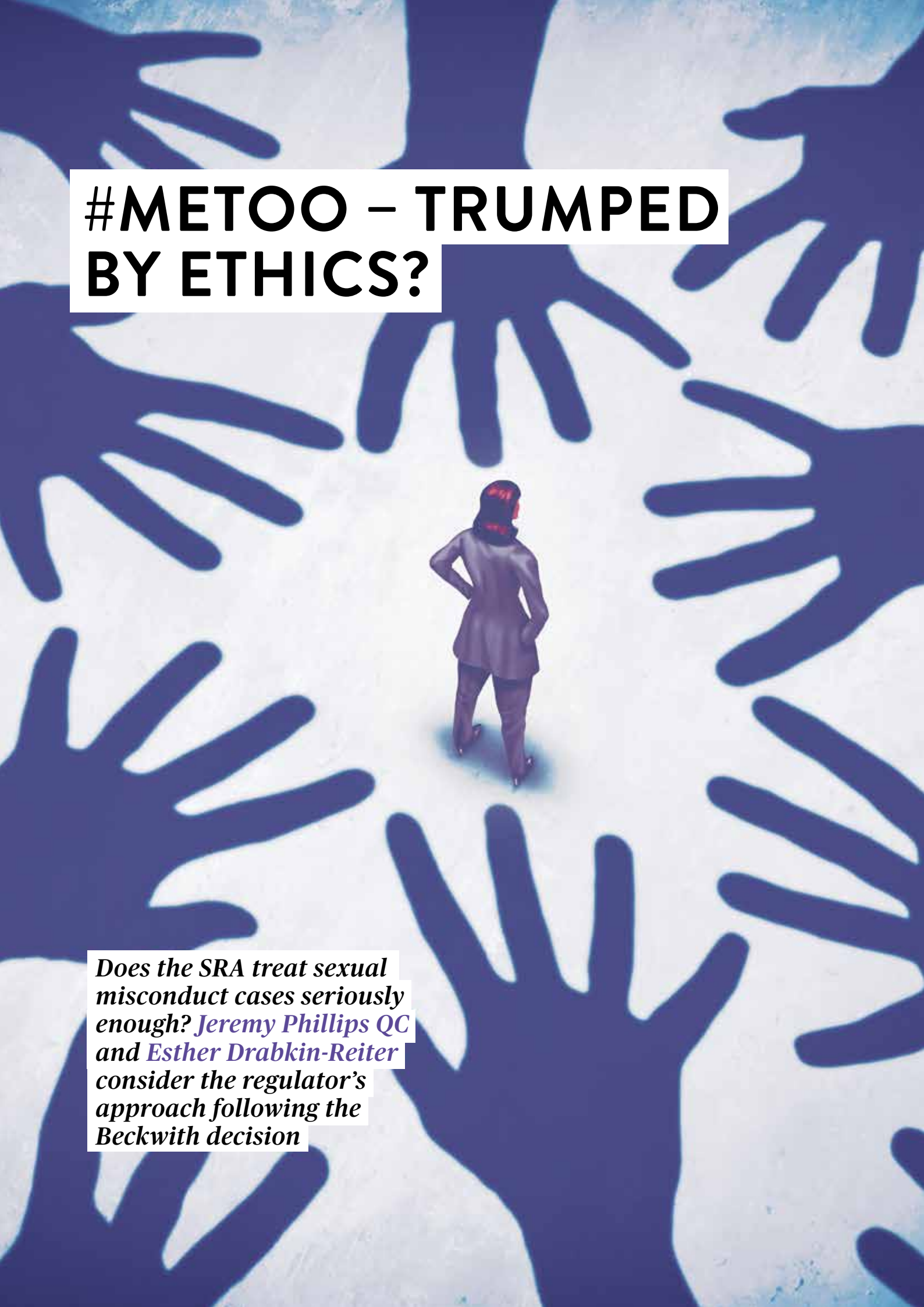
#METOO – TRUMPED BY ETHICS?



Does the SRA treat sexual misconduct cases seriously enough? Jeremy Phillips QC and Esther Drabkin-Reiter consider the regulator's approach following the Beckwith decision

In the wake of the #metoo movement, what role do professional regulators have to play in the prevention of sexual harassment and abuse in the workplace?

Should the Solicitors Disciplinary Tribunal (SDT) get involved in matters involving private relationships between colleagues within a law firm? Do their respective positions in the firm's hierarchy matter? Will such behaviour undermine trust in the professional as a whole, and if so, what sanction is appropriate?

These and other questions have moved rapidly up the public agenda, recently prompting the Times magazine, for example, to carry the headline Sex, Lies and Lawyers on its front page, followed by a somewhat prurient five-page article concerning the shenanigans occurring in solicitors' practices – including a number of "top City law firms".

RYAN BECKWITH

Last October, following allegations of sexual misconduct by a co-worker, the SDT found that Ryan Beckwith, previously a partner at Freshfields, had breached what was (under the previous regulatory code in force at the time) Principle 2 (acting with integrity) and Principle 6 (behaving in a way that maintains the trust the public places in you and in the provision of legal services) of the Solicitors Regulation Authority (SRA) Code of Conduct. Beckwith was fined £35,000 and ordered to pay £20,000 costs.

A 50-page judgment set out the reasons for those sanctions. On 19 February 2020 Beckwith filed an appeal to the High Court against this ruling. The SRA has decided not to appeal.

The allegations were raised by a junior female colleague of Beckwith, described as Person A before the SDT to protect her anonymity. She described her patchy recollection of an intoxicated evening in the summer of 2016 at a pub opposite Freshfields' London office, fuelled by drinks the partner had bought. After that, she claimed she found herself in a taxi with Beckwith with her trousers undone, and later waking up to find herself in her own apartment undressed with him touching her body. While accepting they had engaged in what he described as a "consensual sexual encounter", Beckwith denied the details of Person A's account.

The SDT found (as accepted by both parties) that there was a sexual encounter between them though it was not asked by the SRA to make any ruling on consent and did not do so.

Notwithstanding the submissions made to the contrary on behalf of the partner, the SDT considered that the SRA's failure to raise consent as an issue did not mean it was unable to consider whether there had been a breach of the SRA principles. The SDT found that in all the circumstances, Beckwith knew that his conduct, in engaging in sexual activity with Person A, was inappropriate.

THE NEW FRAMEWORK

Claims of sexual misconduct by solicitors come before the SDT where the SRA considers that the solicitor in question has breached one or more of the SRA principles (now found in the new SRA Standards and Regulations (STARs)).

In particular, the SRA generally considers that sexual harassment is capable of undermining Principle 2 (the requirement to act in a way that upholds public trust and confi-

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dence in the solicitors' profession) and Principle 5 (the requirement to act with integrity). Sexual misconduct may also amount to an abuse of position by taking unfair advantage of others, as prohibited by paragraph 1.2 of the SRA code for solicitors.

Under section 49 of the Solicitors Act 1974, an SDT decision can be appealed to the High Court, which can then make any order it sees fit. However, in line with many other regulatory appeals, the High Court has confirmed (most recently in *Solicitors Regulation Authority v Dar* [2019] EWHC 2831 (Admin) [para 38-41]) that as an appeal is by way of review not rehearing it will only allow an appeal where the SDT has got it 'wrong'.

In particular, it will approach any challenge to the finding of facts and evaluation of those facts by a specialist tribunal such as the SDT with great caution, and only where something has gone "plainly wrong". A sanction imposed by the SDT will only be interfered with where it is "in error of law or clearly inappropriate", in the sense of falling outside the boundaries of what the SDT could properly and reasonably decide.

The High Court has also considered what it means to act with integrity for the purposes of the SRA principles. Integrity requires adherence to the higher standards of professional behaviour required of solicitors; and failure to act with integrity goes beyond inadvertent or even negligent acts. The duty to act with integrity applies not only to what professional persons say, but also to what they do.

However, solicitors are not required to be paragons of virtue (*Solicitors Regulation Authority v Wingate* [2018] EWCA Civ 366). A lack of integrity is not the same thing as manifest incompetence.

While a finding of lack of integrity will not inexorably lead to a striking off or suspension, where the lack of integrity is particularly serious, it may be considered that the reputation of the profession would be seriously undermined by the mere imposition of fines as a sanction and can only be protected by striking off. In Beckwith's case, the SDT emphasised that the duty to act with integrity does not only apply to a solicitor's professional life, but also to activities undertaken outside practice.

The proceedings against Beckwith were brought when the previous regulatory code was in place (the SRA Handbook). In relation to the new SRA principles there is no overt difference between the handbook and the STARs, although the principles require a greater focus upon judgement as opposed to unthinking compliance. In that context, the new code does for the first time include a separate requirement to act honestly, as well as with integrity.

The code also places greater emphasis on self-reporting, by explicitly requiring solicitors to report promptly to the SRA any facts or matters that they reasonably believe are capable of amounting to a serious breach of their regulatory arrangements by any person regulated by them, including the solicitor themselves (rule 7.7 STARs).

However, previously under the handbook a solicitor only had to notify where they had in fact seriously failed to comply with the SRA principles and handbook, and the obligation to report serious misconduct only extended to solicitors other than the reporter themselves.

In new guidance issued alongside the STARs, Public trust and confidence, relating to SRA Principle 2, the SRA indicates it will act where conduct, either inside or outside of practice, would diminish the public's trust in the profession if it knew it was done by a solicitor, such as behaviour involving sexual harassment. It notes that "we do not expect everyone to conform to a perfect ideal of behaviour outside of practice. The threshold for us taking action relating to conduct in personal relationships is high but may well be crossed by unlawful or abusive behaviour".

NDAS

The SRA has also issued a warning notice relating to the use of non-disclosure agreements (NDAs) – which apply to claims of sexual misconduct within solicitors' firms as well as misconduct or serious breaches of regulatory requirements generally.

It provides that firms' use of such agreements to suppress claims of sexual misconduct may also breach Principle 1 (to act in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice) and Principle 3 (to act with honesty) – as well as conflicting with requirements in the SRA code to cooperate with and provide information to the SRA and inform it of any serious breaches of regulatory arrangements.

Solicitors are not required to be paragons of virtue

ENFORCEMENT

The purpose of SDT sanctions is fourfold: to be punitive, a deterrent, prevent repeat offending and maintain the reputation of the profession.

The SDT's guidance note on sanctions requires the SDT to assess the culpability and

harm of the offender then consider any aggravating and mitigating factors. The imposition of fines is subject to a banded approach – the amount imposed will fall within levels one to five reflecting the seriousness of the offending behaviour. Dishonesty will normally result in a solicitor being struck off the roll while in other serious misconduct cases, all circumstances must be considered in the round.

The High Court recently confirmed that serious misconduct will not lead automatically to strike off or an immediate suspension of practice, although such an outcome would be appropriate in most cases (*Solicitors Regulation Authority v Dar* [2019] EWHC 2831).

In most cases, the SDT will be in the best position to determine the sanction to be applied and its findings are unlikely to be interfered with. In the case of Beckwith, it found that his conduct caused harm to the reputation of the profession and his firm and significant harm to Person A. It was too serious for no order as to sanctions or a reprimand to be appropriate, but a restriction order was not necessary to protect the public. A fine towards the upper limit of level four was appropriate.

IMPLICATIONS

The *Beckwith* case demonstrates that the SRA and the SDT are willing to take action in sexual misconduct cases which might, historically, have been considered a purely internal matter.

It also shows the willingness of the SDT to take action and impose sanctions even where it did not make a finding that the sexual activity was non-consensual. Even now, it seems highly unlikely that consensual sexual activity between solicitors working in the same firm at a similar level in the organisation would be subject to regulatory action.

However, where (as in *Beckwith*) the sexual activity occurred in the context of a significant disparity in seniority, the abuse of position involved (or potentially perceived to be by members of the public) provides greater justification for disciplinary action by the regulator. This will be particularly so in firms with a well-developed hierarchical structure, in which junior members are highly dependent on senior colleagues for their professional development.

Imposing a fine rather than striking Beckwith off (or even suspending him) demonstrates that the SDT considered any misconduct on his part to be less serious. In *Dar*, incompetent but not dishonest conduct on the solicitor's part which enabled an attempted fraudulent transaction was found to have breached the same principles as in Beckwith's case. The High Court upheld the SDT's sanction of a suspended suspension order as well as a fine.

SEA CHANGE

In the wake of the #metoo movement, the SDT's failure to place any restriction on Beckwith's practice may lead some to consider that the regulator is not treating sexual misconduct cases seriously enough, or is allowing members of wealthy private practices effectively to buy their way out of the consequences of their actions.

However, the SRA action against Beckwith, and the SDT's findings, does have significant implications for what is something of a sea change for the SRA in its approach to sexual misconduct cases.

Despite a previous reluctance to take action in respect of such allegations, a large number of sexual misconduct cases brought by the SRA are in the pipeline. For example, in December 2019 the SDT began hearing a three-week case alleging sexual harassment against Gary Senior, the former managing partner of Baker McKenzie's London office. The development of the SDT's approach to sanctions in these upcoming cases will be crucial to the way in which such behaviour will be deterred and managed in future.

These cases, and the SRA's increased appetite to bring sexual misconduct claims before the SDT, is also likely to lead to changes to internal disciplinary and regulatory procedures. A new online training course for solicitors on sexual harassment in the workplace went live earlier this month. One firm, for example, has already indicated it will put its own measures in place to "improve behaviour and inclusiveness" by setting up a conduct committee and protocol; and imposing earnings deductions of up to 20 per cent for bad behaviour. Other firms are likely to follow suit.

Given the SRA's warning concerning the use of NDAs, it would be unwise for firms to consider such an approach as a substitute for the duty to notify otherwise reportable breaches. Any such practice, should it become widespread, could raise public concerns that senior lawyers were still able to buy their way out of the consequences sexual misconduct – a most unwelcome outcome which would undoubtedly further diminish the standing of the legal profession as a whole. SJ

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