What UK Professional Regulation Looks Like In A #MeToo Era

By **Andrew Katzen** (December 22, 2021)

Andrew Katzen

The past 20 years have seen significant changes in what is considered to be appropriate workplace behavior. From the acceptability of alcohol consumption, through views on diversity, to tolerance of sexualized interaction, the modern workplace is a different place than it was at the turn of the millennium.

As public views on this issue have shifted, so too have the approaches of the various professional regulators. In recent months, there have been two rulings — Jon Frensham v. Financial Conduct Authority and Adam Fouracre v. Solicitors Regulation Authority — which may be considered significant moments in a rapidly evolving area of law.

The rate of change across the regulatory world has not been uniform. Some bodies have moved faster than others. But there has been a steady, sector-wide shift as regulators try to better represent what we might, for lack of a better term, call the #MeToo era.

While there is not yet a widely understood new normal there are clear trends about the way in which professionals' behavior is now being governed, which anyone concerned with this developing area of law should know about.

Private/Public Interface

The leading case in this area is that of Ryan Beckwith, a former magic circle solicitor alleged to have breached the SRA's professional standards of integrity and upholding confidence in the profession by having sex with a junior colleague after a social event at which both parties had been drinking alcohol.

Beckwith, a partner at Freshfields Bruckhaus Deringer, admitted to kissing the woman — his appraisee — in a pub and then accompanied her in a taxi to her home, where he said a consensual sexual encounter took place.

The case turned, in part, on the responsibilities incumbent on powerful working men. But, as it was litigated, the question of where one should draw the line between private and public emerged as a significant issue.

For his part, Beckwith argued that an incident which started outside the office and ended in a private home should be considered beyond the SRA's remit. The Solicitors Disciplinary Tribunal disagreed. In January 2020, it ruled Beckwith acted without integrity and threatened the trust placed in him by the public. He was ordered to pay £200,000 (around $267,179) in costs and a £35,000 fine.[1]

As we shall see, the SDT's decision did not stand. But the fact that it ruled against Beckwith — and that the SRA brought the case — is significant in its own right.

In another SRA matter, in September 2020, Gary Senior, former senior managing partner at U.S. law firm Baker McKenzie, was found to have committed serious professional misconduct by attempting to kiss a junior lawyer against her will.[2]

The incident occurred eight years earlier, when Senior asked the junior lawyer to stay behind in his hotel room after a work event and drinks. He was fined £55,000 and ordered to pay £40,000 in costs.

It is clear from these two cases that for solicitors at least, the idea that private and professional environments may be easily distinguished is no longer the case. It is surely not hard to imagine similar decisions from other professional regulators.

Quasi-Criminal Allegations

Professional disciplinary tribunals do not hold criminal trials. But there is a sense, in some of these cases, that the behavior in question is quasi-criminal in nature. The allegations may not be framed as such, but the alleged behavior in some sexual misconduct cases may be understood by some as amounting to harassment, sexual assault or even rape.

Unlike the criminal courts, professional disciplinary tribunals are not used to dealing with the sort of highly contested issues of fact which are typically found in sexual allegations. Accurately assessing the reliability of witness testimony and managing vulnerable individuals are difficult skills which require time, and well-thought-through processes, to master. There is a potential for injustice if these processes are not conducted properly.

There is also the related issue of disclosure. The criminal courts have a well-defined set of rules and case law governing the disclosure of material not relied on by the prosecution. The same is not true of regulatory tribunals which may struggle to determine how they should properly deal with contentious — but potentially vital — material, such as medical records.

Sexual misconduct regulatory cases must clearly be sensitively managed if we wish to achieve a just result, which balances the interests of all parties.

Then there is the fact that tribunals, unlike the criminal courts, determine proof on the balance of probabilities, rather than to the criminal standard.

The Role of the Tribunals and Courts

There have been a limited number of appellate tribunal and court rulings in misconduct matters. In the Beckwith case referred to above, in November 2020 the High Court reversed the SDT's decision.[3] Essentially, the High Court's judgment was that for sexual misconduct cases which had not resulted in a criminal conviction, disciplinary findings should only occur when there is a clear link to — and resultant breach of — the SRA Code and Principles.

It held that in relation to the 2011 Code of Conduct:

> The standard of conduct required by the obligation to act with integrity must be drawn from and informed by appropriate construction of the contents of the Handbook, because that is the legally recognised source for regulation of the profession.

It added:

> What the Appellant did affected his own reputation; but there is a qualitative distinction between conduct of that order and conduct that affects either his own reputation as a provider of legal services or the reputation of his profession.

And in a particularly striking comment, Justice Jonathan Swift stated there is no general definition of professional misconduct based on the public's view of acceptable standards of behavior. He warned regulators about interfering too far into professionals' personal lives, saying:

> Regulators will do well to recognise that it is all too easy to be dogmatic without knowing it; popular outcry is not proof that a particular set of events gives rise to any matter falling within a regulator's remit.

There has been another important tribunal ruling in a recent FCA case. Jon Frensham was a financial adviser who, in October 2020, was banned by the FCA from practicing following his conviction for a sex-related crime, the specifics of which were unconnected to his job.[4]

Unlike the other cases mentioned so far, there was a criminal trial and conviction to deal with. The FCA determined that Frensham's conviction three years earlier for attempting to meet a child following sexual grooming, meant he was not a "fit and proper person."

Frensham referred the FCA's decision the Upper Tribunal.[5] While the court upheld the decision to ban him, it rejected the FCA's apparent assumption that a conviction of this sort should automatically lead to professional suspension.

The court characterized the FCA's submission to it as "saying that the offence must be regarded as being so awful and would be regarded as such by fair-minded members of the public with knowledge of the facts, that the only answer to the question posed must be that the person concerned must be prohibited from working in the industry."

The Upper Tribunal took issue with this. It affirmed the position that to prove non-financial misconduct there needs to be a clear link to breach of FCA rules and principles.

To quote from the ruling:

> The basis on which the Authority seeks to link Mr Frensham's lack of personal integrity to his professional role on the basis of the nature of the offence alone is speculative and unconvincing."

It cited directly the judgment in Beckwith about regulators not acting on popular outcry.

Moving Forward

There was a time, not so long ago, when a regulated professional might relatively easily define which areas of their lives their regulator was entitled to police, and which areas it couldn't. Put very simply and generally: Misbehavior committed in the office was regulated, while misbehavior in a hotel, at home or on the golf course wasn't.

That is no longer the case. It is now common for professional regulators to seek to sanction behavior that may previously have been considered private. Where the lines will be drawn by the courts is not entirely clear but on the limited number of cases a pattern seems to be emerging.

The recent High Court ruling in Beckwith appears to have resulted in both the SRA, and particularly the SDT, approaching these types of issues with more caution.

For instance, in the recent case of Fouracre v SRA, a trainee solicitor appealed against the decision of the SRA to rebuke him for finding him in breach of maintaining trust in the profession due to sexually offensive comments (both verbal and in a Christmas card) to a work colleague.[6]

The tribunal characterized this behavior as "deeply inappropriate and disgraceful" but found that there was insufficient link between the comments and the provision of legal services and so the appeal was allowed. The direction of travel is clear; but the precise contours of this new era of regulatory law are still being set.

The results so far seem to endorse the approach in Beckwith of requiring there to be a clear infringement of professional rules for behavior in private life — even if disturbing, outrageous and even criminal — to warrant disciplinary sanction.

Andrew Katzen is a partner and head of regulatory law at Hickman & Rose Solicitors.

[1] https://www.solicitorstribunal.org.uk

[2] https://www.solicitorstribunal.org.uk

[3] https://www.judiciary.uk/wp-content/uploads/2020/11/Beckwith-v-SRA-judgment.pdf.

[4] https://www.fca.org.uk/publication/decision-notices/jon-frensham-2020.pdf.

[5] https://assets.publishing.service.gov.uk/media/612e14dfe90e07054107585e/Frensham_v_FCA.pdf.