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LawCare's response to the LSB's call for information on competence

Introduction

LawCare is a charity which has:

- (i) helped individuals within the legal profession for over 21 years with a wide range of mental health problems such as stress, depression, alcohol and other addictions, eating disorders and many more through its confidential helpline ; and
- (ii) promoted the value of good mental health for both the individual and for firms, chambers and legal practices – (for more information about LawCare's extensive and innovative work see <https://www.lawcare.org.uk/>).

Mental health problems almost inevitably have some level of impact on an individual's ability to work effectively. In a number of cases, they will affect the individual's competence and judgement, sometimes to the extent that this leads to dishonesty. Often the working environment contributes to this. Managing huge workloads, tight deadlines and demanding clients and meeting billing targets can exacerbate mental health problems or even create them. Additionally, the way a firm is managed can have a huge impact on the individual lawyer's ability to cope with these pressures.

LawCare's input for the LSB's information gathering, therefore, looks at the part good mental health and healthy work places play in ensuring lawyer competence. Integral to this is LawCare's belief that competence goes beyond just having the appropriate legal knowledge and the ability to apply it and that it extends to all aspects of being a lawyer. This should include the "soft skills" or "people skills" that underpin a healthy workplace and are instrumental in ensuring individuals feel confident and supported in all their work. Lawyers need clarity of mind and focus to meet the high professional standards expected of them by the public, poor mental health compromises this.

A separate, but related, response to the information gathering is being submitted by Emma Jones, an academic with whom LawCare has worked closely over the production of self training materials called "Fit for Law". These are intended to assist lawyers be more aware about why and how they react to certain stressful situations and individuals in practice and how to deal with them without compromising their professional competence. Emma's response will, therefore, look specifically at the issue of "emotional competence".

What evidence is there for the impact of mental health on competence?

Research in the USA has shown that lawyers' ethical decision making is compromised by poor mental health. In the UK, a number of cases which have been heard by the SDT (Solicitors Disciplinary Tribunal) and courts demonstrate that this is also a problem in England and Wales. Breaches of the SRA Principles, particularly those concerning honesty and integrity, have arisen where an individual's decision making has been compromised by mental health issues. Failures of this nature almost inevitably result in detriment to clients as the legal skills and judgement needed to progress a client's case are intertwined with the required ethical skills. An example would be that of a hearing

date being missed coupled with an attempt to cover up for the mistake. These lapses may or may not have arisen through work related stress but it is usually the case that the high pressure environment in which lawyers work is a contributory factor. This can be compounded by management and supervision failures and a legal mindset that is perfectionist with a fear of making and admitting mistakes.

Three high profile cases made headline news in 2018 when they went on appeal together from the SDT to the High Court – Solicitors Regulation Authority v James and others. They were all illustrative of the fact that stress and depression can affect an individual's decision making to such an extent that normally honest, hardworking lawyers can behave dishonestly and fail to meet their clients' needs. The SDT had initially suspended the solicitors concerned from practice, taking into account the high levels of stress they had all been under at the time of their dishonest actions. On appeal by the SRA against the SDT's decision, they were all struck off the roll.

Looking in detail at one of these cases – that of Sovani James – is instructive in how the working environment can also play a part in competence. She was employed by a firm that specialised in medical negligence cases. In one particular case, she failed to meet a court deadline for serving the particulars of claim, a schedule of loss and medical report. She then made a series of misleading statements on nine separate occasions to the client and to the firm about the current position on the file giving the impression that the proceedings had been stayed, judgment on liability had been obtained in the client's favour and extensions of time for service of the Schedule of Loss and medical report had been granted by the NHS Trust. None of this was true. In essence, she had been negligent and compounded this by dishonestly covering up her failure.

In reaching its decision, the SDT concluded that "the root cause of the Respondent's misconduct, including the allegations of dishonesty, was the combination of the culture of the firm in terms of pressures placed on junior solicitors and her mental ill-health arising from the pressures of work allied with difficult personal circumstances". The pressures applied by the firm to reach billing targets were immense. When James fell behind with her billing, she was told to work weekends and bank holidays until she caught up. The working atmosphere created by the firm was described by the SDT as toxic. It is interesting to note that since she left the firm, James had worked as a solicitor for three years with another firm with a more supportive environment without problems.

In the James case, the SDT summed up more widely its thoughts on the responsibility of firms' managers to deal with mental health problems:

"During the last 10 to 15 years, and in particular in the last 5 years or so, awareness and openness concerning mental health issues have developed. Management at law firms and elsewhere should be more alert to the warning signs, which included, amongst other things, decline in performance, physical symptoms of distress, and uncharacteristic behaviour such as a drop in reliability. Management should be able to respond appropriately, for example by providing access to external counselling services. We have all become much more aware of bullying and harassment in the workplace which can have a significant impact on employees, particularly those who might be described as being vulnerable."

There are other cases that have been heard by the SDT where addiction problems, typically alcohol and gambling, have taken their toll on a solicitor's honesty and the ability to represent clients competently.

The SDT cases make headline news and are probably just the tip of the iceberg in terms of those who have fallen victim to mental health issues and work stress. LawCare has spoken to numerous

helpline callers about problems arising from, or exacerbated by, unhealthy workplaces where bullying is rife and there is little or no support because of poor supervision and management.

LawCare has also seen examples of cases where underlying mental health problems alone create a serious problem for the individual concerned, the firm and the clients. Depression and addiction problems are typical examples. Often partners and work colleagues are aware of the problem but have no idea how to confront it. The situation is allowed to fester and work can be badly affected with consequences for clients and the firm.

There are a number of lessons to take away from the SDT cases and from the numerous situations which have come to light through the LawCare helpline. No two cases are the same but what is evident is that too much work related stress, particularly if combined with unhealthy workplaces where insufficient support is available or a culture of bullying prevails, will produce casualties. This affects not just the lawyers concerned but also the clients they act for, and ultimately the reputation of the legal profession. Not all cases of stress or depression are work related but if brought into the workplace will affect competence and this also needs to be factored into any solution.

How does mental health feed into the debate on competence? Should competence be defined more widely?

As outlined above, mental health clearly affects competence. For this reason, any debate on lawyer competence, including how it is defined and how it is enforced, must look at a need for (i) individuals to take much more responsibility for their own good mental health and (ii) for firms – and in particular the managers – to take responsibility for creating healthy workplaces where individuals can flourish, which would include taking responsibility for and supporting those displaying mental health problems.

The need for lawyers to be competent is a theme carried throughout the different regulatory regimes of all approved regulators. Nowhere, however, is competence defined in terms of any sets of skills which an individual is likely to be required to demonstrate at any stage in their career. The SRA, for example, in its Code of Conduct for Solicitors, RELs and RFLs deals with the subject of competence in its Standard 3 in very general terms. It requires that the service provided to clients is competent, that “you maintain your competence to carry out your role and keep your professional skills up to date” and where your role involves supervising or managing others “you effectively supervise work being done for clients”.

To a certain extent, it is obvious that to be competent as a lawyer it is necessary to have and maintain the requisite legal knowledge and skills that go with the areas of work undertaken. Some Codes of approved regulators say as much. Beyond that, there is no real indication of what competence might encompass in terms of other skills. This is where greater definition would help to get solicitors and firms to think more widely about exactly what “maintaining your competence” and “you effectively supervise work” might look like and to think in terms of incorporating policies on healthy work places and practices to include in their office manuals.

One specific area where LawCare would suggest there is greater need for definition is in terms of supervisory and management skills. The SRA Code of Conduct for Firms requires firms to “ensure that your managers ... are competent to carry out their role”. Lawyers tend to progress to these roles as their experience of legal practice increases but there is no requirement that “managers” or “supervisors” have any particular skills to be competent to carry them out.

It would probably be unhelpful and certainly go against the emphasis on the current principles based approach to regulation to have a detailed and complicated definition of competence in any set of rules but this is something that could be explained in guidance by regulators. Since the SRA Standards and Regulations came into force last November, the SRA has been producing extensive guidance to explain how rules might apply but nothing deals with the subject of competence and what it might look like.

LawCare has produced materials for both individuals and firms to help address this - <https://www.lawcare.org.uk/workplace-hub/toolkit>. Whilst not expecting regulators to replicate this level of detail, it would certainly be beneficial if some of the ideas could be drawn into the regulators' regimes through guidance which addresses mentally healthy workplaces. This would help to reinforce the idea that bad management practices, such as manifest in the James case, and poor supervision are not acceptable and may encourage regulators to take action against them. At present, regulators seem reluctant to do so yet this is the root cause of so many failings by individuals who are placed under unacceptable levels of work pressure.

Finally, ensuring mentally healthy lawyers and workplaces must feed into the continuing competence regime of regulators. Some regimes require CPD points, others simply require individuals to reflect on their needs and address them. In both instances, more needs to be done to encourage good mental health to form part of the process.