

**THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL
(PROCEDURE RULES 2008)**

DECISION

in hearing on Compensation in Complaint

by

**THE COUNCIL OF THE LAW SOCIETY of
SCOTLAND, Atria One, 144 Morrison Street,
Edinburgh**

Complainers

against

**SIMON KENNEDY DUNCAN, Solicitor, Flat
G/L, 603 Clarkston Road, Glasgow**

Respondent

1. On 2 June 2023, Simon Kennedy Duncan, Solicitor, Flat G/L, 603 Clarkston Road, Glasgow (“the Respondent”), was found guilty of professional misconduct.
2. There was a Secondary Complainer in the Complaint, Mandy McCallum, 4 Corthan Crescent, Aberdeen.
3. Following the finding of professional misconduct, the Tribunal allowed the Secondary Complainer 28 days from the intimation of the findings of misconduct to lodge a claim for compensation. The written findings were intimated to the Secondary Complainer. A claim was lodged.
4. The Tribunal set the matter down for a virtual compensation hearing on 8 December 2023. Notice was duly served upon the Respondent and Secondary Complainer.
5. At the virtual compensation hearing on 8 December 2023, the Secondary Complainer was neither present nor represented. The Respondent was present and represented by Johnston Clark, Solicitor, Dundee.
6. The Tribunal found the following facts established:-

- 6.1 The claimant at this hearing was Mandy McCallum, a Secondary Complainer in the Complaint against the Respondent, Simon Duncan.
- 6.2 On 2 June 2023, the Tribunal found the Respondent guilty of professional misconduct in respect that he
- (a) Failed to provide updates of progress from May 2014;
 - (b) Failed to obtain a medical report on behalf of the Secondary Complainer despite the Secondary Complainer providing £1000 in or around June 2014;
 - (c) Failed to provide the Secondary Complainer with any case related documentation after May 2014 drafted in her name, for her approval;
 - (d) Raised a Court Action on 17 November 2015 at Glasgow Sheriff Court on the Secondary Complainer's behalf without her instruction;
 - (e) Failed to co-operate with the Complainers' investigation of the complaint and failed to respond to any correspondence sent to him by the Complainers in relation to that complaint including Notices in terms of the 2007 Act Section 48(1)(a) and the 1980 Act Section 15(2)(i)(i) both Notices dated 9 November 2018.
- 6.3 The Secondary Complainer lodged a written statement of claim with the Tribunal claiming £5,000 for inconvenience and distress.

7. The Tribunal pronounced an Interlocutor in the following terms:-

By Video Conference, 8 December 2023. The Tribunal, having considered the Complaint at the instance of the Council of the Law Society of Scotland against Simon Kennedy Duncan, Solicitor, Flat G/L, 603 Clarkston Road, Glasgow and having previously determined that the Respondent was guilty of professional misconduct; Having considered whether it was appropriate to award compensation to the Secondary Complainer; Find that the Secondary Complainer has been directly affected by the Respondent's misconduct and considered that it is appropriate to award compensation to the Secondary Complainer: Ordain the Respondent in terms of Section 53(2)(bb) of the Solicitors (Scotland) Act 1980 to pay to the Secondary Complainer, Mandy McCallum, 4 Corthan Crescent, Aberdeen, the sum of £400 by way of compensation in respect of inconvenience and distress resulting from the professional misconduct within 28 days of the date on which this Interlocutor becomes final with interest at the rate of 8% per annum

from the due date until paid; Make no finding of expenses due to or by either party; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and the Secondary Complainer but need not identify any other person.

(signed)

Ben Kemp

Vice Chair

8. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent and the Secondary Complainer by recorded delivery service on 18 JANUARY 2024 .

IN THE NAME OF THE TRIBUNAL



Ben Kemp
Vice Chair

NOTE

At the virtual compensation hearing on 8 December 2023, the Tribunal had before it the decision in the misconduct case against the Respondent; the Secondary Complainer's compensation claim form; emails from the Secondary Complainer; and the Second Inventory of Productions for the Respondent which had been lodged in the misconduct case.

The Secondary Complainer had indicated by email to the Tribunal Office that she would not be able to attend the compensation hearing due to work commitments. She was also unable to attend on an alternative date. She invited the Tribunal to proceed in her absence on the basis of the documents lodged in the case. Mr Clark noted that the email correspondence which appeared to be from the Secondary Complainer had been sent from the email address of the claims handler who had originally introduced the Secondary Complainer to the Respondent.

The Tribunal considered whether it was fair and appropriate to proceed in the absence of the Secondary Complainer. The date of the hearing had been intimated to her. It was clear from her email correspondence that she was aware of the compensation hearing. She had invited the Tribunal to proceed on the basis of the documents lodged with it. In all these circumstances the Tribunal was content to continue in the Secondary Complainer's absence.

SECONDARY COMPLAINER'S CLAIM

The Secondary Complainer claimed for financial loss. She referred to "£1000 taken from me for medical report". She claimed this money was never used and remained outstanding. She said it had been retained by the Respondent. She claimed for loss of interest. She referred to a loss of opportunity to claim for medical negligence due to the case being mishandled. She explained that there had been numerous telephone calls and efforts to switch the case to another solicitor. There had been nine years of effort, emails, time and telephone calls.

The Secondary Complainer also claimed for inconvenience and distress. She said the situation had caused her stress and upset over ten years. She said she had lost her claim due to non-action by the Respondent. She referred to the effect on her health. She was stressed and worried by the Respondent raising an action without her knowledge, withdrawing without her knowledge and Sheriff Officers attending at her door. She claimed to have been left vulnerable to financial risk. She felt angry at the way she had been treated. She had no closure. She was embarrassed. She did not want to have to deal with solicitors again.

SUBMISSIONS FOR THE RESPONDENT

Mr Clark noted that the Secondary Complainer had undergone plastic surgery in November 2012. The time bar for a claim was therefore November 2015.

Another solicitor under the Respondent's supervision was put in charge of the Secondary Complainer's case. He asked the Secondary Complainer for £1,000. However, this was not enough for two reports. In Mr Clark's submission, this was the first mistake in the way this case was handled. By 12 November 2015 there was still no medical report. The Respondent had not reported to the client. He raised an action and had it sisted. The account for the sist was paid by the Respondent. A mandate was received and agency terminated on 22 August 2017.

Mr Clark submitted that the Respondent's agency lasted only for a short period. The misconduct related to failing to make substantial progress, failure to obtain a medical report, failure to provide the Secondary Complainer with case-related documents, and raising an action without the Secondary Complainer's instructions.

With reference to the claim for financial loss, Mr Clark said it was apparent from the claim form that the Secondary Complainer believed that the Respondent had stolen, or at least failed to account for, money which she had given to him. Mr Clark noted that the Secondary Complainer believed that £1000 paid to the Respondent was never used or accounted for. However, that was not the case.

Mr Clark noted that the Secondary Complainer complained about the injuries she sustained, but the Respondent was not responsible for this. She complained that she lost her opportunity to pursue her case. However, the Respondent raised the action to preserve her position, although she also criticised that decision. The Secondary Complainer works offshore. In Mr Clark's submission, the best way not to prejudice her was to raise an action. The court dues were lost but the Secondary Complainer's claim was based on her having lost an opportunity to pursue her case. There was no finding of misconduct relating to loss of opportunity or lack of due diligence. Mr Clark noted the Secondary Complainer's anger about the surgery and the lack of compensation for that. Although the Secondary Complainer had referred to a ten-year period, the Respondent was only responsible for her case for part of that time.

Mr Clark referred to the claim for inconvenience and distress. Mr Clark noted that there was no vouching of the worry or distress the Secondary Complainer said that she had experienced. The Secondary Complainer had referred to Sheriff Officers but this had not occurred during the Respondent's period of

agency. Mr Clark submitted that failing to cooperate with the Law Society did not make much of a difference to the Secondary Complainer's claim for compensation.

In conclusion, Mr Clark said any financial loss was restricted to the warranting dues. To make an award for inconvenience and distress, the Tribunal would have to be satisfied that there was inconvenience and distress beyond that already subsisting at the time of the Respondent's misconduct.

DECISION

The Tribunal considered the terms of Section 53(2)(bb) of the Solicitors (Scotland) Act 1980 which provides that:-

“Where the solicitor has been guilty of professional misconduct, and where the Tribunal consider that the Complainer has been directly affected by the misconduct, direct the solicitor to pay compensation of such amount, not exceeding £5,000, as the Tribunal may specify to the Complainer for loss, inconvenience or distress resulting from the misconduct.”

The Tribunal's power to award compensation is limited. It can only direct a solicitor to pay compensation up to a maximum award of £5,000 to a Secondary Complainer for loss, inconvenience or distress which resulted from the misconduct. A direct effect is one which would not have happened but for the professional misconduct. The standard of proof in connection with a claim for compensation is that of balance of probabilities. The onus of proof rests upon the Secondary Complainer. The Tribunal has a discretion to award compensation but is not obliged to do so.

The Tribunal considered the Secondary Complainer's claim for financial loss. She said that she had paid £1,000 to the Respondent for a medical report, that no report was instructed, and that the money was not returned to her. She implied that the Respondent had misappropriated her money. The previous Tribunal had made no finding of misconduct to this effect. Careful consideration of the documents lodged in this case tended to show on the balance of probabilities that the Secondary Complainer had paid £1,000 to the Respondent for a medical report. From this money, the Respondent paid £120 for warrant dues and £110 for medical records. This left a balance of £770 which was transferred to the Secondary Complainer's new solicitor when agency was transferred. The Secondary Complainer paid a further £576 to her new solicitor. This made a balance of £1346. This money was all used up on motion dues of £96 and an expert report which cost £1250. There was therefore no basis upon which to make an award for £1000 as requested by the Secondary Complainer, as most of this money had been spent legitimately or transferred to her new solicitor. The Tribunal noted that professional misconduct had been established


on the basis that the Respondent had raised a court action without the Secondary Complainer's instruction. The action was raised to protect the Secondary Complainer's position. However, this would not have had to been done at that stage if the Respondent had taken action earlier and communicated effectively with the Secondary Complainer. The Tribunal therefore considered it appropriate that the Secondary Complainer received compensation for the warrant dues of £120.

The Secondary Complainer argued that she had lost the opportunity to pursue her claim. The Tribunal considered that this claim had no foundation. The Respondent raised the claim within the timebar and the Secondary Complainer abandoned it after advice from her new solicitor.

The Tribunal considered the Secondary Complainer's claim for inconvenience and distress. The Tribunal noted that the Secondary Complainer was already distressed about the alleged negligent incidents which were the subject of the original claim. However, the Tribunal's role in awarding compensation was limited to direct effects of the Respondent's established professional misconduct.

The Tribunal noted that the Respondent had failed to communicate with the Secondary Complainer for a long period and had failed to cooperate with the Law Society in its investigation. This caused the Secondary Complainer inconvenience and distress. Having regard to its compensation tariffs guidance, the Tribunal considered that the consequence on the Secondary Complainer had been modest. It was of limited effect and duration and caused minor inconvenience on a number of occasions causing some worry and concern. In all the circumstances, the Tribunal was of the view that the appropriate award of compensation for inconvenience and distress was £280. The total award of compensation for financial loss and non-quantifiable loss was therefore £400.

The Tribunal found no expenses due to or by either party. Although the Respondent would normally bear the expenses as the unsuccessful party, the circumstances were such that the Tribunal decided to exercise its discretion in this case to make no award. There was no motion for expenses made by the Secondary Complainer. Her expenses for a hearing by video conference which she did not attend would be minimal. The Tribunal directed that publicity would be given to the decision, naming the Respondent and the Secondary Complainer.



Ben Kemp
Vice Chair