

**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, Wilma Keddie, 2 Overton Mains, Kirkcaldy.
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 form was received and intimated to the Respondent.
4. The Tribunal set the matter down for a virtual compensation hearing on 24 November 2023. Notice was duly served upon the Respondent and Secondary Complainer.
5. At the virtual compensation hearing on 24 November 2023, the Secondary Complainer was present and represented herself. The Respondent was present and represented by Johnston Clark, Solicitor, Dundee. The Secondary Complainer gave evidence on her own behalf. The compensation hearing was continued to 8 December 2023 for the Tribunal to make some further enquiries.

6. At the continued virtual compensation hearing on 8 December 2023, the Secondary Complainer neither present nor represented. The Respondent was present and represented by Johnston Clark, Solicitor, Dundee. Mr Clark made submissions.

7. The Tribunal found the following facts established:-

7.1 The claimant at this hearing was Wilma Keddie, a Secondary Complainer in the Complaint against the Respondent, Simon Duncan.

7.2 On 2 June 2023, the Tribunal found the Respondent guilty of professional misconduct in respect that he

(a) Failed to comply with a mandate signed by the Secondary Complainer and sent to him on 6 March 2018 requiring his file to be delivered to Watermans, Solicitors, as they had been instructed by the Secondary Complainer to deal with her claim;

(b) Failed to respond to letters from Watermans dated 28 March and 12 April 2018 seeking compliance with the mandate sent on 6 March 2018 for delivery of the file to Watermans, Solicitors;

(c) Failed to co-operate with the Complainers' investigation of the complaint and failed to respond to any correspondence sent to him by the Complainer including formal notices in terms of the 2007 Act Section 48(1)(a) and the 1980 Act Section 15(2)(i)(i).

7.3 The Secondary Complainer lodged a written statement of claim with the Tribunal claiming £5,000 for financial loss, inconvenience and distress.

8. 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, Wilma Keddie, 2 Overton Mains, Kirkcaldy; Make no award of compensation; 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

9. 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 24 November 2023, the Tribunal had before it the findings in the misconduct case and the Secondary Complainer's compensation claim form.

EVIDENCE FOR THE SECONDARY COMPLAINER

The Secondary Complainer gave evidence on oath about a difficult dental treatment she had experienced during which an attempt had been made to extract a tooth. She had indicated that the dentist should stop but attempts had continued while she was in considerable pain. She explained that she had suffered trauma and anxiety as a result. The experience had taken a lot out of her. She had found it difficult to eat, drink and sleep. She was terrified to visit the dentist. She had to go to hospital to have the extraction completed. She had a large bruise and a black eye. She felt very anxious. It took months for her to get back to normal and she was terrified of it happening again.

Mr Clark indicated that he might not cross examine the Secondary Complainer but that depended on whether the Tribunal intended to ask any questions itself. The Tribunal indicated that it did have some questions for the Secondary Complainer.

The Chair noted that the Tribunal had already determined that the Secondary Complainer had consulted the Respondent with regard to a personal injury claim related to a road traffic accident. The Secondary Complainer denied ever having been in road traffic accident. The Chair asked the Secondary Complainer how the dental procedure related to the Respondent, her solicitor. The Secondary Complainer said that she did not ever remember meeting the Respondent. Mr Clark said he understood that the Secondary Complainer's case concerned dental negligence. The Tribunal asked the Secondary Complainer whether she remembered instructing the Respondent as her solicitor. She said that she did not and that she did not know him.

It appeared possible to the Tribunal that there might have been some kind of factual error in the pleadings in the misconduct case which was continued in the findings. The Tribunal proposed in the interests of justice to continue the hearing to 8 December 2023 at 3.30pm to seek clarity from the Law Society about the case. Mr Clark was opposed to that course of action, noting that the case was about the Respondent's professional misconduct, not the Secondary Complainer's injury. Mr Clark raised concerns that the Secondary Complainer was still on oath. He believed that the Secondary Complainer's daughter had been assisting her during her evidence. Mr Clark noted that the case was about compliance with a mandate and failure to cooperate with the Law Society. The narrative about the type of case was

irrelevant. However, the Tribunal wished to clarify whether the parties' previously agreed position, and the pleadings in the misconduct case, were in error. The Tribunal continued the hearing to 8 December 2023 at 3.30pm to take place by video conference. The Secondary Complainer was reminded that she was no longer on oath.

The Tribunal Clerk made enquiries with the Law Society and the Fiscal about the purpose for which the Respondent was instructed by the Secondary Complainer. Mr Clark also provided information from the SLCC. It appeared that the formal documents comprising the complaint completed by the Secondary Complainer's new solicitor referred to a personal injury matter, and accident claim, and a road traffic accident. The Secondary Complainer and the Respondent both were of the view that the case had concerned dental negligence. The Clerk sent copies of the correspondence received to the Respondent and the Secondary Complainer.

At the virtual continued compensation hearing on 8 December 2023, the Tribunal had before it the findings in the misconduct case, the Secondary Complainer's compensation claim form, and correspondence from the Law Society Fiscal, the Clerk to the Professional Conduct Sub Committee, and Mr Clark. On 8 December 2023, the Secondary Complainer was not present or represented. The Respondent was present and represented by Mr Clark who moved the Tribunal to proceed with the case in the Secondary Complainer's absence. He confirmed that the case had concerned dental negligence. He did not wish to cross examine the Secondary Complainer. The Tribunal retired to consider whether to proceed in the absence of the Secondary Complainer.

The Tribunal noted that the Secondary Complainer had been personally present on the last occasion when the date for the continued compensation hearing had been set. A letter confirming the date and attaching an extract from the Tribunal's minute had been sent by Royal Mail "Signed For" Delivery to the Secondary Complainer on 24 November 2023. According to the Royal Mail Track and Trace website, the letter had been delivered and signed for by "Keddie" on 28 November 2023. The video conference joining instructions had been sent by email to the Secondary Complainer one week before the hearing. The Tribunal Office had also tried to contact the Secondary Complainer at the time the continued hearing was due to start since she was not present in the waiting room.

The Tribunal was of the view that proper intimation of the hearing had been made to the Secondary Complainer. It considered whether it should adjourn to another date. However, it was of the view that there was nothing to suggest that the Secondary Complainer would appear on another date. It was also important to balance fairness to the Respondent and the public interest in bringing these proceedings to a conclusion. The Secondary Complainer had given written notice of her claim in the compensation

claim form. She had taken the opportunity to give evidence to the Tribunal. Therefore, it decided to proceed in the Secondary Complainer's absence on the basis that she had waived her right to attend.

SUBMISSIONS FOR THE RESPONDENT

Mr Clark noted that the compensation claim form had not been signed by the Secondary Complainer. He asked the Tribunal to give the form appropriate weight as evidence in the circumstances. He noted that the Secondary Complainer had said she did not know the Respondent. Her oral evidence had been about embarrassment and pain which arose as a result of the dental incident. It was difficult to attribute the references to pain and embarrassment in the claim form to the Respondent rather than the dentist. Mr Clark noted that the misconduct in this case concerned failing to implement a mandate, failing to reply to correspondence and failing to cooperate with the Law Society. He said there was no relevant claim for financial loss or distress and inconvenience although he did not claim the form was a fundamental nullity. He suggested that the Tribunal should not make an award of compensation in this case.

DECISION

The powers of the Tribunal to award compensation are set out within 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 was sympathetic to the Secondary Complainer but found the case difficult. The Secondary Complainer's muddled testimony exclusively related to her distress following a dental procedure. The Respondent indicated that the Secondary Complainer had consulted him about a dental negligence

matter. The Secondary Complainer did not remember the Respondent. The Tribunal had previously made a finding of fact based on the agreed position of the parties that the Secondary Complainer had instructed the Respondent. The Respondent had pleaded guilty to failing to obtemper a mandate, communicate with the Secondary Complainer and cooperate with the Law Society's investigation. The Tribunal considered whether there was any evidence that the Secondary Complainer had been directly affected by the Respondent's misconduct and concluded that there was no foundation to make an award of compensation. The claim form referred to inconvenience and distress. It noted the damage to her health and the way the Secondary Complainer interacted with professional bodies. She referred to her embarrassment and hurt. However, the Tribunal was unable on the basis of the information before it to make out any causal link between the Respondent's misconduct and the issues which the Secondary Complainer referred to in her claim form, which might also have been referring to her dentist. It was therefore unable to point to a direct effect on the Secondary Complainer caused by the Respondent for which compensation could be paid.

Therefore, having carefully considered all the information available to it, the Tribunal was unable to identify a relevant basis for compensation attributable to the professional misconduct found established by the Tribunal against the Respondent. The Secondary Complainer had failed to discharge the onus of proof on the balance of probabilities. It therefore made no award of compensation. Having considered all the circumstances of the case, the Tribunal decided to exercise its discretion and make no award of expenses. The Tribunal's decision will be published in the usual way. The Respondent and the Secondary Complainer will be named in the decision, but third parties will not be identified.



Ben Kemp
Vice Chair