

**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

**THERESA MARY McWILLIAMS, Trainor
Alston Limited, 18 Academy Street, Coatbridge,
North Lanarkshire**

Respondent

1. On 23 October 2020, Theresa Mary McWilliams, Trainor Alston Limited, 18 Academy Street, Coatbridge, North Lanarkshire (hereinafter referred to as “the Respondent”) was found guilty of professional misconduct.
2. There was a Secondary Complainer.
3. On 23 October 2020, the Tribunal allowed the Secondary Complainer 28 days from the date of intimation of the Findings to lodge a written claim for compensation with the Tribunal Office. A written claim for compensation was lodged and the Tribunal set the case down for a virtual procedural hearing on 15 March 2021.
4. At the virtual procedural hearing on 15 March 2021, the Secondary Complainer was present. The Respondent was absent but was represented by Nicola Irvine, Solicitor, Glasgow. The representative for the Secondary Complainer, Alison Martin, had, in advance of the procedural hearing, advised the Tribunal Office that she was ill and unable to attend. Accordingly, the case was continued to a further virtual procedural hearing to take place on 22 March 2021 to allow Ms Martin to be present.
5. At the virtual procedural hearing on 22 March 2021, the Secondary Complainer was present and represented by Alison Martin. The Respondent was not present but was represented by Nicola Irvine, Solicitor, Glasgow. Ms Martin confirmed that she was ready for the matter

to be set down for a hearing. She confirmed having received a file of papers from the Secondary Complainer's previous agents. She intended lodging some of the documents provided as Productions and confirmed that she was in a position to do so within the next 14 days. She confirmed that her only witness would be the Secondary Complainer. There being no objection by the Respondent, the Tribunal fixed a hearing for 17 May 2021. Both parties confirmed that the hearing was suitable for a virtual platform. The Secondary Complainer was allowed 14 days from this date to lodge his productions.

6. At the virtual compensation hearing on 17 May 2021, the Secondary Complainer was present and represented by Alison Martin. The Respondent was not present but was represented by Nicola Irvine, Solicitor, Glasgow. There being no objection, the Tribunal allowed the Secondary Complainer's Productions to be received late. Ms Martin confirmed that she was not intending to lead any additional evidence beyond the copy fee notes and email produced. The Tribunal heard submissions from both parties.
7. The Tribunal found the following facts established:-
 - 7.1 The Applicant was the Secondary Complainer in the Complaint against Theresa Mary McWilliams, Trainor Alston Limited, 18 Academy Street, Coatbridge, North Lanarkshire. The Respondent was found guilty of professional misconduct in respect that she (a) failed or unduly delayed, for a period of 10 months, to implement a mandate; and (b) failed to communicate effectively with Brodies Solicitors.
 - 7.2 The Secondary Complainer lodged a written statement of claim with the Tribunal Office claiming compensation of £5,000 to include distress, inconvenience and fees incurred to Messrs Brodies Solicitors.
 - 7.3 The Secondary Complainer was directly affected by the Respondent's misconduct when the Respondent (a) failed or unduly delayed, for a period of 10 months, to implement a mandate and (b) failed to communicate effectively with Messrs Brodies Solicitors. As a result of the foregoing misconduct, the Secondary Complainer incurred legal expenses and suffered inconvenience.
8. The Tribunal intimated its findings to the parties and invited detailed submissions in relation to expenses and publicity. Ms Martin intimated that she had other commitments requiring her attendance. Both parties were content to proceed by way of written

submissions. Accordingly, the Tribunal allowed both parties seven days within which to lodge written submissions in relation to expenses and publicity.

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

By Video Conference, 17 May 2021. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Theresa Mary McWilliams, Trainor Alston Limited, 18 Academy Street, Coatbridge, North Lanarkshire and having previously determined that the Respondent was guilty of professional misconduct; Find that the Secondary Complainer has been directly affected by the Respondent's misconduct and consider 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 the sum of £650, representing £500 in respect of loss and £150 in respect of inconvenience, resulting from the 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; and Allow both parties seven days from the date of this Interlocutor to lodge written submissions in relation to expenses and publicity.

(signed)

Ben Kemp

Vice Chair

10. By Video Conference, 27 May 2021. The Tribunal having considered the parties' written submissions in the Complaint at the instance of the Council of the Law Society of Scotland against Theresa Mary McWilliams, Trainor Alston Limited, 18 Academy Street, Coatbridge, North Lanarkshire; Find the Respondent liable in the expenses of the Secondary Complainer to the extent of £350; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not identify any other person.

(signed)

Ben Kemp

Vice Chair

11. 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 **4 AUGUST 2021**.

IN THE NAME OF THE TRIBUNAL



Ben Kemp

Vice Chair

NOTE

At the compensation hearing on 17 May 2021, the Tribunal had before it the written claim for compensation and two sets of Productions for the Secondary Complainer. At the procedural hearing on 22 March 2021, the Secondary Complainer had been allowed 14 days from that date to lodge productions. Subsequently, the Secondary Complainer's representative, Ms Martin, had requested an extension of that time limit. That request was granted and the time for lodging Productions was extended to 23 April 2021. The First List of Productions was lodged with the Tribunal Office on 26 April 2021. The Second List of Productions was lodged on the morning of the compensation hearing. There being no objection on behalf of the Respondent, the Tribunal allowed the Secondary Complainer's Productions to be received late.

The Tribunal invited Ms Martin to proceed first as the compensation claim was her application. Ms Martin confirmed that she was not leading any evidence beyond the Productions she had lodged. As it was her view that she had set out her case within the claim for compensation and the documentary productions, she invited the Tribunal to hear submissions from Ms Irvine first. Ms Irvine confirmed that she was prepared to proceed accordingly.

SUBMISSIONS FOR THE RESPONDENT

Ms Irvine confirmed that she had previously indicated to Ms Martin that she had issues with the relevance of some of the invoices lodged as productions.

She invited the Tribunal to disregard the invoices numbered Productions 2 to 6 inclusive. She explained that each of these invoices is addressed to another individual – not the Secondary Complainer. Furthermore, each of the invoices is headed "Advice regarding [Company A]". She emphasised that the burden of proof lay with the Secondary Complainer and no supplementary oral evidence had been given. She submitted that the Tribunal could not be satisfied on a balance of probabilities that these fees notes could be considered.

She invited the tribunal to consider the contents of the findings against the Respondent. She drew the Tribunal's attention to paragraph 7.5 of those findings where it was stated that Brodies had sent a letter to the Respondent's firm enclosing a mandate on behalf of another client in relation to a third matter. In paragraph 7.8, the findings stated that the Respondent sent an email to Brodies on 18 June 2018 confirming that she held no files in relation to the other client. It is also apparent that the Secondary

Complainer's own mandate related to two separate matters. The finding of misconduct related only to a file for a client, KM.

Ms Irvine stated that she believed that the other client referred to in the findings was in fact Company A which led her to the conclusion that none of the invoices at Productions 2-6 relate to the matter before the Tribunal. They were all addressed to another individual and so Brodies would have no right of recovery against the Secondary Complainer.

Additionally, Ms Irvine stated that she had compared the contents of these fee notes with the dates of letters in the findings and could not identify corresponding entries.

The remaining invoices, Productions 7 to 13 inclusive, are all addressed to the Secondary Complainer.

She invited the Tribunal to disregard Production 7. There was no breakdown within the fee note of the work done. The element of fee sought to be included by the Secondary Complainer was described in the fee note as relating to "all work undertaken in connection with claims against prior solicitors". There was insufficient information within the description of work undertaken to allow the Tribunal to conclude that any of these fees were incurred as a direct result of this misconduct.

With regard to Production 8, the heading for this fee note is "Advice regarding Trainor Alston and [Firm B]". The only detailed reference to Trainor Alston within the fee breakdown is the second entry of £88.50.

Ms Irvine invited the Tribunal to disregard Production 9. This invoice has the same heading. None of the detailed entries mention Trainor Alston. She submitted it was impossible for the Tribunal to conclude, on a balance of probabilities, that any of the entries related to this misconduct. Additionally, there was a summary of work done on the front sheet of the invoice which clearly made reference to other matters that neither related to Trainor Alston or Firm B.

Production 10 had the same heading. None of the detailed entries referred to Trainor Alston. There is insufficient detail to allow the Tribunal to conclude that any of the entries related to the misconduct before it.

Production 11 had the same heading. Ms Irvine drew the Tribunal's attention to the first three entries of the detailed breakdown of the fee note. These referred to time being split with another file and the other

files reference matched the reference on Productions 2 to 6 relating to Company A. Additionally, the fee note makes reference to a calling-up notice and another entirely different firm of solicitors.

Production 12 has the same heading. None of the detailed breakdown makes reference to Trainor Alston.

Production 13 has no detailed breakdown and the summary narrative relates to Firm B. Accordingly, she submitted that Production 13 was irrelevant and should be disregarded.

Ms Irvine accepted that, as a matter of principle, compensation may be payable as a result of misconduct. However, the loss, inconvenience and distress must relate to the actual misconduct found. She submitted that the Secondary Complainer had not met the evidential burden.

Additionally, she drew the Tribunal's attention to correspondence attached with the original compensation claim form suggesting that the invoices had not been paid. Even if the Tribunal was satisfied that some of the fees incurred related to this misconduct, there was no evidence before the Tribunal that the fees had been paid.

With regard to the second head of claim by the Secondary Complainer, Ms Irvine submitted that the Tribunal had heard no evidence of what was referred to by the Secondary Complainer in his form as stress, frustration and harassment. Accordingly, she submitted that the Secondary Complainer had not discharged the burden of proof in relation to either of the two heads of claim.

SUBMISSIONS FOR THE SECONDARY COMPLAINER

Ms Martin indicated that she agreed that the invoices produced were "somewhat confusing". She explained that was why she had sought further information from Brodies about the 2018 fees incurred by the Secondary Complainer. She submitted that the email lodged this morning from Brodies clarified this issue.

Ms Martin drew the Tribunal's attention to the findings in fact produced following the hearing of the substantive Complaint and in particular she placed emphasis on the dates of correspondence noted therein. She argued that there was no denying that work had been carried out by Brodies to try and have the Respondent deliver what had been asked for.

Ms Martin drew the Tribunal's attention to the dates of entries that she had highlighted within the invoice at Production 2. These were the entries from that invoice that she had included in her summary at

Production 1, which set out her calculation of the element of fees charged by Brodies that should be treated as part of the Secondary Complainer's claim for compensation. Whilst she accepted that the entries were not as clear as they could have been, she explained that she had not wanted to incur additional expense for the Secondary Complainer by asking Brodies for clarification. She emphasised that the Respondent had already admitted receiving correspondence from Brodies dated 10 May 2018 and a telephone call on 15 June 2018, two of the dates within the detail of Production 2.

She indicated that she did not intend to go through all of the invoices in detail but emphasised that the dates of correspondence noted within the previous findings corresponded with dates in the invoices.

With regard to Production 2 to 6, she could only assume that Brodies had included the work carried out for the Secondary Complainer in the invoices addressed to a third party by mistake. She had taken the approach that it was accepted by all that work was done by Brodies on behalf of the Secondary Complainer and consequently she had not thought that the fees would be disputed.

Ms Martin emphasised that all of the invoices had been paid. She explained that Brodies would not have released the documents to her otherwise. She offered to obtain an email from Brodies to confirm this, if it was considered necessary.

With regard to the invoices reproduced at Production 7 to 13, she accepted that the description on page 1 of each invoice included reference to both the Respondent's firm and another firm and conceded that this might raise a question mark. However, she still considered the invoices relevant to some degree.

With regard to Production 7, Ms Martin conceded that the description of work done appeared broader than the specific terms of the finding of misconduct. She argued that, nonetheless, elements within the description of work done were relevant.

In answer to a question from the Tribunal as to how it was to allocate fees incurred to the misconduct, Ms Martin invited the Tribunal to consider the work admitted to have been done by Brodies and then assess the time taken for that work whilst having regard to the hourly rates quoted for Brodies in their invoices, in order to reach a fair figure. In answer to a further question from the Tribunal, Ms Martin conceded that it was not appropriate to include the time taken by Brodies in preparing and issuing the mandate itself in the figure reached for compensation.

In moving on to address Production 8, Ms Martin submitted that she had to take all of the invoices at face value. The invoice at Production 8 referred in its title to advice regarding Trainor Alston and another

firm. She had to presume that Brodies would not have referred to Trainor Alston in the title unless the invoice included work done involving them. She accepted that the entries did not always refer to Trainor Alston and sometimes they referred to other firms or individuals. She argued that “it was not much of a reach” to look at the detailed entries and understand that they were directly related to the Respondent’s misconduct. She conceded that certain of the entries clearly had no relevance to the misconduct found in this case.

With regard to Production 9, she emphasised that in her statement of fees to be taken into account at Production 1, she had deducted anything charged for within the invoices that she considered was not relevant.

With regard to Production 10, she explained that she had found the invoice confusing herself and could not explain why all of the work charged for was mixed in the same invoice. She submitted that it was a matter for the Tribunal to take what it could from Production 10.

In summary in relation to Productions 7 to 13, she submitted that she had done the best she could with the information she had. She argued there was no denying that Brodies had carried out work for the Secondary Complainer and it was a matter for the Tribunal to assess this.

Ms Martin argued that the standard of proof had already been met by the findings in fact made following the previous hearing. She argued there was no denying that the Secondary Complainer had to pay money that he would not have had to pay if it had not been for the Respondent failing to do what she was required to do.

The Tribunal enquired whether Ms Martin wished to make any submissions in relation to the second head of claim for compensation. Ms Martin submitted that she did not consider that there was any denying that the Secondary Complainer had been caused stress and anxiety. She had taken the decision not to lead the Secondary Complainer as a witness nor to prepare a statement for him because of his health. He had told her that he had suffered sleepless nights and felt anxiety as a result of the Respondent’s misconduct. Ms Martin had not wanted to exacerbate the Secondary Complainer’s health problems by taking a formal statement or by leading him as a witness. The Tribunal confirmed that this was a decision for her and the Secondary Complainer to take.

The Tribunal invited Ms Martin to provide further assistance with regard to the process to be undertaken in allocating the fees incurred to the misconduct established. In response, Ms Martin referred the Tribunal to Production 1, her calculation of the element of fees to be taken into account in an award of

compensation. She explained that paragraph 1 related to Productions 2 to 6. She argued that the email from Brodies, lodged this morning, clarified that the fees for work undertaken for the Secondary Complainer in the course of 2018 were included in the fee notes for the third party. She argued that the dates in the fee notes produced reflected dates for correspondence noted in the findings. The total figure she had assessed as relevant from these fee notes was £3,360.

Ms Martin confirmed that she understood the Tribunal might be “struggling” with regard to Productions 7 to 13 as they were more obscure. However, she argued that the entries that specifically named Trainor Alston could not be in question. All she could do was rely upon the Tribunal to reach a fair judgement.

The total of fees to be taken from Productions 2 to 6 together with her own fee note was almost at the £5,000 limit. She argued that if the Tribunal had a careful analysis of Productions 7 to 13 it would have less trouble. She was relying upon the Tribunal to go through and digest the fee notes. Any entry within the fee notes at Productions 7 to 13 referring to the firm Trainor Alston should be treated as relevant to the claim for compensation as, in Ms Martin’s submission, the only subject being dealt with by Brodies for the Secondary Complainer referring to Trainor Alston was this matter.

The Tribunal questioned what weight could be placed on invoices addressed to the third party. Ms Martin emphasised that these invoices were relevant because the dates within the invoices tied in with the findings in fact. She argued that there was no dispute that Brodies had carried out work for the Secondary Complainer. She was unable to explain why that work had been included in invoices addressed to a third party. She emphasised that the invoices were relevant and they were paid by the Secondary Complainer.

RESPONSE BY THE RESPONDENT

Ms Irvine indicated that she did not accept that Brodies were only dealing with one matter on behalf of the Secondary Complainer.

She argued that various factors pointed to the invoices at Productions 2 to 6 being for a distinct and separate matter. Production 9 included entries where there was a split of the time with a file reference that matched file reference for invoices 2 to 6 addressed to a third party. She did not accept that fee notes 2 to 6 were erroneously headed with the name of Company A. The invoice at Production 6 included an entry dated 26 March 2019 referring to an SLCC complaint made by the third party against Trainor Alston.

The Tribunal could see from Production 2 an entry dated 10 May 2018 involving Brodies writing to Trainor Alston regarding another matter as well as the Secondary Complainer's. Comparing this with the findings in fact from the original hearing, Ms Irvine submitted that the client in the second mandate sent to Trainor Alston was the addressee of the invoice and Company A. The proposition that invoices Productions 2 to 6 were unrelated to this Complaint was supported by the absence of any reference to a letter dated 7 June 2018 or an email of 6 July 2018. Ms Irvine argued that the Tribunal could take nothing from the invoices at Productions 2 to 6.

She submitted that, accordingly, the evidential burden had not been discharged by the Secondary Complainer. She stated that the email from Brodies did not assist the Tribunal in any way with regard to the analysis of these invoices. Work may have been done for the Secondary Complainer in 2018 but there was no evidence before the Tribunal that it was charged for.

No evidence has been led before the Tribunal of stress, distress or frustration suffered by the Secondary Complainer in relation to the second head of claim.

Accordingly, Ms Irvine submitted that the evidential burden had not been reached.

RESPONSE BY THE SECONDARY COMPLAINER

Ms Martin emphasised that the majority of work done for the Secondary Complainer was carried out in 2018. She argued that there was no possibility that this work would not have been charged for.

She submitted that the fee note at Production 2 did contain dates that coincided with the findings in fact. She emphasised that she had not submitted that Brodies had no other business for the Secondary Complainer, but had stated that they had no other business involving the Secondary Complainer and Trainor Alston.

Whilst she conceded that the fee notes mentioned Trainor Alston and not the Respondent specifically, she argued that it was not disputed that Brodies had been instructed to carry out work for the Secondary Complainer and he had incurred fees for work which he would not have been done other than for the misconduct.

DECISION

Section 53(2)(bb) of the Solicitors (Scotland) Act 1980 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 onus of proof lies with the Secondary Complainer to establish that he had been directly affected by the misconduct established at the substantive hearing and that he had sustained loss, inconvenience or distress as a result of that misconduct. The standard of proof for these proceedings is that of the balance of probabilities. The Tribunal has the discretion to award compensation and is not obliged to do so.

The Tribunal can only have regard to loss, inconvenience or distress caused by the misconduct and not incurred as a result of any broader issues in relation to the Secondary Complainer’s involvement with the Respondent.

The only evidence produced by the Secondary Complainer was a number of invoices from Brodies and an email. The Secondary Complainer’s claim for compensation fell under two heads: (a) loss incurred as a result of fees he required to pay to Brodies; and (b) what was referred to as frustration, stress and harassment.

The Tribunal considered that it was able to look at the details of the facts found at the substantive hearing for assistance with regard to the question of whether the Secondary Complainer was directly affected by the misconduct. Given the detail of the steps required to be taken by Brodies in order to succeed in getting the Respondent to comply with the mandate, the Tribunal was satisfied on a balance of probabilities that the Secondary Complainer was directly affected by the misconduct on the part of the Respondent. The next step for the Tribunal was to assess whether the Secondary Complainer had incurred any loss or suffered any inconvenience or distress as a result of the misconduct.

The Tribunal considered the first element of the Secondary Complainer’s claim for compensation, namely loss. The Secondary Complainer had produced copies of some 12 invoices from Brodies.

Productions 2 to 6 were invoices addressed to a third party individual, who the Tribunal were told by Ms Martin was the daughter of the Secondary Complainer, and each of the invoices was headed “Advice

regarding [Company A]”. Ms Martin had submitted that the email from Brodies resolved the difficulties with these invoices. Unfortunately, that email provides no detail of any individual invoice nor any specific entry within an invoice. The Tribunal concluded that it provided no assistance at all in resolving the difficulties arising from these invoices. As suggested by Ms Martin, the Tribunal considered each of the individual entries within the invoices. Production 2 made reference to the preparation of four mandates, without indicating the identity of the signatories. Production 4 made reference to there being a complaint to the SLCC by the Secondary Complainer against the Respondent and one of her partners at Trainor Alston. Production 6 made reference to the Secondary Complainer’s daughter having a complaint to the SLCC against the Respondent’s firm. Entries within the accounts made specific reference to a complaint against another firm entirely. Ms Martin had highlighted entries within the individual accounts which she had included in her summary of relevant fees which was Production 1. The Tribunal found it difficult to see any logic to the entries that were highlighted compared to those that were not. Taking into account the number of mandates and complaints to the SLCC referred to, along with the lack of detail within the invoices, the Tribunal was unable to say that on a balance of probabilities any of these detailed fees could be attributed to the misconduct in this case.

Productions 7 to 13 were invoices addressed to the Secondary Complainer himself.

Production 7 has no detailed breakdown of fees charged. The part of the invoice said by Ms Martin to be relevant to this case was headed “Advice regarding Trainor Alston and [Firm B]”. The description provided was a broad narrative far more extensive than the issue of the mandate sent to the Respondent in this case. The Tribunal was unable to draw any conclusions from this invoice.

Production 8 had the same heading but did provide a detailed breakdown. Only one of these entries made specific reference to Trainor Alston, although not the Respondent herself.

Production 9 had the same heading and a similar narrative. With regard to the detailed entries, there was no reference to either the Respondent or her firm, although there was reference to another firm against whom a complaint had been made.

Production 10 bore the same heading. None of the detailed entries made reference to either the Respondent or her firm, although they did refer to Firm B.

Production 11 had the same heading. Although the detailed entries made reference to Trainor Alston, entries were split with the Secondary Complainer’s daughter’s file and referred to mandates in connection with Company A.

Production 12 had the same heading. The detailed entries made no reference to either the Respondent or her firm but repeatedly referred to Firm B.

Production 13 had the same heading. It did not contain detailed entries and only had a narrative which made no reference to the Respondent or her firm but appeared to relate entirely to the complaint against Firm B.

Having given all of the invoices very careful consideration, the Tribunal was unable to say that it was satisfied on the balance of probabilities that any of the entries related to the misconduct found in this case. However, the Tribunal considered that it could take into account the detailed findings in fact from the substantive hearing when considering this issue. Accordingly, the Tribunal was satisfied on a balance of probabilities that the Secondary Complainer had incurred fees to Brodies which he would not have incurred if it had not been for the Respondent's misconduct. The Tribunal considered that the appropriate and fair award of compensation in respect of fees incurred was one of £500.

The Tribunal turned to the second head of the Secondary Complainer's claim for compensation. No evidence had been led of frustration, stress or harassment. However, the Tribunal concluded that it could look to the detailed findings of fact made following the substantive hearing in order to consider this issue. The Tribunal considered that it was a reasonable inference to draw from the findings in fact that the Secondary Complainer had suffered inconvenience as a result of the Respondent's continued failure to comply with the mandate. Accordingly, the Tribunal was satisfied on a balance of probabilities that the Secondary Complainer had suffered inconvenience as a direct result of the Respondent's misconduct. Without any further detail, the Tribunal considered that the appropriate and fair award in connection with the inconvenience suffered by the Secondary Complainer was one of £150.

Having advised the parties of its determination. The Tribunal invited both parties to make submissions with regard to expenses and publicity. Ms Martin indicated that she had other commitments requiring her attendance and, both parties being content to proceed by way of written submissions, the Tribunal allowed both parties seven days within which to lodge written submissions.

SUBMISSIONS REGARDING EXPENSES AND PUBLICITY

The Secondary Complainer submitted his written submissions as responses to the Respondent's written submissions. This unified document containing both sets of submissions was as follows:-

“Expenses
Background

Following the finding of professional misconduct against the Respondent, the Tribunal had to consider the Secondary Complainer’s application for compensation. The application is dated 8th July 2020 and has not been adjusted. At a procedural hearing on 22nd March 2021, the Tribunal permitted 14 days for the Secondary Complainer to lodge documents in support of the application. On 9th April 2021, the Secondary Complainer sought a prorogation of time for lodging documents. That application was granted and the time limit for lodging documents was extended to 23rd April 2021. The Secondary Complainer lodged an inventory of productions comprising 13 productions on 26th April 2021.

Offer by Respondent

After examination of those productions, the Respondent made an offer on 14th May 2021 to pay £1,000 on the basis that the application for compensation would be withdrawn and the hearing assigned for 17th May 2021 would not be required. A copy of an email intimating that offer is attached and referred to for its terms. The offer was rejected by the Secondary Complainer and the hearing proceeded on Monday 17th May 2021.

It is accepted by the Secondary Complainer that this offer was made, however, it was a Without Prejudice offer which did not mention or take the standard form of a Tender. For clarification, I have attached a Tender template. Given that the extract from McPhail mentions a Tender and the consequences of failing to beat a Tender, we are presuming that the Respondent is claiming that her email was a Tender. It was not.

Compensation hearing

The Tribunal has my submissions on the Secondary Complainer’s claim. The Respondent’s position is that the application for compensation was grossly overstated. The Respondent made a reasonable offer to the Secondary Complainer and had to incur the expense of being represented at the compensation hearing. Had the reasonable offer been accepted, that expense could have been avoided. At the hearing, the Respondent was successful in resisting the claim of £5,000 by the Secondary Complainer. The general rule in relation to expenses is that they should follow success. It is submitted that this general rule should be followed in the present case. An excerpt from MacPhail Sheriff Court Practice (paragraph 19.07) is attached which sets out the general rule.

It is the Second Complainer’s position that his application for compensation was not grossly overstated. We understand why the invoices were confusing to the Tribunal, but we have been back in touch with Brodies in an effort to have this matter clarified. It remains the Second Complainer’s position that he paid fees for all actions submitted within the Complaint which were accepted by the SLCC and the Respondent herself. Agreed that the Respondent was able to resist the claim of £5,000, however, being that there was an award made against her, the successful finding was in fact made for the Second Complainer, not the Respondent. Being that the general rule is that expenses follow success, and the Second Complainer was in fact successful, expenses should be awarded in his favour. Indeed, the paragraph mentioned by the Respondent (19.07) quite clearly states that:

“if any party is put to expense in vindicating his rights, he is entitled to recover it from the person by whom it was created, unless there is something in his own conduct that gives him the character of an improper litigant in insisting on things which his title does not warrant”

Given the findings against the Respondent, both in the primary case and in the current case, where an award has been made, there is no argument that the Second Complainer is an improper litigant; and further, the Secondary Complainer was put to significant expense in vindicating his rights in both cases.

Motion

The Respondent’s motion is to find the Secondary Complainer liable in the expenses of the Respondent and of the Tribunal including expenses of the Clerk. The invoices produced by the Secondary Complainer in support of the claim are almost all two years old or older. The Secondary Complainer could have produced them at a far earlier stage in proceedings. Had they been produced earlier, the Respondent would have made an offer of compensation earlier.

The Secondary Complainer wholly rejects the Respondent’s Motion. Aside from his illness and the pandemic, even if the Secondary Complainer had submitted the invoices earlier and an offer is made, the Secondary Complainer is under no legal obligation to accept said offer. The Secondary Complainer was, and still is of the strong belief that he spent a significant sum in an attempt to force the Respondent to comply with her legislative responsibilities and as such, he wanted this case to be heard before the Tribunal which is his legal right. It is not in the interests of justice to penalise any person for this.

At the hearing on 17th May 2021, the Tribunal indicated to Miss Martin that the invoice from DM Legal Ltd lodged on the morning of the hearing had not yet been taken account of. It was explained that the normal practice is that, if an award of expenses is made, fees are normally chargeable in terms of Chapter three of the last published Law Society’s Table of Fees for general business. In the event that the Tribunal is considering making an award of expenses in favour of the Secondary Complainer, it is submitted that it would not be appropriate to award expenses chargeable in terms of Chapter Three, on the basis that that Table is for enrolled solicitors. In respect of a lay representative, one might draw a parallel with the level of expenses awarded in simple procedure cases in the Sheriff Court, which is £150 if the sum awarded in the claim is between £200 and £1,500.

The Secondary Complainant rejects the above assessment. The Secondary Complainer states that he has been so disgusted by the actions of the Respondent as well as solicitors that the Respondent previously referred him to, he no longer wished to deal with someone in the profession, therefore he instructed me. Additionally, whilst the term in this situation may be ‘lay representative’, I currently hold two law degrees, have been running an access to justice legal company for almost a decade and have successfully secured compensation for groups of equal pay claimants on two previous occasions, in addition to achieving successful outcomes in other areas of law for our clients. The Secondary Complainer engaged my services at a rate of £150 per hour, therefore these are the fees he agreed to pay. Had it not been for the actions of the Respondent, he would not have incurred these fees in the first place. In terms of hours spent on this whole case, the Tribunal has my fee note up until the Hearing, which was an additional two hours, if I recall correctly.

Publicity
Legal Framework

The starting point in considering this issue is paragraphs 14 and 14A of schedule 4 to the Solicitors (Scotland) Act 1980.

Paragraph 14 provides:

Every decision of the Tribunal shall be signed by the Chairman or other person presiding and shall, subject to paragraph 14A, be published in full.

Paragraph 14A provides:

In carrying out their duty under paragraph 14, the Tribunal may refrain from publishing any names, places or other facts the publication of which would, in their opinion, damage, or be likely to damage, the interests of persons other than-

- (a) The solicitor against whom the complaint was made; or*
- (b) His partners*
- (c) His or their families, but where they so refrain they shall publish their reasons for so doing.*

Motion

In my submission, there is no reason to refrain from publishing the names of the Respondent and the Secondary Complainer. I consider that publication will not damage, or be likely to damage the interests of the Secondary Complainer. There are no other persons who would be affected by publication.


The Secondary Complainer does not wish his private details to be made public, as he considers that this could damage his interests in future. However, he has no objection to the Respondent's details being subject to publication.

DECISION ON EXPENSES AND PUBLICITY

The Tribunal allowed the Secondary Complainer's submissions to be received late.

Having considered parties' written submissions, the Tribunal noted that the Respondent had made an offer to the Secondary Complainer, which exceeded the award made by the Tribunal. The Secondary Complainer had submitted that this was not a tender. The Tribunal noted that there was no formal tender procedure within Tribunal proceedings. Whilst the offer was only made by the Respondent on 14 May, the Tribunal noted that the Secondary Complainer's productions were themselves lodged late in proceedings. The Tribunal concluded that, in respect that the Secondary Complainer had enjoyed success overall in achieving an award of compensation, it was appropriate to make an award of expenses in his favour. However, in order to reflect the way in which proceedings had been conducted, including the offer previously made by the Respondent, it considered that this award should be restricted to £350.

With regard to publicity, the Tribunal noted that the Tribunal at the substantive hearing had determined that the Secondary Complainer should not be named. Given that there was no suggestion of any change in circumstances since the date of that determination, the Tribunal concluded that the appropriate order was for publicity of this decision to include the name of the Respondent but not the name of the Secondary Complainer.



Ben Kemp
Vice Chair