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

F I N D I N G S

in Complaint

by

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

Complainers

against

DAVID WILKIE-THORBURN, 12 Harcourt Road, Aberdeen

Respondent

1. A Complaint dated 28 March 2022 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that David Wilkie-Thorburn, 12 Harcourt Road, Aberdeen (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There were three Secondary Complainers.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent. Answers were lodged for the Respondent.

4. In terms of its Rules, the Tribunal fixed a virtual procedural hearing for 20 June 2022. The Tribunal produced an Interlocutor and Note following the procedural hearing on 20 June 2022.

5. At that hearing, the Tribunal fixed a full hearing for 16 September 2022 to take place on a virtual platform and to be heard in private.

6. At the virtual hearing on 16 September 2022, the Complainers were represented by their Fiscal, Breck Stewart, Solicitor Advocate, Edinburgh. The Respondent was present and represented himself. The Tribunal, on the motion of the Complainers with the consent of the Respondent, allowed an amended Complaint and Joint Minute to be received. No evidence required to be led. The Tribunal heard submissions from both parties.

7. The Tribunal found the following facts established:-

7.1 The Respondent resides at 12 Harcourt Road, Aberdeen. He was born on the 2 September 1967. He was enrolled as a solicitor on the 14 March 1994. He was employed by Alexander George & Co between the 21 March 1994 until the 31 October 1996, thereafter Storie, Crudin & Simpson, between the 1 November 1996 and the 3 July 1998, thereafter Baxter & Co between the 6 July 1998 and the 24 December 1998. He returned to Alexander George & Co where he was employed between the 7 January 1998 and the 3 September 2001. He then joined the Procurator Fiscal Service where he was employed from the 1 October 2001 until the 15 December 2020.

7.2 The Respondent's husband operated a Salon in Aberdeen, in relation to which, he contracted with all three secondary complainers. They individually rented chair space in his salon. In February 2019 two of the Secondary Complainers gave notice to quit their chairs in terms of the agreement. In April 2019, the third gave notice in terms of her contract. The three Secondary Complainers set up business together in competition with the Respondent's husband in nearby premises.

7.3 At 1.22 am on the 7 April 2019 the Respondent sent a direct message to the third Secondary Complainer via Facebook Messenger. The message was menacing and threatening in nature. The message was in the following terms:-

[...]
Neil has been keeping me advised of discussions between you.

[..] and [..] stabbed Neil in the back – something you acknowledged.

It's therefore difficult to understand how you could be advising Neil you are doing the same.

In any way you look at it, what you are doing is even worse than what they did. And contradicts what you have previously said.

Neil's biggest fault is that he wants to see the best in everyone. He never believes anyone could act in an underhanded way and as a result he gets very upset by people behaving in the way [..] and [..] and now you have.

I admire Neil for the way he approaches people. Even though I don't share his confidence. I have no such approach and I never believe in coincidence.

Anyway. I don't know if you know what I do. But it might be informative for you to know.

I am head of prosecution in Grampian.

I am the liaison for departments which in England prosecute their own cases. Such as HMRC, Serious Fraud Office, Immigration and over 50 other departments. I make the decision on whether we prosecute their cases. I make recommendations on deportation.

Our most important reporter is the police. They are particularly important because -by law- they are subject to my instruction on what they investigate.

Anyway, I thought that might be interesting for you to know. I understand you need an understanding of that role.

And please feel free to share it with your new business partners.

I can't wish you well. I hate lying. There has been quite enough of that going on as it is.

David

7.4 The message was reported to the Police. The Respondent faced a criminal trial on the 29 October 2019 and 12 December 2019 on a complaint which alleged a single breach of Section 127(1) (a) of Communications Act 2003. Section 127 which provides

127 Improper use of public electronic communications network

(1)A person is guilty of an offence if he—

(a)sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; ...

7.5 The Respondent was convicted of a racially aggravated offence under section 127(1)(a) of the Communications Act 2003 after trial.

7.6 The Respondent was found guilty on the following charge.

On 7th April 2019 at [ ], Aberdeen or elsewhere, you DAVID JOSEPH WILKIE-THORBURN did send, by means of a public electronic communications network a message to [..] residing there, that was of a menacing character, in that you did send her a message in the early hours of the morning by way of Facebook Messenger, in the context of a dispute between said [..] and Nell (sic) Wilkie-Thorburn, your husband, stating that you were the head of prosecution in Grampian, that you were responsible for making prosecution decisions on HMRC, Serious Fraud and Immigration cases and that you were responsible for making recommendations on deportation matters, whereby you did place said [..] in a state of fear and alarm that she was at risk of being deported: CONTRARY to the Communications Act 2003, Section 127(1)(a) (Racial Prejudice)

7.7 The Respondent was fined £700.

7.8 Media articles dated 18 December 2019 (Scottish Sun), 6 January 2020 (Daily Record and stv.news), and 7 January 2020 (Aberdeen Press & Journal), were published. In each the name of the Respondent and his occupation were published. The articles detailed the nature of the offence the Respondent was convicted of (including the disposal), accompanying the articles were photographs of the Respondent.

8. Having considered the foregoing circumstances, the Tribunal found the Respondent guilty of Professional Misconduct *singly* and *in cumulo* in respect that he, by sending an electronic message which was menacing and threatening in nature and which resulted in a conviction

under section 127(1)(a) of the Communication Act 2003, acted in contravention of rule B1.2 of the Practice Rules 2011; failed to maintain the standards of propriety expected of him as a member of the legal profession in his private life; breached the duty upon him to act with integrity; and acted in a way which brought the profession into disrepute.

9. The Tribunal invited submissions in relation to sanction, publicity and expenses.

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

By Video Conference, 16 September 2022. The Tribunal having considered the Complaint dated 28 March 2022 at the instance of the Council of the Law Society of Scotland against David Wilkie-Thorburn, 12 Harcourt Road, Aberdeen; Find the Respondent guilty of professional misconduct singly and *in cumulo* in respect that he, by sending an electronic message which was menacing and threatening in nature and which resulted in a conviction under section 127(1)(a) of the Communication Act 2003, acted in contravention of rule B1.2 of the Practice Rules 2011, failed to maintain the standards of propriety expected of him as a member of the legal profession in his private life, breached the duty upon him to act with integrity, and acted in a way which brought the profession into disrepute; Suspend the Respondent from practice for a period of two years; Direct in terms of Section 53(6) of the Solicitors (Scotland) Act 1980 that this order shall take effect on the date on which the written findings are intimated to the Respondent; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, under exception of the virtual procedural hearing of 20 June 2022, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision, to include the attached note of the virtual procedural hearing on 20 June 2022, and that this publicity should include the name of the Respondent but shall not include the names of the Secondary Complainers.

(signed)

Colin Bell

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 by recorded delivery service on 9 NOVEMBER 2022.

IN THE NAME OF THE TRIBUNAL

[redacted]

Colin Bell

Chair

NOTE

Prior to the virtual hearing on 16 September 2022, the Fiscal had lodged with the Tribunal Office an adjusted Complaint and Joint Minute. At the hearing, the Fiscal invited the Tribunal to allow both documents to be received. The Respondent indicating his consent to that motion, the Tribunal granted same. The Respondent confirmed that he was withdrawing his Answers previously lodged.

The Joint Minute agreed all of the averments of fact, duty and misconduct within the adjusted Complaint. Consequently, no evidence required to be led. The Tribunal reminded both parties that whether the admitted conduct met the test for professional misconduct was a matter for it to determine. The Tribunal invited both parties to make submissions, at this stage, relating solely to the question of professional misconduct.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal thanked the Respondent for his cooperation in relation to the discussions that had taken place between the parties resulting in the adjusted Complaint and Joint Minute.

The Fiscal took the Tribunal through the averments of fact and duties within the adjusted Complaint. He drew the Tribunal's attention to the test for professional misconduct set out in the case of Sharp-v-Council of the Law Society of Scotland 1984 SC129. He confirmed that he relied upon the case of the Solicitors Regulation Authority-v-Wingate (CA) [2018] 1WLR in relation to the duty upon members of the profession to act with integrity. In particular, he pointed the Tribunal to paragraphs 95, 96, 97, 98, 100, 101, 102 and 103 of that decision. He submitted that it was well established that a solicitor's acting in his private life could result in a finding of professional misconduct and directed the Tribunal's attention to *Paterson and Ritchie, Practice and Conduct of Solicitors* (2nd edition) at paragraph 1.22.

The Fiscal directed the Tribunal to the averments of professional misconduct, in particular paragraph 5.2. He submitted that the Respondent, having held a role as a senior employee of the Crown Office and Procurator Fiscal Service (COPFS), had a greater responsibility to ensure that the law is upheld. He submitted that the language of the electronic message was properly described as offensive and unpleasant and was intended to be intimidatory, the implication from the wording of it being that the Respondent was threatening to use his position to the detriment of the Secondary Complainer. He stated that the Respondent had caused fear and alarm as confirmed by the Respondent's admission of the conviction.

The conduct as a whole was damaging to the reputation of the profession as could be seen by the level of press interest and publicity. He submitted that the conduct easily met the test for professional misconduct set out within the case of Sharp to the extent that the conduct could be described as deplorable. He invited the Tribunal to find the Respondent guilty of professional misconduct.

SUBMISSIONS FOR THE RESPONDENT

The Respondent confirmed that, given the terms of the Joint Minute, he had no comment to make at this stage.

The Tribunal adjourned to consider the question of professional misconduct.

DECISION IN RELATION TO PROFESSIONAL MISCONDUCT

The conduct and breaches of duty were clearly admitted by the Respondent in the Joint Minute. However, the determination of whether the conduct amounted to professional misconduct rested with the Tribunal. The test for misconduct is set out in the case of Sharp-v-Council of the Law Society of Scotland 1984 SLT 313,

"There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions, the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is to be made."

It is well established that conduct that takes place in the private life of a member of the profession can amount to professional misconduct. Not all inappropriate, even criminal conduct, that occurs in a solicitor's private life will do so. However, here the Respondent had sent a menacing and intimidating message to a third party that specifically referenced his role as a senior prosecutor. This resulted in the recipient of the message being placed in a state of fear and alarm and the subsequent conviction of the Respondent. The Tribunal considered the conduct to be not only deplorable but shocking. The admitted

conduct clearly fell below the standards to be expected of a competent and reputable solicitor and could only be described as serious and reprehensible.

The Tribunal invited both parties to make further submissions which, at this stage, be restricted to the issue of sanction.

The Fiscal confirmed that the Respondent had no record of any previous disciplinary matter.

SUBMISSIONS FOR THE RESPONDENT IN RELATION TO SANCTION

The Respondent stated that he wanted to emphasise how sorry he was that this matter had brought him before the Tribunal. He wanted to emphasise that he took full responsibility for the fact that it did. After very careful consideration, he had concluded that he did not want the Tribunal to look behind the conviction. He had appealed to the Sheriff Appeal Court and they had opened the possibility of an appeal to the High Court but in October 2020 he took the decision not to appeal any further. At that stage, he had concluded it was time to move on with his life and, with difficulty, had accepted the conviction. This all arose as a result of his own stupidity by becoming involved in something that he would not normally be involved in. The Sheriff had described his conduct as an error of judgment. Through counselling, he had learned why this had happened and now knew without any doubt that nothing like this would ever happen again. Whilst he may not have intended the consequences, even while giving evidence in court, he had stated that, if the message had had the effect on the Secondary Complainer that she described when giving evidence, then he was sorry about that and he continued to be sorry. He expressed immense regret for his conduct.

The Respondent invited the Tribunal to consider matters which he hoped the Tribunal would consider mitigatory. This was not a course of conduct. It was a one-off message. He had never denied sending the message. He had cooperated fully with the criminal prosecution, agreeing a great deal of evidence and instructing his representative not to cross-examine several of the witnesses.

The prosecution was for an offence that could only be prosecuted summarily. He was fined £700, which was well short of the statutory maximum fine for that offence. Only one of the Secondary Complainers had been involved in the criminal prosecution. The other two Secondary Complainers did not feature in the criminal prosecution in any way.

As a result of the conviction, the Respondent had given up a career with COPFS of more than 19 years standing. He had never been the subject of a complaint in his professional capacity. He had decided to give up being a lawyer because, in his mind, he will always be a prosecutor. He considered that no other legal role would come close to that for him. Much of the counselling he has referred to previously dealt with his grieving over the loss of his longstanding career.

As a result of his conviction, he was involved in a bitter procedure with the COPFS, which he believed went further than could be justified. This had had a significant impact upon him.

In addition to the health consequences, he had also suffered financial consequences as a result of the loss of his career. After a short period of unemployment, he was able to find new employment but this was at a significantly lower salary. Additionally, he had lost a significant amount of pension entitlement. In the criminal prosecution he had been responsible for the fees for his solicitor and Counsel.

Both his mental and physical health had suffered as a result of all of this and he did not know when he would return to normal. He was continuing to seek counselling which had given him a better understanding of himself but he considered he was still a work in progress.

The disciplinary process before the Tribunal had been stressful for him. He wanted to emphasise that he had referred himself to the Law Society on 7 October 2020 even though he was not obliged to. The complaint process had taken several years. He invited the Tribunal to consider that this delay was part of his punishment.

He drew the Tribunal's attention to four references that he had lodged. He explained that none of the references came from current employees of COPFS because of employment restrictions. One of the referees was an ex-member of staff and his reference supported the Respondent's submission that he had contributed to the profession. He had contributed to the training of new trainees and trained numerous lawyers at other stages in their careers. He had dedicated 19 years to public service, not just to COPFS but in other areas. He had provided training to other services including the police.

From the outset of the disciplinary proceedings, he had sought to resolve the case. The Answers he had lodged had admitted large parts of the Complaint and only disputed what was factually incorrect.

The Respondent emphasised that the racial aggravation to the conviction caused him particular distress. He himself had been the victim of discrimination and through his role in COPFS he had been involved in equalities work, something which he believed in passionately. No one in the course of the criminal trial indicated that the Respondent had acted in a racist manner.

He thanked the Fiscal for providing valuable guidance in relation to the Tribunal procedure and his assistance in resolving the case.

In response to a question from the Tribunal, he confirmed that his current employment was not a legal role and he had no intention of working in the profession again.

DECISION ON SANCTION

The Tribunal considered the conduct in this case to be extremely serious. The Respondent had acted in a manner that called into question his own integrity and was damaging to the reputation of the profession. Whilst the conduct had been carried out in his private life, it had involved the reference to his professional legal role that he accepted was menacing and threatening. The Tribunal has a duty to protect the public and the reputation of the profession. The reputation of the profession relies on the public having trust in it. The Tribunal recognised the mitigatory factors referred to by the Respondent and, but for these, would otherwise have considered a striking off.

The Tribunal accepted that this was a one-off message. The Respondent had cooperated from the very outset, both with the criminal prosecution and with the disciplinary proceedings.

Whilst it appreciated that the criminal prosecution was on summary complaint and resulted in the imposition of a fine at the lower end of what was competent, the Tribunal noted that the issues to be considered by the Tribunal in professional disciplinary proceedings are quite different to those for a Sheriff in criminal proceedings.

The Respondent had lost a career that was extremely important to him. The Tribunal recognised that he had contributed 19 years to public service. It was unfortunate that it was that public service that had been referred to in the electronic message. The Tribunal accepted that the effect of all of this had significantly impacted the Respondent's life, financially and through his health.

The Tribunal gave careful consideration to the references produced and considered these to be extremely supportive of the Respondent. It noted that the Respondent had no intention of returning to the profession.

However, the Tribunal considered that the conduct itself was so serious that it required to mark this out for the benefit of the members of the profession and the public. In all the circumstances, the Tribunal considered it appropriate to suspend the Respondent for a period of two years.

The Respondent, in his submissions, had made reference to the racial aggravation to the charge. The Tribunal noted that there was no averment of fact within the Complaint and no other information before the Tribunal of any racist or potentially racist conduct on the part of the Respondent, beyond the reference to deportation within the message itself.

EXPENSES AND PUBLICITY

The Tribunal invited submissions on expenses and publicity.

The Fiscal moved for expenses, submitting that expenses should follow success and that if they did not the profession as a whole would require to bear the cost of proceedings which he described as civil in nature. He invited the Tribunal to make the usual order with regard to publicity.

The Respondent opposed the Fiscal's motion for expenses and submitted that a fair outcome would be an order of no expenses due to or by either party. He emphasised that at no time had he sought to defend the case against him. He explained that he had only lodged Answers to correct factually inaccurate averments. Once these inaccuracies had been resolved a Joint Minute was entered into. He submitted that the case settled as a result of the combined efforts of both parties. He argued that if expenses were to follow success then he should be awarded the expenses of the procedural hearing on 20 June 2022 which he considered he had won. The Complainers had unsuccessfully opposed his motion for the case to be heard in private. He had not insisted on his motion for a preliminary hearing to be fixed as, given the Tribunal's decision, it was not necessary.

In response, the Fiscal suggested that it would be fair that no award be made in relation to the procedural hearing which he considered to have been one of mixed success. He emphasised that there had been an exchange of emails prior to the Procedural Hearing between him and the Respondent in an effort to

clarify the Respondent's motion, in particular, in relation to the fixing of a preliminary hearing. Whilst he accepted that the Respondent had assisted in achieving resolution of the case, he emphasised that there was, none the less, a cost incurred by the proceedings which someone would require to bear.

The Tribunal asked if the Respondent wished to make any oral submissions in relation to the issue of publicity. The Respondent indicated that his arguments were all contained in his written note which he had lodged in order to avoid having to make oral submissions.

The written note set out three grounds that were said to be a bar to publicity: the Rehabilitation of Offenders Act 1974 (hereinafter referred to as the 1974 Act); the likely effect on the Respondent's mental health; and the likely damage to the Secondary Complainers.

The written note set out the framework of the 1974 Act and set out the terms of sections 1; 4(1), (2)(b), (3), (4), (5), (6); and 7(3) and (4). It set out that the pertinent conviction is "spent" and consequently the Respondent is a "protected person" for the purposes of the 1974 Act. It argued that the application of the 1974 Act could only be excluded by Order made in terms of the Act. It was explained that the application of the Act is excluded in relation to "proceedings" before this Tribunal by section 3 of the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013. This exclusion is restricted to "proceedings" only. Publicity cannot be seen as falling within the ambit of "proceedings". The Tribunal, therefore, requires to have in mind the impact on the "protected person" who should not be left open to prejudice as a result of a "spent" conviction and consequently there should be no publicity of this decision. Publicity would open him to potential prejudice in his employment, something the 1974 Act was specifically intended to prevent.

The Respondent emphasised that section 4(1) of the 1974 Act applied "notwithstanding the provisions of any other enactment or rule of law to the contrary" and, therefore, superseded Paragraph 14 of Schedule 4 of the Solicitors (Scotland) Act 1980 (hereinafter referred to as the 1980 Act).

The written note set out in detail the effect that his arrest, conviction, publicity, loss of career and these proceedings had on his mental health. It was argued that publicity of this decision was likely to exacerbate his health issues.

The third line of argument was that the Secondary Complainers had been significantly adversely affected by the publicity of his criminal conviction. Publicity of this decision would attract media attention again

with the likelihood of the same consequences for the Secondary Complainers. Any publicity including his name or the conduct involved would lead to identification of the Secondary Complainers by way of a simple internet search.

In response, the Fiscal emphasised that the issues for the Tribunal today were quite different to those at the Procedural Hearing. The motion for the Hearing to be held in private involved the application of a discretion in the Tribunal Rules, where here the Tribunal required to apply provisions contained in primary legislation.

The Fiscal submitted that the Tribunal was obliged to act within its statutory powers. The Tribunal had no discretion not to name the Respondent in relation to Paragraph 14 of Schedule 4 to the 1980 Act.

In relation to the 1974 Act, he submitted that "proceedings" includes the making of and intimation in public of the decision. He argued that publication of that decision must fall within the scope of "proceedings". He submitted that the 1974 Act was not intended to protect the convicted person from the consequences of his actions in civil proceedings, such as these. The Respondent had made reference in his written note of argument to potential prejudice to him in his employment. The Fiscal emphasised that the 1974 Act specifically provided the Respondent with protection from that.

Whilst he recognised the impact of events on the Respondent's mental health, he submitted that fundamentally this was caused by the Respondent's own conduct. Paragraph 14 of Schedule 4 did not allow for the health of the Respondent to affect the decision to publish.

With regard to the possible anonymisation of the Secondary Complainers, the Fiscal advised that the Council of the Law Society did not consider it appropriate for him to make submissions on whether they should or should not be anonymised. He made reference to the case of Lu-v-SRA [2022] EWHC 1729 (Admin) and submitted that the Tribunal would require to obtain evidence from the Secondary Complainers themselves in order to have the power to anonymise them in the Decision. He accepted that this appeared to be a change of position on the part of the Council but explained this was as a result of the Lu case and the different stage in proceedings. In answer to questions from the Tribunal, he did not dispute what he was reported to have said at the Procedural Hearing. He explained that comments had been made by the Secondary Complainers in correspondence with them prior to the raising of the Complaint but he could not comment on their accuracy.

In response, the Respondent emphasised that section 4(1) of the 1974 Act superseded the 1980 Act. The Respondent was unaware of any definition of "proceedings" that includes publicity. To publish this decision would give his employers information that they were not entitled to have. He argued that it was impossible to see how that could be interpreted as anything other than prejudicial to him.

With regard to the Secondary Complainers, the Respondent stated that the Law Society had already provided information to the Tribunal to which it was entitled to have regard.

DECISION ON EXPENSES

In terms of paragraph 19 of Schedule 4 of the 1980 Act, the Tribunal "may make....such order as it thinks fit" in relation to the expenses of these proceedings.

The Complainers sought an award of expenses in their favour, later adjusted to exclude the expenses in relation to the Procedural Hearing of 20 June 2022. The Respondent opposed that motion drawing the Tribunal's attention to his success at the Procedural Hearing and the degree of his cooperation in the whole proceedings allowing matters to be resolved without the leading of evidence. The Tribunal considered that, fundamentally, it was the conduct of the Respondent that had necessitated these proceedings. Acting in such a way as to allow proceedings to be concluded as expeditiously as possible was to the benefit of both parties. The bringing of complaints before the Tribunal is an important function of the Law Society in its role as the regulator of the profession. Having regard to all of the circumstances, the Tribunal determined that the fair and appropriate order was to make an award of expenses in favour of the Complainers, excluding those in relation to the Procedural Hearing of 20 June 2022.

DECISION ON PUBLICITY

The Tribunal is a body created by statute. Its duties and powers are set out in the Solicitors (Scotland) Act 1980. Paragraph 14 of Part II of Schedule 4 of that Act, entitled "Procedure and Powers of Tribunal", states,

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

The only exception provided by the Act is in Paragraph 14A which states,

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; or

(c)his or their families,

but where they so refrain they shall publish their reasons for so doing.

The Respondent argued that there were three grounds in law preventing publicity of this decision. The first was that the operation of section 4(1) of the 1974 Act was only excluded in relation to "proceedings" before this Tribunal, publication of this Decision did not fall within the ambit of "proceedings" and, therefore, the Respondent's status as a "protected person" required that there be no publicity.

The role of the Tribunal is to protect the public and the reputation of the profession. If it is to do that effectively then its decisions must be open to scrutiny and must be transparent. It is presumably for this reason that publicity is set out as a "duty" in Paragraphs 14 and 14A. No definition of "proceedings" is given in the 2013 Order excluding these proceedings from the application of Section 4(1) of the 1974 Act. The Tribunal considered it of particular note that publication of its decisions is set out as a specific duty of the Tribunal and it is not, as in many other different types of tribunal proceedings, an ancillary matter. Taking into account the nature and purpose of these proceedings, the Tribunal concluded that, on a plain reading of the 2013 Order together with the 1980 Act, publicity fell within the ambit of "proceedings". Therefore, Section 4(1) of the 1974 Act does not apply to the issue of publicity.

Even if "proceedings" were not considered to include publicity, the Tribunal was not persuaded that the 1974 Act was a barrier to the publishing of this Decision but, given its determination noted above, it did not require to consider this issue.

The second ground put forward was the likely effects publicity would have on the Respondent's mental health. Paragraph 14A(a) specifically excludes damage, or likely damage, resulting from publicity, to the interests of the Respondent from consideration by the Tribunal when making the order for publicity. If this had been a matter that the Tribunal could take into account, the Tribunal was of the view that there was insufficient before it to justify a decision not to publish at all or even anonymise the Respondent. Although the Tribunal recognised that it is not absolute, the principle of open justice is one

not to be interfered with lightly. This was emphasised in MH-v-Mental Health Tribunal for Scotland 2019 SLT 411, Anwar-v-Advocate General [2019] CSIH 43 and the recent case of Lu referred to by the Fiscal.

The third ground argued was that publicity was likely to damage the interests of the Secondary Complainers to the extent that no publicity of this Decision should take place at all. The Fiscal argued that it was not open to the Tribunal to even consider anonymising the Secondary Complainers without a direct request from them.

Paragraph 14A allows the Tribunal to consider harm or likely harm to a party such as the Secondary Complainers when making an order for publicity. The Tribunal has the discretion to refrain from publishing any name, including the Respondent's, or any fact where appropriate. Any such decision must be proportionate and balance the competing rights and obligations. The Tribunal should adopt the least restrictive option.

The Tribunal considered that the case of Lu was of little practical assistance in this regard. It is an English case involving an appeal from the English equivalent to this Tribunal and which has substantially different rules of procedure. It is easily distinguished from this case, given that this Tribunal has a motion before it to consider the privacy of the Secondary Complainers and the Tribunal has previously received information from the Fiscal capable of supporting that motion.

The Respondent had previously described the effect publicity of his conviction had on the Secondary Complainers. The Fiscal had indicated that the Secondary Complainers did not want to be involved in these proceedings and did not want the matter to be made public again. The Tribunal considered that the facts of the case were fairly simple, and the names of the Secondary Complainers could be anonymised without making the Decision any more difficult to read.

The Tribunal did not consider it necessary or desirable to cause any further delay by adjourning the case further to allow direct contact to be made. The Tribunal noted Rule 5(a) of the 2008 Rules which states:

(a) the Tribunal shall deal only with the Council except where it is otherwise expressly provided in these rules;

The Tribunal also had regard to Rule 5(b)(iii) which states that it is the duty of the Council:

(iii) to take account, where relevant, of any comments made by the secondary complainer in any comments or representations made by the Council to the Tribunal.

In all the circumstances the Tribunal considered that the appropriate and fair order was to direct that publicity of this Decision shall take place, to include the name of the Respondent but not the names of the three Secondary Complainers.

The Fiscal confirmed that none of the Secondary Complainers were seeking compensation.

Colin Bell

Chair