

**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

**DAMIEN CHRISTOPHER TONNER, having a
place of business at Clyde & Co., Albany House,
58 Albany Street, Edinburgh**

Respondent

1. On 25 August 2022, Damien Christopher Tonner, having a place of business at Clyde & Co., Albany House, 58 Albany Street, Edinburgh (hereinafter referred to as “the Respondent”), was found guilty of professional misconduct.
2. There was a Secondary Complainer in the Complaint.
3. Prior to the hearing on 25 August 2022, the Secondary Complainer had lodged a written claim for compensation together with supporting documentation. Following the finding of professional misconduct, the Tribunal allowed the Secondary Complainer 28 days from the intimation of the findings of misconduct to update her statement of claim if so advised. The written findings were intimated to the Secondary Complainer on 27 September 2022.
4. The Tribunal set the matter down for a virtual compensation hearing on 19 December 2022. Notice was duly served upon the Respondent and Secondary Complainer.
5. At the virtual compensation hearing on 19 December 2022, the Secondary Complainer was neither present nor represented. The Respondent was present and represented himself. The Tribunal heard evidence from the Clerk in relation to the service of the notice of hearing upon the Secondary Complainer. Having given careful consideration to the information before it, the Tribunal concluded that it was fair and appropriate to proceed with the

compensation hearing in the absence of the Secondary Complainer. The Tribunal proceeded to hear submissions from the Respondent.

6. Having given careful consideration to the submissions by the Respondent and the documents lodged by the Secondary Complainer, the Tribunal found the following facts established:-

6.1 The claimant in this hearing was the Secondary Complainer in the Complaint against Damien Christopher Tonner, having a place of business at Clyde & Co., Albany House, 58 Albany Street, Edinburgh. The Respondent was found guilty of professional misconduct in the following terms:-

- a) He failed to act in the Secondary Complainer's best interests by failing to provide her with the summons and the defences lodged in the action meaning that she was not aware of her case, the defence case or the potential prospect of failure of her case due to the Respondent's omission to lodge the first summons for calling, and failed to advise her of a potential conflict of interest;
- b) He did not communicate effectively with the Secondary Complainer from the point at which the case fell until March 2012 in that he failed to inform her in writing; that the first cause had fallen; the consequences with regard to timebar, the Court's discretion to excuse the failure and her right of action against the Respondent and his firm; the content of Counsel's note; that a potential conflict of interest had arisen; and that she may wish to take alternative legal advice. He also failed to provide the Secondary Complainer with a copy of the defences when lodged.

6.2 The Secondary Complainer lodged a written statement of claim with the Tribunal claiming the maximum award permitted by statute, namely £5,000, in relation to quantifiable and non-quantifiable loss.

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

By Video Conference, 19 December 2022. The Tribunal having considered the Complaint at the instance of the Council of the Law Society of Scotland against Damien Christopher Tonner, having a place of business at Clyde & Co., Albany House, 58 Albany Street, Edinburgh 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; 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 but need not identify the Secondary Complainer or any other person.

(signed)

Colin Bell

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 **9 FEBRUARY 2023**.

IN THE NAME OF THE TRIBUNAL



Colin Bell
Chair

NOTE

Following a finding of professional misconduct against the Respondent on 25 August 2022, the Tribunal set down a virtual hearing of the statement of claim for compensation lodged by the Secondary Complainer in that Complaint. At the virtual compensation hearing on 19 December 2022, the Secondary Complainer was neither present nor represented. The Respondent was present and represented himself. The first issue for the Tribunal to determine was whether it was appropriate to proceed in the absence of the Secondary Complainer. The Respondent indicated that although he was keen for the hearing to proceed, he was conscious that he had enquired of the Secondary Complainer as to the amount of compensation already paid to her by his former employers and no information had been provided.

The Tribunal proceeded to hear evidence from the Clerk confirming service of the notice of hearing. A letter giving notice of the Compensation Hearing, addressed to the Secondary Complainer and dated 26 October 2022 was sent by Recorded Delivery post. The Track and Trace system for Royal Mail disclosed that this letter was delivered on 27 October 2022 and, whilst the system showed a code number rather than a signature, it was stated that the letter was signed for by the Secondary Complainer. In addition to the notice of hearing, the Tribunal Office had written to the Secondary Complainer on 1 December 2022 enclosing a copy email from Mr Macreath, the solicitor for the Respondent. Additionally, the Tribunal Office had emailed sign-in instructions for the virtual compensation hearing to the Secondary Complainer on 12 December 2022.

Having given careful consideration to the information before it, the Tribunal was satisfied that the Secondary Complainer had been given proper notice of the hearing. It then went on to consider whether it was fair to proceed in her absence. The Tribunal had regard to the case of R-v-Jones [2002] UKHL5 and the need to exercise its discretion in this matter “*with great caution and close regard to the overall fairness of the proceedings*”. The Tribunal noted that in the final paragraph of the Secondary Complainer’s letter dated 10 August 2022, enclosing her statement of claim and supporting documents, the Secondary Complainer stated, “*These are my final submissions to the process.*” and “*We await contact by post to hear the outcome of the discipline tribunal and also of the compensation claim.*”. The Tribunal considered that these comments were an indication that the Secondary Complainer did not wish to attend any hearing. In these circumstances, the Tribunal considered it fair and appropriate to proceed in the absence of the Secondary Complainer and on the basis of the documents provided to the Tribunal.

The Tribunal invited the Respondent to make any submissions he considered relevant to the issue of compensation.

SUBMISSIONS FOR THE RESPONDENT

The Respondent invited the Tribunal to have regard to the email from Mr Macreath dated 15 November 2022 which noted that the Secondary Complainer had received an award of compensation through the Scottish Legal Complaints Commission (SLCC) in respect of a finding of inadequate professional services against his former employers, Brodies, in the sum of £1,000 together with an order that Brodies repay fees. Additionally, he was aware that the Secondary Complainer had raised civil proceedings against his former employers and he understood that an extra judicial settlement was made by Brodies. Unfortunately, Brodies indicated that the details of any settlement were confidential. He stated that he had through his agent enquired of the Secondary Complainer what compensation had been paid by Brodies and no information had been provided.

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 noted its power to award compensation was limited. It could only direct a solicitor to pay compensation up to a maximum award of £5,000 to a Secondary Complainer for loss, inconvenience or distress resulting from the misconduct. The standard of proof in connection with a claim of 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.

Here the Secondary Complainer had lodged a written statement of claim dated 10 August 2022. Additionally, there was a written compensation claim statement dated 10 August 2022, an invoice from a psychotherapist dated 12 October (no year given), an email from the Secondary Complainer dated 2 August 2022 forwarding an email from her solicitor dated 1 August 2022 enclosing an unsigned precognition dated 13 December 2018 and an unsworn Affidavit. In her claim form, the Secondary Complainer claimed the maximum possible award of £5,000 in relation to expenses she had incurred for psychotherapy. This part of her claim fell under the heading quantifiable loss. Whilst it was not clear from the completion of the form itself that the Secondary Complainer was claiming non-quantifiable

loss, the Tribunal took the view that the compensation claim statement attached to the form was consistent with there being a claim for non-quantifiable loss.

It is important to note the actual terms of the findings of professional misconduct. These were that, (a) the Respondent failed to act in the Secondary Complainer's best interests by failing to provide her with the summons and the defences lodged in the action and failed to advise her of the potential conflict of interest; and (b) did not communicate effectively with her by failing to provide her with certain information in writing and by failing to provide her with a copy of the defences when they were lodged. The Fiscal emphasised to the Tribunal in his submissions that the Respondent's failure to lodge the court summons timeously was not any part of the case of misconduct. Additionally, the Fiscal had emphasised that the failure on the part of the Respondent was to confirm information in writing not, the Complainers' position, that there was no communication at all. This was the starting point for the Tribunal in considering the Secondary Complainer's written claim for compensation.

The Tribunal looked firstly at the claim for quantifiable loss. The Secondary Complainer had provided an invoice from the psychotherapist. Unfortunately, there was no information from the psychotherapist regarding the reasons why the Secondary Complainer had required counselling and what might have caused any of these problems. The written statement of claim lodged by the Secondary Complainer states that the psychotherapy/counselling was *"as a direct result of Damien Tonner's critical legal error and his duplicitous behaviours after that event. And due to the full ramifications and consequences of what Tonner's error did."* The Tribunal considered that this statement made specific reference to the two matters that the Fiscal had emphasised were not part of his case against the Respondent.

On the information before it, the Tribunal was unable to hold, on a balance of probabilities, that the counselling was necessitated by the specific professional misconduct found against the Respondent.

Whilst it was not entirely clear from the completion of the form itself that the Secondary Complainer had a claim for non-quantifiable loss, in relation to inconvenience and distress, the Tribunal was satisfied that the supporting statement was capable of being read as intimating such a claim. The Tribunal required to assess what inconvenience and distress might have been caused by the misconduct found at the hearing in August 2022.

In her supporting statement, the Secondary Complainer referred to *"non-quantifiable losses that I most certainly had sustained as a direct result of Damien Tonner error actions and behaviours"* and later she makes reference to *"his critical negligent error and a massive betrayal of trust"* and again, *"his critical*

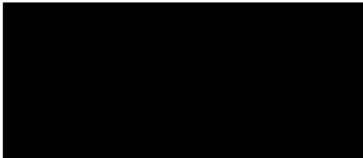
legal error". It was impossible for the Tribunal to determine to what extent, if any, the misconduct in this case contributed to any of the inconvenience and distress described in the supporting statement.

Even if the Tribunal had been able to identify inconvenience or distress resulting from this misconduct, matters were further complicated by the Respondent's submission that the Secondary Complainer had received compensation from the SLCC of £1,000 from his former employers and that she may also have received an extra judicial payment. It is not the identity of the payer of the compensation that is relevant but rather what the payment was compensating for.

In all of these circumstances the Tribunal concluded that it was unable to make any award of compensation.

The Respondent indicated that he had no motion for expenses and submitted to the Tribunal that the appropriate award would be one of no expenses due to or by either party. He submitted that he would prefer there to be no publicity but understood that to be unavoidable.

The Tribunal concluded that, in the circumstances, no award of expenses should be made. The Tribunal noted that the Tribunal hearing the Complaint itself had indicated that publicity might damage or be likely to damage the interests of the Secondary Complainer and had therefore directed that she should not be named. In these circumstances, and for the sake of consistency, the Tribunal directed that publicity should be given to this decision and that the publicity should include the name of the Respondent but need not identify the Secondary Complainer or any other person.



Colin Bell
Chair