

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

**DECISION**

**in hearing on Compensation in Complaint**

**by**

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

**Complainers**

**against**

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

**Respondent**

1. On 2 June 2023, Simon Kennedy Duncan, Solicitor, Flat G/L, 603 Clarkston Road, Glasgow (“the Respondent”), was found guilty of professional misconduct.
2. There was a Secondary Complainer in the Complaint, Peter Prokop, 20/I Granton Medway, Edinburgh.
3. Following the finding of professional misconduct, the Tribunal allowed the Secondary Complainer 28 days from the intimation of the findings of misconduct to lodge a claim for compensation. The written findings were intimated to the Secondary Complainer.
4. The Tribunal set the matter down for a virtual compensation hearing on 27 October 2023. Notice was duly served upon the Respondent and Secondary Complainer.
5. At the virtual compensation hearing on 27 October 2023, the Secondary Complainer was present and represented himself. The Respondent was present and represented by Johnston Clark, Solicitor, Dundee. The Tribunal had arranged for a Czech interpreter to be present to interpret proceedings for the Secondary Complainer and the Tribunal.
6. The Tribunal found the following facts established:-

- 6.1 The claimant at this hearing was Peter Prokop, a Secondary Complainer in the Complaint against the Respondent, Simon Duncan. On 2 June 2023, the Tribunal found the Respondent guilty of professional misconduct in respect that he failed to communicate effectively with the Secondary Complainer by failing to respond to his requests for information about his case and in particular information about whether the Respondent had filed proceedings on the Secondary Complainer's behalf in respect of the claim, despite the fact that the Secondary Complainer requested this information on 5 and 6 September 2017. The Respondent failed to respond to the Secondary Complainer's new solicitor and in particular failed to respond to the new solicitor's request for the file and information about the case. The Respondent failed to co-operate with the Law Society of Scotland's investigation in respect of the principal complaint or to provide relevant papers to the Law Society in connection with the principal complaint by failing to respond to any correspondence sent to him by the Law Society of Scotland including formal Notices in terms of the Legal Profession and Legal Aid (Scotland) Act 2007 Section 48(1)(a) and the Solicitors (Scotland) Act 1980 Section 15(2)(i)(i) both dated 3 July 2018.
- 6.2 The Secondary Complainer lodged a written statement of claim with the Tribunal claiming £5,000 for financial loss as well as inconvenience and distress.

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

By Video Conference, 27 October 2023. The Tribunal, having considered the Complaint at the instance of the Council of the Law Society of Scotland against Simon Kennedy Duncan, Solicitor, Flat G/L, 603 Clarkston Road, Glasgow and having previously determined that the Respondent was guilty of professional misconduct; Having considered whether it was appropriate to award compensation to the Secondary Complainer; Make no award of compensation; Make no finding of expenses due to or by either party; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent and the Secondary Complainer but need not identify any other person.

(signed)  
**Ben Kemp**  
**Vice Chair**

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 5 DECEMBER 2023 .

**IN THE NAME OF THE TRIBUNAL**



**Ben Kemp**  
**Vice Chair**

**NOTE**

At the virtual compensation hearing on 27 October 2023, the Tribunal had the assistance of a Czech interpreter. The Tribunal had before it the findings in the professional misconduct case against the Respondent; the compensation claim form completed by the Secondary Complainer with attached documents; Answers for the Respondent in the form of an email from the Respondent's representative dated 9 October 2023; a bundle of documents for the Respondent; and two bundles of documents for the Secondary Complainer. Prior to the hearing on 27 October 2023, the Tribunal members had read all of the documents lodged by parties.

Through the interpreter, the Chair canvassed with the Secondary Complainer whether he wished to give evidence on oath or simply make a submission to the Tribunal. The Secondary Complainer elected to give evidence on oath.

**EVIDENCE FOR THE SECONDARY COMPLAINER**

With the assistance of the interpreter, the Secondary Complainer explained to the Tribunal that he contacted the Respondent in June 2015 with a view to making a claim for an accident at work. He said that he suffered a loss because the Respondent told him he had applied for insurance and would let the Secondary Complainer know when he had answers, but the Respondent has never given him any answers. The Secondary Complainer contacted another solicitor, but she told him she could not take on the case as there was insufficient time. The Secondary Complainer said he was quite distressed. He did not know where to turn or what to do.

The Secondary Complainer said that he signed an agreement on 24 May 2017. It was handwritten, not typed. The Secondary Complainer said he would like to have an explanation of this as he never visited the Respondent in person. He only saw him once at the SLCC. He would like to receive answers about this. The Chair asked the Secondary Complainer to explain what he meant by answers. The Chair reminded the Secondary Complainer that this was his claim for compensation and it was for him to give evidence to the Tribunal at this stage. To assist the interpreter, the Chair asked the Secondary Complainer to pause after each sentence. The Secondary Complainer said he was unable to do this. He asked for a different interpreter. The Chair indicated that the Tribunal was understanding him quite clearly when he was giving evidence. However, it would be helpful if he could pause more often and allow the interpreter space to speak. The Secondary Complainer said he would try to do that.

The Secondary Complainer said he received a settlement agreement dated 24 May 2017 which was after the time limit for his original case. He asked if Mr Clark, the Respondent's representative, had any argument regarding this. The Chair explained that the Tribunal would hear from Mr Clark later but that this was the Secondary Complainer's turn to tell the Tribunal his position.

The Chair said the Tribunal understood the Secondary Complainer's action was raised in court before the time limit expired and asked for the Secondary Complainer's comment on that. The Secondary Complainer said there was no communication from the Respondent. The Respondent did not answer any of his emails. His new solicitor told him the time limit was about to expire. Four months later he received a settlement agreement which said things were now between the Respondent and his new solicitor.

The Secondary Complainer said on 5 September 2017, his new solicitor asked if he had any proof that he had complained to the SLCC. The Secondary Complainer said he could not find it. Nothing happened until the letter of 1 November 2017 attaching the G10 form referring to a case at Dunfermline. The Secondary Complainer said he did not understand it. He contacted his new solicitor. She sent him by email of 21 November 2017 a mandate to represent him. On 13 December 2017 the Secondary Complainer contacted his new firm. A solicitor told him the firm was on her way to the first hearing and if the judge had questions, she would call him. On 17 January 2018 he was told that there would be a process hearing on 31 January 2018.

Following a comfort break, the Chair asked the Secondary Complainer to focus on why he said his loss was caused by the Respondent. The Chair indicated that it was the Tribunal's understanding that the Respondent was not acting for the Secondary Complainer in the litigation and that the settlement agreement of 24 August 2017 did not relate to the accident at work litigation itself, rather it was a settlement relating to the SLCC complaint. The Secondary Complainer said that the settlement agreement had said the whole matter was between him and his new solicitor.

The Secondary Complainer said that he heard from his new solicitor on 17 January 2018. Clyde and Co had contacted them. They represented the Secondary Complainer's employer. The Secondary Complainer understood that there was to be a hearing on 31 January 2018. He was told that if he attended the hearing, or a representative attended on his behalf, the court would most probably refuse the allegation against him and would approve expenses for the defender.

At this stage in the Secondary Complainer's evidence, he complained that the interpreter was not interpreting properly. He asked for a different interpreter. The Chair explained that there was no other interpreter available at this time, but the Secondary Complainer could seek an adjournment if he did not

wish to continue. Mr Clark offered to agree the document the Secondary Complainer was referring to. The Respondent could concede the letter referring to the preemptory diet. The Chair asked the Secondary Complainer to describe the specific document he was talking about. The Secondary Complainer noted that he had lodged 15 documents. He wanted to refer to the Tribunal to them all. The Chair asked the Secondary Complainer if he was content to proceed or whether he was seeking an adjournment. The Secondary Complainer said he was seeking an adjournment and he would arrange his own interpreter. The Chair explained that if the Tribunal adjourned the case, it would have to call on another day. The Tribunal arranges the attendance of an independent interpreter. An adjournment could result in additional expenses. The Secondary Complainer said he wanted to know what was and was not the subject of the hearing. He said he had asked but had not been given an answer. The Chair clarified again that the purpose of the hearing was to consider the Respondent's claim for compensation which he said arose from the loss, inconvenience of distress which the Respondent caused. The Secondary Complainer said he had been harassed and distressed. He said he would like to continue and would speak sentence by sentence for the interpreter.

The Secondary Complainer said he received a letter from his new solicitor on 17 January 2018. He had to find a new solicitor because the Respondent had never informed him of what was going on. His new solicitor told him on the telephone on 13 December 2017 that she was going to record that a court hearing was going to happen. However, she did not call him. The Secondary Complainer asked when the mandate was taken over from the Respondent. Mr Clark interjected to refer the Tribunal to its decision in the misconduct case. The Tribunal made a finding of fact (at paragraph 7.34) that the mandate was dated 21 November 2017.

The Secondary Complainer continued saying that he was given no opportunity to give evidence in his workplace accident case. His new solicitor used the evidence given to the SLCC by the Respondent. She did not tell him what a mandate meant. She told him he had to find a new solicitor. She basically did the same thing as the Respondent and the Secondary Complainer intended to complain about her too.

At the close of the Secondary Complainer's evidence-in-chief, the Tribunal adjourned briefly to consider whether they had any questions for him. They noted the confused nature of the Secondary Complainer's evidence but considered this was due to his understanding of what had happened, rather than due to any communication difficulty or fault of the interpreter. The Tribunal was satisfied that the proceedings had been fair, despite the Secondary Complainer's criticisms of the interpreter.

The Chair asked the Secondary Complainer whether it was his understanding that the mandate was provided on 21 November 2017 and that on 11 December 2017, the Respondent complied with that

mandate and sent the file to the new solicitor. The Secondary Complainer agreed that this was correct. The Chair asked the Secondary Complainer to confirm that by the time his claim concluded, therefore, the Respondent was not representing the Secondary Complainer in relation to his claim. The Secondary Complainer confirmed that was the case. The Chair asked whether the Secondary Complainer agreed that the outcome of the claim was not the Respondent's responsibility. The Secondary Complainer said the Respondent was responsible for failing to contact him before the expiry of the time limit so he had to find a new solicitor. The Secondary Complainer agreed with the Chair that the ordinary cause personal injury action was raised on 5 May 2017. The Chair asked whether the Secondary Complainer accepted that a court action was raised on his behalf. The Secondary Complainer said he did not accept that because he did not know that. The Respondent did not contact him after that.

The Secondary Complainer was not cross examined.

## **SUBMISSIONS FOR THE RESPONDENT**

Mr Clark referred the Tribunal to the papers lodged with the Tribunal, particularly its own decision in the misconduct case and the account of expenses which the Secondary Complainer lodged. He reminded the Tribunal that the established misconduct related to failing to communicate effectively, failing to respond to new solicitors and failing to respond to the Law Society of Scotland. He said he would work through the time line and make some submissions regarding the settlement agreement the Secondary Complainer had referred to and the Respondent's communication near the time of the time bar at the end of April and beginning of May 2017.

Mr Clark said that the Secondary Complainer's accident took place on 6 May 2014. The Respondent was instructed in June 2015. The claim was intimated to the Secondary Complainer's employer on 17 June 2015. Liability was denied on 26 November 2015. On 31 August 2016, the Secondary Complainer told the Respondent he was going to instruct another solicitor. On 1 and 12 September 2016 there was further communication between the Respondent and the Secondary Complainer and this was set out at paragraph 7.23 of the Tribunal's misconduct decision. On 18 January 2018, the Secondary Complainer complained to the SLCC. The Secondary Complainer had lodged the eligibility decision which concerns communication. It was eligible as a service complaint. That was the subject of a mediation agreement on 24 August 2017, and Mr Clark said he would refer to that again later. On 28 April 2017, the Respondent warned the Secondary Complainer about the costs of raising an action. On 2 May 2017, the Secondary Complainer's new solicitors warned him to raise an action to avoid timebar. On 5 May 2017, the Respondent advised on prospects again but he raised an action to protect the Secondary Complainer's position. Mr Clark invited the Tribunal to consider that the Respondent's communication had been

effective up to that point. In his submission, this period did not refer to the poor communication of which he was convicted. Mr Clark said that in June 2017 the court issued a timetable. The Tribunal could see from the account of expenses lodged by the Secondary Complainer that the Respondent made a motion to vary the timetable to extend the time limit for things to be done.

On 24 August 2017, the SLCC mediation took place. It dealt with the complaint to January 2017. It referred to the Secondary Complainer's new solicitors. The Respondent assumed therefore he was no longer acting. The correct thing to do to recover the papers from the Respondent was to send a mandate. The court fixed a peremptory diet for 9 November 2017 which was continued on 13 December 2017. The Respondent received a mandate from the Secondary Complainer's new solicitors on 21 November 2018. It was implemented on 11 December 2017. The established misconduct does not refer to implementation of the mandate. The Tribunal's decision notes that the Secondary Complainer's new solicitors attempted to make contact with the Respondent on 21 November 2017, 29 November 2017, 5 December 2017, 6 December 2017 and 8 December 2017 and that the Respondent did not respond. The peremptory diet was continued again. On 21 December 2018 the Secondary Complainer's new solicitors declined to take instructions on a no win no fee basis for the same reasons which the Respondent had already given to the Secondary Complainer.

Turning to quantifiable loss, Mr Clark noted that the Secondary Complainer said his financial loss constituted the judicial account which he had lodged. Mr Clark noted that the Secondary Complainer said he had not paid it. He had not vouched any decree against him for it. By any objective standard, the consequence of raising the case was brought to his notice along with prospects of success. There was no loss of opportunity here. The Respondent raised the action at his own expense as per the settlement agreement.

Mr Clark said there was no failure causing distress and inconvenience. The Secondary Complainer's alleged non-financial loss was not vouched as per the Tribunal's guidance. There was no financial loss. The Respondent took every step to protect the Secondary Complainer's position despite the Secondary Complainer not accepting his advice. Any distress and inconvenience arose because of the Secondary Complainer's failure to follow the Respondent's advice.

With regard to the expenses of this action, Mr Clark noted that the Respondent's position was that there was no relevant claim for financial loss, inconvenience or distress. Although the Tribunal does not have a tender system, Mr Clark noted that the Respondent had made an offer to settle the matter to the Secondary Complainer, without accepting liability. The Secondary Complainer did not respond to that offer. Mr Clark submitted that if the Tribunal made no award of compensation, or made an award less



than the settlement offer, the Secondary Complainer should meet the expenses of the Tribunal and the Respondent.

### **SUBMISSIONS FOR THE SECONDARY COMPLAINER**

The Secondary Complainer said that his new solicitor could not take the case because the time limit was due to expire. He said something was not quite right. He said he did not ask the Respondent to do what he did. He wrote to the Respondent clearly saying he was not his solicitor, and that he had a new solicitor.

The Secondary Complainer said that no one has asked him to pay the award of expenses so far. He did not have an opportunity to take part in the court hearing. The new solicitor refused to take his case. She did not give him a chance to give evidence to the court. That is why he was distressed. The new solicitor made the same mistake as the Respondent. He intended to make a complaint about that.

The Chair invited the Secondary Complainer to make submissions regarding the expenses relating to the present compensation hearing. The Secondary Complainer said that the Respondent did not communicate with him and was late in complying with the mandate. The Secondary Complainer said he could not take part in the court hearing. He did not know what else to say about expenses.

### **DECISION**

The powers of the Tribunal to award compensation are set out within Section 53(2)(bb) of the Solicitors (Scotland) Act 1980 which provides that:-

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

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

The Tribunal carefully considered the facts found on the last occasion and the terms of the finding of misconduct which related to the Secondary Complainer. The Tribunal could only have regard to the professional misconduct which had been established, not any additional complaints the Secondary Complainer might have about the Respondent.

In June 2015 the Secondary Complainer instructed the Respondent to make a personal injury claim. The Secondary Complainer made a complaint to the SLCC in respect of the Respondent's services on 18 January 2017. On 31 March 2017, the Respondent set out for the Secondary Complainer in an email his views on the evidential difficulties of proving the case. On 28 April 2017, he advised the Secondary Complainer that in his view there were no reasonable prospects of success. The Respondent told the Secondary Complainer that he would bear the risk of the employers' costs if the action failed. On 29 April 2017, the Secondary Complainer indicated he had not been able to get another solicitor. On 2 May 2017, the Respondent advised he was prepared to raise protective court proceedings and the Secondary Complainer would then be free to instruct another solicitor. On 4 May 2017, the Respondent sent an email to the Secondary Complainer advising that he would proceed on the basis that the Secondary Complainer did not want him to raise protective court proceedings. On 5 May 2017, the Secondary Complainer advised that he had told the Respondent's firm that it should raise a court action for him that day and then the file would be transferred. The Respondent raised an ordinary cause personal injury action on 5 May 2017. On 24 August 2017, the Respondent and the Secondary Complainer entered into an SLCC mediation agreement. The Respondent agreed to waive his outlays if the Secondary Complainer's new solicitor was unable to recover them. Subsequently, in an effort to obtain information for the Secondary Complainer, the SLCC attempted to contact the Respondent on various occasions in October 2017. The Respondent did not respond. The Secondary Complainer submitted a Complaint to the SLCC on 10 November 2017. A mandate was sent to the Respondent on 21 November 2017 from the Secondary Complainer's new solicitors. The Respondent complied with the mandate on 11 December 2017. The Respondent failed to respond to the Law Society when it was investigating the Secondary Complainer's complaint. The Tribunal found that the Respondent had failed to communicate effectively with the Secondary Complainer by failing to respond to his requests for information about his case, particularly about whether the Respondent had filed proceedings on the Secondary Complainer's behalf, information which was requested on 5 and 6 September 2017. The Tribunal found that the Respondent had failed to respond to the Secondary Complainer's new solicitor. The Tribunal also found that the Respondent had failed to cooperate with the Law Society's investigation into the complaint against him.

The Tribunal considered the Secondary Complainer's claim for quantifiable loss. In his claim form, the Secondary Complainer said that he wished to claim £5,000 in order to resolve the situation arising from

the court's decision to grant expenses to his employer. This was also the thrust of the main part of his evidence before the Tribunal. However, it was clear that the Respondent had raised protective court proceedings for the Secondary Complainer timeously, that he had advised that the case had poor prospects of success, that he did not want to pursue it on behalf of the Secondary Complainer, and that the Secondary Complainer ought to get another solicitor. The Secondary Complainer had advised the Respondent that the file would be transferred. While the Respondent ought to have communicated better with the Secondary Complainer and his new solicitors, the Secondary Complainer had advised the Respondent that the file should be transferred. By August 2017, the SLCC agreement suggests that there were new solicitors in place or new solicitors were to be instructed. Therefore, the Tribunal could establish no causal link between the alleged loss and the misconduct. Any loss did not arise as a direct effect of the Respondent's misconduct. The Secondary Complainer would have pursued his action and he would have been liable in expenses, even if the Respondent had not committed professional misconduct.

The Tribunal considered the Secondary Complainer's claim regarding inconvenience and distress. He claimed to have suffered a lot of stress and anxiety due to the financial order against him as he has no means to settle it. He failed to get any damages for his accident at work. He had experienced difficulties getting work. As is set out above, the Tribunal could establish no link between the Respondent's misconduct and the award of expenses against the Secondary Complainer. This award related to a claim the Secondary Complainer pursued and insisted upon in the face of the Respondent's advice to the contrary. There was also no link between the Respondent's misconduct and the Secondary Complainer's failed personal injury case or the Secondary Complainer's difficulties in obtaining work.

The Tribunal noted that the Secondary Complainer said he was stressed by the Respondent's conduct. However, it was not clear what it was about the Respondent's conduct which made him feel that way. No vouching was provided in support of the Secondary Complainer's claim that he suffered stress. Understandably, he was upset that his claim failed and that he was found liable in expenses. However, any distress which arose as a result of these factors was not down to the Respondent. The Secondary Complainer's assertion that he did not instruct the Respondent to make the protective court action was contrary to the Tribunal's decision at paragraph 7.28. The Respondent was dilatory in responding to the Secondary Complainer's new solicitors but he made the claim to preserve the Secondary Complainer's position on the Secondary Complainer's instruction, and also complied with the mandate. On the information before it therefore, the Tribunal was unable to hold on a balance of probabilities that the Respondent's conduct had caused the Secondary Complainer inconvenience or distress.

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



**Ben Kemp**  
**Vice Chair**