SENIOR COURTS
COSTS OFFICE

SCCO Ref: 145/18

21 January 2019

ON APPEAL FROM REDETERMINATION

REGINA v ZAMEER AHMED

CROWN COURT AT BRADFORD

APPEAL PURSUANT TO REGULATION 29 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20167299

LEGAL AID AGENCY CASE

DATE OF REASONS: 27 JUNE 2018

DATE OF NOTICE OF APPEAL: 9 AUGUST 2018

APPLICANT:	SOLICITORS	ISAAC SOLICITORS BRADFORD

The appeal has been successful (in part) for the reasons set out below.

The appropriate additional payment, to which should be added the sum of £ (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

JASON ROWLEY
COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by Isaac solicitors of Bradford against the amount of pages of prosecution evidence ("PPE") used by the determining officer in calculating the solicitors' payment under the Litigators Graduated Fee Scheme.

2. The solicitors were instructed on behalf of Zameer Ahmed in relation to a three count indictment involving sexual offences alleged to have been perpetrated upon two different complainants. Shortly before the trial, the prosecution decided to sever the indictment so that there would be separate trials involving each individual complainant. I was told by Mr Worsley of counsel, who appeared on behalf of the appellant solicitors, that there was some question over whether one of the complainants would give evidence in respect of her count.

3. The trial involving the second complainant proceeded and the defendant was found guilty of the two counts against him. He was sentenced and upon that occurring the prosecution decided not to proceed further with the count in respect of the original complainant.

4. Consequently, the solicitors made a claim under the graduated fee scheme for payment for a trial and also for a cracked trial in respect of the prosecution which was ultimately abandoned. The determining officer allowed the 40 pages of prosecution evidence served on paper together with a further 1,232 pages of electronic evidence making a total of 1,272 pages of PPE for the purposes of calculating the graduated fee.

5. The solicitors say that the determining officer should have taken into account considerably more of the electronic evidence that was served so that the appropriate PPE figure should be the maximum 10,000 pages. The solicitors do not pursue a claim for special preparation for the pages above that figure. Mr Rimer, on behalf of the Legal Aid Agency, contends that the determining officer was correct in relation to the PPE for the trial fee but ought not to have allowed the PPE to the extent that she did in respect of the cracked trial.

6. I will deal with Mr Rimer's "duplication" point, as it was described at the hearing before me, first. Mr Rimer's argument is that the electronic evidence did not cover the period of the cracked trial indictment and so could not be relevant to it. The offence alleged in that indictment occurred between the first and third of October 2012 and the served electronic evidence only went back to 2013.

7. Furthermore, the evidence had already been considered in relation to the effective trial indictment since the severance only occurred shortly before that trial was due to take place. The evidence had already been considered therefore in relation to the effective trial and it was simply duplication to make any allowance for the pages to be considered in the cracked trial fee.

8. Mr Worsley relied upon paragraph 3.1 in Section 3 of the Crown Court Fee Guidance which states as follows:

> "2. A case is defined as proceedings against a single person on a single indictment regardless of the number of counts. If counts have been severed so that two or more counts are to be dealt with separately, or two defendants are to be dealt with separately, or if two indictments were committed together but dealt with separately, then there are two cases and the representative may claim two fees."

9. Whilst the version Mr Worsley referred me to postdates the representation order in this case, I have compared it with an earlier version of the Guidance and the wording appears to me to be identical. The next paragraph of the Guidance (i.e. 3.2) refers to the converse position where, for example a solicitor acts for two defendants in the same proceedings. In such circumstances, only one fee is payable.

10. The determining officer obviously thought that it was clear that the solicitors were entitled to two fees in exactly the circumstances set out in paragraph 3.1 of the Guidance. Both fees are to be calculated in accordance with the regulations, including using the appropriate PPE figure in each case.

11. I agree entirely with the determining officer's approach to the duplication point. To the extent that this represents any form of a "windfall" to the solicitors, it is no more than an example of the swings and roundabouts nature of the scheme. It is entirely unattractive in my view to seek to question whether the PPE had already been considered in the other case. It represents an ex post facto assessment of the costs which, other than in relation to confiscation proceedings, was done away with when the graduated fee scheme came into being.

12. The three counts on the original indictment all follow the same rubric. They allege that Ahmed, on a specified date (or range of dates), intentionally touched the complainant in circumstances where the touching was sexual, but the complainant did not consent to it and Ahmed did not reasonably believe that the complainant consented.

13. The complainants were former work colleagues of Ahmed when they were working in a children's home. Ahmed's defence was that the culture in place was one where "banter" and physical contact was common. He disputed some of the facts of the alleged touching but his defence centered on the context of a high pressured workplace where the behaviour complained of by the two complainants regularly occurred between various colleagues and no complaint was made of such behaviour. As such he reasonably believed that the complainants had consented to the contact.

14. The prosecution's case rested on a small number of short witness statements and the contents of the defendant's telephone which was served in its entirety on disc. The determining officer allowed 1,232 pages of the disc's contents. Those pages relate to the call log, contacts and various forms of messaging.

The determining officer took the view that none of the other data appeared to be relevant.

15. Mr Worsley told me that the prosecution relied on parts of the contents of the disc which the determining officer has not allowed as PPE. By way of example, the Crown referred to the website searches and Ahmed's viewing of pornography to seek to cast the inappropriate behaviour in a more serious light on the basis that it occurred shortly after that viewing. Similarly, according to Mr Worsley, the defence relied on the fact that Ahmed was a frequent viewer of pornography whenever he had an opportunity to do so and nothing occurred on many occasions thereafter.

16. The complainants were said to have been uncomfortable with things which caused no problems to others. Consequently, material sent between co-workers which showed the work environment was relevant to the defence in demonstrating that the defendant behaved similarly with friends and associates both male and female.

17. Mr Worsley pointed out that the activities alleged were open to interpretation and that they were not unequivocally sexual in their nature. The only way to demonstrate Ahmed's reasonable belief was to show what had happened before and after the incidents complained of in order to build the context of the workplace environment.

18. Both Mr Rimer and the determining officer before him, took the view that items such as the web history and the images could not be any more than peripherally relevant to the defence of the case. They could not have any direct bearing on whether the complainant had been touched as she had alleged and, at least in Mr Rimer's view, what the defendant's belief might be at the time. Nevertheless, given that the documents were served, Mr Rimer accepted that there was at least logically the scope for a claim for special preparation to be made by the solicitors for the time spent in viewing these less relevant items on the disc.

19. The nature of assessing work done inevitably runs the risk of imposing the assessor's view of how the case should have been run in order to decide upon the reasonableness of what was actually undertaken. I think that the determining officer, and indeed Mr Rimer, have fallen on the wrong side of that line in this particular case. It seems to me that the only way of demonstrating that Ahmed's belief was reasonable was to show how he behaved with others and, just as importantly, how they responded. This would include images sent by others to him to demonstrate the workplace culture. The fact that the jury did not accept the defendant's contention does not mean that the way the case was run was not a reasonable one.

20. In addition to the items allowed by the determining officer, the solicitors claim for items under the headings calendar, notes, searched items, timeline, web history, images and analytics data.

21. All of these items were challenged by Mr Rimer on the basis that they were no more than peripheral. However, I was satisfied by Mr Worsley's explanation of

the need to consider each one of these headings. Most of those items come under the umbrella of establishing the workplace culture. But some were more specific, such as the calendar entries and the notes contained within them. Mr Worsley explained that there was an issue as to how much contact there had been between the complainant and Ahmed. The employer's records were not complete as to when the two employees had worked and consequently the calendar function on the phone which had recorded at least a number of the shifts was relevant in its own right. Also, the timeline data was claimed by the solicitors on the basis that it brought all of the other data together. So, whilst the individual data items could be accessed elsewhere, the context of that data provided both prosecution and defence with lines of examination and cross-examination.

22. Having heard Mr Worsley and Mr Rimer go through the various headings which were claimed, I am satisfied that all of those items are recoverable in principle as part of the PPE.

23. This conclusion is subject to the final but important aspect of the different formats considered by the solicitors. The information was downloaded in both PDF and Excel formats as is invariably the case. There is no suggestion that the formats contained different information albeit that the spreadsheet contains some information via hyperlinks embedded into the application itself.

24. The solicitors appeared to concede in their appellant's notice that they could not claim for the Excel pages in addition to the PDF pages but that concession was withdrawn by Mr Worsley on the basis that both formats had been used by the solicitors in their case preparation. The need to search in a more sophisticated manner than "Ctrl + F" meant that the information was searched in Excel before then being referred back to the PDF version for annotation. This did not apply to the images which could not be manipulated or searched in Excel.

25. Mr Worsley accepted that the Excel format did not lend itself to an easy page count calculation. But his solicitors' claim was only for 10,000 pages and, based on the Excel spreadsheet, there were many more pages than that which could be claimed (the total page count is said to be 28,075 although some items are not claimed). On that basis, there did not need to be a precise calculation of the number of Excel pages in order for me to find for the solicitors.

26. Mr Rimer relied upon the recent case of R v Muiyoro (70/18). I indicated that there was also another case of Master Leonard's which I had recently read (R v Simpson 44/18) in which he had similarly gone through the various costs judge authorities on this point. With the exception of R v O'Rourke, the authorities all prefer the use of PDF documents for the page count rather than Excel spreadsheets. At paragraph 74 of Muiyoro, Master Leonard relies on the approach previously taken by both Master Gordon-Saker and Holroyde J (as he then was), namely that electronic documents require the same amount of consideration as evidence served on paper and that is most appropriately done by considering the documents in a PDF.

27. For my part, I simply take the view that the method in which the information is manipulated and the method by which the litigator is to be remunerated do not have to be based on the same format of document. Fundamentally, the extent of the data is the same in whichever format it is presented. It seems to me incontrovertible that the nearest equivalent to a paper document is the PDF format and it should be that one which is used for the purposes of PPE. The vast difference in page counts in this case simply demonstrates, in my view, the unsatisfactory nature of using Excel spreadsheet print preview as a method of determining the page count.

28. Consequently, although this appeal succeeds in that I consider the items claimed from the disc by the solicitors ought to be allowed, the increased page count is to be calculated from the PDF figures and not the Excel spreadsheet. As such the figure will be nearer 5,000 pages than the 10,000 pages claimed.

29. On the basis that this appeal succeeds, the solicitors are entitled to their costs of the appeal.

TO: ISAAC SOLICITORS
212-214 OTLEY ROAD
BRADFORD
BD3 0JH

COPIES TO: JAS SOAR
LEGAL AID AGENCY
DX 10035 NOTTINGHAM