Neutral Citation No. [2022] EWHC 1536 (SCCO)

Case No: T20200487

SCCO Reference: SC-2022-CRI-000025

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 27/05/2022

Before:

COSTS JUDGE ROWLEY

REGINA (MACMILLAN CANCER SUPPORT)
v
ANDREWS

Judgment on Appeal under Regulation 10 of the
Costs in Criminal Cases (General) Regulations 1986

Appellant: Macmillan Cancer Support

The appeal has been successful for the reasons set out below.

The appropriate additional payment, to which should be added the sum of £3,000 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Macmillan Cancer Support ("Macmillan") against decisions of the determining officer when assessing fees payable to Macmillan as a private prosecutor under section 17 of the Prosecution of Offences Act 1985.

2. Under this Act, the determining officer is required to allow payment out of central funds of such sum as is reasonably sufficient to compensate the prosecutor for any expenses properly incurred by it in the proceedings.

3. There are two aspects of the determination which are challenged by Macmillan. The first concerns an attendance by its investigators for a second time in order to interview witnesses. The second aspect concerns some of the fees charged by counsel.

4. Macmillan has two investigators, Bob Browell and Lee Duddridge. They both attended Redpack in Norwich, the business location where the fraud occurred, on 23 July 2020. Witness statements of Guy Howard and Brittany Dunham were prepared and drafts signed on that occasion. On 29 July 2020 the investigators returned to Redpack and took statements from two further witnesses, namely David Owen and Harley Francis. Subsequently, and in response to the defendant's defence statement, another witness statement was taken by telephone.

5. The determining officer allowed the attendance of Mr Browell on the first occasion but disallowed Mr Duddridge's attendance on the basis that it was a "duplication" of Mr Browell's attendance. She took the view that neither investigator needed to attend on the second occasion and that the follow-up of the witnesses could have been carried out by Skype or telephone as occurred with the other witness.

6. Ashley Fairbrother of Edwards Marshall McMahon, Macmillan's solicitors, appeared before me via Teams on the appeal hearing. He confirmed that the determining officer's disallowance of Mr Duddridge's attendance on the basis of duplication was not challenged on this appeal. The consequence of that was that only the attendance of one investigator on 29 July 2020 was pursued.

7. In her written reasons, the determining officer indicates that she was not aware of which witnesses were attended or the time actually taken on interviewing those witnesses. It seems to me that her analysis of the fees has misconstrued the purpose of the second attendance. It may be that that is as a result of lacking some information. Be that as it may, it is clear that the second attendance was for the purpose of interviewing further witnesses and not simply a matter of finalising the witness statements of witnesses who had been seen previously.

8. On this basis, I do not think that the determining officer's decision can stand because it is essentially based on a false premise. To the extent that the returning officer simply considered that there was never any need to see those witnesses in person, then I disagree. A decision was taken to obtain a statement from a witness via the telephone regarding the money appropriated by the defendant and which said had in fact been lost in transit. That decision indicates to me that suitable rigour has been employed in deciding who needs to be interviewed in person and who might be interviewed by other means. Accordingly, I consider that the attendance of one of the investigators on 29 July 2020 was justified and requires compensation as a result.

9. The two investigators cover the country and attempt to split their work between the North where Mr Dudridge is based and the South where Mr Browell lives. Mr Browell lives closer to Norwich and it might be thought that he would lead this investigation. But, owing to the number of other cases in which they were dealing at the time, Macmillan decided that Mr Duddridge ought to be the lead investigator. Consequently, he carried out work after the attendance at Redpack and this appeal seeks his time for attending upon the witnesses rather than that Mr Browell's. As I indicated at the hearing, it did not seem to me that, when considering the concept of reasonably sufficient compensation from central funds, the starting location of the two investigators could be ignored. This was particularly so where both attended on the day in question in any event. For the purposes of remuneration, it seems to me that Mr Browell's time and expense is the appropriate measure being the more local investigator. Accordingly, I allow the fee set out in line 12 of the prosecutor work claimed tab rather than line 13.

10. In respect of the nine fees charged by counsel, three of the sums allowed by the determining officer are challenged. They relate to the first appearance at the magistrates court on 29 September 2020, the subsequent PTPH hearing on 27 October 2020 and a fee for trial preparation which is dated 12 March 2021 and relates to work from 26 February up to that date.

11. For the two appearances, a fee of £600 has been charged for each occasion and £300 has been allowed by the determining officer. In respect of the trial preparation work of two hours has been claimed in the sum of £500. The determining officer has allowed £250.

12. I have not found it easy to follow the determining officer's reasoning for the allowances that she has made in respect of counsel's fees. The total fees allowed for counsel are £2,850. This included £600 (as claimed) for the sentencing hearing and which, in her written reasons, the determining officer describes as being the "basic fee." The determining officer goes on to say that the basic fee allowed for work done by counsel for attendance on the first day of trial and includes an allowance for short conferences that might take place on the first day and preparation undertaken during the course of the trial.

13. This description of a basic fee seems to me to have come from the Criminal Legal Aid (Remuneration) Regulations 2013 where it is an integral part of the graduated fee scheme. For example, in Schedule 1 to the Regulations relating to advocates' fees, paragraph 19(2) says that "the fees payable in respect of attendance at the first three pre-trial conferences or views, as set out in subparagraph 1(a) to (c), are included in the basic fee…"

14. By contrast, there is no reference to a basic fee in the Costs in Criminal Cases (General) Regulations 1986 which apply in respect of the costs payable under section 17. The determining officer's seeming use of the 2013 Regulations terminology appears to have led her into downgrading the earlier hearings on the basis that they were not the main hearing to which the basic fee applied (they are described as "subsidiary hearings"). Moreover, it has taken her away from considering each hearing and the appropriate fee to be allowed on essentially a stand alone basis as befits a privately paid arrangement.

15. The determining officer quite rightly refers to the need to consider brief fees on more than simply an arithmetical basis. The only difficulty with that approach is that the figure can appear arbitrary if it is not clear as to how the weight et cetera of the case has been viewed in order to reach the sum allowed. The counsel involved, Ms Wood, has also been involved in another private prosecution on behalf of Macmillan – R v Toogood – on which an appeal to a costs judge has recently taken place. Costs Judge Leonard provided his decision as recently as 12 May 2022 (SC-2022-CRI-000001) and there are obvious similarities in respect of counsel's fees. In Toogood, Ms Word charged £600 for the hearing at the magistrates court and £750 for the PTPH hearing. In this case she has charged £600 on both occasions. In Toogood the returning officer had allowed £300 on each occasion, which is the same as here.

16. Costs Judge Leonard described Ms Wood's fees as being well within a reasonable range for the work undertaken in Toogood and I consider the same to be entirely the case here. There is no need to consider the question of travel in this case because Ms Wood attended by CVP on both occasions. But I think it is worth endorsing Costs Judge Leonard's comments that the need for travel to and from court is part of the consideration of the appropriate brief fee. It remains unusual for a separate fee to be charged but it is not the case, in my view, that any time allowed for in calculating the brief fee in respect of travel should somehow be removed in the manner suggested by the determining officer.

17. There is no need for me to rehearse the preparation time of the work done in respect of each hearing as well as the attendance on the day. The work done clearly justifies rather more than the sums allowed. Those figures do not represent reasonable compensation and appear to have been artificially lowered on the basis that they are not the main hearing.

18. In relation to the trial preparation fee, I note that Costs Judge Leonard reduced the equivalent figures in the case of Toogood, albeit that they were rather higher than here. Two hours are claimed in respect of considering the case at the point where the defence statement had been produced and involved work some little time before the trial was due to take place.

19. A fee of £500 has been claimed by counsel and half that sum has been allowed by the determining officer. But I am not convinced that that is simply an allowance of one hour rather than two. In the spreadsheet on which the determination took place, the determining officer has provided the comment "an element for general preparation is included within the other fees allowed." Once more I regret to say that this comment is not entirely clear to me. There is no amplification in the written reasons as to which other fees may have incorporated some general preparation.

20. In the written reasons the determining officer's decision to reduce this fee seems to be based on the view that the trial should not have been fully prepared in March 2021. The reasoning for this is that the case was very likely to be postponed until later given the backlog of trials arising from the pandemic. That view is then resiled from to some extent by the determining officer accepting that counsel needed to be in a position to become fully trial ready at short notice.

21. Consideration of the case including the defence statement took place between the end of February and 12 March for the two hours claimed. Within that time was the

consideration of the defendant's defence statement and the defence being run that the money had been lost by others responsible for it being banked. The existence of separate proceedings being brought by the CPS against the defendant led to the need to consider an application for bad character evidence to be adduced in respect of the alleged credit card offences being prosecuted separately.

22. Mr Fairbrother pointed out at the hearing that not all trials were adjourned during the pandemic and that Toogood was an example of that where a six-day trial took place in June 2021.

23. Having considered the work that was done during this period, I have no hesitation in allowing the two hours claimed by counsel. It seems to me that a considerable amount was achieved in that period and there is nothing that I have seen which suggests that only two hours was required to prepare fully for trial. It may well have required rather further time to have been spent and that as such the two hours claimed simply brought the case to the level of readiness accepted by the determining officer in any event.

24. The determining officer does not specifically challenge the hourly rate and I make no formal decision about it. There is some difficulty with it being above the Evans v Serious Fraud Office ceiling described by Higginbotham J (as he then was). However, it is very much in line with the fees charged by other private prosecution counsel in cases such as R v Zinga and R v O'Leary. For the avoidance of doubt therefore, I allow the £500 claimed at line 13 of the advocate work claimed tab.

25. Since Macmillan has been successful on all aspects of this appeal, it is also entitled to costs in respect of pursuing it.