Final Decision

Date: 29 November 2024

Introduction

This matter has been with our organisation for some considerable time and it has been with me for a significant proportion of that. I appreciate that the parties have been patient and have given their comments on request and I am grateful to them for that. It is now time for me to make my final decision.

Mr A and Ms B instructed Scornik Gerstein LLP in October XXXX to help them with a claim against their former employer. The case was ultimately settled by agreement in Mr A and Ms B's favour and, although there was a delay in payment (which the firm has explained required a recovery process), the employer paid both compensation and the legal costs that had been agreed between them.

In keeping with the shorthand my colleague used in his Case Decision, I'll refer to Scornik Gerstein as "the firm" from this point.

Originally paying privately for the work, Mr A and Ms B were struggling to keep to the payment plan that had been set up. In July XXXX, the arrangement for the payment of costs changed to a damages-based agreement (known in short as a "DBA"). This explained that the firm's fees would be defined by 35% of whatever was recovered under the claim. I will come back to this later.

There is one issue of complaint before me: **the firm deducted more fees than agreed in the Damages Based Agreement**. This is the wording of the complaint we agreed to investigate and it has been the basis of the conclusions in my colleague's Case Decision and which I am using in my Final Decision.

In his Case Decision, my colleague concluded that the firm's service had been reasonable: it had deducted 35% of the damages Mr A and Ms B received from the other side, which is what they had agreed to pay the firm.

Over the course of two Provisional Decisions – separated by some further enquiries – I came to propose to conclude that the firm had failed in its service on this issue. My initial proposal was a remedy of a total of £54,879.62 and, following comments and evidence from the firm, I reduced this to £38,930.02 in my Second Provisional Decision.

In response to this Second Provisional Decision, both parties have written to explain why they disagree. I will deal with the reasons below, but my view on the service, the detriment and the appropriate remedy remain as I set out in my Second Provisional Decision. All I am going to do is make a small adjustment to reflect the interest calculation for the extra days since the Second Provisional Decision, using the same process as I have throughout. This brings the total remedy to **£39,126.53.**

Conclusions

1. My role as an ombudsman is to determine a complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case.

2. When determining what is 'fair and reasonable', I am expected to take into account (but I am not bound by) what decision a court might make, relevant regulatory rules and what I consider to be good practice.

3. I confirm that I have taken these factors into account, and the decision that I set out below, is what, in my opinion, I consider to be fair and reasonable in all the circumstances of this case.

4. In what follows, I am going to break the conclusions up into sections, reflecting different aspects of my analysis of the service the firm provided in this case.

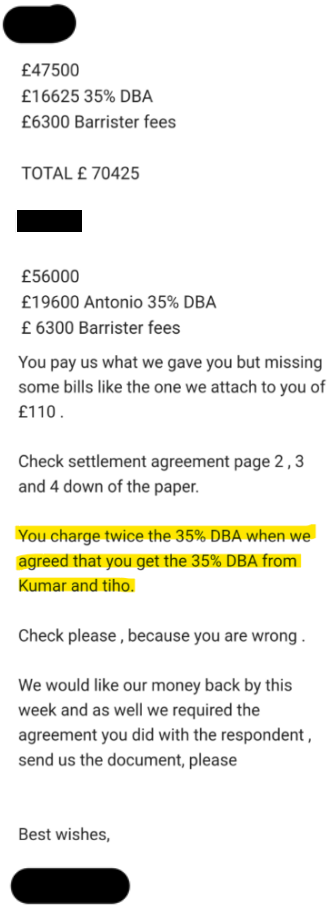
The original complaint

5. The firm has raised a question about the complaint itself, in its response to my Second Provisional Decision. Specifically, the firm questions whether the complaint I'm drawing conclusions on matches what Mr A and Ms B have actually complained to us about.

6. My starting point on this needs to be to make clear that we are not under an obligation to share the complaint form or the initial contact to us with the party being complained about. Rather, the idea is that the person will have complained to the lawyer first, so the details of the complaint will be known at that point. Then there is a process at the start of our investigation, where we establish the details of the complaint, defining and agreeing the wording of specific allegations, which form the basis of our investigation. That then gets shared with the lawyer and, if there are any discrepancies, they can be dealt with there.

7. In this case, my colleague shared the single allegation with the firm, the firm raised no concerns about this wording reflecting Mr A and Ms B's complaint and we have proceeded on that basis. My conclusions have stayed within the bounds of what we have agreed to investigate.

8. I have reminded myself of the initial complaint Mr A and Ms B made to the firm, which was in an email sent on XX October XXXX, a day after the clients received their settlement. It included (my highlighting):



£47500
£16625 35% DBA
£6300 Barrister fees

TOTAL £ 70425

[redacted]

£56000
£19600 Antonio 35% DBA
£ 6300 Barrister fees

You pay us what we gave you but missing some bills like the one we attach to you of £110 .

Check settlement agreement page 2 , 3 and 4 down of the paper.

You charge twice the 35% DBA when we agreed that you get the 35% DBA from Kumar and tiho.

Check please , because you are wrong .

We would like our money back by this week and as well we required the agreement you did with the respondent , send us the document, please

Best wishes,

[redacted]

9. This reads clearly, in my view. The firm argues that the complaint was about a departure from the DBA, but that is only part of the point being made: there is an inherent question in the difference between what the clients believed they were going to pay and what they actually have paid. The firm believes it has acted properly and in line with the agreement. That is a position it is entitled to convey, but it doesn't change the basis of the complaint.

10. I reject the firm's contention that I have deviated from the original complaint. What I am concluding on mirrors the position the clients raised with the firm two years ago. I am therefore satisfied that I may fairly proceed.

The law

11. In response to my Provisional Decision, the firm asked me to read the relevant legal framework. I did so and set out my understanding in my Second Provisional Decision. I note that, in its response to that, the firm has offered no comment at all.

I take from this that the firm does not believe I have either missed or misunderstood anything, so a lot of what follows in this section is a repeat of what I wrote last time.

12. Our normal approach is to focus on the *service*, rather than the *law*, which means we find ourselves looking at the work a lawyer has done a case through a different lens to the lens a judge would in a negligence or contract claim.

13. However, at the firm's request to consider the legal framework, I have done so. Our Scheme Rule 5.37a) says that, in deciding what is fair and reasonable when assessing a service, the ombudsman will take into account (but isn't bound by) what decision a court might make.

14. Section 4(1) of the Damages Based Agreement Regulations 2013 provides:

> **4.**(1) In respect of any claim or proceedings, other than an employment matter, to which these Regulations apply, a damages-based agreement must not require an amount to be paid by the client other than—
>
> (a) the payment, net of—
>
> (i) any costs (including fixed costs under Part 45 of the Civil Procedure Rules 1998); and
>
> (ii) where relevant, any sum in respect of disbursements incurred by the representative in respect of counsel's fees,
>
> that have been paid or are payable by another party to the proceedings by agreement or order; and
>
> (b) any expenses incurred by the representative, net of any amount which has been paid or is payable by another party to the proceedings by agreement or order.

15. This enacts what is known as the Ontario model, which is, in short, that the winning claimant lawyer doesn't recover more than the contingency fee and the losing defendant doesn't pay more than the assessed costs.

16. Employment matters like Mr A and Ms B's are expressly excluded from 4(1), but it is noteworthy that Employment Tribunals have been keen to refer to these regulations and to the Ontario model in their decisions, when assessing the question of fairness of costs orders.

17. I note the case of *Barry v University of Wales Trinity St David* in 2013 (I attached a copy of the judgment to the email I sent the Second Provisional Decision on), where the Tribunal expressly and deliberately measured the fairness of the proposed costs against the Ontario model. For the avoidance of any doubt, whilst there is a claimant in that case with the same name as me, it isn't me and I don't know him.

18. In the explanatory notes to the Damages-Based Agreement Regulations 2013 (which, from this point, I'll refer to as "the DBA Regulations") (https://www.legislation.gov.uk/ukdsi/2013/9780111533444/pdfs/ukdsiem_9780111533444_en.pdf), at 4.5, the spirit is clear:

> 4.5 The DBA principles are based on the lawyer not being able to recover any more than the DBA fee.

19. That doesn't distinguish between employment cases and everything else.

20. The firm has rightly noted that there is a separate section of the DBA Regulations for employment claims, which is section 7:

> **7.** In an employment matter, a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 35% of the sums ultimately recovered by the client in the claim or proceedings.

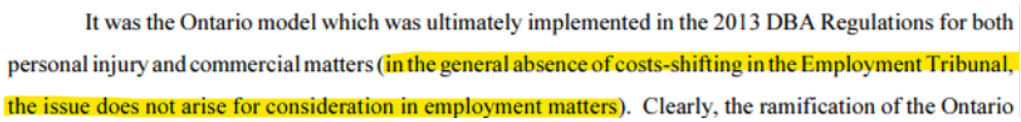
21. The details of section 4 aren't there in section 7, but it's fair to note that, in litigation generally, the losing party should expect to pay some of the winning party's costs, unless the case is an employment one. In employment cases, the Tribunals will usually only award costs where a party's conduct has been poor, and there have been some helpful recent cases on this (https://littletonchambers.com/articles-webinars/costs-orders-and-the-publication-of-judgments-in-the-employment-tribunal/).

22. The Tribunal dealt with this point directly in *Barry*, in addressing the relevance of the Ontario model to its decision-making process (my highlighting for emphasis):

> 9. When the 2013 Regulations were being drafted, two models for costs recovery were discussed. Under the so-called "Ontario model", the lawyer's recoverable costs would be deducted from the contingency fee payable by his client. Under the "success fee model", the contingency fee payable by the successful claimant was treated as a success fee, which the lawyer could retain on top of the recoverable costs awarded.
>
> 10. It seems clear enough that the 2013 Regulations implement the Ontario model for non-employment matters. The combined effect of Regulation 4(1), read with the definition of "payment" in Regulation 1(2), is that recoverable costs fall within the contingency fee. The effect is that a successful claimant's lawyer cannot treat the contingency fee as a true success fee. This interpretation is supported by paragraph 7.10 of the explanatory memorandum. We accept that this does not extend to employment matters, but that must simply be because employment matters are not litigated in a cost-shifting jurisdiction. That does not mean that we cannot take account of the fact that the Ontario model was adopted when considering the exercise of our discretion.
>
> 11. So, under the Ontario model, a successful claimant would be able to claim from a defendant some or all of his costs on a conventional "hourly rate" basis. Such costs would still be assessed in the normal way under CPR 44.3 (see CPR 44.18). However, the indemnity principle would apply so that a party would not be able to recover, by way of costs, more than the total amount payable by that party under the DBA. The claimant may pay its lawyer the contingency fee out of the recovered costs, and any shortfall between the recovered costs and the contingency fee would then be paid from the damages awarded.

23. Employment claims are known to be different from the rest of the litigation framework because of the difference in approach when it comes to recovering

costs. That goes to the heart of this complaint, of course. My understanding of this is supported by the Civil Justice Council, whose review of DBAs in 2015 explained:



It was the Ontario model which was ultimately implemented in the 2013 DBA Regulations for both personal injury and commercial matters (in the general absence of costs-shifting in the Employment Tribunal, the issue does not arise for consideration in employment matters). Clearly, the ramification of the Ontario

Source: [The Damages-Based Agreements Reform Project: Drafting and Policy Issues (judiciary.uk)]

24. My point is that the distinction the firm makes doesn't change the general principle that the Ontario model should be relevant to a decision-maker on a costs complaint. I don't believe there is a general tolerance of firms recovering more than the DBA built into the legal framework, expressly or by implication of employment claims being separated from section 4.

25. I have noted that the firm has referred me to the case of *Zuberi v Lexlaw* [2021] (https://www.bailii.org/ew/cases/EWCA/Civ/2021/16.html) and the firm tells me that there can be "hybrid" agreements, where there is a contingency element and a separate element, and the result can mean a firm may recover more than the 35% of damages.

26. That case is about a potentially rogue termination clause of the DBA, rather than about what happens when the damages are recovered. The court was considering whether a clause could be in the DBA which allowed for a different payment to be recovered from the client, in the event that the firm's involvement ended before the case was over.

27. The case saw a claimant, who had settled her claim by agreement, arguing that there was a clause in the DBA which invalidated the DBA itself. Whilst the court did dismiss the appeal (upholding the DBA as being lawful, even with the extra clause that was in dispute), the three Lord Justices in that case had different interpretations of the regulations in drawing their conclusions. They seem to me to have agreed that the regulations are not clear and to recognise the history of DBAs having previously been considered inconsistent with legal morality.

28. Of interest to me, the case didn't see the lawyers receiving more than the ordinary DBA recovery (which, in our case, would be 35% of damages recovered). Rather, the solicitors simply recovered their normal share of the spoils. This reinforces my conclusions, to my mind.

29. Putting all of this together, I don't agree with the firm's position that the law expressly allows firms to recover more than 35% of damages in employment claims. I am not persuaded that the firm has demonstrated this to be true. *Zuberi*

seems to me to allow firms to have hybrid DBAs which include a clause that sets a structure for fees, if the case doesn't go through to completion. The idea is that lawyers should get paid for their labour and clients should be responsible for paying them (unless and until someone else agrees or is ordered to do it instead).

30. In that case, the firm would still only recover money to reflect its work (if this were a time-spent basis). That isn't what happened for the complaint in front of me. I have no reason to suggest that the DBA in Mr A and Ms B's case is unenforceable or invalid and so the overarching considerations in *Zuberi* seem to be of little (if any) relevance to this case.

31. My reading of the information provided by the firm and the research I've done above lead me to conclude that a court wouldn't hold the firm's approach to be normal practice. What was agreed between the parties is important, though, and I will come to this later.

32. As I noted above, the firm has not offered any comment of substance on this analysis from my Second Provisional Decision, nor directed me to any legal point it considers I have missed or misunderstood. I see no reason to change my views.

Were there two retainers in this case?

33. When the case first came to me for a decision, I was unclear as to whether there had been – or whether the firm was arguing that there had been – a separate civil claim to enforce the settlement agreement.

34. The firm has explained that there were enforcement proceedings, but that it regarded these as being under the DBA, so, whilst there was additional work after the employment claim, it all came under one retainer.

35. There isn't any good evidence to persuade me there was a second retainer, which is a point I made in my Provisional Decision. On that basis, I'm content to treat the whole service as being under the terms of the DBA, which naturally leads me to consider the DBA itself.

The DBA

36. Having dealt with the general position, I turn to the specific agreement reached between Mr A, Ms B and the firm.

37. It seems to me that the idea of litigation funding through a DBA is to ensure that a lawyer gets paid when they win, and that the client has access to justice. It can be an excellent way of meeting both needs and it can help provide certainty to both parties on how much the client will receive, if they win their case.

38. In this case, the settlement agreement – unusually for employment cases, where costs awards at tribunal are rare – involved a full payment of Mr A and Ms B's legal costs. By "full", I mean the amount the employer agreed to pay under the agreement was exactly 35% of the compensation due to Mr A and Ms B.

39. The fundamental question here is whether the DBA made clear to Mr A and Ms B that the firm would be charging 35% and might recover further costs from the defendant. I will come to cost information more generally later.

40. In my Provisional Decision, I discussed some parts of the DBA, which the firm argues I either misunderstood or took out of context.

41. I started with 9.3, but the firm argued in response that this needs to be read in the context of section 9 as a whole, and here it is in full (I've redacted the name of the employer):

> "… 9. IF THE TRIBUNAL MAKES A COSTS ORDER FOR OR AGAINST YOU
>
> 9.1 While your case is proceeding before the tribunal, a costs order may be made in your favour or one may be made against you. It is rare for a tribunal to make a costs order. We will advise you if we believe this is likely to happen.
>
> 9.2 If [redacted] Ltd. acts unreasonably or vexatiously in defending your claim, you agree that we are entitled to charge you for our costs incurred in dealing with that unreasonable or vexatious conduct, calculated in accordance with clause 13 of this agreement. You agree that we may seek a costs order from the tribunal against [redacted] Ltd. to recover those costs. If we are unsuccessful in obtaining a costs order against [redacted] Ltd. we agree that we will refund those costs to you (if you have already paid them) or no longer charge those costs to you (if you are yet to pay them).
>
> 9.3 If the tribunal awards costs against [redacted] Ltd. and you have not yet paid us in respect of those costs, you agree for those costs to be paid direct to us. If [redacted] Ltd. refuses to pay us direct, you agree to pay us those costs on receipt.
>
> 9.4 For the purpose of recovering such costs from [redacted] Ltd. our costs will be the amount ordered by the tribunal or calculated in accordance with any tribunal order or direction. If the award includes payment of expenses that you are responsible for, as long as we receive payment from [redacted] Ltd., these will be repaid to you (if you have already paid them) or not charged to you (if you are yet to pay them).

42. The firm argues that 9.3 covers the eventuality that the defendant acted unreasonably and that it says the client then agrees for the firm to incur further costs in dealing with that poor conduct.

43. It's not obvious to me why this is in a section about where a costs order has already been made. I also note that I haven't seen an order by a tribunal for costs in relation to the conduct work; just a court order for the enforcement work. Nevertheless, I

am grateful to the firm for explaining that 9.3 is narrower than I had appreciated, in that it only covers the situation where there has been a costs order.

44. The firm says 9.2 entitles it to charge for legal costs incurred in addition to the 35% of recovered damages. I hadn't intended to suggest that a firm shouldn't be paid for extra work done on a client's case. Enforcement costs are sadly necessary from time to time and, if they can't be recovered as part of the enforcement action (plus any interest, service fees and court costs), the client is left bearing that expense. It just needs to be clear to the client and for the client then to be able to give informed consent.

45. What shouldn't happen is a firm getting paid twice for the same work. I am satisfied from the "The law" section above that this is fundamental.

46. The firm accepts that, in an example I gave in my Provisional Decision, if the defendant paid half of the firm's fees, the clients would be responsible for the other half. This is, after all, how the indemnity principle works in practice, including ensuring that lawyers are paid for their labour.

47. In my Provisional Decision, I questioned the consistency with the DBA of the firm recovering a payment towards legal costs that happened to equal 35% of the damages agreed in the settlement agreement, and then taking 35% from the damages recovered for payment from the clients.

48. The firm's argument is that the costs recovered from the defendant were separate, arising from poor behaviour by the defendant. I recognised in my Second Provisional Decision that the principle of that is fine, but the absence of supporting evidence is a real concern. This is something the firm hasn't addressed in its response to my Second Provisional Decision. Although the firm says generally that it was understood by the clients, I would have expected such an important point in the retainer to be recorded, if only for the firm's own protection down the line.

49. What I'm being asked to follow is that the defendant's conduct was so poor that a sum equal to the full costs for the work chargeable to the client under the DBA were payable by agreement. The clause that would enable the firm to regard the defendant's conduct as unreasonable or vexatious was activated, the firm says, but I've seen no evidence of this being specified. Also, the narrow reading of clause 9.2 the firm encourages me to make (as in, needing to be read in the context of section 9 as a whole) seems to require a costs order being made by a tribunal.

50. I've also got nothing to suggest that there was a conduct issue so serious as to warrant a full payment of costs on that scale. That is notwithstanding the point that costs would be assessed on a time-spent basis. The firm has had plenty of time and opportunity to show me that this happened and it hasn't done so.

51. I turn to the costs incurred in enforcing the debt. The DBA does say that the firm may charge for additional work, and it makes complete sense that work done outside what was originally intended would be chargeable. The firm refers to clause 11.3 of the DBA on this:

> 11.3 You agree that if [redacted] Ltd. fails to comply with an agreement or order to pay you compensation, you will use all reasonable endeavours in assisting us to recover the money due to you. You agree that this will include the right for us to take action in your name to enforce an order or agreement. We will seek to recover from your employer the costs of any enforcement action taken. However, you agree that you will be ultimately responsible for the costs of and expenses incurred in any action required by us in this regard. Our costs will be calculated in accordance with *Paragraph 13*.

52. I wish to make it clear to the firm that it was not my intention to suggest that a firm couldn't charge for enforcement proceedings work. At that point, I was unsure about whether there had been two retainers, so, in my Provisional Decision, I had a section where I was debating whether there had been two retainers. I have now answered that to my satisfaction, as I've covered above.

53. My reading of the evidence and of the firm's comments is that there is common ground, here, that the firm can't recover costs in full from both the clients and the defendant for the same thing. The firm is saying that these costs were both different and anticipated in the DBA.

54. To that extent, I am satisfied that the DBA itself isn't the problem. However, the firm has charged costs to the full value of the work done in the case to reflect the conduct work. This scale of costs isn't predicted in the DBA or even hinted at, and the firm seems to have calculated the costs based on 35% of damages (a point the firm seems not to contest).

55. Whilst the general principle of charging separately is in the DBA, I find that the firm has gone beyond the *spirit* of the DBA in charging in the way it has. Its approach seems to me to go beyond the intention of the Ontario model and the indemnity principle, with no obvious justification.

Cost information

56. From a *service* perspective, though, this is where the problem lies, in my view.

57. The firm says that it charged the clients 35% of damages recovered and that is what it told the clients to expect to pay. That is perfectly fine and clear.

58. However, the firm also recovered the same amounts (£16,625 and £19,600) from the defendant and this was, as I've covered above, because the firm says there

was additional work, outside the scope of what was covered by the clients' 35%, triggered by the unreasonable conduct of the defendant.

59. In my Second Provisional Decision, I wrote that, although the firm says the clients understood what was happening, I have not seen that this was reported to the clients, or that the clients gave their authority. I don't know what triggered the conduct clause, I don't know what the firm told Mr A and Ms B about it and I don't know how the costs caused by the unreasonable behaviour were distinguished.

60. The firm has not offered any evidence to address these points. All I know is the costs were the same as the 35% of damages the clients were charged.

61. This is despite clause 9.1 of the DBA making clear that this would be announced if triggered (I note the word "will" in the last sentence):

> "… 9. IF THE TRIBUNAL MAKES A COSTS ORDER FOR OR AGAINST YOU
>
> 9.1 While your case is proceeding before the tribunal, a costs order may be made in your favour or one may be made against you. It is rare for a tribunal to make a costs order. We will advise you if we believe this is likely to happen.

62. In our publication *An Ombudsman's View of Good Costs Service*, there is an example of a firm giving details about possible future costs:

https://www.legalombudsman.org.uk/media/ttkhya1z/an-ombudsman-s-view-of-good-costs-service-v3.pdf

Example

Firm D was instructed to administer the estate of Mr J's late mother. Mr J was a beneficiary of the estate. The firm's terms of business explained they would be charging on a time-spent basis. They provided the hourly rate and an estimate of £4,000 + VAT and expenses. The terms also included details of possible charges, which might be triggered depending on the case, such as tax implications or the size and complexity of the estate. One of the possible charges was an additional cost based on the value of the estate.

The final bill included a charge of around £3,500 + VAT on top of the hourly rate charges.

We decided that, whilst the firm was entitled in theory to charge a value element, they had never made it clear that this would be charged, and how it would be calculated. We decided the estate was entitled to believe that they would only be charged the hourly rate charge. Including some other failings in cost information. We decided to reduce the firm's fees to the £4,000 + VAT estimate and endorsed the compensation offer the firm made to Mr J personally of £360, reflecting his own upset and inconvenience.

63. The concept of triggering a clause which means there are additional costs is fine, but the client should understand both that the clause has been triggered and what

the triggering means for them. It isn't likely to be enough to rely on the initial cost information alone; time has passed and lawyers should take reasonable steps to ensure their clients understand the price they'll be paying for the work. Clause 9.1 seems to recognise that, as I've noted above.

64. In that example from our guidance, the solicitors were effectively their own client, as executors, so there was a legal basis for arguing that consent had been given by the client to levy the value element. Here, though, the clients were Mr A and Ms B and the firm has offered no evidence of this critical information being provided to them, or of them providing informed consent. The firm has had plenty of opportunity to do so, so I infer that there isn't any evidence it can show me.

65. Our costs guidance puts legal costs into three categories:
    - Things the client WILL have to pay;
    - Things the client MIGHT have to pay; and
    - Things the client WON'T have to pay.

66. We are looking here at the second, MIGHT, category. Once those costs became things the client WILL have to pay, the firm should have made that change clear to the clients and then set expectations about how much they should expect to be asked to pay.

67. What the clients would be consenting to in this case would have been the authority for the firm to continue with the case, incurring some additional expenses because of poor behaviour, and then the firm hoping to recover the excess costs. When the settlement agreement came, if what the firm says is true about the arrangement in place, the clients should have understood that the £16,625 and £19,600 sums were completely separate from the 35% they would be paying.

68. On the balance of the evidence I have in front of me, I find it highly unlikely that this consent was given. The only documentary evidence I've seen is the clients complaining "you charge twice", the day they received their compensation.

69. Demonstration of the defendant's poor conduct is essentially the only way that a claimant is likely to recover any of their legal costs in an employment claim. Whilst clause 9.2 of the firm's DBA is reasonably there to ensure that the firm has the possibility to get paid for any additional work it does in a client's name, the costs award can extend beyond the additional labour, and can include the costs for the work done in the claim itself.

70. I find it hard to believe a client would agree to waive their right to recover costs for the employment claim because of the poor conduct of the defendant, as implied by the firm's interpretation of clause 9.2. The client would surely want to recover as much of their expenses as they could, and the indemnity principle enables

claimants to recover fair contributions towards costs (including, in these unusual conduct cases, employment). The poor conduct the firm says triggered clause 9.2 and the additional expenses were the vehicle for Mr A and Ms B to recover some of their legal costs under the indemnity principle.

71. As such, why would a client consent to poor conduct leading to no contribution towards costs, when that is the only circumstance in practice where an employment tribunal might award costs? It is not even like there were some calculated and distinguishable time-spent costs generated, which the firm could show as not relating to the index claim. The figures are notably identical.

72. The firm has had plenty of opportunities to demonstrate that the clients gave consent and should have shown us this long before now. Failing to do so leads me to conclude there isn't a note or email that it can show me, so I find that there wasn't informed consent.

73. This brings me to a question I asked in my Provisional Decision on the negotiations for the settlement agreement: I asked why the clients would have agreed to the settlement with full payment of costs, if they weren't going to get those costs. The firm said in response that this was because they were separate costs and because the firm was able to charge the clients these sums, too, under the terms of the agreement.

74. I have seen no evidence whatsoever that the firm told Mr A and Ms B that the conduct-driven extra work would cost as much as the actual claim. Were they to understand that, in the event that the firm wasn't able to recover all of these conduct costs from the defendant, the balance would be pursued against the clients? The DBA does say that this might happen, but was it clear that the costs liability was as high as those in the index claim? I have seen nothing to suggest to me it was.

75. The suggestion that the clients agreed to it because it was to their benefit is one I find difficult to accept. The settlement agreement makes no mention of a contribution towards the costs in the case (or to conduct-related costs) and I don't have anything to say that the clients should have thought they were otherwise on the hook for two lots of £16,625 and £19,600.

76. In my Provisional Decision, I wrote:

> "If there were two retainers, that means that the clients could have instructed different solicitors after the first retainer, paid them privately and paid them on an hourly rate basis. I have seen no evidence of the firm explaining this to the clients, when it would surely have been in the clients' interest, if the alternative was that debt recovery would somehow trigger liability for 35% of the damages as fees."

77. Responding, the firm described this position as “naïve”, arguing that the clients had no money to pay for their legal costs and that they were “lucky” that the firm accepted to undertake the work under the cover of the DBA.

78. I was at that time unclear as to what the extra costs related to, and the firm has now given me its position, which is that the conduct of the defendant had triggered the clause for separate work. The debt recovery work was separate but there weren’t separate retainers.

79. Now that I understand what it was for, it is clear to me that there was a substantial cost information failing by the firm on these conduct-related costs. To suggest that the clients had no practical choice but to proceed with the firm is to miss the point entirely: the firm was triggering a clause in the DBA which would entitle the firm to additional costs (for which the clients were liable, unless agreed or ordered otherwise). This was a critical point for the firm to demonstrate it was giving clear information to its clients about what they should expect to pay for the work and the firm failed to deliver.

80. If the settlement agreement hadn’t led to the full costs for the additional work (which equated to 35% of the compensation in the agreement) being included, the firm is arguing that it could have – by virtue of the DBA – required Mr A and Ms B to pay them. The firm has never even suggested in its contact with us, so far as I can tell, that it gave Mr A and Ms B an estimate of the work, or regular updates on accruing costs for this conduct work.

81. If they were aware that the additional conduct work would be as much as the 35% costs of the index case, what client would rationally consent, in the hope that the defendant would agree to cover these costs in full? They would be embarking on a substantial amount of work (some £35,000) to deal specifically with issues drawn from the poor conduct of the defendant. The cost-benefit of this work would be a serious and material factor in the decision-process for the case. What options would exist for going to the tribunal sooner, for example?

82. In short, I consider that there was an obligation to tell the clients that the clause had been triggered for this additional work (which clause 9.1 of the DBA specifically says <u>will</u> happen), and there was a further obligation to provide clear and regular information on the costs to them of this additional work. The firm met neither.

83. Then there is the pursuit of the debt, after the settlement agreement failed.

84. I thank the firm for explaining that there were enforcement proceedings, but under the cover of the DBA, rather than a separate retainer. I also thank the firm for

providing me with a copy of the consent order, dated XXXXX, which records:

BY CONSENT IT IS ORDERED THAT:

1. **The hearing of [redacted] be vacated.**

2. **The Defendants shall pay to the First Claimant the sum of £70,425 by 4pm on [redacted] in settlement of her claim.**

3. **The Defendants shall pay to the Second Claimant the sum of £81,900 by 4pm on [redacted] in settlement of his claim.**

4. **The Defendants shall pay the Claimants costs of the claim in the sum of £22,500.00 by 4pm on [redacted]**

5. **The Claimants' application for judgment against the First Defendant is dismissed.**

85. It's worthy of note that the figures in points 2 and 3 include the additional sums the firm has earmarked as being conduct costs, as well as the barrister's costs, because this adds up to the figures in the original settlement agreement.

86. The consent order was the date that the firm recorded sending the clients their money:

Number	Date	Amount	Currency
[redacted]	[redacted]	38,317.50	GBP
[redacted]	[redacted]	44,890.55	GBP
TOTAL TRANSFER TO THE CLIENT		**83,208.05**	**GBP**

87. The firm has confirmed that the payments made the next day to the clients reflected the amounts they had already paid (B[redacted]s Ms B and D[redacted]is Mr A):

	B[redacted]	D[redacted]	Total
Agreement	£47,500.00	£56,000.00	
35%	£16,625.00	£19,600.00	
	£30,875.00	£36,400.00	
Payments made SG	£7,442.50	£8,490.55	£15,933.05
Total to pay	**£38,317.50**	**£44,890.55**	

88. I can see that the total awarded by the court in XXXX was £174,825. Of this, £22,500 was specifically for the costs of the firm, leaving £152,325 for Mr A and Ms B.
89. In my Second Provisional Decision, I wrote at paragraph 41:

> "However, there is a significant difference between the figure in the agreement (£152,325) and the amount the firm received (£174,825) in October XXXX. My

> guess – and I am happy to be shown differently – is that there was some sort of agreement about interest and/or legal costs to explain the difference, although that isn't set out in what I have available to me at the moment."

90. My understanding now is that there was no interest claimed on the claimed money at all for the period between the settlement agreement and the consent order. It's possible that this was just part of the negotiations that led to the resolution of the dispute, although neither party has given me any detail on that. The difference between the two figures is £22,500, which is the same amount the firm recovered in the consent order.

91. I have seen no cost information for the work done on the enforcement proceedings, and I refer to my points above about when a clause in a DBA (or any other agreement) is triggered.

92. The firm says it embarked on this work with the full consent and understanding of Mr A and Ms B, but it hasn't provided any record of this consent: where is the explanation that they would ultimately be liable for these costs and how much the firm expected to charge for that work? Where are the (presumably updated, given the passage of time since the start of the retainer) hourly rates? The firm seems to have been a long way from the regulatory requirement of "best possible information" about charges.

93. The firm has argued in response to my Second Provisional Decision that the only reason for the employer to settle by paying costs was because the employer recognised a failing in its own conduct and that no reasonable client could have believed differently. The firm says the clients "obviously" would have understood that this was "equivalent" to an order under clause 9 of the DBA.

94. The speculation as to the clients' understanding is demonstrative of the problem the firm apparently has in showing us that it gave cost information at the appropriate level.

95. I also note the firm's choice of words about the agreement being "equivalent" to what would have come under clause 9, rather than it actually *coming* under clause 9, which it seems to me makes the firm's position in relying on the DBA weaker, rather than stronger. There was, by the firm's account, only one retainer, recorded in the DBA. The DBA is either enforceable for the firm's purposes or it isn't. To argue it's analogous to the DBA is surely to underline the importance of this being communicated and recorded.

96. In my view, knowledge that the work was being done isn't the same as informed consent of the total expense. Nor even is knowledge that the work would be

chargeable. It strikes me that this is the extent of the firm's defence and I don't consider that to be sufficient.

Summary

97. I have assessed the evidence we have gathered, including the comments provided by the parties and my understanding of the relevant legal and practice considerations. My conclusion is that the firm has recovered costs from the employer without the authority to separate these costs from those charged to Mr A and Ms B.

98. Even if the firm had the authority to do so, my view is that the firm's cost information was well short of the level it should have been at, including failing to tell the clients that the relevant clause in the DBA had been triggered.

99. On the enforcement work, the firm seems to have properly recovered costs for this and not charged Mr A or Ms B, although it didn't give any information to them to reflect that the costs clause in the DBA was being triggered or any cost information about the work.

100. My conclusion is that the firm has failed in its service, because the firm has deducted more than the clients agreed to pay under the DBA. If the firm wanted to charge more than the original agreement and believed the authority to do existed in the terms of the DBA, it should have activated those conditional clauses, notified the clients and explained what it meant for them in terms of how much they should expect to pay. The firm failing to do so means the clients have paid more than I believe they should have.

Remedy

101. The purpose of any remedy we direct is to put the clients in the position they would have been in, had the service been of a reasonable standard. In essence, we're looking to address the consequences to the clients of the failings.

102. I'll deal with different aspects in turn.

The firm's fees

103. We know that the firm charged Mr A £19,600 and Ms B £16,625 for its services. This was in line with the 35% agreement in the DBA. However, the firm also recovered costs for its work in the settlement agreement of exactly the same amount.

104. I have seen no warning that clause 9.2 of the DBA had been triggered:

> 9.2 If [redacted] Ltd. acts unreasonably or vexatiously in defending your claim, you agree that we are entitled to charge you for our costs incurred in dealing with that unreasonable or vexatious conduct, calculated in accordance with clause 13 of this agreement. You agree that we may seek a costs order from the tribunal against [redacted] Ltd. to recover those costs. If we are unsuccessful in obtaining a costs order against [redacted] Ltd. we agree that we will refund those costs to you (if you have already paid them) or no longer charge those costs to you (if you are yet to pay them).

105. I have seen no information about the expected or accruing costs. I have seen no evidence of hourly rate explanations or cost-benefit analysis. I have not seen that the clients were given the chance to make an informed decision about whether to proceed with this work.

106. As the firm reminded me in its response to my Provisional Decision, Mr A and Ms B were ultimately liable for these additional costs and it is only because the costs were recovered in full (albeit seemingly not on a time-spent basis) that the firm was not in the position of having to decide whether to ask the clients to cover the shortfall. This cannot be consistent with a reasonable service.

107. My view is that the firm failed to enact section 9.2 of the DBA from the clients' perspective, then charged an amount well in excess of what the clients ought reasonably to have understood they could be responsible for.

108. I wrote in my Second Provisional Decision that I find this failure of cost information so serious that I was minded to direct the firm to refund the fees Mr A and Ms B paid in their entirety. In doing this, what I am ensuring is that the firm is paid once for its work on the index employment case.

109. The firm argued in response that the clients expected to be charged 35% of any damages recovered and that's what they had deducted from their damages. I appreciate that the firm has argued there's a distinction between the cost of the basic retainer, the costs of conduct work and the enforcement costs. These are not distinctions it has been able to demonstrate it has explained well to its clients, nor, critically, has it demonstrated it's explained the practical relevance of these distinctions.

110. Instead, the approach and the level of cost information provided are closer to an arrangement whereby the firm recovered the cost of the work in full from the employer in a settlement agreement and the indemnity principle applies, so the clients don't pay anything for the work.

111. This is a highly unusual situation in an employment case, but the firm is asking me to believe that the clients understood something they claim not to have understood and which the firm can't show me it explained to them. The amount the employer paid in the settlement agreement is identical to 35% of the damages recorded in that same agreement. In concluding on the balance of the evidence, I don't see

why I should find that the clients' understanding of the situation should have been what the firm tell me it was.

112. The firm recovered those costs in full, and any further costs recovered were either not consistent with the indemnity principle (in which case, the clients should be entitled to the balance of the recovered costs) or not made clear to the client through the cost information requirements for a reasonable service.

113. Either way, I believe the fair and reasonable position is that, as the firm has been paid for its work under the DBA, Mr A and Ms B should not be required to pay the firm for the same work, as their liability has been satisfied by the recovery of costs from the other side.

114. The firm has stressed in its response to my Second Provisional Decision that there was money paid by the clients at the start of the case, which they were refunded at the point of settlement, and the firm has referred me to the table at paragraph 87 above. These total £15,933.05.

115. This was money for payment of the firm's fees in the early stages of the work. It was only when the clients started to struggle to make regular payments that the firm proposed paying under the DBA. The firm argues that the refund of this money should not be included in my calculations, because the only reason for the firm to have sent the clients this money is because it had recovered the legal costs from elsewhere.

116. I have looked at the money paid by the employer and compared it to the breakdown of figures in the settlement agreement.

117. Ms B received £70,425, which comprised:
    - £12,500 compensation for termination of employment
    - £35,000 compensation lost wages
    - £6,300 for her barrister's fees
    - £16,625 for the firm's fees

118. Mr A received £81,900, which comprised:
    - £15,00 compensation for termination of employment
    - £41,000 compensation lost wages
    - £6,300 for her barrister's fees
    - £19,600 for the firm's fees

119. These figures match with no balance. The amount the clients received in the consent order is the amount they agreed to in the settlement.

120. As recorded in the table at paragraph 87 above, the firm then sent the clients back the money they had paid, with the firm describing the money as “payments made SG” (which I understand to mean *payments made to Scornik Gerstein*).

121. I don’t agree with the firm’s explanation of what happened, here. The firm’s position relies on the employer paying extra money to the agreed amounts, else why would the employer agree to pay the “conduct” costs in the settlement agreement and the clients be refunded for amounts paid for the basic charges of the work? The firm has argued there was a distinction between these two types of costs, and I don’t see how the firm can have it both ways.

122. Instead, what I see is Mr A and Ms B paid the firm on a time-spent basis for a while, but couldn’t keep up the regular payments agreed, so the firm switched the charges to a DBA. This was retrospective and would reflect the ordinary charges the firm would take for its work. If this was true, the firm would refund the amounts paid already, on receipt of the settlement from the employer, because the indemnity principle would say that the firm had now been paid for its work.

123. So, what I see as having happened is what I would expect to see for the firm getting its costs recovered from the employer and reimbursing the clients for the part they had already paid.

124. Next, the firm says that the clients will have received a “windfall”, because the clients will have paid nothing for the work and the firm will have only been paid for the index work of £36,225. The firm contends that the clients get the benefit of the work “for free”.

125. I detailed my understanding of the law in the “the law” section above. It seems to me that a key feature of the indemnity principle is that clients (not their lawyers) get the benefit of cost recovery. This can mean they don’t have to pay for the work, but that’s the same as exists in the costs-shifting forms of litigation and the lawyers will be paid once for their time. There is nothing improper in that result, in my view.

126. Nevertheless, if the firm has (as it seems to suggest) refunded additional costs, outside the DBA, that was a decision it made of its own volition and I don’t see why it should be for me to undo anything the firm now regrets doing. It looks to me like Mr A and Ms B have paid the firm in line with the agreement they made with the firm, so I am not going to factor the refunded fees into my calculations as the firm want me to.

127. We also know that the firm recovered £22,500 when the settlement was finally paid and this was retained by the firm, because it was to reflect additional costs, so I find the firm’s description of its remuneration inadequate.

128. I am satisfied that the fair and reasonable thing to do with the costs is to say the fees are limited to the 35% of damages the firm was entitled to charge, and these were recovered from the employer under the settlement. There should be a full refund of the second 35%, so the firm should send to Mr A and Ms B the amount it deducted from their settlement for its fees.

129. The firm has argued that these were conduct costs, but the cost information for that work is so poor that I am content that the amount in full should be given to the clients. This means the firm receives payment in full for the work it did on the employment case and it recovers its enforcement costs. Meanwhile, the clients benefit from the indemnity principle.

130. This means a refund of **£36,225**, including VAT.

Interest on refund of fees

131. There are 773 days between XXXXX and the date of my letter today. I am content the numbers are substantial enough for me to direct a separate award for interest. This is a lot of money and a long period of time, and I am concerned that not making an award for interest would fail to reflect the effect on Mr A and Ms B properly.

132. We know that interest rates have climbed steadily over the past two years, albeit with some recent small drops, and I know high street banks haven't been paying at the same rates as the Bank of England's rate. I am going to set what I think is a sensible 3% flat rate, with a desire not to penalise the firm and only to provide fair recognition for the delay in paying Mr A and Ms B what they were owed.

133. This is inexact by design. I don't know what they would have done with the money (saved it, invested it, spent it) or what sort of interest they would have generated, so a scaled set of figures of "X days at 2%, Y days at 2.25%, Z days at 4%" and so on would be nothing more than guesswork. I would rather choose a flat figure that, even if conservative, gives a realistic broad guide as to a fair number.

134. I have been clear in my Provisional Decision and Second Provisional Decision that this is the approach I propose to take and neither party has raised any significant objection to lead me to handle it differently. I'm aware the firm has objected in principle to there being an award of interest, but this is a substantial amount of money that I find the clients have been denied for a substantial amount of time, so an award of interest seems to me entirely proper.

135. Using the same logic and reasoning as I have previously (on which approach neither party has offered comment), 773 days of 3% interest comes to **£2,301.53**. I propose the firm pays this to Mr A and Ms B in total.

Compensation for emotional impact

136. Mr A and Ms B raised an objection on XXXXX to what had been taken in fees. They were cross about it as soon as they identified that they had paid 35% while the firm received the same amount from the employer and, on my current reading of the evidence, they are missing a substantial amount that they should have received in XXXXX.

137. The firm has argued with force that the situation was known to them, and that they had told the firm that there had been an agreement that the firm had renèged on. I don't believe the clients have been insincere in believing they have been overcharged and this is a reason why I have reached the conclusion I have.

138. I am taking into account that my proposal brings the financial effects to an end, so the ongoing emotional effects of the failings are necessarily reduced. I don't want to give Mr A and Ms B money twice for the same thing, because that wouldn't be fair.

139. I am going to recognise, however, that they didn't correct me in my understanding of what had happened in the enforcement of the debt work. By my Provisional Decision, I was going to award them compensation for a loss of interest which I now have seen was clearly the firm's costs of £22,500. There is still the problem of the original costs, which I consider to be the main cause of distress, but I reduced my figure a little from the Provisional Decision and the comments from the parties haven't changed me from that view.

140. The firm restates its argument about the clients benefiting from a windfall. I have dealt with that above.

141. Mr A and Ms B argue that their emotional effects go far beyond my proposal and that I should award as much as £30,000, saying there has been substantial psychological and physical damage to them. I don't find their argument persuasive. I expect they were given a nasty shock when they received a deducted settlement and this prompted them to complain straight away. The case took longer than they expected, because of the attitude of the employer, and that was not the firm's fault.

142. Ms B says that Mr A has been off work unwell because of the firm's failings, but I can't make that connection, here. The remedy I am proposing restores them to what I consider to be the correct financial position.

143. We have three categories of compensation for emotional effects and, taking into account the other parts I am directing, I remain of the view that the firm should pay **£600** compensation for the shock, the inconvenience caused by the loss of use of

the money and the upset caused by the delay. This is in the upper-middle of our middle category (£250-750).

144. It is serious enough to recognise significant shock and upset, but also reflects that I am returning the money I believe they are owed, plus the consequential interest. This should bring the emotional effects to an end. I have no doubt that there have been some emotional effects, and that is why I am providing this remedy, but I don't believe that I can fairly attribute the effects Mr A and Ms B describe to the cost information failings I've set out above.

145. To be clear, this is – like all the other remedies – to go to Mr A and Ms B in total; it is not £600 each.

Final Decision

I am aware that my final decision differs slightly from my Second Provisional Decision, in that the calculation of interest has been updated to reflect the time that has passed. As such, it is open to me to delay my decision to give both parties a further chance to comment.

I am not going to do that for three reasons: first, both parties have had lots of time to give me their views on all aspects of the service and my proposals, including on my proposed methodology for the calculation of interest; second, the difference is on a very small point in the context of the rest of the conclusions and I consider it would be disproportionate to delay the outcome further for comments; and third, there would inevitably be a period of time between my proposal and my final decision, meaning the figure would always need to be updated and would thus always be different.

For the reasons explained above, my final decision is that the service provided by the firm in this case fell below a reasonable standard. In order to reflect the consequences to Mr A and Ms B of the failings in the service, the firm should pay them:

- **£36,225 for a refund of fees including VAT;**
- **£2,301.53 interest on that refund of fees; and**
- **£600 compensation for emotional impact.**

This means a total payment of £39,126.53.