DRN-4166641

The complaint

Ms S complains about how Atkinson Rose LLP trading as Atkinson Rose (AR) handled her employment dispute case.

What happened

Ms S said she was in dispute with her employer. She said she looked to instruct a solicitor to help her with her case against them. Ms S said she thought AR were employment solicitors but later found out they were a claims management company (CMC).

Ms S said their customer care letter (CCL) wasn't clear as to who they were or what they did. She said they missed deadlines and persuaded her to leave her employment which she didn't want to do. Ms S said she didn't think AR were acting in her best interests and wanted solicitors to consider her case. She said the agreement she'd with AR was on a No Win No Fee basis and as she didn't agree to the settlement with them their fee wasn't justified. She said AR has now asked her pay around £19,000 as they said she'd breached her contract with them and had started legal proceedings for the recovery of their fee. Ms S complained to AR.

AR said Ms S had made a number of complaint points, their CCL being unclear, she wasn't given the opportunity to consider what she was agreeing to during the cooling off period because of the information she'd been asked to provide for the Advisory, Conciliation and Arbitration Service (ACAS). She complained she'd been poorly represented by them and that they'd mis-led her into thinking she'd instructed employment solicitors. She also said they'd persuaded her to leave her employment even though she didn't want to.

AR said they'd been clear throughout about who was representing Ms S and the work they would do for her. AR said they'd kept Ms S updated about the progress of her employment dispute and worked to achieve a reasonable settlement from her employer. AR said they'd more than doubled the initial settlement offer that had been made to Ms S before their involvement. And Ms S had accepted the settlement offer before she said she no longer wanted AR to act for her. They also said that a provision of any settlement was that Ms S would leave her employment. AR said Ms S had breached her agreement and so they were justified in asking her to pay a fee of £19,284 in line with their terms and conditions.

Ms S wasn't happy with AR's response. She referred her complaint to us.

Our investigator didn't think it was fair for AR to rely on the breach of contract clause. Ms S had a No Win No Fee that meant she'd pay AR a fee on the offer of a reasonable settlement. As AR had reached an agreement between Ms S and her employer for a reasonable settlement offer he said it would be fair for AR to ask Ms S to pay their fee on the basis of the No Win No Fee arrangement.

Ms S didn't agree and reiterated her complaint points about AR. She asked for an ombudsman to decide.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I've reached the same overall conclusions as the investigator, and for broadly the same reasons. While I've fully considered all the evidence, and Ms S' detailed testimony, I've focused my comments on what I think is relevant. If I haven't commented on any specific point, it's because I don't believe it's affected what I think is the right outcome.

Firstly, it isn't this service's role to investigate Ms S' complaint against her former employer. Neither can we consider the costs Ms S incurs from her solicitors for work done in any legal proceedings. So, I won't comment further on these issues.

AR are a CMC and complaints about CMC's are dealt with by the Claims Management Ombudsman. In reaching my decision I've considered whether AR, as a CMC have treated Ms S fairly and reasonably when advising, investigating and representing her case.

I know Ms S said she used AR's services as she thought they were solicitors, but I've not seen anything to show me that AR are, or were, regulated as solicitors – they're regulated as a CMC. As a CMC, AR are required to provide Ms S with information that is fair, clear and not misleading before she agrees to them representing her. I've looked at AR's website which says:

"Atkinson Rose LLP are a claims management company".

The website gives details of AR's team and their approach. And shows they're regulated by the Financial Conduct Authority (FCA) in respect of claims management activities. They do refer to speaking to a lawyer. A lawyer is anyone who could give legal advice, this term encompasses solicitors, barristers, and legal executives. The Solicitors Regulation Authority regulates solicitors in England and Wales.

I haven't seen any information which suggests AR claimed to be a firm of solicitors or otherwise to lead Ms S into believing they were. I can see AR sent Ms S their complaints procedure alongside the CCL, which sets out that a complaint about AR are subject to the Claims Management Ombudsman, which doesn't suggest they are an authorised firm of solicitors. Also, the information about who would be assisting Ms S with her dispute doesn't say solicitor but that they're experienced in HR and employment dispute settlements. So, I can't say AR have acted unreasonably here.

Employment claims are very individual and however similar, no two are exactly alike. At the time Ms S instructed AR she was at a stage where she could look for early conciliation with a negotiated settlement without the need to progress to an employment tribunal. What I'd expect is AR to have been transparent and upfront about who they were, how much they would charge, what they would do and what the likelihood of success would be with the options available to her. And I think AR has done this.

I can see in June 2022 AR sent Ms S their CCL. This covered, fees, initial action, timescale, level of risk/uncertainty, hourly fees, employment tribunal, ACAS, expenses and conditions of the agreement which included the termination of it. For fees the basis of their charges were:

"1) a fixed fee of £800 + VAT(£160) = £960 to review relevant documentation relating to your work related matter, provide advice with regards to the remaining grievance process, ACAS, and if needed purpose and negotiate a settlement agreement with the employer where they are willing to do so;

2) a fee of 25% plus VAT fee in relation in relation to any monies/compensation received by you from your employment matters and any other contractual non- contractual payments and/or compensation or termination payments by way of any compensation."

I can see that Ms S, after she suggested a change to the wording about her dispute with her employer, signed the contract agreement in late June 2022. And paid two instalments of £480. As Ms S had a No Win No Fee agreement with AR, this meant she'd pay a fee of 25% plus VAT for any monies/compensation that she received from her employer as settlement of her dispute.

AR's CCL also said that, if Ms S terminated the retainer, or if they had to terminate it because she breached the conditions, they had the right "*to bill you on an hourly basis for the work that had been carried out alternatively, for 35% plus expenses of any offer made to you by the Respondent."*

The CCL explained that the usual hourly rate would be £200 but said if another named colleague was involved the hourly rate would be £300.

From the information I've seen, I can't say AR acted without instructions. There is regular communication between AR and Ms S discussing all aspects of the settlement. And there's a number of occasions where AR, following Ms S' instructions, return to her employer with suggested changes to some of the finer points of the settlement terms. So, the evidence shows Ms S was very much involved in the negotiations and was fully aware of the terms on which AR were settling her claim. I can see that the deadline for early conciliation through ACAS was 11 August 2022. The final negotiated ex gratia offer made by Ms S' former employer was for £22,000 made by them on 11 August 2022, which was accepted subject to a COT3 Agreement being drafted. This agreement would reflect what had been agreed between Ms S and her employer. I can see from AR's records that further discussions around wording (how Ms S told her team she was leaving) within the COT3 were discussed up to 22 August 2022 when Ms S complained to AR and stated she no longer wanted to instruct them.

Ms S says that she was unwell and that AR pressured her despite being aware of her vulnerabilities when she wasn't in a position to make a decision on settlement. I've looked at the emails exchanged between Ms S and AR and, while I agree Ms S does bring this to AR's attention, I can see Ms S continues to engage with AR and provides instructions on the settlement terms. And after Ms S ends her association with AR she is sent the COT3 agreement by the ACAS conciliator who explains Ms S' former employer has said the terms of the settlement were non-negotiable. So, I can't say AR have acted unfairly here.

Ms S has confirmed she received a settlement from her former employer in October 2022. I haven't seen any evidence to show that anyone other than AR had negotiated the settlement. Nor that the ex-gratia settlement offer of £22,000 was increased. Ms S has said she sought legal advice about the possibility of pursuing an employment tribunal case, and while there was the possibility her settlement could be increased, she didn't pursue this avenue.

Ms S says the actions of AR led her to lose her job with her former employer. But the evidence shows the settlement terms being discussed throughout involve Ms S leaving her employment. And I can see Ms S in an email response said "*I don't even want to lose my job, and they are the ones that forced it"*, the implication being her employer not AR. So, I can't say any errors by AR are the reason for Ms S leaving her former employer. This is down to the terms of settlement she'd agreed.

As stated above the terms of the agreement detail AR's charges where they consider there

has been a breach of contract. And as Ms S terminated her dealings with AR only after a settlement offer had been made did AR seek to implement the terms of the agreement. And they invoiced Ms S "*on an hourly basis for the work that had been carried out",* this being 66.25 hours at £200, and 9.4 hours at £300, including VAT this in total amounted to £19,284.

I can see Ms S terminated the agreement she'd with AR only after a final settlement offer had been made by her former employer in August 2022 for an ex-gratia payment of £22,000. AR has looked to apply the terms of the agreement for breach of contract and asked Ms S to pay a fee calculated on an hourly rate for work they'd done. But I agree with our investigator that the fee AR calculated based on the No Win No Fee agreement would be a fairer resolution. AR calculated their fee to be £5,500 plus VAT in total £6,600.

Putting things right

I understand this has been a difficult time for Ms S, she has been heavily invested in the outcome of her employment dispute. And has had to leave her employment. But the agreement signed by her in June 2022, was on a "No win No fee" basis. This means AR charged a percentage success fee, not a fee based upon the amount of work they actually did. Where a claim was successful, AR's fee may be more or less than the value of the work they actually did. This is the risk taken by all parties in this type of agreement. And as I think AR successful negotiated an ex-gratia settlement for Ms S for £22,000, I consider her claim was successful and so AR's fee of 25% plus VAT - £6,600 is justified.

I understand that AR had looked to recover their fee by way of a court hearing. The Claims Management Ombudsman – a Financial Ombudsman Service operates according to a set of rules made by the FCA. These rules are set out in a section of the FCA's Handbook called Dispute Resolution: Complaints ("DISP").

DISP 3.6.6(3) says: "*if the complainant notifies the Ombudsman that he accepts the determination within that time limit, it is final and binding on both parties". And DISP 3.6.6(4) …..if the complainant does not notify the Ombudsman that he accepts the determination within that time limit, the complainant will be treated as having rejected the determination, and neither party will be bound by it…"*

My final decision

For the reasons outlined above I ask Atkinson Rose LLP trading as Atkinson Rose to reduce their outstanding bill from £19,284 (hourly rate) to their percentage fee of 25% plus VAT - £6,600.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 30 October 2023.

Anne Scarr
Ombudsman