DRN-4562108

The complaint

Miss B complains about the service she received and the fees she's been charged by Atkinson Rose LLP after she instructed it to help her with an employment dispute.

What happened

In July 2022, Miss B instructed Atkinson Rose to assist her with an employment matter. Atkinson Rose agreed to submit an ET1 claim form to the employment tribunal, complete a draft schedule of loss and draft a subject access request (SAR) for Miss B to send to her employers. It agreed to do this for a fixed fee of £6,000 (including VAT). Atkinson Rose arranged for a barrister to compile the ET1 and submit it to the courts. It also completed the schedule of loss and SAR as agreed.

In October 2022, Miss B instructed Atkinson Rose to carry out some further work in relation to her employment claim and paid it a £4,000 retainer. Around a month later, Atkinson Rose sent Miss B an invoice for almost £6,000 and requested this amount be paid in full within the next 14 days. Miss B didn't pay the invoice by the due date. After chasing for the payment, Atkinson Rose told Miss B that if the payment wasn't received in the next few days, it would terminate its retainer, advise her insurers it would no longer act for her and escalate the matter in respect of the amount owed.

Miss B raised a complaint with Atkinson Rose about the work it had carried out and the fees she'd been charged. She said Atkinson Rose hadn't provided clear information about its charges and had charged her the higher rate in violation of her agreement. It was aware cover from her insurer was in place but had deliberately failed to let her know. She felt Atkinson Rose had overcharged her for time worked and should also have let her know that it was going over budget.

Miss B was also unhappy that Atkinson Rose hadn't informed her of the outcome from her insurer on the prospects assessment it had provided and was holding on to this information pending payment of the invoice. She also raised several other concerns about the quality of work it had carried out. She said she no longer wanted Atkinson Rose to undertake further work. She also asked Atkinson Rose to return her £4,000 retainer, which she said was put on account for the purpose of the ET1 amendment which hadn't been done.

Atkinson Rose disagreed with Miss B's complaint points. It said it believed Miss B had used its firm to provide advice to her insurer to successfully gain funding that had previously been refused, and then dis-instruct it. It felt Miss B's complaint was vexatious and she'd used the complaints procedure to abuse its staff.

Miss B asked our service to consider her complaint.

Our investigator thought Miss B's complaint should be upheld. He didn't think Atkinson Rose had given Miss B a sufficient estimate for the cost for the new prospects assessment her insurers had asked for. He said Miss B's insurer had since confirmed indemnity for the prospects assessment so Atkinson Rose should invoice the insurer.

Our investigator didn't think Atkinson Rose should charge Miss B for any work relating to the two SAR responses because he thought they weren't of sufficient quality and took too long to produce. He also thought Atkinson Rose should waive its fees for any received or sent emails to put right its failure to include an attachment stated to have been included with the original email. And he said there should be no charge for complaint handling.

Our investigator didn't think Atkinson Rose should charge Miss B the hourly rate of a senior member of staff in addition to the caseworker's rate where work was completed by the case worker.

The investigator also recommended that Atkinson Rose pay Miss B £600 for distress and inconvenience.

Both parties disagreed with our investigator's outcome.

Miss B said she believed Atkinson Rose had breached its contract with her in a number of ways. She said it had also committed GDPR violations on two separate occasions by submitting highly sensitive case files to her insurer and our service. Miss B also commented on the operation of Atkinson Rose and its regulation as a claims management company.

Miss B made a number of comments about the impact of Atkinson Rose's actions on her. She didn't think our investigator had acknowledged that Atkinson Rose was liable for both financial and consequential loss. She also provided some further evidence relating to medical conditions she'd been diagnosed with.

Miss B set out her expectations to put things right. She thought Atkinson Rose should waive the fees and refund money on account for services which were not received. It should compensate her for emotional distress, as well as financial and consequential loss because she'd had to instruct another solicitor. She also felt Atkinson Rose should compensate her for the time she spent dealing with her complaint against it.

Atkinson Rose said it was agreeable to waiving outstanding invoices and paying Miss B a small level of compensation. However, it rejected our investigator's recommendation to refund Miss B all monies, including the sums agreed for the risk assessment.

Atkinson Rose said it was agreed by a signed retainer that the risk assessment on prospects would be carried out on a private basis. This was to assist Miss B in obtaining insurance which would be granted if prospects were over 51%. It said Miss B had sent it a voluminous amount of documentation along with covert recordings. It couldn't provide an assessment without having considered everything sent to it. It believed Miss B was unhappy about the invoice for work carried out, and presumably, comments it had made in respect of her recordings.

It said it would be unusual for an insurer to pay for invoices for prospects advice, especially where its own panel solicitors had completed the assignment (negatively) and where the client was clearly without cover. If there was confirmation from the insurer that it would pay for the invoice for prospects advice Atkinson Rose would be willing to waive all other fees for work carried out after that outcome.
As both parties disagree with our investigator's outcome, the complaint has been passed to me 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 broadly the same conclusions as our investigator. I'll explain why.

I've considered everything Miss B has told our service, but I'll be keeping my findings to what I believe to be the crux of her complaint. I wish to reassure her I've read and considered everything she has sent in, but if I haven't mentioned a particular point or piece of evidence, it isn't because I haven't seen it or thought about it. It's just that I don't feel I need to reference it to explain my decision. This isn't intended as a discourtesy and is a reflection of the informal nature of our service.

Prospects of success assessment fee

The relevant industry rules require Atkinson Rose (as a claims management company) to provide a fee illustration or estimate, and explanation. The rules say that where the fee is not ascertainable but is instead dependent on factors which cannot be known in advance (for example, where the firm charges an hourly rate), the firm must explain its fee structure, and provide an estimate.

Atkinson Rose said it was agreed with Miss B by a signed retainer that the risk assessment on prospects would be carried out on a private basis. This was to assist Miss B in obtaining insurance cover which would be granted if prospects were over 51%.

Miss B says the scope of work Atkinson Rose was required to do when she instructed it in October 2022 was extremely limited. She needed it to make an amendment to the ET1, draft two SAR letters and carry out any other basic admin required ahead of the preliminary hearing. The ET1 was to be amended by the barrister who had worked on her case previously as a whole fee disbursement. She says Atkinson Rose confirmed disbursements would be paid in full by the insurer.

The agreement Miss B agreed to on 26 October 2022 set out the scope of instructions as follows:

"*You have ongoing employment tribunal proceedings and wish to instruct our firm. Your insurers are part funding the matter with you remaining responsible for the shortfall in our hourly rate…"*

The agreement said Miss B authorised her husband (H) to be copied into emails and assist her in providing instruction to Atkinson Rose.

Miss B has provided a recording of a telephone conversation between H and a senior representative from Atkinson Rose (Mr P) which took place on 25 October 2022 after the agreement was sent to her.

In this call, H and Mr P discussed the fees and the work Atkinson Rose was expected to do. H said he expected the work Atkinson Rose to do between then and the preliminary hearing to be minimal.
H understood any work carried out by the barrister would be paid in full by Miss B's insurance company as a disbursement. H indicated that he understood the insurer wouldn't cover Mr P's fee (of £300 an hour) and Atkinson Rose's caseworker's fee (of £200 an hour) in full. He and Miss B were prepared to supplement their fees (in line with the agreement) but he also wanted to try to keep costs to a minimum.

H said he and Miss B couldn't afford to pay £10,000 at that time. He asked if they could put £3,000 (plus VAT) on account to take them to the preliminary hearing stage. He didn't think there was much work to be done by Atkinson Rose at that stage. They were required to work on two SAR letters and potentially a further response to them. There was also the ET1 disbursement which H understood would be completed by the barrister, with the costs covered in full by the insurer.

During the call, H said the insurer might ask for a probability assessment because of what the panel solicitors had said about the prospects of success of the tribunal. He said he and Miss B currently had a complaint against the panel solicitors and the insurer had agreed what they'd done was wrong. He said the insurer had accepted Atkinson Rose based on its assessment but might come back to "*cross the T's and dot the I's*."

Mr P said he was happy the prospects of success were over 51% but he wanted to warn H that the insurer might want an independent counsel to do another assessment because of the negative advice from the insurer's panel solicitor.

H said the insurer's claims handler had told him Atkinson Rose was already approved but the insurer might want confirmation of the probability from it. The insurer just wanted to be happy the prospects of success was more than 51% at all times. They had accepted Atkinson Rose and just wanted its signed letter of instruction.

Following the call, Mr P sent Miss B and H an email confirming that he'd spoken to the barrister and was happy for the amount on account to be amended to £4,000.

Miss B confirmed by email that the agreement had been signed and £4,000 had been transferred. She referred to an email she'd sent previously and asked that Atkinson Rose assist her with pulling together two letters in relation to SAR breaches, with details of what she wanted to be covered in the letters and some questions.

A few days later, Mr P emailed Miss B confirming receipt of her email and told her Atkinson Rose had signed and sent the terms to the insurers. He said: "*We are just awaiting their confirmation on Tuesday that everything is fine and we shall come on record and action all of the items below*."

A couple of days later, Mr P sent Miss B a further email which said:

"*(The insurer) have come to us requesting further information re prospects etc. to see if they are willing to provide cover.*

I have asked if they will still provide cover whilst we await their new decision and am waiting on their response.

In the meantime, I will not carry out work on the below unless you specifically request us to do so. If you are without cover then it will be charged at the full hourly rate."

In response, Miss B thanked Mr P for the update and asked him to keep her posted on the outcome from the insurer. She said she was happy to chase them too. Miss B said:

"*In the interim, please continue on the work outlined in the previous email.*

We understand that in the event we are not covered by (the insurer), we will cover the fees in full."

Mr P responded with:

"*OK, thanks. We will carry the work out despite there potentially not being cover in place at the moment*."

I think it's clear from the above exchange that Miss B wanted Atkinson Rose to go ahead with the work she'd specified in her earlier email. I don't think Atkinson Rose made it clear that it would invoice Miss B for providing further information to the insurer regarding the prospects of success. So, I don't think it's fair for Atkinson Rose to charge Miss B for time spent on the prospects assessment.

Miss B's insurer has told us it has agreed to cover the cost of Atkinson Rose's prospects assessment. It's told us if it is presented with an invoice from Atkinson Rose it will review that and if the amounts are reasonable it can look to raise payment but would need to assess this further. So, Atkinson Rose might wish to invoice Miss B's insurer directly for the prospects assessment fees.

Quality of work on SAR letters

Miss B says it took three members of Atkinson Rose's staff (whose time she was charged for) to draft two simple SAR letter responses. She says this would be a relatively simple task which would take a competent and qualified solicitor in the region of one to two hours to draft. However, the drafts produced were of an extremely poor standard. She says extremely detailed and comprehensive instructions were provided for this work and she (and her husband) went as far as writing out a draft themselves to be edited, with little being required on top. She says she had to keep chasing for the draft as it was taking far longer than anticipated and Atkinson Rose was aware this was a very time sensitive piece of work, yet it took 3.5 weeks to produce a single letter.

Atkinson Rose says Miss B couldn't provide any reasonable instruction in respect of what she believed to have been redacted in documentation she'd received in response to one of her SARs. It says it had to balance its obligations to assist her, whilst not sending correspondence that had no valid basis in law. It could not simply draft letters containing empty threats. It says Miss B amended the draft in line with how it advised her to amend it on 22 November 2022.

I can see Miss B gave Atkinson Rose instructions of what was required for the two SAR responses in an email she sent on 26 October 2022. On 2 November 2022, Mr P said he couldn't locate one of the documents Miss B had sent but shortly afterwards he said he had it.

Miss B returned Atkinson Rose's draft of one of the SAR responses on 3 November, saying she'd corrected a number of typos and asked if he was happy for her to send it as it was. Mr P responded the next day saying it was good to go. He said the other letter (challenging redactions in documentation provided in response to Miss B's SAR) was a bit more complex so she should have a draft the following week.

Miss B says she received the draft of the second letter on 8 November 2022 and was unhappy with the quality. I've listened to a conversation between H and Mr P that took place that day. H explained why they wanted the response to be more robust. Mr P said they needed to keep in mind that in time the letter would be read by the ICO, so they needed to strike a balance between seeming reasonable and being firm. It was agreed that H would send an email with the points he and Miss B wanted included.

I can see that Miss B emailed Atkinson Rose on 9 November 2022 requesting it compile a new draft of the SAR letter, which was more robust, with specific points she wanted included. Mr P responded the next day saying it was very helpful.

In an email to Mr P on 16 November, Miss A asked when she could hope to receive another draft letter. She said she was keen to get it out as soon as possible because there were further actions that needed to be taken upon receipt of the third party's response to her letter.

On 17 November, Mr P said there were still a few changes to make on the letter and it was very difficult challenging redactions. He hoped to have it ready the next day or early the following week.

On 22 November, Miss B emailed Atkinson Rose saying she assumed the SAR/redaction letter had not yet been compiled. She said she (and H) would compile it and get it sent off.

I think Miss B made it clear to Atkinson Rose that she needed to send the SAR responses off urgently. However, it took almost four weeks for Atkinson Rose to draft the second letter, which seems to be quite general. And it appears that there were issues with the quality of the other SAR letter. So, I don't think it's fair for Atkinson Rose to charge Miss B for work on either of the SAR letters.

Other work

On 14 December 2022, Miss B terminated her agreement with Atkinson Rose when she raised her formal complaint against it.

The terms of the agreement say:

"*If you terminate our retainer, or if we terminate it due toa breach of it's [sic] conditions, we reserve the right to bill you on a the [sic] non-reduced hourly basis for the work that had been carried out up to that date…*"

Under "*our hourly fees*" the agreement says:

"*As a gesture of goodwill, we have agreed to limit my (Mr P''s) rates to £300 + VAT per hour and any caseworker rates to £200 + VAT per hour*."

As Miss B terminated her agreement with Atkinson Rose, I think it's reasonable for it to charge fees, as outlined above, for work it's carried out for her in relation to the employment tribunal proceedings (aside from on the SAR's and prospect assessment).

Miss B says her understanding is that the work would be outsourced to a lower level and Mr P would not contribute to the work himself. However, Mr P reverted to claiming exorbitant rates and funds with the majority of the bill being charged for his time.

In his conversation with H on 25 October 2022, Mr P said he and his caseworker would work on the case together. Where she could do the work, if it was more cost effective, she'd do it. Mr P said nothing would go out without him seeing it anyway, but he wouldn't charge for this, and they always tried to keep things reasonable.

However, the timesheet that was sent with the invoice on 25 November 2022, shows most of the work being charged at £300 per hour (plus VAT) which suggests Mr P's rate was being charged. As Mr P assured H (as Miss B's representative) he wouldn't also charge for any work completed by a caseworker, he should remove any charges for this.

Miss B has also raised concerns at being charged for emails. I think it's fair for Atkinson Rose to charge for emails sent and reviewed in relation to her case. But as our investigator has said, it shouldn't charge for any additional emails it sent to put right any failings to include attachments in its original emails.

I haven't seen anything to suggest that Atkinson Rose has charged Miss B for complaint handling. But to be clear, it wouldn't be fair for it to do so.

Invoice for fees

Miss B says she agreed to put £4,000 on account to cover the hourly cost difference in any casework / solicitors' fees not covered by insurer for a very limited scope of work which would not require much of Atkinson Rose's time. She says £4,000 was sufficient to cover all necessary costs until 31 January 2023.

The agreement Miss B agreed to in October 2022 said:

"*Before we can begin any work on the matter or sign the insurance documents, we will require £10,000 as money on account. This is a working balance and you shall be invoiced monthly, following which you will be required to top the balance up to that figure*."

Around a month after the agreement, Atkinson Rose sent Miss B an invoice for "*professional services in connection with your employment matter*." Miss B was asked to pay a total of £5,880 within 14 days.

The breakdown Atkinson Rose sent Miss B with the invoice showed it was charging Miss B at the higher rate from 1 November with a note which said: "*C wishes for us to work even though no cover so higher rate (HR).*"

I appreciate that the agreement said Miss B was to have £10,000 on account as a working balance and she was required to top up the balance to that figure, after each monthly invoice. I note that Atkinson Rose confirmed it was happy for the amount to be amended to £4,000 by email and this didn't mention any other changes in terms.

However, I think it's clear from the telephone conversation with Miss B's husband just prior to Miss B confirming acceptance of the agreement that they were expecting the £4,000 to be sufficient to last them to the date of the preliminary hearing in January 2023. So, I don't think Miss B was expecting to be asked to pay anything extra until then.

I can see that the insurer sent Atkinson Rose an email on 12 December 2022 which said:

"*We are satisfied in principle with the information provided and we thank you for clarifying that prospects remain at over 51%. On this basis we are happy to progress with funding, though will first require an estimated breakdown of work in the coming month. Once this is provided we can look to grant indemnity*."

So, as far as Atkinson Rose was concerned the insurer hadn't agreed to cover when it sent Miss B its invoice on 25 November 2022. While this explains why it started charging Miss B the higher rate from 1 November, I think it would have been helpful if Atkinson Rose had explained this to Miss B before sending the invoice.

I think the invoice Atkinson Rose sent Miss B on 25 November was a shock to her for several reasons. I don't think she was expecting to be charged for the prospects assessment because Atkinson Rose hadn't explained this to her, and the only work she'd said to go

ahead with was the SAR responses and the ET1 amendment. While the agreement said Miss B needed to keep a balance on the account at all times and she'd be invoiced monthly, H's discussion with Mr P on 25 October (after the agreement had been produced) was around £4,000 being put on account to last until the preliminary hearing in January 2023.

Although Miss B had said to go ahead with the SAR responses and ET1 amendment, this was with the understanding that she would cover the fees in full in the event there was no cover from the insurer. So, I don't think she was expecting to receive an invoice for the full fees the same day Atkinson Rose sent the prospects assessment to the insurer. I think she was only expecting to be charged in the event the insurer refused cover.

So, I think Atkinson Rose's communication with Miss B should have been much better. And I've considered the impact of its poor communication on her in the overall amount I've awarded for distress and inconvenience.

Fees charged by Miss B's subsequent solicitor

Miss B feels Atkinson Rose should cover the cost of the prospects assessment carried out by the solicitor she instructed after terminating her agreement with Atkinson Rose. She says she would not have been forced to transition to a new solicitor if Atkinson Rose had conducted itself in a proper manner.

Miss B says she acknowledges that her insurer typically does not cover the cost of duplicated work, including redundant probability assessments, it agreed to fully indemnify Atkinson Rose's probability assessment to address its own error.

When our investigator asked Miss B's insurer why it had agreed to pay costs for Atkinson Rose's prospects assessment when one had already been completed by its panel solicitors, the insurer said this was because it had told Miss B it would. The insurer said in normal circumstances it wouldn't have covered Atkinson Rose's assessment, but it has because it was honouring what it had told Miss B.

Given the above, I'm not persuaded that Atkinson Rose is responsible for Miss B incurring additional costs from her subsequent solicitor. So, I don't think it needs to compensate her for this.

Sharing of information

Miss B says Atkinson Rose committed GDPR violations on two separate occasions by submitting highly sensitive case files to her insurer and our service.

Miss B says Atkinson Rose transmitted audio recordings relating to her tribunal case to her insurer, even though her insurer only required sample evidence to support the merits assessment. She says her evidence file comprised of over 400 documents, and her insurer did not expect nor request the entire set.

When our investigator asked Miss B's insurer if it would have expected information Atkinson Rose sent to have been supplied with the prospects of success, they said they would. They said the more information relating to the claim the better to help them understand it. The insurer said the information Atkinson Rose had sent wasn't unusual to receive. While I appreciate Miss B might have preferred Atkinson Rose to forewarn her it was sharing information that she may have considered sensitive, I think she would likely have agreed to it being sent because this was in her best interest. So, I'm not persuaded that Miss B has been negatively impacted by Atkinson Rose sharing information relating to her tribunal claim with her insurer.

Miss B's concerns about Atkinson Rose sharing sensitive information with our service go beyond the scope of this complaint, so I haven't been able to consider these here. However, I'd like to reassure Miss B that this information was removed from her case file long before it was passed to me. So, it hasn't had any bearing on my decision.

Distress and inconvenience

Miss B has provided detailed commentary about the impact of Atkinson Rose's actions on her. She says Atkinson Rose has caused her significant distress and anxiety. She's made us aware of a number of chronic medical conditions she is suffering from. She says Atkinson Rose was fully aware of her medical status and her physical and mental health conditions resulting from her former employer and the legal case against them. She says this did not deter Atkinson Rose from acting against her vexatiously and with malice.

I appreciate Atkinson Rose felt Miss B's complaint was vexatious and she was being abusive towards its staff. It also seemed to believe that she'd raised the complaint because she didn't want to pay for its services.

However, I've already explained why I think Atkinson Rose's communication with Miss B was poor and it didn't provide the quality of service it should have. And while I understand why Atkinson Rose was keen to try to recover its fees from Miss B, I think it caused her some unnecessary distress when pursuing these.

For example, a letter was sent from Atkinson Rose's solicitors threatening legal action if payment wasn't received within seven days, the same day her complaint was responded to.

I also think some of the wording in Atkinson Rose's response to Miss B's complaint came across as quite threatening. For example, it suggested it might tell her insurer that it believed her prospects of success in the employment tribunal were below 51%. This seemed to be based on her behaviour in raising a complaint, rather than additional information it had discovered relating to her tribunal claim against her former employer.

I appreciate Miss B has put a lot of time and effort into her complaint, but this isn't something I can tell Atkinson Rose to compensate her for.

I understand Miss B has been under a great deal of stress over the last couple of years which seems to have had a significant impact on her mental and physical health and I empathise with her. Given what she's said about her legal case against her former employer, it's difficult to attribute the decline in her health to Atkinson Rose. However, I have considered her vulnerability when thinking about the compensation it should pay her. I think Atkinson Rose's actions are likely to have had a greater impact on Miss B, given her pre-existing health conditions and the stress she was already under.

Our investigator recommended Atkinson Rose pay Miss B £600 to compensate her for distress and inconvenience. This is in the range of what our service considers fair where the impact of a business's actions has caused considerable distress, upset and worry. So, I think compensation of £600 for this is reasonable.

Putting things right

Atkinson Rose should:

- Waive its fees for the prospects assessment and two SAR responses, including the preparation and sending of them.

- Waive its fees for any received or sent emails to put right its failure to include an attachment stated to have been included in the original email.
- Remove any fees charged at Mr P's hourly rate where the work was carried out by a caseworker.
- It should only charge Miss B for any remaining work it's carried out in line with 'our hourly fees' in the agreement (£300 + VAT for Mr P, £200 + VAT for a caseworker)
- If the above amendments result in a credit on Miss B's account, it should refund this to her along with interest calculated at 8% simple per year* from the date the agreement ended to the date the refund is made.
- Pay Miss B £600 for distress and inconvenience.

*If Atkinson Rose considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Miss B how much it's taken off. It should also give Miss B a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

For the reasons I've explained, I uphold Miss B's complaint and direct Atkinson Rose LLP to put things right by doing as I've said above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 27 March 2024.

Anne Muscroft
Ombudsman