

COURT OF SESSION, SCOTLAND

REPORT

by

**AUDITOR OF THE COURT OF
SESSION**

in the cause

HER MAJESTY'S ADVOCATE

RK

against



EDINBURGH. 15 DECEMBER 2004

1. This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and Mhari Richards, QC, in relation to fees claimed by counsel for representing [REDACTED] on charges of sexual offences against two girls under the Criminal Law (consolidation) (Scotland) Act 1995 Sections 5 and 6.
2. At the Taxation on the 29 November 2004, the Board were represented by Mr [REDACTED] from Alex Quinn & Partners Law Accountants represented Miss Richards.

3. Background

The accused in this case was charged on indictment which contained six charges including offences contrary to the Criminal Law (Consolidation) (Scotland) Act 1995 Section 6, Rape, Breach of the Peace and three charges under the Misuse of Drugs Act 1997.

However, it was brought to the attention of the Crown that the complainers had previously made allegations of rape against two male Social Workers, leading to investigations of them. On both occasions the allegations were found to be groundless and had been made out of spite and boredom.

Counsel was invited by the Advocate Depute to consider all the Productions, which were lodged, and provide a note in which he could report the matter to a Law Officer to have it dismissed. In preparing the note Ms Richards had to read all the papers and managed to distil some 4,000 pages of Productions down to 800 – 1000 pages, which were particularly relevant to the case. However, before Counsel's Note could be presented to a Law Officer for consideration the case was transferred from Edinburgh to the High Court in Forfar where it proceeded to Trial which lasted for six days.

4. Regulations and Authorities

Regulation 10 (1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 provides that counsel shall be allowed "such fees as appears to the Auditor to represent reasonable remuneration, calculated in accordance with Schedule 2, for the work actually and reasonably done, due regard being had to economy. Schedule 2 sets out the fees payable to counsel. Paragraph 3 thereof gives the Auditor the discretion to increase any fee set out in the Table of Fees, where he is satisfied that the matter is of particular complexity or difficulty or where other particulars circumstances dictate that such an increase is necessary to provide reasonable remuneration for the work undertaken.

The Auditor is bound by the Regulations and the principles set out by the Lord Justice Clerk in *Uisdean McKay v. HMA 1999 SC 670*, where the Lord Justice Clerk states, “it is important, in our view, to bear in mind that the allowance of fees at a taxation in a legal aid case requires to be carried out within a statutory framework, in the present case as that set out in Schedule 2. This rule binds the Auditor, and they bind Counsel who are to be taken as having accepted instructions to act in return for fees determined in accordance with them. Para. 2 makes specific reference to the general levels of fees in the Table of Fees as one of the circumstances to which the Auditor is to have regard. Where a case is of a type for which fees of those general levels would be appropriate, the Auditor would normally be expected to select a fee in line with those levels for any item of work which no fee is prescribed. However, the case may be one which calls for a higher level of fee than that of the fees prescribed in the table. This points to the terms of para. 3, namely that “because of the particular complexity or difficulty of the work or any other particular circumstances, such an increase is necessary to provide reasonable remuneration for the work”. Thus in such a situation the Auditor would be entitled under para. 2, to allow a higher fee than would have resulted from his allowing a fee in line with the general levels of fees in the Table. In that sense, therefore, para. 2 includes the possibility of an increase of the type referred to in para. 3”.

5. SLAB'S Objections

██████████ lodged Points of Objection, which are referred to for their terms. He made the following submissions:

- The fees are prescribed by regulation 10 (1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 which provides that counsel shall be “allowed such fee as appears to the Auditor to represent reasonable remuneration, calculated in accordance with Schedule 2, for work actually and reasonably done, due regard to economy”.

- The fees prescribed by Schedule 2, Chapter 2 of the regulations for senior counsel in respect of a Trial per day is £377.50.
- Counsel is seeking £1,100 per day for a six day Trial at Forfar High Court. The Board has offered five days at £1,100 because one of the Trial diets is not supported by an equivalent entry in the solicitor's account. This figure is inclusive of preparation.
- The principal abatement relates to the separate preparation fee of £13,200 for a stated 106.5 hours spent in preparation.
- A Note to the Advocate Depute has been charged at £500. The Board offered the prescribed fee of £70.50 because the Note itself has not been made available to the Board and it is unclear what separate or additional work has been undertaken in drafting the Note.
- The Board considers that it made a reasonable offer on the basis of the information made available to it by counsel and in terms of the observations made by the court in *McKay v. HMA 1999 SC 670*. Whilst the broad reference has been made by counsel as to the sheetage, there is no vouching in support of the separate preparation. In particular there is no breakdown of this time such as would indicate what documentation was perused at any given time, when and how long it took in order that the Board can form a view, in the performance of its statutory functions, as to whether the particular elements of the preparation were necessary and the time taken reasonable.
- The Board offered payment to counsel for the items of work shown in the table below:

Date	Subject	Time	Claim	Offer
24.11.03	Consultation Perth	1 hr 5	£450.00	£230.00

+ 70

	Prison	mins		
02.12.03	Edinburgh High Court		£500	£315.00
05.01.04	Meetings with Advocate Depute & client	2 hrs 20 mins	£350.00	£300.00
09.01.04	House meeting	4 hours	£500.00	£475.00
09.01.04	Drafting note for Crown as requested by Advocate Depute		£500.00	£70.50
13.01.04	Trial Diet Edinburgh		£400.00	£315.00
07.02.04	Drafting lengthy 275 notice (included in preparation)	18 hours		
10.02.04	6 Trial days – Forfar High Court		£6600.00	£5500.00
10.02.04	Revising lengthy joint minute		£200.00	£70.50
10.02.04 – 17.02.04	Preparation	106.5 hrs	£13200.00	£0.00

6. Counsels Submissions

The Auditor refers to counsel's written submissions for their terms.

Ms Richards refers to the Criminal Legal Aid (Scotland) (Regulations) 1989 and the Lord Justice Clerks decision in *Uisdean McKay v. HMA 1999 SC 670* as the basis upon which preparatory work might be allowed in addition to a daily trial rate, the preparation falling within paragraph 2 of Schedule 2.

Ms Richards submits that in this particular case the preparatory work was exceptional. She had to read all the papers and distilled 4,000 pages of productions down to 800 – 1000 pages for the purpose of providing a Note to the Crown to have the case dismissed. However, before a Law Officer could be approached to consider the Note the case was transferred from Edinburgh to Forfar Sheriff Court. Thereafter, counsel had to prepare the case fully for Trial and in particular to prepare a Section 275 Notice which attacks the character of the two complainers. This involved counsel trawling through the records to

prove the allegations made were fictitious and to determine how many times the complainers had absconded from care and from family. This also assisted in attacking their credibility in general. In addition counsel had to consider in detail which witnesses would be required to be called for the Defence as well as considering which of the Social Work Records were to be lodged on behalf of the Defender. The Trial lasted for six days and following extensive negotiations with the Advocate Depute a Joint Minute was entered into. The accused was subsequently acquitted.

7. Diet of Taxation

Submissions

did not dispute the time spent by Ms Richards in preparation, but sought clarification that it was done economically. also conceded that the Trial did run for the six days as charged for by Ms Richards and he did not have a difficulty with the daily rate claimed. However, was of the view that the preparation carried out by counsel should be subsumed within the enhanced daily rate charged, but was willing to concede to counsel being paid separately for the Note and the Section 275 Notice. There was also the issue of whether there was any duplication of the preparation, which had already been carried out prior to the Trial Diet being transferred to Forfar Sheriff Court.

Submissions

set out the circumstances in which Ms Richards was seeking to be paid separately for preparation. He referred to the Auditors decisions in *v. HMA* and *HMA v.* where separate preparation in addition to the daily fee had been allowed. argued that preparation should be allowed at 2/3rds of the daily fee. The 106.5 hours claimed was a global charge to include preparation for the Trial in Edinburgh and then for Forfar. He accepted that the

bulk of the Trial preparation was done in the drafting of the Note and the Section 275 Notice.

8. Conclusion

In arriving at his decision the Auditor is satisfied that this was a complex case of great importance to the client who if convicted would have received a custodial sentence. He is in no doubt that Ms Richards required to undertake a significant amount of preparation to represent the interests of her client. *HMA v. ██████████ September 2000* is not a relevant comparator. It was the longest running case in history of the Scottish High Court. It involved novel points of law and presented significant difficulties and complexities. The indictment ran to 36 pages and included 43 separate charges of fraud. The Crown lodged in excess of 14,000 pages of productions. The trial of ██████████ was deserted *pro loca et tempore* and the trial of his co-accused ██████████ lasted 117 days.

The Auditor is satisfied that the work specifically for preparation for the Trial should be subsumed within the daily enhance rate. It is reasonable however to remunerate counsel for the significant burden of preparing the Note and the Section 275 Notice. The Auditor therefore allows 10 days preparation as reasonable at £600 per day, due regard being had to economy.

Accordingly, the Auditor taxes the preparation element of Ms Richard's QC fees in the sum of £6,000.00 plus VAT of £1050.00..

9. Costs of Taxation

In the event of success, counsel seeks payment of her Expenses for the Diet of Taxation, which includes the costs to Alex Quinn & Partners for preparing and attending at the Diet of Taxation.

██████████ sought payment of £450 for his fees being 5 hours at £90. The Auditor finds the success to be divided and awards Mr Wilkinson a fee of £300. Such a payment is specifically approved in *Uisdean McKay (supra)*

Henry Wilkinson.

AUDITOR OF THE COURT OF SESSION