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Victorian Civil and Administrative Tribunal

**Arya v Donaghey (Legal Practice) [2020] VCAT 923 (26 August 2020)**

Last Updated: 26 August 2020

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**LEGAL PRACTICE LIST**

VCAT REFERENCE NO. J47/20

**CATCHWORDS**

Legal Practice List – [Legal Profession Uniform Law Application Act 2014](#) (Vic), [s 99](#) – *Legal Profession Uniform Law (Victoria)*, [ss 172, 178, 200, 307 & 309](#) – fair and reasonable legal costs.

<b>APPLICANT</b>	Ms Sudha Arya
<b>RESPONDENT</b>	Mr Timothy Donaghey
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	R. Tang AM, Member
<b>HEARING TYPE</b>	Hearing by video conference
<b>DATE OF HEARING</b>	14 August 2020
<b>DATE OF ORDER AND REASONS</b>	26 August 2020
<b>CITATION</b>	<a href="#">Arya v Donaghey (Legal Practice) [2020] VCAT 923</a>

**ORDERS**

1. Under [section 99\(4\)\(a\)](#) of the [Legal Profession Uniform Law Application Act 2014](#) (Vic), the Tribunal specifies the amount payable by the applicant to the respondent as legal costs is \$3,500.
2. The claim by the applicant for a compensation order under [section 99\(4\)\(b\)\(v\)](#) of the [Legal Profession Uniform Law Application Act 2014](#) (Vic) is dismissed.
3. Except to the extent provided in Order 1, the counterclaim by the respondent is dismissed.

R. Tang, AM

**Member**

**APPEARANCES:**

For Applicant

Ms S Arya, in person

**REASONS**

1. This proceeding is a costs dispute, brought under [section 99](#) of the *Legal Profession Uniform Law Application Act 2014* (Vic) (**LPULA Act**). It relates to fees of \$9,200 charged by Mr Timothy Donaghey, a barrister, to Ms Sudha Arya in respect of preliminary written advice he provided in relation to the claims the applicant may have had against her former employer in respect of the circumstances leading to her resignation.
2. As Ms Arya is awaiting a decision from the Federal Circuit Court in relation to the claims she decided to pursue, I have not identified the employer concerned and limited the extent to which I have referred to Mr Donaghey's advice.

***Background to the dispute***

3. In August 2018, Ms Sudha Arya resigned from her position with her then employer. She did so 'due to the discrimination, victimization, harassment and bullying I faced causing me mental injury, emotional distress and constructive dismissal'.<sup>[1]</sup>
4. Ms Arya pursued a complaint in relation to the discrimination with the Australian Human Rights Commission (**AHRC**), which was terminated by notice dated 1 November 2018. At the time, Ms Arya was represented by Mr Athula Pathinayake of Pathinayake Lawyers.
5. On the day prior to receiving the AHRC termination notice, Ms Arya decided that she would like to receive a second opinion as to her position. She identified Mr Donaghey as having the appropriate expertise and called him to book a conference.
6. Mr Donaghey took the call and referred the caller to his clerk to make the appropriate arrangements. He says he believed he was talking to Athula Pathinayake (not knowing the gender of Mr Pathinayake at the time).
7. The clerk booked a conference for 9 November 2018 and sent a confirmation to Ms Arya confirming that the conference had been booked for one hour, the fee payable was \$525 per hour (inclusive of GST) and noting that it was a 'direct access' brief (ie. that no solicitor was involved).<sup>[2]</sup> Mr Donaghey says he did not notice the reference to the direct brief at the time and believed he was retained by Mr Pathinayake.
8. Ms Arya attended the conference with Mr Donaghey on 9 November 2018, together with her husband. She brought additional material to show Mr Donaghey, including a copy of the AHRC termination notice. As a consequence of the termination notice, there was a discussion about the provision of written advice by Mr Donaghey, to be provided through Mr Pathinayake, although exactly what was discussed is disputed.
9. What is not disputed is that Mr Donaghey did not provide any estimate of the costs involved for the provision of that advice.
10. Shortly after the conference, Ms Arya emailed Mr Pathinayake to advise him that:<sup>[3]</sup>

today I visited one barrister on [a] friend[']s recommendation. Tim Donaghey, and he will send you a letter of [advice] by next Tuesday. He went through main evidences and he will advise accordingly. He is quite experienced, therefore thought of taking a second opinion. I will forward you Human Rights commission termination notice shortly.

11. Ms Arya sent Mr Donaghey an email on 21 November 2018 to follow up on the status of the advice, noting that it 'will help us to decide about our next step'.<sup>[4]</sup> Mr Donaghey says he did not receive that email, explaining that it may have gone into his junk email.
12. In the event, Mr Donaghey did not provide his written advice until 4 December 2018, by email to Mr Pathinayake. The advice, albeit preliminary, is quite detailed, at 23 pages (including a chronology). In the email, Mr Donaghey apologises for the delay, noting that 'it was necessary to look at every detail'.<sup>[5]</sup>
13. On 10 December 2018, Mr Pathinayake replied to Mr Donaghey thanking him for the advice and copying Ms Arya.<sup>[6]</sup> He also advised that Mr Donaghey's invoice 'can be sent to her directly'.
14. Later the same day, Mr Donaghey sent his invoice by email to 'Sanjeeva' from Mr Pathinayake's firm and copied to Ms Arya.<sup>[7]</sup> The tax invoice was issued by Mr Donaghey's clerk in the sum of \$9,900, and attached a memorandum of fees prepared by Mr Donaghey for work conducted over the period from 1 November to 4 December 2018 (**Fee Memorandum**).<sup>[8]</sup> The Fee Memorandum specifies the dates and times on which work was conducted, recording the total time involved for both the conference and the written advice as 17 hours and 10 minutes. In the Fee Memorandum, the fees are calculated at a rate of \$595 per hour (being the rate that Mr Donaghey charges solicitors) and the total cost was identified as being \$10,174.50, although Mr Donaghey was only seeking the sum of \$9,900.
15. Ms Arya sent an email to Mr Donaghey on 11 December 2018 indicating that she had paid the sum of \$700 for the conference, but noting that in relation to the balance:<sup>[9]</sup>

I was never advised verbally or in writing nor provided any cost disclosure before, during or after the conference. As I never committed to any further cost beyond the conference booking, I am unable to pay the remainder of the Invoice.

16. Ms Arya filed a complaint regarding the fees charged by Mr Donaghey with the Victorian Legal Services Commissioner (**Commissioner**) on 8 January 2019. By letter dated 5 April 2019, a delegate of the Commissioner noted that she had been unsuccessful in seeking to resolve the costs dispute and confirming that Ms Arya could proceed to apply to the Tribunal.<sup>[10]</sup>
17. Ms Arya lodged her application with the Tribunal on 26 May 2019. She claimed:

The disputed cost of \$2,200.00<sup>[11]</sup> is void as law practitioner contravenes the disclosure obligations.

Claiming compensation of \$15,000.00 for mental distress, harassment and exacerbating psychiatric injury by the law practitioner.

18. At the hearing, Ms Arya also said that she sought an order that Mr Donaghey engaged in professional misconduct. However, I explained that any such claim must be brought by the Commissioner and the Tribunal does not have the power to make such an order in respect of a costs dispute.

### ***Overview of statutory framework relating to legal costs***

19. Since 1 July 2015, legal costs charged by a law practice (including a barrister) to a client have been regulated under the LPULA Act and Part 4.3 of the *Legal Profession Uniform Law (Victoria)* (**Uniform Law**).<sup>[12]</sup>
20. Section 169 of the Uniform Law sets out the objectives of Part 4.3, namely:

(a) to ensure that clients of law practices can make informed choices about their legal options and the costs associated with pursuing those options; and

(b) to provide that law practices must not charge more than fair and reasonable amounts for legal costs; and

(c) to provide a framework for assessment of legal costs.

21. Section 172 contains the requirement that legal costs be 'no more than fair and reasonable in all the circumstances', including that they are 'proportionately and reasonably incurred' and 'proportionate and reasonable in amount'. It goes on to provide that, when considering if legal costs are reasonable, regard must be had to whether the costs reasonably reflect:

- . the level of skill, experience, specialisation and seniority of the lawyers concerned;
- . the level of complexity, novelty or difficulty of the issues involved;
- . the labour and responsibility involved;
- . the circumstances in acting on the matter, including the urgency and the time spent;
- . the quality of the work done; and
- . the retainer and the instructions (express or implied) given in the matter.

22. Section 174 creates an obligation for law practices to provide their clients with costs disclosure, namely the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs. The law practice must disclose any significant change to the legal costs that will be payable by the client. These obligations are referred to in these reasons as the **Cost Disclosure Obligations**.

23. Under section 179, a client of a law practice has a right to require a costs agreement with the law practice, which must be written or evidenced in writing.

24. A costs agreement is *prima facie* evidence that legal costs are fair and reasonable, provided that the Cost Disclosure Obligations have been complied with.<sup>[13]</sup>

25. Conversely, if the Cost Disclosure Obligations are not complied with, then section 178 provides that:

- . any costs agreement is void; and
- . the client is not required to pay, and the law practice cannot take steps to recover, the legal costs until they have been assessed or the costs dispute determined by the Commissioner or Tribunal.

26. Section 99 of the LPULA Act establishes the jurisdiction of the Tribunal to deal with a costs dispute where the amount of legal costs in dispute is not more than \$25,000 and the parties have been informed by the Commissioner of their right to apply to VCAT. The Tribunal must determine the dispute and can make:

- . an order specifying the amount payable as legal costs, which can be nil, but cannot exceed \$25,000 (indexed); and
- . a compensation order against the law practice in accordance with Part 5.5 of the Uniform Law.

27. In making an order regarding the amount payable as legal costs, the Tribunal has to make an assessment 'of what is fair and reasonable in all the circumstances', having regard to section 200 of the Uniform Law.<sup>[14]</sup>

28. The factors to be considered under section 200 of the Uniform Law include the principles in section 172 (so far as they are applicable) and the compliance of the law practice with the Uniform Law and any disclosures made as to the legal costs.

29. A compensation order may be made under section 306 of the Uniform Law if requested by a complainant in respect of a loss suffered 'because of the conduct the subject of the complaint'<sup>[15]</sup> and provided the Tribunal is satisfied that the person has suffered loss because of the conduct concerned and it is in the interests of justice that the order be made.<sup>[16]</sup>

***What are the fair and reasonable legal costs payable by Ms Arya to Mr Donaghey?***

30. Broadly, Ms Arya contends that Mr Donaghey should not be entitled to any costs on the basis that the only agreement she had with Mr Donaghey was to pay \$525 for a conference of one hour (although she paid \$700 because the conference lasted for more than an hour). She says that there was no contract or costs agreement relating to the written advice and, as it was not reasonable to expect her to understand that there was a cost for obtaining that advice, she should not be responsible for any additional cost.

31. Mr Donaghey concedes that he did not comply with the Cost Disclosure Obligations and that, in the event there was any costs agreement, it would be void under section 178 of the Uniform Law.

32. While Mr Donaghey maintains that he should be entitled to some 'proper amount for [his] labour' and 'the use to [Ms Arya] of the Written Advice',<sup>[17]</sup> he concedes that the fees claimed should be reduced:

- . to exclude the time for reviewing documents, drafting notes and otherwise preparing for the conference with Ms Arya (totalling 4 hours and 50 minutes);
- . to limit the hourly rate to \$525 per hour as quoted by his clerk, rather than the rate of \$595 per hour used in the Fee Memorandum; and
- . by some amount, as determined by the Tribunal, to reflect his failure to comply with the Cost Disclosure Obligations.

33. Ultimately, it is for the Tribunal to determine what the fair and reasonable costs are, having regard to the various considerations set out in section 200 of the Uniform Law. I consider each matter in turn.

34. **Absence of costs agreement and failure to comply with Cost Disclosure Obligations:** The absence of a costs agreement, or it being rendered void as a result of a failure to comply with the Cost Disclosure Obligations, means that a law practice cannot rely on a presumption that the legal costs are fair and reasonable. However, while it is relevant to the overall assessment, it does not follow that the law practice is not entitled to any costs.

35. I consider that the failure to comply with the Cost Disclosure Obligations requires some level of discount to the fees otherwise chargeable.

36. **Level of skill, experience, specialisation and seniority of the lawyers concerned:** Mr Donaghey gave evidence that he has practised at the Victorian Bar for some 18 years and has developed particular expertise relating to workplace termination and general protection claims, which is a specialised field of law. Ms Arya did not challenge Mr Donaghey's expertise, which is appropriate given that she sought him out for a second opinion. I accept his evidence and, considered in that context, find that his rate of \$525 per hour is reasonable.

37. **Level of complexity, novelty or difficulty of the issues involved:** Mr Donaghey's evidence was that there was additional complexity involved due to the AHRC termination notice, which he only became aware of at the conference. He says that was when he offered to prepare written advice.

38. While Ms Arya did not directly address this matter, she did suggest that Mr Donaghey's position changed between the conference and the written advice.

39. Having heard Mr Donaghey's explanation, and having read the advice provided by Mr Donaghey, I am satisfied that there were complexities involved with the matter that warranted further consideration (particularly as to the impact of the AHRC termination notice) and the provision of written advice.

40. **The labour and responsibility involved:** Having regard to the complexity involved, it was clearly a matter that required Mr Donaghey's attention.

41. **The circumstances in acting on the matter, including the urgency and the time spent:** The written advice is 23 pages in length, although 5 pages are devoted to a chronology of events relating to the

termination of Ms Arya's employment. Excluding the conference (1 hour and 20 minutes) and the associated preparatory activities (4 hours and 50 minutes), the Fee Memorandum records 11 hours devoted to the preparation of the advice over a period of around 3 weeks. In the context of the skill brought to bear and the complexity involved, I consider that amount of time to be reasonable in the circumstances.

42. There was a degree of urgency involved as Ms Arya had to file any claim she wished to pursue in the Federal Circuit Court by early January 2019. In that regard, it appears there was delay on the part of Mr Donaghey in completing the advice.

43. Ms Arya says that Mr Donaghey promised the advice by the Tuesday following the meeting (ie. 13 November 2018) as evidenced by the comment to that effect in her email to Mr Athinayake (see [10]). She says that, by the time it was delivered, the advice was of no value because the work to prepare the claim in the Federal Circuit Court had largely been completed by Mr Athinayake and separate counsel retained for that purpose.

44. Mr Donaghey denies that he promised to deliver the advice within any particular time frame. He says that he was delayed because he was busy, but contends that the period between 4 December 2018 and January 2019 left sufficient time for the making of any claim in the Federal Circuit Court.

45. I prefer Ms Arya's evidence on this point. In this regard, I note that in the Fee Memorandum, Mr Donaghey has recorded 15 minutes of time on 13 November 2018 for '[s]ending email to instructor regarding delay in advice'. This is consistent with an expectation that the work would be completed by then.

46. A question arises whether the delay rendered the advice valueless by the time it arrived. Ms Arya contends it does because much of the information it contained was covered in the AHRC termination notice and by the time it was received, work had already been done by Mr Athinayake and the other legal counsel to prepare the matter for the Federal Circuit Court proceeding.

47. Having read the advice, I consider that it contained information of relevance to Ms Arya which would ultimately help her to make an informed decision about whether or not to proceed to file the claim with the Federal Circuit Court. This is consistent with her own email of 21 November 2018 (see [11]).

48. However, I have still taken the delay into account in assessing the overall discount to the fees otherwise payable to Mr Donaghey.

49. **The quality of the work done:** The advice is comprehensive and clear. There was no complaint by Ms Arya as to its quality (as opposed to its timeliness and usefulness).

50. **The retainer and the instructions (express or implied) given in the matter:** At the hearing, there was a lot of debate whether Mr Donaghey offered to prepare written advice, which was accepted by Ms Arya (as contended for by Mr Donaghey) or Mr Donaghey said that he was going to prepare advice and Ms Arya just said 'okay' (as contended for by Ms Arya).

51. Ultimately, while that difference may be relevant to the existence or otherwise of a contract under which Ms Arya was liable to pay fees for the written advice, it does not change the fact that Mr Donaghey continued to be retained to advise Ms Arya after the conference. That he continued to be retained is reflected in the email which Ms Arya sent to Mr Donaghey on 21 November 2018 (albeit not received by Mr Donaghey) that his advice was needed to help her (and Mr Athinayake) decide the next steps (see [11]).

52. Ms Arya contended that she did not know, and it was not reasonable for her to understand, that there would be any further charge for preparation of the written advice. I do not accept her evidence in this regard.

53. First, she had already engaged Mr Pathinayake and (different) counsel to assist with her preparing the claim against her former employer. It is reasonable to infer that they were charging her for that work, and doing so based on time charges for the work performed.

54. Second, in his email of 10 December 2018, Mr Pathinayake asked Mr Donaghey to send his invoice directly to Ms Arya. I infer that Mr Athinayake knew that there would be some charge for the written advice and would not have sent the email to Mr Donaghey without first speaking to Ms Arya about it.

55. **Conclusion on fair and reasonable costs:** Having regard to the foregoing considerations, I determine the fair and reasonable costs payable by Ms Arya to Mr Donaghey to be \$3,500 (representing 11 hours work at \$525 per hour, less what I consider to be a fair and reasonable discount to account for Mr Donaghey's delay in providing his advice and his failure to comply with the Cost Disclosure Obligations). For the avoidance of doubt, this is in addition to the amount of \$700 already paid by Ms Arya for the conference.

### ***Is Ms Arya entitled to a compensation order?***

56. Ms Arya is not entitled to a compensation order as I am not satisfied that she has suffered any loss because of the conduct of Mr Donaghey.

57. Ms Arya's original claim relates to 'mental distress, harassment and exacerbating psychiatric injury' she says was caused by Mr Donaghey in pursuing her and/or Mr Pathinayake for payment of his legal fees (noting the evidence suggests any follow up for payment was by Mr Donaghey's clerk). In her Points of Claim, she suggests the compensation should be awarded for:<sup>[18]</sup>

- (a) 'Legal costs and out of pocket expenses';
- (b) 'Economic loss of husband as the Applicant cannot leave the house by herself due to psychiatric injury';
- (c) 'Damages for exacerbation of psychiatric injury (depression and anxiety disorder)'; and
- (d) 'Damages for pain and suffering'.

58. Apart from unquantified claims for legal costs, out of pocket expenses and her husband having to take time off work, Ms Arya has not identified any economic loss, rather her claim appears largely to relate to non-economic loss associated with the impact of the pursuit of the legal fees on her psychiatric state.

59. A question arises as to whether any such loss is compensable under section 306 of the Uniform Law and, if so, whether [section 28LE](#) of the [Wrongs Act 1958](#) (Vic) prevents recovery of any compensation unless it can be shown that Ms Arya has suffered a 'significant injury'.

60. In the event, it is unnecessary to resolve these matters because the only medical evidence that has been produced by Ms Arya is an undated medical report by Dr Yiu-Man Ip<sup>[19]</sup> which was prepared for the purposes of her claim against her employer. While it suggests that Ms Arya suffers from major depressive disorder, generalized anxiety disorder and possibly post-traumatic stress disorder, this appears to have come about as a result of her treatment by her former employer. There is nothing in the report to establish any causal link between the acts of Mr Donaghey and the existence or exacerbation of Ms Arya's psychiatric injury.

61. At the hearing, Ms Arya explained that she could not afford to get a further medical report because they are expensive. She referred to a decision of the Federal Circuit Court where an order was made awarding the plaintiff compensation of \$12,500 for hurt and humiliation.<sup>[20]</sup>

62. The Federal Circuit Court decision referred to relates to an entirely different legislative regime – orders made in respect of contraventions under the [Fair Work Act 2009](#) (Cth) – and is not relevant to the issues before the Tribunal.

63. While I accept that obtaining an expert medical report is expensive, the Uniform Law expressly provides that the Tribunal cannot make any compensation order unless it is satisfied that there is loss caused by the law practice and, in the absence of any evidence to establish that causal link, I cannot be relevantly satisfied.

64. I dismiss this claim.

R. Tang, AM

**Member**

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[1] Exhibit A1 filed by the applicant on 10 August 2020.

[2] Email from Greens List to Ms Arya dated 31 October 2020: Points of Claim, 4.

[3] Email dated 9 November 2018: Points of Claim, 7.

[4] Email dated 21 November 2018: Points of Claim, 8.

[5] Email dated 4 December 2018: Points of Claim, 15.

[6] Email dated 10 December 2018: Points of Claim, 15.

[7] Email dated 10 December 2018: Points of Claim, 16.

[8] Tax Invoice dated 7 December 2018: Points of Claim, 11-13.

[9] Email dated 11 December 2018: Points of Claim, 14.

[10] Points of Claim, 51.

[11] Later clarified to be \$9,200 by order of the Tribunal dated 18 July 2019.

[12] The Uniform Law is adopted as a law of Victoria under section 4 of the LPULA Act.

[13] Uniform Law, s 172(4).

[14] LPULA Act, s 99(5)-(6).

[15] Uniform Law, s 307(2).



[16] Uniform Law, s 309(1).

[17] Counterclaim against the applicant dated 15 August 2019 [5(b)].

[18] Points of Claim, 3.

[19] Points of Claim, 54-56.

[20] *Bristow v Sonny's Restaurant and Bar Pty Ltd* [2019] FCCA 1639.