CITATION: Monkhouse Law v. Belyavsky, 2024 ONSC 4970
COURT FILE NO.: CV-22-00677021-0000
DATE: 20240909

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Monkhouse Law, Plaintiff

-and-

Yefim Belyavsky, Defendant

BEFORE: Robert Centa J.

COUNSEL: Andrew Monkhouse, for the plaintiff

Yefim Belyavsky, self-represented defendant

HEARD: July 31, 2024

ENDORSEMENT

[1] Monkhouse Law commenced this proceeding against its former client, Yefim Belyavsky, seeking an assessment of its fees in the amount of $25,165.63. I find that the legal fees are subject to an assessment conducted by a judge because the retainer agreement is a contingency fee agreement.

[2] Although the firm has the burden of proving the reasonableness of its account, Monkhouse Law filed no sworn first-hand evidence from either Andrew Monkhouse or Danielle S. Rawlinson, the two lawyers who had carriage of this matter, or any other professional who worked on the file. Instead, Monkhouse Law filed affidavits from an articling student who was not at the firm at the relevant times and an associate lawyer who never worked on the file.

[3] Considering all the relevant factors, I find that Monkhouse Law has not proved that its bill was reasonable in all the circumstances. I assess its account at $2,000, including disbursements and HST.

Background facts

[4] I will briefly set out the uncontested facts that form the background to this assessment. I will return to the contested facts in more detail when I consider the specific issues raised by the parties.

[5] On October 1, 2020, Mr. Belyavsky commenced employment with Greg Walsh and Walsh Financial Solutions. He was about 22 years old. He was an associate advisor to Mr. Walsh

with an annual salary of $28,002, plus benefits. Walsh Financial Solutions had a relationship with Sun Life Financial Inc. The nature of this relationship and whether Sun Life was Mr. Belyavsky's employer became a matter of some controversy.

[6] On December 31, 2020, Mr. Belyavsky's employment was terminated. On January 4, 2021, Mr. Belyavsky filed a complaint with the Ministry of Labour in respect of the termination of his employment.

[7] On March 18, 2021, the employment standards officer released her decision on Mr. Belyavsky's complaint. She made the following findings:

a. Mr. Belyavsky was an employee, and his employer was Gregory M. Walsh, because Walsh Financial Solutions was a sole proprietorship;

b. Gregory M. Walsh committed a reprisal against Mr. Belyavsky when he suggested that he may not provide positive references for Mr. Belyavsky because he filed a complaint with the Ministry of Labour. The officer awarded Mr. Belyavsky $100 for emotional pain and suffering caused by this breach of s. 74(1)(a)(iii) of the *Employment Standards Act*;[1]

c. Mr. Belyavsky was not owed any unpaid wages for the 12.5 hours that Mr. Belyavsky claimed to have worked between August 19 and September 29, 2020, because Mr. Belyavsky spent that time on self-study, which was voluntary and completed before his employment started;

d. Mr. Belyavsky was not owed any money in respect of any commissions earned by Mr. Walsh;

e. Mr. Belyavsky was not entitled to minimum wages or vacation pay because he was a salesperson and was, therefore, exempt from those statutory minimums because of O. Reg. 285/01, s. 2(1)(h); [2] and

f. Mr. Belyavsky was not entitled to termination pay or severance pay under the *Employment Standards Act* because he was employed for less than three months.

[8] Mr. Belyavsky applied to the Ontario Labour Relations Board for a review of this decision.

[9] On April 5, 2021, Mr. Belyavsky signed a contingency fee agreement with Monkhouse Law. In broad strokes, the agreement stated that Mr. Belyavsky would pay the firm a contingency fee of 30% on the amount recovered at trial or at settlement, plus HST and disbursements. The agreement stated that Monkhouse Law would not recover more in fees than the amount Mr. Belyavsky received by settlement or in damages. The agreement also

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[1] *Employment Standards Act*, 2000, S.O. 2000, c. 41, at s. 74(1)(a)(iii).
[2] *When Work Deemed to Be Performed, Exemptions and Special Rules*, O. Reg. 285/01, at s. 2(1)(h).

contemplated that if the retainer ended, Mr. Belyavsky would pay to Monkhouse Law legal fees calculated at hourly rates "relating to the actual time spent up to the date of ending those services." Mr. Monkhouse and Ms. Rawlinson were the responsible lawyers for Mr. Belyavsky's file.

[10] On April 8, 2021, Mr. Belyavsky withdrew his application for a review of the employment standards officer's decision. He states that he did so with the advice of Monkhouse Law.

[11] On April 13, 2021, Ms. Rawlinson of Monkhouse Law sent a demand letter to Greg Walsh. On April 27, 2021, counsel for Mr. Walsh sent the following response to Ms. Rawlinson:

> The issue of wrongful dismissal was in fact already the subject matter of a complaint filed by your client with the Ontario Ministry of Labour.
>
> That complaint was determined in our client's favour as to the fact that Mr. Belyavsky was terminated during his probationary period and was not entitled to any compensation, which decision was released on March 18, 2021, a copy of which is attached for your ease of reference. While Mr. Belyavsky had filed an application for review pursuant to 116 of the *Employment Standards Act*, that application was withdrawn.
>
> We understand no further action was taken to seek review/appeal from that decision and the issue has therefore been finally resolved.
>
> The order to pay $100 to your client has been complied with by Mr. Walsh.
>
> Trusting this addresses your concerns. Our instructions would be to defend any claim which is commenced on the basis of issue estoppel and to seek to recover our client's legal fees on a full indemnity basis.

[12] On April 30, 2021, Ms. Rawlinson sent a further demand letter to counsel for Mr. Walsh.

[13] On June 3, 2021, Monkhouse Law issued a statement of claim for Mr. Belyavsky. The claim named a single defendant, "Sun Life Financial, Inc. and Walsh Financial Solutions." The claim asserted that Mr. Belyavsky was an employee, "was wrongfully terminated," and is "entitled to reasonable common law notice for the termination of his employment." The statement of claim sought the following relief:

a. Damages for wrongful dismissal and breach of an employment contract in the sum of $28,680;

b. $12,000 in compensation for commissions earned up to the date of termination and the pro-rated amount for the balance of the fixed-term contract;

c. $3,840 representing the "minimum wage gap" on wages between October and December 2020;

d. $240 in retroactive unpaid vacation and statutory holiday pay on variable compensation throughout his employment;

e. $12,500 in punitive, aggravated, *Bhasin*,[3] and/or moral damages;

f. $12,500 for violations of the Ontario *Human Rights Code*;[4]

g. Back pay, with an option of reinstatement by the court; and

h. "Damages of disgorgement of profits relating to the illegal and unjust benefit that the Defendant gained by failing to provide all of [Mr. Belyavsky's] entitlements according to common law."

[14] On August 12, 2021, counsel for Sun Life wrote to Monkhouse Law and advised that Sun Life and Walsh Financial Solutions were separate entities. Sun Life also took the position that it was not Mr. Belyavsky's employer and indicated that it would move to strike the statement of claim.

[15] On August 27, 2021, Ms. Rawlinson (on behalf Mr. Belyavsky) and counsel for Sun Life signed a consent to discontinue the action against Sun Life on a with-prejudice basis.

[16] On August 31, 2021, Mr. Belyavsky emailed Ms. Rawlinson and stated that he believed she "made a mistake by removing Sun Life as a defendant" and asked her to include Sun Life as a defendant in the action. Ms. Rawlinson responded as follows:

> As per our phone conversation on August 26, 2021, I thought we were in agreement in this regard. I will prepare a formal recommendation letter that outlines the law on this matter and get back to you. This may take a couple of days to draft.

[17] On September 8, 2021, Ms. Rawlinson provided her legal opinion to Mr. Belyavsky. The letter made no reference to the fact that Ms. Rawlinson had already agreed in writing to a with-prejudice discontinuance of the action against Sun Life. The letter read, in part, as follows:

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[3] *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494.
[4] *Human Rights Code*, R.S.O. 1990, c. H.19.

> Therefore, our recommendation is that you discontinue your claim against Sun Life and focus on your claim against Greg Walsh.
>
> You can choose to continue to pursue a claim against Sun Life, however, we would pursue this claim on your behalf on an hourly rate retainer agreement and have costs be potentially awarded against you.
>
> Moreover, you can hire another lawyer to pursue your claim and thus pay us our hourly rate for the work that we have done to date.

[18] Mr. Belyavsky did not react well to this opinion. On September 8, 2021, he sent a lengthy email to Ms. Rawlinson that questioned her competence and stated that she had a conflict of interest arising from her desire to minimize the number of hours she would have to spend on the case. In my view, Mr. Belyavsky terminated the retainer agreement in this email message when he wrote that "I take your desire to charge hourly for a motion that I may win as an END to our contingency agreement…I take it that our retainer has ended."

[19] On September 8, 2021, Mr. Monkhouse wrote to Mr. Belyavsky and accepted his termination of the retainer agreement. He indicated that he would send Mr. Belyavsky a bill for the work performed by Monkhouse Law.

[20] On September 27, 2021, Monkhouse Law served a notice of motion to be removed from the record. The motion was returnable December 9, 2021.

[21] On September 28, 2021, Mr. Belyavsky delivered a notice of intention to act in person, dated September 18, 2021.

[22] On October 7, 2021, Monkhouse Law sent Mr. Belyavsky an invoice for $25,165.63, inclusive of disbursements and HST. The invoice contained a series of task descriptions and the dates on which they were performed. The invoice did not include the hourly rate charged by each of the professionals, the amount of time for each entry on the account, or the total amount of time worked by each timekeeper.

[23] On November 9, 2021, Mr. Belyavsky filed for an assessment of the legal fees (Court File No. CV-21-00671738-0000).

[24] On February 16, 2022, Monkhouse Law filed for an assessment of the legal fees (Court File CV-22-00677021-0000).

[25] On August 9, 2023, Mr. Belyavsky settled his action for $15,000.

Procedural matters

[26] Because this matter involved a contingency fee arrangement, Monkhouse Law moved to have the matter transferred from an assessment officer to a judge.[5] In light of that motion, the assessment officer adjourned Mr. Belyavsky's assessment *sine die* pending further directions of the court.

[27] Monkhouse Law's motion was to be heard on June 7, 2023. However, the day before the hearing, Monkhouse Law delivered additional evidence, including (for the first time) a detailed five-page time sheet, which it described as an invoice, and a further affidavit. The invoice showed for each specific task: the name of the timekeeper, the date on which the task was performed, the time spent on each task, the hourly rate charged by the timekeeper, and the amount billed to the client. Justice Vermette adjourned the motion to July 31, 2024, and set a timetable for the exchange of further materials.

[28] The parties attended Civil Practice Court on June 12, 2024. Mr. Belyavsky wished to book a date for a motion in the proceeding commenced by Monkhouse Law or to advance a cross-motion. Justice Dow declined to schedule any further motions on the basis that any relief sought by Mr. Belyavsky could be obtained at the return of this motion on July 31, 2024.

[29] On June 17, 2024, Mr. Belyavsky made a further request for a cross-motion on the basis that he now sought different relief than when he previously appeared in Civil Practice Court. Justice Koehnen declined to schedule a separate cross-motion or to order that Mr. Belyavsky's motion proceed. Justice Koehnen's endorsement read as follows:

> A motion in this matter has been scheduled for July 31, 2024. [Mr. Belyavsky] seeks to bring a cross-motion. Justice Dow refused to grant leave to bring a separate cross-motion and ordered the motion to proceed on July 31, 2024.
>
> [Mr. Belyavsky] now brings a further request for a cross-motion on the basis that the relief he now seeks is different than the relief he sought before Justice Dow.
>
> I am not prepared to schedule a separate cross-motion at this time; nor am I prepared to order that [Mr. Belyavsky's] cross-motion shall proceed on July 31, 2024. The parties should proceed with the motion that is scheduled on July 31, 2024. [Mr. Belyavsky] can raise whatever relief he seeks in the guise of the cross-motion on July 31. It will be up to the motions judge to determine whether the request for relief is appropriate to address on July 31, whether to schedule a further date for the relief [Mr. Belyavsky] seeks or to make whatever

[5] *Solicitors Act*, R.S.O. 1990, c. S.15, s. 28.1(11).

> other disposition he or she deems appropriate. The motions judge will be far better placed to make that decision with a full picture of the matter than I am able to on a triage form.

[30] In my view, there is no need for Mr. Belyavsky's cross-motion or to schedule a further date to consider his request for relief. This assessment has already gone on for too long and consumed too many resources. It would neither be proportionate nor reasonable to schedule any further proceedings in this matter. The amount at issue, even on Monkhouse Law's best case, is a little over $25,000. I can consider the issues raised by Mr. Belyavsky in determining whether the account delivered by Monkhouse Law is lawful and reasonable in all the circumstances. It is imperative that the parties receive a final decision in this fee dispute.

The legal fees are subject to an assessment by a judge

[31] Monkhouse Law submits that only a judge, not an assessment officer, may resolve any dispute regarding the nature, validity, or effect of a contingency agreement. I agree.[6]

[32] In my view, the contingency fee agreement is valid. Monkhouse Law has litigated the validity of its contingency fee agreement (in similar form) and the court has upheld the agreement.[7] I do not accept Mr. Belyavsky's submissions that the agreement at issue does not comply with the provisions of the *Solicitors Act*. In any event, I do not think that anything turns on this distinction. If Mr. Belyavsky is correct, the legal fees owing would be assessed on a *quantum meruit* basis.[8] Monkhouse Law also seeks to have its fees charged on an hourly rate assessed on a *quantum meruit* basis.

[33] Moreover, it does not matter whether Mr. Belyavsky terminated the retainer or Monkhouse Law terminated the retainer. Pursuant to the agreement, in either situation, Monkhouse Law was entitled to issue an account based on its hourly rates, which is then to be assessed on a *quantum meruit* basis. However, as I explained above, I find that Mr. Belyavsky terminated the retainer with his email sent on September 8, 2021.

The assessment process

[34] I will briefly outline the process to be followed on an assessment.

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[6] *Cookish v. Paul Lee Associates Professional Corporation*, 2013 ONCA 278, 305 O.A.C. 359, at para. 39.
[7] *Cao v. Monkhouse Law Professional Corporation*, 2020 ONSC 1088, upheld in *Cao v. Monkhouse Law Professional Corporation*, 2021 ONSC 7894.
[8] *Hodge v. Neinstein*, 2017 ONCA 494, 136 O.R. (3d) 81, at paras. 133-139; *Wang v. Motor Vehicle Accident Claims Fund*, 2022 ONSC 3212, at para 14; and *Novosel v. Campisi et al*., 2022 ONSC 3300, at para. 48, aff'd *Novosel v. Campisi*, 2023 ONCA 439, 33 C.C.L.I. (6th) 169.

A. The court exercises a supervisory jurisdiction over legal fees

[35] The court always retains a supervisory jurisdiction over legal fees. The Court of Appeal for Ontario put it this way:

> The rendering of legal services and the determination of appropriate compensation for those services is not solely a private matter to be left entirely to the parties. There is a public interest component relating to the performance of legal services and the compensation paid for them. That public interest component requires that the court maintain a supervisory role over disputes relating to the payment of lawyers' fees. I adopt the comments of Adams J. in *Borden & Elliot v. Barclays Bank of Canada* (1993), 15 O.R. (3d) 352 (Ont. Gen. Div.) at 357-58, where he said:
>
> > ... The *Solicitors Act* begins with s. 1 reflecting the legal profession's monopoly status. This beneficial status or privilege of the profession is coupled with corresponding obligations set out in the Act and which make clear that the rendering of legal services is not simply a matter of contract. This is not to say a contract to pay a specific amount for legal fees cannot prevail. It may. But even that kind of agreement can be the subject of review for fairness: see s. 18 of the *Solicitors Act*.[9]

[36] Clients are entitled to have an independent review of a lawyer's account pursuant to the *Solicitors Act*. The bill is to be assessed on a *quantum meruit* basis, which considers the reasonable value of the lawyer's account. For that reason, it is an error in principle for an assessment to focus on the mechanical application of an hourly rate to a given number of hours rather than considering all relevant factors.[10] The quantity of time spent by the lawyer does not solely determine the fairness or reasonableness of the account sent to the client.[11]

B. The onus is on the lawyer to prove that the account is fair and reasonable

[37] In an assessment, the lawyer bears the onus of proving on a balance of probabilities that the account is fair and reasonable in all the circumstances.[12] The lawyers defending the reasonableness of their account decide what evidence they will present to meet their burden of proof.

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[9] *Plazavest Financial Corp. v. National Bank of Canada*, (2000), 47 O.R. (3d) 641 (C.A.), at para. 14.
[10] *Newell v. Sax*, 2019 ONCA 455, 43 C.P.C. (8th) 217, at para. 41.
[11] *Solicitors, Re* (1945), [1946] 2 D.L.R. 382 (Ont. H.C.), at p. 385; *Newell*, at para. 43.
[12] Mark M. Orkin & Robert G. Schipper, *Orkin on the Law of Costs*, 2nd ed. (2024) Release No. 5 [*Orkin*] at §3:75.

[38] The leading textbook, *Orkin on the Law of Costs*, notes that while it is not necessary to call all the timekeepers who worked on a file as witnesses, evidence given by other members of the firm is to be treated as hearsay and may be given less weight:

> It is not necessary to call all timekeepers who worked on the file. However, evidence given by other witnesses as to the work done by members of the firm not called to testify is to be treated as hearsay and is to be given less weight. Such oral testimony can be augmented by business records such as time dockets, notes, memoranda, and correspondence where a notice under s. 35 of the *Evidence Act* has been served.
>
> …
>
> When a solicitor does not testify at an assessment hearing, the solicitor fails to meet the burden of proof and risks having the accounts assessed at zero. The same principle is applicable with respect to timekeepers who are not called to give evidence.[13]

[39] Monkhouse Law decided not to file any evidence from any of the timekeepers that worked on Mr. Belyavsky's file. According to the evidence filed by the firm, Andrew Monkhouse, Danielle Rawlinson, Marjan Ehsas, Katherine Manwaring, Micah Rodriguez, Alexandra Monkhouse, Rachel Flommerfelt, and Samantha Lucifora "contributed to the work outlined in the invoice." Monkhouse Law, however, decided not to file an affidavit from any of these eight persons and, therefore, took the risk of having their accounts assessed at zero.

[40] Instead, Monkhouse Law filed two affidavits from Marissa Hum (an articling student), dated May 23, 2023, and June 7, 2023, and one affidavit from Dharshani Arumugam (an associate lawyer who did not docket on Mr. Belyavsky's file), dated August 11, 2023. None of these affidavits explain why Monkhouse Law could not file an affidavit from any of the professionals who were involved with this file.[14] Indeed, the affidavits explain that "Andrew Monkhouse, Managing Partner, was financially responsible for the file and was co-counsel on the file at all material times." Monkhouse Law chose to have Mr. Monkhouse argue the application before me instead of filing an affidavit. In doing so, the firm did not provide the best available evidence. This decision will make it harder for the firm to prove that its account was reasonable in all the circumstances.

[41] Although they are the primary affidavits filed by Monkhouse Law, Ms. Hum's affidavits are of limited assistance to me in assessing the account. First, Ms. Hum states in her affidavits that she was an articling student when she swore her affidavits in May and June

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[13] *Orkin*, at §3:75 and §6:57.

[14] Even if Ms. Rawlinson no longer practices at Monkhouse Law, that does not mean that she was unable to file an affidavit.

2023. That means that she was almost certainly not at the firm between April and September 2021, when Monkhouse Law provided the legal services to Mr. Belyavsky. That, in turn, means Ms. Hum has no relevant first-hand or personal knowledge regarding the facts at issue on this assessment.

[42] Second, contrary to rule 39.01(4), Ms. Hum does not identify the source of her information and belief or who informed her of any of the facts she sets out in her affidavit.[15] This causes me to place less weight on her evidence and, as I will set out below, I prefer the evidence of Mr. Belyavsky to the evidence of Ms. Hum where there is a conflict in the evidence.

[43] Third, the affidavit contains opinion evidence that is not properly admissible in a fact affidavit. For example, Ms. Hum offers the opinion that the Monkhouse Law paralegals "are highly effective in working on [the firm's] files and assisting clients." Similarly, a lay witness cannot provide the opinion that:

> Monkhouse Law demonstrated more than a reasonable amount of skill and competence in handling [Mr. Belyavsky's] matter. The firm took the necessary approach to keep costs down and attempted to bring the dispute to a conclusion in a timely fashion.

[44] By choosing to rely on the evidence of an articling student, Monkhouse Law has not provided clear and cogent evidence of the qualifications and experience of the lawyers who provided the legal services but were not called to testify. It is difficult for me to be satisfied on this record that the work was performed with reasonable skill and competence, that the hourly rates were reasonable, that the work could not have been performed by a less expensive timekeeper, or that the fees billed for their work accurately reflects the *quantum meruit* value of the work.[16] As the Court of Appeal recently stated regarding hourly rates by lawyers who intended to be compensated through a contingency fee:

> Lawyers' compensation in Ontario is, in large measure (though not entirely), a reflection of fees representing billable hours multiplied by billable rates. Quite apart from the assumptions that docketed billable hours accurately reflect the time spent and that lawyers' time is spent efficiently, the fee assessment process assumes that the billable rates are appropriate measures of acceptable charges. For instance, is an appropriate hourly rate $1,500, $1,000, $500, or less and for what seniority and expertise? In this regard, there is limited information to assess whether the rates charged are fair and reasonable. Moreover, as *Smith Estate* discussed, the court is not well-equipped to investigate dockets and rates: at para. 36. (See also:

[15] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 39.01(4).
[16] *Orkin*, at §3:75.

McCarthy v. Canadian Red Cross Society (2001), 8 C.P.C. (5th) 349 (Ont. S.C.), at para. 21.).[17]

[45] To be clear, I am not blaming Ms. Hum for the deficiencies in her evidence. Monkhouse Law should never have put her in this situation.[18] It was inappropriate for a law firm to ask an articling student to provide affidavit evidence about contested points in a fee dispute (including opinion evidence regarding the quality of the firm's representation), much less to do so in a case that was completed long before she arrived at the firm. Monkhouse Law should have tendered an affidavit from one, or both, of Ms. Rawlinson and Mr. Monkhouse. I will weigh the frailties of the evidence provided by the firm as I assess the account.[19]

Assessing the account rendered

[46] As explained above, an assessment is not simply a mechanical calculation. I am to assess the reasonable value of the services that Monkhouse Law provided to Mr. Belyavsky. I am required to take a "nuanced, contextual approach having regard to all the relevant circumstances."[20] The relevant circumstances are usually examined in reference to the criteria from *Cohen v. Kealey & Blaney*:

1. the time expended by the lawyer;

2. the legal complexity of the matter dealt with;

3. the degree of responsibility assumed by the lawyer;

4. the monetary value of the matters in issue;

5. the importance of the matter to the client;

6. the degree of skill and competence demonstrated by the lawyer;

7. the results achieved;

8. the ability of the client to pay; and

[17] *Fresco v. Canadian Imperial Bank of Commerce*, 2024 ONCA 628, at para. 45.
[18] I agree with Agarwal J., who recently observed, "I'm also skeptical that a lawyer's employees, especially articling students, have enough agency to turn down a request to become a witness to a legal proceeding." *Kamrani-Ghadjar v. Anaergia Inc.*, 2024 ONSC 4866 at para. 16.
[19] *Novosel v. Campisi et al.*, 2022 ONSC 4022, at paras. 18- 20, aff'd 2023 ONCA 439.
[20] *Newell*, at para. 39; *Tri Level Claims Consultants Ltd. v. Koliniotis* (2005), 257 D.L.R. (4th) 297 (Ont. C.A.), at para. 34; *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc*., 2011 ONCA 418, 334 D.L.R. (4th) 445, at paras. 46-50.

9. the reasonable expectation of the client as to the amount of fees.[21]

[47] As noted by Roberts J.A., these criteria involve factors beyond a mathematical calculation of a lawyer's time records and turn on the evidence underlying them.[22] I identified above some of my concerns about the evidence filed by Monkhouse Law on this assessment.

[48] I will consider each of the *Cohen* factors below.

A. Time expended by the lawyer

[49] The invoice delivered on October 7, 2021, does not list the total number of hours docketed on Mr. Belyavsky's file or the total number of hours docketed by each billing professional. The late-delivered invoice shows the amount of time docketed by each billing professional on each day but does not provide a total of the number of hours each individual docketed.

[50] Ms. Hum also included a draft "costs outline" in support of the assessment of the Monkhouse Law account. The firm claims for 63.7 hours of work totaling $21,670, plus HST. The firm breaks down the amounts claimed as follows:

Fee Item	Person	Hours	Actual Rate	Amount claimed
Correspondence: To correspond with client; to correspond with opposing counsel;	A. Monkhouse (2013 call)	13.0	$550	$7,150.00
	D. Rawlinson (2020 call)	26.5	$350	$9,275.00
	M. Ehsas (Paralegal)	9.5	$200	$1900.00
	K. Manwaring (Paralegal)	0.3	$200	$60.00
	M. Rodriguez (Paralegal)	0.3	$200	$60.00
	Reception	0.2	$200	$40.00
	M. Carter (Paralegal)	1.0	$200	$200.00
Total for correspondence		50.8		$18,685.00

[21] *Victor Ages Vallance LLP v. OZ Optics Ltd*., 2022 ONCA 169, at para 2, citing *Cohen v. Kealey & Blaney* (1985), 10 O.A.C. 344 (C.A.).
[22] *Newell*, at para. 40.

Fee Item	Person	Hours	Actual Rate	Amount claimed
PLEADINGS: To draft pleadings; to draft representation letter; to draft statement of claim; to draft amended statement of claim; to issue pleadings;	D. Rawlinson (2020 call)	2.7	$350	$945.00
	M. Ehsas (Paralegal)	10.2	$200	$2,040.00
Total for pleadings		12.9		$2,985.00
Grand Totals		63.7		$21,670.00

[51] I have several concerns about the amount of time spent by Monkhouse Law on this file.

All time spent after the termination of the retainer must be deducted

[52] As noted above, on September 8, 2001, Mr. Belyavsky terminated the retainer and Mr. Monkhouse accepted the termination of the retainer. Nevertheless, Monkhouse Law asks the court to approve $3,020 plus HST in legal fees for time docketed after September 8, 2021. Indeed, Monkhouse Law seeks to collect for time docketed after Mr. Belyavsky delivered a notice of intention to act in person. I can see no reason in law or policy to approve of this part of the account. I am troubled that the firm seeks to recover such amounts.

[53] First, billing for time docketed after the termination of the retainer is inconsistent with the express terms of the retainer agreement, which states:

> You are free to end our services before your case is completed by writing us a letter or note. If you do so, you agree to pay our expenses and our fees calculated at our hourly fee as discussed above, relating to the actual time spent up to the date of ending those services plus GST and HST. [emphasis added]

[54] Mr. Belyavsky did not agree to pay for time docketed after the retainer was terminated. No reasonable client would have expected to pay for such charges.

[55] Second, case law indicates that a lawyer should not bill for time spent to terminate the solicitor-client relationship or time spent after the termination of the retainer, except in rare circumstances, which are absent from this case.[23]

[56] Third, there was no evidence to suggest that Mr. Belyavsky would not deliver a notice of intention to act in person in a timely way or that Monkhouse Law needed to spend time to prepare a motion to get off the record. There is no evidence that Monkhouse Law told Mr. Belyavsky that he had to deliver a notice of intention to act in person, or that he was at risk of incurring legal fees if he did not do so promptly. Indeed, the day after Monkhouse Law delivered a notice of motion to get off the record, Mr. Belyavsky delivered a notice of intention to act in person. In any event, time spent preparing a motion to get off the record is not properly charged to the former client as part of the final account.

[57] Fourth, there is no apparent value to Mr. Belyavsky from any of the time docketed by members of Monkhouse Law after the retainer was terminated on September 8, 2021. For example, on October 5, 2021, Ms. Rawlinson docketed 1.5 hours with only the following explanation:

> To internal correspondence with [a law clerk]; To review correspondence from [a law clerk] to the court, to correspondence with [Mr. Monkhouse]; To review correspondence from the client.

[58] It is unclear what occupied Ms. Rawlinson for these 90 minutes. In any event, I cannot see any justification for charging fees to Mr. Belyavsky for this expenditure of time almost a month after the retainer was terminated.

[59] For these reasons, I disallow all amounts claimed for time docketed on or after September 9, 2021.

<u>All time docketed by the receptionist must be deducted</u>

[60] Monkhouse Law has asked the court to approve fees charged for time docketed by its receptionist. I will not do so.

[61] The six-minute docket entry on July 29, 2021, which was charged at 0.2 hours, reads "To receive KAP; to scan the Invoice – Corporation Profile Report – Affidavit of Service; to send the scan to [Ms. Rawlinson and Ms. Ehsas]."

[62] Monkhouse Law provided no evidence to explain why this work supports a $200 per hour billing rate, or why these tasks should not properly be considered part of office overhead.

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[23] *Goldman, Sloan, Nash & Haber v. Jakovljevic* 1993 CarswellOnt 4690, at para. 9; *Simon Kent Law Corp. v. Davidson*, 2014 BCPC 238, at para. 31 and 41(e); *Mary Fus Law Corp. v. Hi Line Consultant Ltd.*, 2010 BCSC 1521, at para. 30; and *Olson v. Gould*, 2003 MBQB 272, at paras. 18-19.

While the amount charged ($40) is not significant, I am troubled that the firm considered it appropriate to ask the court to approve this charge.

[63] I disallow the claim for time docketed by the receptionist in its entirety.

Too much time spent on file and a disproportionate time spent on other than pleadings

[64] The firm billed Mr. Belyavsky for 66.5 hours of time.[24] The firm submits that its work product included drafting:

a. a representation letter;

b. a demand letter;

c. a statement of claim; and

d. an amended statement of claim.

[65] I would disallow all charges for drafting a retainer letter. The retainer letter in this case is best described as standard form and falls within office overhead, not legal work to be charged to the client.

[66] As I will explain below, the amended statement of claim was only necessary because Monkhouse Law made significant and elementary errors when it drafted the initial statement of claim. I disallow all charges for the amended statement of claim. Mr. Belyavsky should not be financially responsible for his lawyers correcting their own mistakes.

[67] Stepping back, it is unreasonable to docket 66.5 hours on a straightforward employment law dispute for a young, short-term employee with a fairly low salary. As I will explain below, Monkhouse Law did not prove that it was reasonable to spend this amount of time on the file.

[68] The problem is more acute because as set out above in the bill of costs, the firm spent $18,685 on time grouped under correspondence and $2,985 on all work connected to the pleadings in this action. This balance is, on its face, difficult to understand. Moreover, it is difficult to determine what, if any, value Mr. Belyavsky received from the activities described as correspondence. One of the significant challenges in determining the value of the time spent on correspondence is that Monkhouse Law appears to have an idiosyncratic understanding of that word.

[24] Ms. Hum's affidavit and the Monkhouse Law factums use this number. The bill of costs attached to Ms. Hum's affidavit includes 63.7 hours of time. The amount the firm seeks to be recovered is the same in all places. I find that nothing turns on the minor discrepancy in the specific number of hours docketed.

[69] In her affidavit sworn on June 7, 2023, Ms. Hum attached two exhibits:

a. Appendix A, which she described as "a detailed invoice with the breakdown of time spent"; and

b. Appendix B, which she described as a costs outline.

[70] The detailed invoice at Appendix A appears to be a printout of electronic docket entries from the firm's accounting system. Monkhouse Law relies on these docket entries in support of its assessment. Time dockets alone, of course, do not prove the fairness or reasonableness of a bill.

[71] Ms. Arumugam's affidavit explains that the word "correspondence," as used in the invoice, is a "generalized term" that includes a wide variety of activity, including internal meetings and discussions, drafting, and strategizing about the file. Her affidavit reads as follows:

> 4. On June 7, 2023, a new, detailed invoice ("the invoice") was provided to Yefim through CaseLines, since Yefim noted that the initial invoice provided on October 7, 2021, was non-descriptive. I am informed that the invoice has been reviewed and it appears to be accurate.
>
> 5. The invoice was attached as an Appendix A to the supplementary affidavit ("affidavit") of Marissa Hum, dated June 7, 2023.
>
> …
>
> 9. The term "correspondence" is referred to often through the invoice. At our firm, this line item is a generalized term to refer to a variety of actions performed on files, including but not limited to: communications between Monkhouse Law and [Mr. Belyavsky]; discussing legal strategy and theories; drafting and strategizing next steps; and having internal meetings. [Mr. Belyavsky] and Monkhouse Law have been involved in numerous correspondences related to the file.

[72] Monkhouse Law uses "correspondence" to cover such a broad range of activity that the phrase is rendered not only meaningless, but misleading. For example, no client could reasonably be expected to interpret "correspondence" to mean "internal meeting." Such a practice seems "pointless and impractical."[25] Similarly, how am I to assess the reasonableness of a time entry that includes the word correspondence? Generic and

[25] *R. v. Nnane*, 2024 ONCA 609, at para. 13.

unhelpful descriptions in docket entries are not proper and have little to no value in the assessment process:

> Further, descriptions in docket entries that are so generic and lacking in detail render them of no value and make it difficult if not impossible for the client to know how many hours were charged for what and by whom. Dockets of this nature that are lacking in particularity are literally empty. Such dockets are not proper. In the absence of supporting documentation or other evidence to justify the reasonableness of the time docketed and to establish such work was necessary, the bill must be reduced in the face of empty dockets and lack of particularity.[26]

[73] All time-based accounts must have a description of the activity performed, otherwise there is no basis to assess the reasonableness of the account. The more description, the better. This applies to legal invoices as much as any other service:

> The same need for description applies to legal bills. Otherwise, how can an assessing court determine if there was repetition of activity within a firm of many lawyers (the client should not be charged for the getting up to speed of a successor lawyer in the firm finding himself or herself with a file as one of the partners or associates had). How can the assessor determine if whatever counsel did on a particular day for a particular number of hours or fraction thereof was something efficient relative to the progress of the file? We would not be happy if we received a bill from a dentist or an automobile technician which spoke of "conversation with colleague". One would invariably wonder about the topic of the conversation "was it about my case, what was achieved". In summary, there has to be detail on a legal invoice with respect to what was done and for what reason.[27]

[74] Measured against this standard, most of the dockets entered by timekeepers at Monkhouse Law are vague and unhelpful. For example, and mindful of Monkhouse Law's idiosyncratic use of the word correspondence, consider Ms. Rawlinson's docket entry to justify 90 minutes of time docketed on October 5, 2021:

> To internal correspondence with [a law clerk]; To review correspondence from [a law clerk] to the court, to correspondence with [Mr. Monkhouse]; To review correspondence from the client.

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[26] *Orkin*, at §3:75
[27] *Blake v. Dominion of Canada General Insurance Co.*, 2013 ONSC 7445, 26 C.C.L.I. (5th) 259, at para. 13.

[75] Docket entries like these make it difficult for me to determine whether whatever counsel did on a particular day for a particular number of minutes or hours efficiently advanced the interests of Mr. Belyavsky.

[76] Stepping back, Monkhouse Law drafted a demand letter and a statement of claim for Mr. Belyavsky.[28] The firm seeks to recover $25,163.63 (including disbursements and HST), which is unreasonable for the work performed. There is no satisfactory evidence before me to explain why the law firm spent roughly $3,000 in time on the pleadings and $18,000 on correspondence and activities other than drafting the statement of claim. The time spent on this matter seems unreasonable and undermines the reasonableness of the account rendered to Mr. Belyavsky.

B. The legal complexity of the matter

[77] Monkhouse Law submits that this matter was more complex than a simple without cause termination case. Ms. Hum's affidavit puts it this way:

> The action involved a wrongful dismissal matter coupled with issues relating to misclassification of his employment status, common employers, and Ministry of Labour complaint. In addition, it was initially thought that [Mr. Belyavsky's] legal matter related to his simultaneous termination from two employers.

[78] I have several concerns about this submission.

[79] First, it appears that Mr. Belyavsky personally handled his complaint to the Ministry of Labour. Mr. Belyavsky filed his complaint regarding his termination of employment with the Ministry of Labour on January 4, 2021. On March 18, 2021, the Ministry of Labour released its decision. Mr. Belyavsky then initiated an appeal of that decision to the Ontario Labour Relations Board. Mr. Belyavsky did not sign a retainer agreement with Monkhouse Law until April 5, 2021.

[80] In his affidavit, Mr. Belyavsky states that the only role that Monkhouse Law played before April 5, 2021, was a telephone consultation he had with an articling student (not Ms. Hum) at the firm on January 19, 2021:

> I informed her that I had an ongoing Ministry of Labour complaint, and she told me to proceed with the Ministry of Labour complaint and that if I do not like the outcome of it, I can sue afterwards. She then emailed me "Again, once you've had some time to consider, and see how your Ministry of Labour complaint goes, you can let us know whether you would like to pursue a civil claim and we can

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[28] As explained above Monkhouse Law submits that they also prepared a "representation letter" and an "amended statement of claim." I disallow all charges for drafting those documents.

> book you in for that follow-up consultation with Daniel that we spoke about."

[81] It is difficult to reconcile this advice with the following provisions of s. 97 of the *Employment Standards Act*:

> 97 (1) An employee who files a complaint under this Act with respect to an alleged failure to pay wages or comply with Part XIII (Benefit Plans) may not commence a civil proceeding with respect to the same matter.
>
> (2) An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.
>
> …
>
> (4) Despite subsections (1) and (2), an employee who has filed a complaint may commence a civil proceeding with respect to a matter described in those subsections if he or she withdraws the complaint within two weeks after it is filed.

[82] In any event, to the extent that Mr. Belyavsky's Ministry of Labour complaint made the proceeding more complex, I would have expected to see written advice to him about the risks associated with bringing a civil action in respect of the termination of his employment after he had already received a decision from the Ministry of Labour, which determined his complaint under the *Act*. No such advice was included in the record before me.

[83] In addition, the statement of claim prepared by Monkhouse Law sought damages for wrongful dismissal, unpaid commissions, an amount in respect of a "minimum wage gap," unpaid vacation, and statutory holiday pay. The statement of claim did not plead any facts relevant to Mr. Belyavsky's complaint to the Ministry of Labour or any facts that might underpin an argument to permit the civil action to go forward despite the earlier complaint, which had rejected all these claims. Monkhouse Law appears to blame Mr. Belyavsky for the deficiencies in its statement of claim:

> In fact it sometimes is possible to start a civil action after the start of a MOL complaint, where 'special circumstances exist". Thus, even if Yefim is correct that Monkhouse Law made some 'mistake' his remedy would have been to have asked for leave under special circumstances to continue the civil claim. He chose not to do that, but this is not the fault of Monkhouse Law.

[84] In my view, Monkhouse Law had the responsibility to advise Mr. Belyavsky of the risks he faced and to plead any material facts that supported a claim of "special circumstances." The firm's attempt to blame its 22-year old client for this deficiency is troubling.

[85] I will address the issues related to "common employers" and the alleged "simultaneous termination from two employers" below.

[86] On balance, this proceeding appears to be a relatively straightforward termination of employment case for a junior, short-term employee. Monkhouse Law was not involved past the pleadings stage. In my view, this matter was not sufficiently complex to justify a larger account than one would typically expect for the preparation of demand letters and a statement of claim in a simple employment case.

C. The degree of responsibility assumed by the lawyer

[87] I accept that Monkhouse Law assumed complete responsibility for this file during its retainer. This factor supports a generous assessment of the firm's account.

D. The monetary value of the matters at issue

[88] The monetary value of this case was never high. Monkhouse Law correctly issued the proceeding as a simplified action. The main claim for damages totalled $44,760 and was set out as follows in the statement of claim:

a. $28,680 in wrongful dismissal damages, representing the remainder of the fixed term contract;

b. $12,000 in commissions earned or pro-rated to be earned during the contract period;

c. $3,840 representing the "minimum wage gap between October to December 2020;" and

d. $240 in unpaid vacation and statutory holiday pay.

[89] While the pleading also sought $50,000 in punitive, aggravated, *Bhasin*, moral, or *Human Rights Code* damages, with respect, there are no material facts pleaded that would be likely to establish any of those claims. I would not include these claims for damages in a reasonable assessment of the monetary value of this claim.

[90] The amount at issue in this claim was always modest. Experienced employment law counsel would understand the importance of a streamlined and efficient deployment of time and energy to advance this claim. It is difficult to see how this claim could ever have justified $25,000 in docketed time before either defendant delivered a statement of defence.

[91] In my view, the monetary value of the matters at issue suggests that the account delivered by Monkhouse Law should be reduced to reflect a more proportionate relationship between time spent and the expected recovery.

E. The importance of the matter to the client

[92] I accept that this matter was important to Mr. Belyavsky. It also appears that he had very fixed views about the unfairness of the termination of his employment and a strong desire to obtain what he perceived to be justice.

[93] While it is the role and responsibility of lawyers to provide clear advice about the strengths and weaknesses of the claim, there is no doubt that this matter was extremely important to Mr. Belyavsky. This factor supports a generous assessment of the firm's account.

F. The degree of skill and competence demonstrated by the lawyer

[94] Monkhouse Law submits that they demonstrated more than a reasonable amount of skill and competence in the handling of this matter. In their first factum, Monkhouse Law's submission on this factor was as follows:

> Monkhouse Law demonstrated more than a reasonable amount of skill and competence in handling [Mr. Belyavsky's]. The firm took the necessary approach to keep costs down and attempted to bring the dispute to a conclusion in a timely fashion.

[95] In a supplementary factum, Monkhouse Law elaborated as follows:

> Monkhouse Law was proactive in its legal approach and notified [Mr. Belyavsky] of the recent change in precedent to ensure the success of his claim. [Monkhouse Law] demonstrated a high level of skill and competence by informing the client of this change, providing a new legal strategy, and walking through the consequences of either following or disagreeing with the legal advice given.

[96] I have concerns about the firm's handling of this file.

[97] First, Monkhouse Law did not demonstrate that it provided detailed written advice to Mr. Belyavsky about the risks inherent in proceeding with his action after the Ministry of Labour had already rendered a decision regarding his complaint. As noted above, the employment standards officer had determined that Mr. Walsh was the employer, and that Mr. Belyavsky was not owed any outstanding pay for unpaid wages, for unpaid commissions, minimum wages, vacation pay, termination pay, or severance pay.

[98] Counsel for Mr. Walsh put Monkhouse Law on notice on April 27, 2021, that it took the position that the Ministry of Labour complaint resolved finally all matters in dispute, and

that it would seek its costs on a full indemnity basis if Mr. Belyavsky commenced an action. At a minimum, Monkhouse Law should have advised Mr. Belyavsky in writing about the risk of proceeding with a civil action following the decision of the employment standards officer, including his exposure to an adverse costs award. There was no evidence before me that the firm provided such advice before it issued the statement of claim on June 3, 2021.

[99] Second, the statement of claim named only a single defendant, "Sun Life Financial Inc. and Walsh Financial Solutions." Monkhouse Law described the defendant as follows in the statement of claim:

> The Defendant, Sun Life Financial Inc. and Walsh Financial Solutions ("Sun Life and Walsh") is a Canadian Financial Services company. It is primarily known as a life insurance company. Walsh Financial Solutions is a community-based financial planning firm committed to serving the financial needs of individuals and families.

[100] Unsurprisingly, after being served with the statement of claim, Sun Life immediately took the position that it was a separate entity from Walsh Financial Solutions Inc. and that there was no such entity as the one named as a defendant in the claim:

> The claim incorrectly identifies "Sun Life Financial, Inc. and Walsh Financial Solutions" as the sole defendant to the action. There is no such entity. Sun Life and Walsh Financial Solutions Ltd. are separate entities.

[101] Monkhouse Law committed a significant error when it named "Sun Life Financial Inc. and Walsh Financial Solutions" as a single entity. Even if Monkhouse Law intended to assert that both Sun Life and Walsh shared responsibility as common employers, that does not change their status as separate entities. This error provided Sun Life with an easy response to the statement of claim and, at a minimum, would require an amendment to the statement of claim to name the correct parties as defendants. Mr. Belyavsky should not be responsible for paying any costs associated with drafting amendments to the statement of claim to correct this elementary error.

[102] Third, Monkhouse Law acted without instructions when it agreed with Sun Life to discontinue the action on a with-prejudice basis. On August 27, 2021, counsel for Sun Life and Ms. Rawlinson signed a consent in the following terms:

> The Parties, by their solicitors, hereby consent to a whole discontinuance of the above action against Sun Life Financial Inc. so as to constitute a defence to a subsequent action as contemplated by subrule 23.04(1) of the *Rule* [*sic*] *of Civil Procedure* on a without costs basis.

[103] Mr. Belyavsky stated in his affidavit that he never instructed or permitted Monkhouse Law to discontinue the action against Sun Life:

> I later discovered that Monkhouse Law had already created and served a Notice of Discontinuance against Sun Life Financial, Inc. The Notice of Discontinuance is attached as Exhibit "H". I also later discovered that Monkhouse Law and Sun Life Financial, Inc. both signed a consent that to discontinue the action against Sun Life Financial, Inc. This consent is attached as Exhibit "I".
>
> I have never instructed or permitted Monkhouse Law to remove Sun Life Financial, Inc. as defendants. This was done without my consent.

[104] Monkhouse Law provided no first-hand evidence to dispute Mr. Belyavsky's evidence. In Ms. Hum's affidavit, she does not say that Mr. Belyavsky instructed Monkhouse Law to discontinue the action against Sun Life:

> On August 26, 2021, [Mr. Belyavsky] had a phone conversation with Danielle in which she provided her legal opinion regarding the removal of Sun Life as a named defendant.

[105] In its reply factum, Monkhouse Law submits that Mr. Belyavsky "put forward no evidence that in fact Monkhouse Law took any action to discontinue his motion [*sic*] against any Defendant. In fact Monkhouse Law took no such action." I do not accept this submission. Ms. Rawlinson signed a consent on behalf of Mr. Belyavsky to discontinue the action. She had ostensible authority to do so.

[106] Ms. Arumugam attached to her affidavit a large volume of email messages. These are, of course, all hearsay. One of the attachments appears to be an email from Ms. Rawlinson to Mr. Belyavsky on October 5, 2021, long after Ms. Rawlinson sent her opinion letter. This message reads as follows:

> On August 26, 2021, I spoke to you on the phone about the matter. I told you that we believed that it would be unlikely to be successful as against Sun Life because you were directly employed by Mr. Walsh.
>
> Given that you instructed me on the phone to discuss discontinuing the claim against Sun Life, I then did so by email on August 26 (attached) to opposing counsel, saying:
>
> > "Given your representations and the representations of Mr. Gregory Mitchell Walsh, I am under the understanding that you are representing that:

> 1. Mr. Yefim Belyavsky never worked for Sun Life;
>
> 2. Sun Life is not the employer of Mr. Yefim Belyavsky.
>
> We will be willing to discontinue the claim against Sun Life without costs. Please advise if you consent. I have attached the notice of discontinuance as well as consent to this email for you to sign or authorize us to sign the consent on your behalf."

You then afterwards withdrew your instructions to us relating to this, and terminated our relationship as your counsel. We did not file the Notice of Discontinuance. When Sun Life followed up with me on September 27, 2021 about it, I wrote to them on September 29, 2021 saying:

> "The Notice of Discontinuance was not filed with the court as we are no longer representing Mr. Belyavsky. As an aside, it is our understanding that Mr. Belyavsky will not be consenting to the discontinuance of this action against Sun Life Financial. I suggest you discuss this further with Mr. Belyavsky." [emphasis added]

[107] The next email in the chain was Mr. Belyavsky's response: "I never instructed you to discontinue over the phone; this was your sole decision."

[108] If Monkhouse Law wished to dispute Mr. Belyavsky's clear evidence that he never instructed or permitted the firm to discontinue the action against Sun Life, the firm should have filed an affidavit from Ms. Rawlinson. The firm chose not to do so. I give no weight to Ms. Rawlinson's unsworn hearsay evidence, prepared long after the event in question. In these circumstances, I accept Mr. Belyavsky's uncontested evidence that Monkhouse Law acted without instructions when it discontinued the action against Sun Life.

[109] Fourth, Ms. Rawlinson's opinion letter dated September 8, 2021, the one that led to the termination of the retainer, was flawed in two important ways. It is important to recall what led to the creation of that letter. On August 31, 2021, Mr. Belyavsky wrote to Ms. Rawlinson to state that he believed that she made a mistake by removing Sun Life as a defendant and asked her to include Sun Life as a defendant. She responded saying that she "thought we were in agreement in this regard" and that she would prepare a formal recommendation letter outlining the appliable law. She delivered that letter on September 8, 2021.

[110] Ms. Rawlinson advised Mr. Belyavsky that the law of Ontario changed on June 7, 2021, when the Court of Appeal for Ontario released its decision in *O'Reilly v. ClearMRI*

Solutions Inc.[29] Ms. Rawlinson stated that if the firm was drafting the statement of claim after this decision was released, it would recommend not including Sun Life as a defendant because of the change in the law occasioned by *O'Reilly*. Ms. Rawlinson wrote as follows:

> The parties in your contract were yourself and Mr. Walsh. At no point in time do any of the documents indicate that Sun Life intended to be your employer or a common employer in your employment relationship with Mr. Walsh. As you recall, we issued your claim with the court on June 3, 2021. Our drafting of that claim was based on the law at the time. On June 7, 2021 the Ontario Court of Appeal came out with a new case that redefined what made someone a "common employer', Given that updated law it appears clear that your case no longer would count as a common employer based on the test in O'Reilly. The O'Reilly case can be found online at: O'Reilly v. ClearMRI Solutions Ltd., 2021 ONCA 385….
>
> In *O'Reilly v. ClearMRI Solutions Ltd*., 2021 ONCA 385, Justice Zarnett explains that in order for a company to be a common employer, they must have an intention to create an employee/employer relationship between the employee and the related company. There is a high burden to prove that Sun Life intended to be your employer, specifically when Mr. Walsh confirms that he alone was your employer, not Sun Life. Sun Life has also made representations that they never employed you and that you never worked for Sun Life.
>
> Generally, 'common employer' type of arguments are most vigorously pursued when there is evidence that one of the parties is unable to pay a judgment against them. Given that your claim against Greg Walsh is a personal one and you could access any personal assets he has this actually puts you in a good situation for collection (as good as anyone else).

[111] The *O'Reilly* decision concerned, in part, the common law doctrine of common employer liability. This doctrine recognizes that an employee may simultaneously have more than one employer. If an employer is a member of an interrelated corporate group, one or more other corporations in the group may also have liability for the employment obligations only if, and to the extent that, each can be said to have entered a contract of employment with the employee. In *O'Reilly*, Zarnett J.A. noted that the companies will only be held to be common employers if, on the evidence assessed objectively, there was an intention to

[29] *O'Reilly v. ClearMRI Solutions Inc*., 2021 ONCA 385, 460 D.L.R. (4th) 487.

create an employer/employee relationship between the employee and those related corporations:

> Thus, consistent with the doctrine of corporate separateness, a corporation is not held to be a common employer simply because it owned, controlled, or was affiliated with another corporation that had a direct employment relationship with the employee. Rather, a corporation related to the nominal employer will be found to be a common employer only where it is shown, on the evidence, that there was an intention to create an employer/employee relationship between the individual and the related corporation: *Gray v. Standard Trustco Ltd.* (1994), 1994 CanLII 7472 (ON SC), 8 C.C.E.L. (2d) 46 (Ont. Gen. Div.), at para. 3; *Downtown Eatery (1993) Ltd. v. Her Majesty the Queen in Right of Ontario* (2001), 2001 CanLII 8538 (ON CA), 54 O.R. (3d) 161 (C.A.), at paras. 31, 40, leave to appeal refused, [2002] 3 S.C.R. vi (note); *Rowland v. VDC Manufacturing Inc*., 2017 ONSC 3351, at paras. 12-13.…[30]

[112] Ms. Rawlinson submits that this statement of the law "redefined what made someone a common employer." It did not.

[113] As is apparent from the citations above, Zarnett J.A. relied on longstanding cases dealing with the common law of common employer liability in reaching this decision. As early as 1994, Ground J. held that to find two corporations to be common employers, one must find evidence of an intention to create an employment relationship:

> Having considered the submissions of counsel and the authorities referred to by them, it seems clear that, for purposes of a wrongful dismissal claim, an individual may be held to be an employee of more than one corporation in a related group of corporations. <u>One must find evidence of an intention to create an employer/employee relationship between the individual and the respective corporations within the group</u>.[31]

[114] The decision of Ground J. was cited with approval by the Court of Appeal for Ontario in 2001.[32] In 2017, Morgan J. made the same point about the necessity of finding an intention to create an employment relationship.[33] It is difficult to see how *O'Reilly* changed the law in the dramatic way suggested by Ms. Rawlinson.

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[30] *O'Reilly*, at para. 50.
[31] *Gray v. Standard Trustco Ltd*. (1994), 29 C.B.R. (3d) 22 (Ont. S.C.), at para. 3 [emphasis added].
[32] *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.), at para 31.
[33] *Rowland v. VDC Manufacturing Inc.*, 2017 ONSC 3351, at para 13.

[115] Finally, the opinion letter dated September 8, 2021, also makes no reference to the fact that Ms. Rawlinson had already agreed on August 27, 2021, to discontinue the action against Sun Life on a with-prejudice basis. Indeed, Ms. Rawlinson's letter strongly suggests that no such step has been taken:

> We have been asked to prepare a legal opinion in your matter regarding whether Sun Life Financial Inc. ("Sun Life") is your employer and should be a Defendant in your matter. …
>
> Given recent case-law regarding common employers we are concerned that Sun Life would be successful as against you if they brought a motion to strike which could expose you to costs. …
>
> Given what we see as clear direction from the Ontario Court of Appeal we would not have advised having Sun Life be a Defendant if your claim had been drafted today. We are concerned that Sun Life has said they will bring a motion to strike and it is very likely you would lose this motion and have to pay some if not all of their legal fees.
>
> Therefore, our recommendation is that you discontinue your claim against Sun Life and focus on your claim against Greg Walsh.
>
> You can choose to continue to pursue a claim against Sun Life, however, we would pursue this claim on your behalf on an hourly rate retainer agreement and have costs be potentially awarded against you.
>
> Moreover, you can hire another lawyer to pursue your claim and thus pay us our hourly rate for the work that we have done to date. [emphasis added]

[116] It is difficult to reconcile Ms. Rawlinson's concern over a potential future motion to strike, or her advice that Mr. Belyavsky could continue to pursue his claim against Sun Life, with the consent to discontinue that she had signed two weeks earlier. Monkhouse Law filed no evidence to explain this part of the letter. At a minimum, the fact of the signed consent should have been explicitly disclosed in the opinion letter and formed the basis of the advice to Mr. Belyavsky. If Ms. Rawlinson appreciated that she may have taken a step without Mr. Belyavsky's instructions, she should have advised him to obtain independent legal advice on how to proceed.[34]

[34] *Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw*, 1999 CanLII 5680 (B.C. S.C.), at para. 20.

[117] On balance, I am not satisfied that Monkhouse Law demonstrated the degree of skill and competence commensurate with the size of the account it delivered.

G. The results achieved

[118] The results achieved factor allows for an assessment of whether the fee is disproportionate to the amount recovered. Because Mr. Belyavsky terminated the retainer, Monkhouse Law did not contribute to the eventual settlement of the action for $15,000.

[119] Ms. Hum's affidavit states that "A significant amount of work went into obtaining a settlement for [Mr. Belyavsky] which she ultimately elected to ignore." [emphasis added]. I do not see anything in the record to suggest that the firm put "a significant amount of work into obtaining a settlement" for Mr. Belyavsky or that he rejected any settlements recommended to him.

[120] It is possible that if Monkhouse Law had remained involved, the lawyers would have been able to negotiate a superior settlement. I do not accept Monkhouse Law's submission that it was "highly probable that [Mr. Belyavsky] could have received a far more favourable result" if the firm had remained involved. Indeed, Mr. Belyavsky may have used particular diligence and relentlessness to achieve any positive settlement at all.

[121] In my view, the result achieved is a neutral factor, except in that it underscores the modest size of this claim and would inform the reasonable expectations of the client, discussed below.

H. The ability of the client to pay

[122] Mr. Belyavsky's unchallenged evidence paints a grim picture of his ability to pay. He has provided affidavit evidence that establishes:

a. He lives at home and is supported by his parents;

b. He has no savings;

c. He currently has debts of over $39,000 on a student line of credit and $42,000 in government student loans;

d. Since the termination of his employment in 2021, he has worked for only 2 to 3 months and has reported taxable income totaling about $13,800 combined for tax years 2022 and 2023; and

e. He used the $15,000 settlement of his wrongful dismissal action to pay down his debt.

[123] Even a bill that is not otherwise unreasonable may be reduced on assessment because of a client's modest means.[35] In my view, the circumstances of this case cry out for a significant reduction of the account to recognize Mr. Belyavsky's limited ability to pay.

I. The reasonable expectation of the client as to the amount of fees

[124] Monkhouse Law submits that Mr. Belyavsky had a reasonable expectation that he would have to pay for their time docketed at their hourly rates if the retainer was terminated before completion. I agree that Mr. Belyavsky was bound by, and should be found to have been aware of, that term in the contract.

[125] I am less certain that Mr. Belyavsky would have had a reasonable expectation that Monkhouse Law had incurred legal fees worth more than half of the reasonable value of his claim before a defendant filed a statement of defence.

[126] Monkhouse Law did not send Mr. Belyavsky any interim accounts showing the amount of time they had spent on the file or the amount of fees he had incurred over the five months of their retainer. The firm did not advise him on September 8, 2021, of the size of the bill he would receive if he terminated the retainer. The firm did nothing to advise Mr. Belyavsky of the size of the bill he faced or to give him an opportunity to alter his position with respect to his retainer of the firm.

[127] When Mr. Belyavsky terminated the retainer, he did not knowingly assume the risk that the costs he had incurred would be so disproportionate to the size of his claim or his likely recovery. There is no evidence that Monkhouse Law ever provided Mr. Belyavsky with an estimate of how much the proceeding might cost if he terminated the retainer and triggered billing on an hourly basis.

[128] In my view, a client who was fired from a short-term, low-paying job would not reasonably expect to receive a bill of $25,000 for drafting a flawed pleading in a straightforward employment law case. This bill exceeded the reasonable expectation of a client in Mr. Belyavsky's situation and must be reduced accordingly.

Conclusion

[129] Taking all the factors into account, I assess that Monkhouse Law provided $2,000 worth of value to Mr. Belyavsky.

[130] I found that some of the *Cohen* factors support the reasonableness of the account delivered by Monkhouse Law. The firm assumed complete responsibility for the file. The matter was extremely important to Mr. Belyavsky, who also appeared to hold strong views about the

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[35] *Re Kronby, Chercover and Hill*, 1982 CarswellOnt 3170 (Ont. Supreme Court); *Kealey v. Elliot*, 1981 CarswellOnt 2845 (Ont. Supreme Court); and *Agozzino Baker Gray v. Baldes*, 1991 CarswellOnt 4831 (Ont. C.J. Gen. Div.).

injustice of the treatment he received. The result achieved is a neutral factor and I accept that the statement of claim provided Mr. Belyavsky with some traction toward his eventual settlement for $15,000. On balance, however, the factors that support the reasonableness of the bill are significantly outweighed by the remaining *Cohen* factors.

[131] Monkhouse Law spent too much time on this file and the excess time was spent on "correspondence" and other activities other than the pleadings. Monkhouse Law delivered no affidavit evidence from any of the timekeepers who worked on this file, so there was no first-hand evidence to demonstrate the value of any of the work performed. The dockets submitted were vague and used the word correspondence in a way that did not demonstrate value to the client. Moreover, I am troubled that the firm sought to recover for time docketed after the termination of the retainer and for work performed by its receptionist. These choices undermined my confidence in the account rendered by the firm and left me with serious doubt about whether the time docketed by the firm provided any value to Mr. Belyavsky.

[132] This matter was not sufficiently complex to justify the account rendered to a junior short-term employee and the monetary value of this case never supported spending $25,000 in legal fees before the defendant(s) delivered a statement of defence. This account would have been far outside the reasonable expectation of a client similarly situated to Mr. Belyavsky.

[133] The degree of skill and competence demonstrated by the lawyers did not justify the account rendered. Monkhouse Law did not satisfy me that they provided detailed advice to Mr. Belyavsky regarding proceeding with a wrongful dismissal action after the Ministry of Labour largely dismissed his employment standards complaint. The pleading was flawed and did not name the potential parties correctly. The firm acted without instructions in consenting to a with-prejudice discontinuance of the action and failed to disclose that step in its opinion letter dated September 8, 2021, which also significantly overstated the effect of a recent decision of the Court of Appeal.

[134] Mr. Belyavsky does not have the ability to pay very much at all toward this account. In the circumstances of this case, I give this factor significant weight.

[135] Balancing all the *Cohen* factors, I find that the amount of the bill must be significantly reduced. The firm claims for about $3000 in time for the preparation of the statement of claim. As mentioned above, the statement of claim was flawed but may have contributed to Mr. Belyavsky ultimately obtaining a settlement.

[136] Taking all of this into account, I order Mr. Belyavsky to pay $2,000, inclusive of HST and disbursements to Monkhouse Law within 30 days of the date of this order. I dismiss Mr. Belyavsky's proceeding for an assessment of the account.

[137] If the parties are not able to resolve costs of this action, Monkhouse Law may email its costs submission of no more than three double-spaced pages to my judicial assistant on or

before September 16, 2024. Mr. Belyavsky may deliver his responding submission of no more than three double-spaced pages on or before September 23, 2024. No reply submissions are to be delivered without leave.

Robert Centa J.

Date: September 9, 2024