Taylor Review

UNISON Scotland response to Review of Expenses and Funding of Civil Litigation in Scotland

March 2012

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http://scotland.gov.uk/About/taylor-review

This response is by UNISON Scotland, the largest public sector trade union in Scotland with 160,000 members. UNISON members work in the health service, local government, police and fire services, national regulatory bodies and the community and voluntary sector.

The provision of a legal service has always been a key and core benefit of trade union membership. We recognise that accidents, injury and disease impact not only upon our members who are injured but also their families. We recognise that obtaining redress for members who suffer workplace accidents, injury or disease is vitally important for the individual but also serves an essential role in terms of wider workplace health and safety. Our experience shows that bringing claims for workplace accidents, injury and disease can and does have a positive impact upon workplace safety.

Accordingly the civil justice system and access to civil justice are key concerns for us and for all of our members.

The legal service we provide to our members, and therefore their ability to access justice, are reliant upon the recovery of legal expenses by our solicitors in successful cases. Any changes which would reduce cost recovery for any of our members' cases would have a profoundly damaging effect to the service we are able to offer and thereby to our members' ability to access justice.

This consultation document is therefore of great importance to us and to our members.

We acknowledge that the consultation document asks a large number of questions, many of which are technical in nature. We do not accordingly intend to address each question specifically. Firstly we will deal with matters of general principle, discussing those set out in the consultation document and also setting out the general principles which we believe should underpin our civil justice system and the question of legal cost recovery.

Our general principles

The financial value of a case is no measure of its importance

The financial value of a case is often used as a measure by which the importance of a case should be judged. In the same way, it is often the basis upon which it is argued that different cases should attract different levels of resource and different levels of representation.

We reject entirely the notion that there is any link between the financial value and the importance of a case. In our view, a low value personal injury case resulting from an accident at work which involves a low paid worker and which has an impact upon wider concerns of health and safety is significantly more important to the worker, the workplace and society then a commercial dispute with a value of a £1million involving multi-national, billion pound profit companies.

It would be unacceptable to have a civil justice system which, in court structure, cost recovery or others means, provides the commercial litigants with access to a higher standard of court, judge or legal representative than it provides to the injured worker.

We consider all cases involving workplace accidents, injury and disease to be important and accordingly believe that victims should have access to the courts, solicitors and be able to recover the legal costs involved.

Access to justice means access to solicitors

Among others, the consumer lobby have long argued for the restriction and removal of legal costs recovery in cases of a value which they consider to be low. They argue this in order that members of the public can bring their own cases without being exposed to legal costs if they lose. In the context of personal injury law, we reject this notion entirely. In that context, we firmly believe that there is no point in a victim of accident, injury or disease being able to access the courts unless they also have access to legal advice and representation which necessarily involves the victim being able to recover the cost of their legal representative from the defenders.

When the small claims limit was increased in 2007 we argued this point forcefully along with other trade unions. Based upon our arguments, personal injury cases were excluded from the small claims court. There should be no change to the policy of excluding personal injury cases from the small claims court.

Polluter pays

We firmly believe in this principle. Currently, the polluter is required to pay the legal costs but not 100% of them. The insurance industry has argued, and the

arguments are noted in the consultation document, that legal costs are too high in certain cases and, on occasion, disproportionate to the principle sum. The insurance industry are therefore seeking to restrict significantly the legal costs which can be recovered in certain cases at certain values,

The argument advanced by the insurance industry is however fundamentally flawed because it overlooks one very important aspect: Raising a court action for compensation is only done as a very last resort and only after there has been an injury which the insurers have refused to deal with pre-litigation. Before we instruct our solicitors to raise court proceedings on behalf of one of our members, the following will have occurred: The employer will have breached the health and safety standards expected; and injury will have occurred; the insurers will have refused to deal with the matter at all or made an unacceptably low offer. Therefore, the employer and the insurer will have had every opportunity to avoid court proceedings being raised against them and being required to carry the cost of those court proceedings. In those circumstances there is no place for the court system being changed to reduce their exposure to legal costs. The polluter should be forced to pay and to pay fully.

Should recoverable legal costs be proportionate to the level of damages?

In lower value cases that is not possible and for all of the reasons we have set out above (access to justice, access to solicitors and the polluter pays) we do not believe that there is a sufficiently strong basis for changing the system to introduce such proportionality.

Further, any effort to introduce proportionality would disproportionately impact upon trade union legal services, particularly claims advanced on behalf of low paid workers. Large proportions of trade union cases, although very important to both the individual and in terms of general health and safety, do not involve particularly large sums of money.

The current legal costs recovery representing around 60% of the actual cost is too low and should be increased

We agree with this general principle. Any increase in legal costs recovery should apply to all case types and to all case values, including therefore lower value personal injury matters.

While there may be exceptions, the starting point should be to create a system of full legal cost recovery.

PART 2 – Response to specific questions

Question 1

From a trade union perspective, there is no problem with access to justice for our members. We have set out above the importance of the trade union legal service and access to justice. We have also set out the important role that legal costs recovery plays in our ability to provide a legal service to our members.

Accordingly any changes which reduce or restricts the recovery of legal costs would impose significant burdens on access to justice for trade union members.

Question 2

For all of the reasons set out above, we do not believe there is any basis for implementing a system where the recovery of legal fees should be proportionate to the financial value of the case. While there may be exceptional cases, our position is that the solicitors should be paid fully for the work they undertake.

Question 4

We consider the use of Counsel to be extremely important to the good and proper conduct of our member's cases. The insurers use the best solicitors and members of the Bar and for equality of arms we always seek to do the same.

We currently therefore seek to raise as many cases as we can in the Court of Session in Edinburgh. We are aware of the recommendations of the Lord Gill Review. We appreciate and agree entirely with Lord Gill's recommendations in relation to the need to create a specialist personal injury court in the event of the privative jurisdiction of the Court of Session being raised. It is essential that the creation of such a court does not cause a reduction in the rights of our members. It is therefore equally essential that within the specialist personal injury court there is the automatic right to sanction for Counsel. At the very least, there should be a presumption in favour of the use of and sanction for Counsel unless the defenders can argue special cause as to why Counsel should not be used.

Question 5

It is very common for our members' cases to involve the employment of experts. It is a necessary and essential part of building a case. We would not wish to see any change which would impede our members' ability to construct a reasonable case and to ensure that, in doing so, there is equality of arms between them and the insurers.

Question 12

Parties to a commercial action should have no greater right to recover fees than any other party. If the Review takes the view that the current level of recovery at 60% is insufficient and requires to be raised then they must do so in relation to all actions and certainly in relation to personal injury cases.

Question 18 and Question 19

There is no place for personal injury cases in the small claims court. It is not appropriate to introduce a low, fixed expenses regime in relation to lower value personal injury cases. The polluter should pay and should pay the full legal costs of the injured party.

Question 20

In relation to personal injury cases, the polluter should pay.

Question 25 and Question 26

There are many campaigning organisations throughout Scotland, which include trade unions and affiliated organisations, who regularly engage in disputes involving public policy and public law. There is no reason in principle why they should not be able to benefit from a protective expenses order.

Question 27

For all of the reason set out above, yes.

Question 28

Yes.

Question 29

Yes.

Questions 36 to 40

In relation to personal injury, we are aware that the legal system is based upon the fundamental principle of restitution. In our view, a system which encourages any deductions from victims damages strikes at the heart of the principle of restitution. The system should in fact encourage and, if possible, ensure that victims of accidents, injury and disease retain 100% of their damages. This of course cannot be achieved while the system allows only 60% of legal costs to be recovered by the successful party. We submit that the answer is to create a

system whereby full legal costs recovery is achieved. If this was done, there would be no need to consider success fees and whether they are payable by the unsuccessful party or by the solicitor's clients. A system of full legal costs recovery would permit strict regulation of claims management and similar companies and would allow a prohibition of retentions from victims' damages to be introduced.

In relation to After The Event (ATE) insurance premiums, we can see that on one analysis it is entirely reasonable for a party to a court action to take out such a policy. If it is accepted that it is reasonable to do so, it ought to be accepted that the cost of the premium be recovered as part of the legal costs and outlays from the negligent wrongdoer. If such a system was introduced in Scotland there would of course be a compelling case for cases underwritten by trades union to include recovery of an appropriate fee to reflect the risk or level of insurance provided by the trade union.

We are however very conscious of the level of premiums and the level of dispute, and satellite litigation, that existed in England in relation to the recovery of ATE insurance premiums. The answer may therefore be for the Cabinet Secretary for Justice, the Lord President or an advisory body to annually fix the maximum of insurance premium which is recoverable. The rate would be fixed according to what is reasonable and according to premiums available in the market. Alternatively, we suspect that, in terms of access to justice, there would be no need for recovery of insurance premiums if the system allowed for full recovery of legal fees as the solicitors involved would, in those circumstances, provide litigation funding and underwriting products based upon a reasonable analysis of the potential success of individual cases.

Questions 42-44

For all of the reasons set out in response to questions 36-40, and in particular our position in relation to restitution and full legal costs recovery, we do not believe that there is any place for damage based agreements in the Scottish legal system.

Questions 47-49

Third party funding appears to permit commercial organisations to speculate and gamble upon the litigation process. We have seen the disastrous effects of such conduct in relation to banking. There is no place for third party funding within the Scottish legal system.

Questions 57-59

As we have said above, we believe that the key issue which requires to be addressed in relation to litigation funding in Scotland is the current situation

where only 60% of legal costs are recovered. If that problem is addressed and full recovery is permitted, everything else will flow from that. In those circumstances, there will be no need for one way cost sifting or similar measures.

In relation to victims of accidents and injury choosing to litigate in England – if that jurisdiction introduced damage based agreements, we believe that Scottish victims would in fact be in a better position if full costs recovery was permitted and damage based agreements were prohibited in the respect that victims would retain 100% of their damages. Only those people with weak cases where, with full costs recovery, a solicitor or a trades union were willing to support and travel to England to take advantage of damage based agreements and these are not the types of cases which we would wish to encourage in Scotland.

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