

Cost recovery in pro bono assisted cases:
Consultation on proposals for secondary legislation

Free Representation Unit Response

July 6, 2007

Introduction

This is the response of the Free Representation Unit (FRU) to the consultation document, issued by the Department of Constitutional Affairs (as it then was) on costs recovery in pro bono assisted cases.

FRU is a charity that aims to relieve poverty by providing representation to litigants in tribunals, where they would otherwise not have access to legal assistance. The majority of the representation is carried out by law students and lawyers in the early stages of their careers. Their work is overseen by FRU's staff, who train and supervise the volunteers.

FRU represents approximately 700 cases annually, predominately in the Social Security and employment tribunals, but also in the Social Security Commissioners, Employment Appeal Tribunal and the Court of Appeal.

1 Do you consider that all civil cases should be included in this legislation? If not, which categories do you think should be excluded and why?

All civil cases should be included. Although FRU does not deal with all areas of law we believe that if, in principle, pro bono representatives should be able to recover costs, this should apply across the board.

There may be some types of cases where pro bono costs awards will be less frequently appropriate, but these can be dealt on a case by case basis by judges who will have discretion whether to make an award.

2 Is the division of cost awards in these circumstances [mixed paid and pro bono representation] likely to present a problem to the Courts?

This is unlikely to be a problem. There is no reason to think that courts will have difficulty identifying that part of the legal assistance provided pro bono and awarding appropriate costs, while applying the ordinary costs rules to other parts.

3 Do you have any comments on the proposals regarding the Charity?

While supporting the Charity, FRU does foresee some practical difficulties that will need to be addressed.

Pursuing costs awards

Obtaining costs awards requires effort on the part of parties and their advisors. Submissions need to be made that an award is appropriate and schedules of costs provided. Both elements are often contested.

Those acting pro bono will face particular challenges in obtaining costs awards and defending their cost assessments. In particular, it will be more difficult to justify a schedule of costs where no fees are being paid because the exercise will be hypothetical.

In order to obtain awards under this scheme and to ensure they are for appropriate sums, lawyers acting pro bono will need to do significant work. This work will not benefit their client and may not directly benefit any pro bono organisation the lawyer is affiliated to.

This will raise considerable difficulties of motivation. There is never any shortage of potential clients in need of pro bono help. Many lawyers and organisations will prefer to focus on other clients rather than pursue costs orders to raise funds for the Charity.

The Charity will have to work hard to convince lawyers acting pro bono that time obtaining funds for it will be well spent.

The simplest and most effective way of achieving this would be for the Charity to take account of which pro bono organisations were obtaining costs orders. This should be a factor that the Charity takes into account when making awards to pro bono charities. Similarly, where a costs award has been obtained by an individual or organisation that is not a pro bono organisation (such as a solicitor's firm) the Charity should take their views into account when making awards. Those acting pro bono should be able to see that their work in obtaining costs awards for the Charity leads to funding for the pro bono organisations they support.

It will also be important to minimise the extra work that costs awards will produce in order to ensure support of the scheme by practitioners acting pro bono and to avoid the diversion of work from pro bono activities into costs litigation.

Enforcement

Unfortunately, many awards are not paid without some use of the civil enforcement process. FRU's experience is that approximately one in three awards in the employment tribunal are not paid without significant pursuit of the paying party. In about half of these cases enforcement proceedings are necessary. This reflects the findings of other research on tribunal awards.¹ This problem may be less acute in other areas of practice, but it is a difficulty that the Charity will face.

Indeed, FRU believes awards to the Charity will be less likely to be paid promptly than awards to parties. Inevitably the Charity will be remote from the litigation to that point. The payment will not be made with the substan-

¹Empty justice: the non-payment of employment tribunal awards, Citizens Advice Bureau, 2004

Hollow victories: an update on the Tribunal awards, CAB, 2005

Survey of litigants experiences and satisfaction with the small claims process, DCA, 2006, Sections 6.3 to 6.4

tive award and the other party will not be the one to enforce it. In these circumstances it will be very tempting for the paying party to do nothing and see what happens.

If significant sums are not to be lost these awards will need to be enforced. It would be particularly damaging if it become understood (as it quickly would be without effective enforcement) that awards to the Charity would not be pursued.

In FRU's view it would be impractical to ask that individuals and organisations who obtain the awards to enforce them.

There will therefore should be a process by which the Charity is informed of costs awards in its favour. It will also need standing and the capacity to enforce costs awards.

Efficiency

FRU is obviously eager that the Charity distribute the maximum possible funds to legal charities. It seems inevitable that a proportion of the funds raised through costs awards will be consumed by the Charity's organisation, but this should be minimised as far as possible.

4 Do you think any special costs provisions should be made in the Civil Procedure Rules in respect of the making of costs orders in pro bono cases under clause 185?

There is a risk that costs orders in pro bono cases will be seen as exceptional rather than routine. If this develops as a problem it might be appropriate to add a clause to the CPR practice direction to the effect that costs should be awarded in these cases, unless there is a good reason not to do so. It would, however, be sensible to observe the scheme in place before making such changes.

5 How might we best ensure the widest use of Summary Cost Assessments in pro bono cases under clause 185?

FRU's view is that Summary Assessment will almost always be appropriate for dealing with pro bono costs. Many pro bono organisations, including FRU, do not have formal time-recording systems in place. Similarly, many pro bono organisations, including FRU, do no commercial work and so have no straightforward basis for estimating costs. Even where such systems exist, it will not normally be a good use of pro bono time to go through the Detailed Assessment Process. These difficulties can be minimised by the broad-brush approach of Summary Assessment. Any attempt to conduct a Detailed Assessment is likely to be frustrating and time-consuming, without making the estimate of costs any more accurate.

For this reason, FRU expects that the courts will freely use their existing discretion to order Summary Costs Assessment in pro bono cases. It is unlikely that further powers or guidance is needed.