Justice Committee

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

Written submission from the Public and Commercial Services (PCS) Union

1. PCS welcomes the opportunity to comment on this draft Bill, and is uniquely placed to do so as the only recognised workplace Union, representing around 900 members Scotland-wide.

2. We endorse the sound political objectives of the Bill. However we do have some areas of concern, detailed below:

Restriction on pursuer’s liability and QOCS (Qualified One way Cost Shifting)

3. Under current arrangements, if an injured person brings a court action for compensation and fails they will be required to pay the defenders’ legal bill. The risk of being exposed to what may be a huge legal bill is a real barrier to access to justice even where members are supported by their trade union.

4. We therefore welcome the proposal to introduce a system where an injured party will not normally be responsible for the defender’s legal costs if their case fails. A similar system has existed in England and Wales since 2013 and, in common with colleagues from other Trade Unions our members have found the changes have had a positive impact on litigation rates successes. However PCS is very concerned about the draft rules as to when the benefit of QOCS will be removed i.e. in certain circumstances, related to the conduct of the injured party claimant, an unsuccessful injured party will still be liable for the defenders legal fees.

5. As drafted, section 8(4) gives far too much leeway to big insurers to argue that the conduct of the pursuer justifies them obtaining their legal costs from the injured party or their Trade Union. As drafted, this will not deliver the benefits we have seen in England and Wales, putting members and Trade Unions here in Scotland at a clear disadvantage.

Expenses where a party is represented free of charge

6. Section 9 raises a number of questions for PCS:

   - How can it be free of charge if the court is going to award a payment to be made to a charity?
   - Who says how much this payment will be and how will this payment be quantified?
   - How can a court order a payment, even if the injured party has only some representations/ work free of charge, as appears to be the case?
   - Will this be based on complexity of case, income of pursuer i.e., means tested or percentage based?

7. PCS believes it should be set out clearly and explicitly how there will be genuine transparency on how much an ordinary person can be asked to pay. What may appear to be a small amount to a judge can have a significant impact on those who are likely to bring this type of court action.
8. Despite the views of some in the senior judiciary, the concerns ordinary people have about access to justice, particularly in relation to business being conducted on-line, are very real. They extend beyond fees to include how cases are conducted in court, and how the outcome may affect those who bring cases forward. PCS has no doubt that the sheer breadth of what the court now charges for in respect of fees to allow any case to proceed, in addition to the fees for legal representation, is a huge burden and consideration for anyone. This has a material impact on the numbers who actually do have ready and real access to justice.

Third party funding of civil litigation

9. Section 10 is clearly aimed at circumstances where a third party agrees to fund and insure the case for a large chunk of the damages. PCS is clear that Trade Union litigation could never be seen in that light but is concerned that, as currently drafted, the relevant section could be interpreted as applying to Trade Union supported cases. An amendment is required to make it clear that the section does not apply to Trade Union funded cases.

QOCS and court fees

10. There is an additional risk associated with raising and losing a court action. It relates to the court fees that require to be paid as case progresses through the courts. Currently both parties to a court action require to pay court fees on a “pay as you go” basis. The bill does nothing to change that position. Injured parties and their funding Trade Union will still end up with a large bill at the end of unsuccessful cases in relation to court fees.

11. Additionally, court fees under the current pay as you go model represent a significant cash flow burden to trade unions at a time when, in light of all of the legislative attacks from the Westminster Government, trade union finances need all the protection they can receive.

12. Accordingly, PCS believes the bill should be amended to direct that an unsuccessful injured party and his/her Trade Union will also be protected from court fees. The easiest way to achieve this is by providing that fees will only be payable at the end of the litigation process and only in a successful case (where those fees will be recovered from the defender). That change would also resolve the ongoing cash-flow problem that court fees currently present to trade unions.

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