

Pro Bono Panel

Minutes

Wednesday 19th December, Freshfields

Attendees: Paul Yates (Freshfields), Pete Summers (Allen & Overy), Natalie Wellings (Freshfields), Claire Hall (Herbert Smith Freehills), Diane Sechi (Simmons and Simmons); David Boyd (Clifford Chance), Helen Rogers (Allen & Overy), Chloe O'Brien (Simmons and Simmons) and Heidi Bancroft (Secretary to the AJC).

Apologies: Marion Edge (Herbert Smith Freehills)

1. Polluter pays mechanism in first-tier administrative tribunals (Topic 2) – Paul Yates

PY gave an update on the polluter pays project. He had circulated a summary of the panel's findings and the draft proposal. They were looking at whether there was good empirical evidence on change of behaviours for litigants and organisations. There were some useful examples (including GDPR) but no 'silver bullet' example which stood out. PY explained that when the Woolfe reforms were introduced in the UK, there wasn't any baseline data beforehand to work out the impact empirically. Proposals had been done previously on the common sense assumption that it would work, but there had been no evidence.

The draft proposal would go to the Council for approval in their July meeting.

Cultural change

In terms of cultural change, Professor Chris Hodge's (CH) had given the view that when it comes to first time decision makers (e.g. DWP, Home Office) financial penalties wouldn't make any difference to their behaviour but what they needed was cultural change. PY felt that whilst it would not be the "silver bullet" in creating cultural change, it could play a small but important role in incentivising cultural change and compliment other initiatives. Whilst CH thought that the monetary value might be too small to make a difference in individual awards, he helpfully suggested that summing up the annual amount racked up under the fee (and presenting it to departments) could be effective.

Previous polluter pay proposals

PY introduced the section in the paper on what had been proposed previously on the polluter pays principle. Previously, one of the key objections had been that it was unfair to punish government departments in losing appeals as new evidence sometimes came to light after the DWP had made their decision. PY proposed that the fee would only occur where the first time decision itself was found by the tribunal to be unlawful. At every hearing the judge looks in any event at the initial decision and in many cases it is quite obvious that the decision is unlawful (for example, because it sets out the wrong legal test).

Issues

PY set out three issues:

- 1) Trigger – fee would be triggered by an unlawful first-instance decision or material breach of the procedural rules, rather than appeal outcome;

- 2) Fees – the mechanism would be framed as a fee rather than a costs award.
- 3) Who gets the money? The logic would be for it to go to HMCTS as they pick up the cost of the tribunal hearing.

Delays

PY informed the panel that another issue to navigate was delay. There was already an issue with delays in decision making and it was important to ensure they did not incentivise delays in making a decision because there isn't enough evidence.

Fees

It was agreed to put a value on people's time working out what the average amount of time would be per case. This could be added to the proposal. PY was waiting to hear back from HMCTS on what the current fee includes e.g. judge's time.

2) Stakeholder engagement of the online PIP form (Topic 1) - Diane Sechi

DS gave an update on the research project which is looking at stakeholder engagement for the online PIP form. She informed the panel that to test environment across England and Wales she was looking at front line agencies including local authorities, libraries, hospitals, GP surgeries to see what was currently happening with any digital assistance. She didn't think that HMCTS were aware how many people would need assistance with going on-line. She wanted to tease out what is out there at the moment and whether there would be any obstacles with agencies upscaling and going digital. She had devised a survey which she was trying to refine. She would welcome any input with regard to further questions. She went through the questions on the form and the panel gave their suggestions.

CO will send the link for the panel to test and give feedback. DS requested assistance with a list of libraries and health care centres.

Deadline – 11th January for responses (before steering group meeting).

It was agreed that the survey would be sent from the AJC email account as it would be inappropriate to use the Simmons & Simmons email address since it was on behalf of the AJC.

Actions:

- a) CO to send the survey link to the panel for testing and feedback; and b) the panel to inform DS if they can provide assistance with databases for libraries and health care centres.

Heidi Bancroft
Secretary to the AJC