



UNISON Scotland response: Scottish Parliament Justice Committee Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

Introduction

UNISON is Scotland's largest trade union with members across the public, private and voluntary sectors. Our legal services for members include significant use of civil litigation to protect their interests and to compensate them for delicts in the workplace. We also have a wider citizenship interest in ensuring access to justice.

Overview

UNISON Scotland broadly welcomes the objectives of the Bill that:

- Introduces a simpler system for solicitors charging their client on a speculative basis.
- Introduces QOCS (Qualified One Way Cost Shifting)
- Introduces rules about group litigation

However, we believe the Bill could be strengthened with some modest amendments.

Speculative Fees

We support the Bill's provisions that simplify procedures that already exist, which allow solicitors to enter into a speculative fee agreement with their clients.

QOCS – Qualified One way Cost Shifting

This was the cornerstone of the review of civil litigation by Sheriff Principal Taylor. The review recognised that the financial power of the insurance industry was such that they could defeat legitimate claims by the sheer force of their financial clout. Not even Trade Union backed cases could sufficiently complete. The financial might of the insurance industry tipped the balance significantly in their favour and QOCS is aimed at rebalancing the scales.

At present, if an injured person brings a court action for compensation and fails they will require to pay the defenders' legal bill. The legal bill can obviously be extremely large and the risk of being exposed to that legal bill is a real barrier to access to justice even to members supported to their trade union.

The Bill will introduce a system where an injured party will not normally be responsible for the defender's legal costs if their case fails. This is a very welcome development and a similar system has existed in England and Wales since 2013.

However, the Bill also contains rules as to when the benefit of QOCS will be removed in certain circumstances. Those circumstances relate to the conduct of the injured party bringing the claim. This is where the Bill is significantly flawed because the circumstances where an injured person will have the benefits of QOCS removed is too wide. UNISON is concerned that it will be too easy for big insurers to argue that the conduct of the pursuer justifies them obtaining their legal costs from the injured party or their trade union.

The bar is set too low and is set lower than in England and Wales. The wording needs to be changed to raise the bar and therefore Section 8 (4) of the bill needs to be amended.

Third Party Funding and QOCS

The Bill contains a section covering circumstances where a third party has a financial interest in the outcome of the litigation (Section 10). If there is a third party who has “a stake” in the case then the benefit of QOCS can be removed.

This provision is clearly aimed at the type of circumstances where a third party takes a stake in a court action for a financial reward. This sort of “litigation venture capital” was seen in the compensation case brought by RBS shareholders. The third party agrees to fund and insure the case for a large chunk of the damages.

Trade Union litigation could clearly never be seen in that light. This is a collective service to members who would find it very difficult to take cases and seek compensation without the support of their trade union.

The problem is that as the Bill 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

There is an additional, not unsubstantial, risk associated with raising and losing a court action. That relates to the court fees that require to be paid as the 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. This means that injured parties will still end up with a large bill at the end of unsuccessful cases in relation to court fees.

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. The Scottish Government is committed to mitigating the impact of the Trade Union Act in Scotland and this would be one way to demonstrate that commitment in practice.

Accordingly, the bill requires to 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 cashflow problem that court fees currently present to trade unions.

Group Litigation (Part 4 of the Bill)

UNISON Scotland agrees that it is a positive step that the bill is seeking to introduce the framework for group litigation orders in Scotland. It is positive that it recognises that such group litigation should take place at the Court of Session. The problem is that as other laws currently stand, only cases with a value in excess of £100,000 could be raised via the proposed group litigation process at the Court of Session in Edinburgh. This is an inconsistency that requires to be changed. The bill should remove the £100,000 cap for group litigation cases.

Conclusion

UNISON Scotland broadly supports this Bill that will improve access to justice. However, it could be strengthened through the modest amendments set out above and we would urge the Justice Committee to recommend these changes.

UNISON Scotland
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