The Jackson report: hot tubbing and heated debates

The Jackson report has been hot news, especially for personal injury practitioners. Its recommendations have largely been accepted, with implementation via the Legal Aid, Sentencing and Punishment of Offenders Act 2013. This comes into force on 1 April 2013. Amendments to the Civil Procedure Rules are being drafted and final approval is anticipated in the autumn. But what relevance does the Act and the other recommendations have for employment practitioners? Although less dramatic, the changes are still important, not least in matters being determined in the civil courts, such as claims for wrongful dismissal and enforcing restrictive covenants. Sarah Fraser Butlin outlines the major changes

Fraser Butlin: extensive changes will spill over into tribunals

Increase in general damages

The report recommended that the level of general damages for pain, suffering and loss of amenity be increased by 10 per cent and that this increase would also apply to 'the level of general damages for nuisance, defamation and any other tort which causes suffering to individuals'. This was primarily to counter the changes in litigation funding but the report noted that while it 'may appear to be a windfall for claimants who are not on conditional fee agreements', the level of general damages in England and Wales was not high and it was an opportune time to raise such damages generally.

The report anticipated that the judiciary would implement this increase and Lord Judge, in the review hearing of *Simmons v Castle,* declared that 'with effect from 1 April 2013, the proper level of general damages in all civil claims for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, (v) mental distress or (vi) loss of society of relatives, will be 10 per cent higher than previously, unless the claimant falls within s.44(6) of LASPO' (ie, unless the claimant had entered a CFA before 1 April 2013).

The question for employment lawyers is whether this will apply to injury to feelings awards and what tactical considerations arise.

Clearly where there is a claim for physical or psychiatric injury arising from discrimination, the 10 per cent increase will apply to cases coming to trial after 1 April 2013 (see s.119 and s.124(6) Equality Act 2010).

Awards for injury to feelings have always taken their lead from levels of damages for pain, suffering and loss of amenity. In *Vento v Chief Constable of West Yorkshire (No 2),* Lord Justice Mummery referred to the need to keep tribunal awards in line with general levels of compensation and with the Judicial Studies Board guidelines (paras 47 and 61). He adopted Smith J's summary, in *HM Prison Service v Johnson,* of general principles for the appropriate level of award, which included the need for awards to bear broad similarity with personal injury awards (para 53). Therefore, an increase in general damages in civil claims should carry over to increase the bands for injury to feelings awards.

There may be an argument that the 10 per cent increase related to changes in litigation funding and therefore should not apply to employment tribunal proceedings. However, the Court of Appeal expressly declared in the first hearing of *Simmons v Castle* that it would apply to 'all other torts which cause suffering, inconvenience or distress to individuals' (para 20). This was extended to 'all civil claims' in the later review hearing. Given that discrimination is a statutory tort and injury to feelings awards are to recompense suffering and distress, the increase is very likely to apply. Consequently, the relevant bands would be £6,600, £19,800 and £33,000.

Tactically, respondent lawyers must be alert to attempts to postpone hearings beyond April 2013 to take advantage of the increase. Claimant lawyers must factor in the increase in any settlements where trial is not due until April 2013 or beyond. This will be particularly important where the claimant has suffered physical or psychiatric injury that would otherwise be recoverable in a personal injury action. After 1 April 2013, *Simmons* will need to be brought to the tribunal's attention to ensure that updated awards for both psychiatric injury and injury to feelings are used.

Litigation funding

There are five key changes in this area that, save for damages based agreements, affect civil court claims:

- removing the recoverability of success fees for conditional fee agreements entered into after 1 April 2013 (s.44(4)) with provision for a maximum percentage success fee that can be taken from particular damages (s.44(2)). The report recommended maximum success fees of 25 per cent of damages, excluding future care and future losses. The details of this, particularly the maximum percentage, applicable damages, inclusion of VAT, counsel's success fees and enforcement remain unclear
- making premiums for after the event insurance irrecoverable, save for limited exceptions for clinical negligence and mesothelioma cases (s.46). This extends to preventing trade unions and other membership organisations from recovering equivalent insurance

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premiums in cases they are funding (s.47)

- extending the use of DBAs to most civil litigation (s.45). DBAs were previously only permitted for solicitors undertaking non-contentious business, which included tribunal matters. The restrictions on DBAs have now been lifted except for criminal and family work (s.45(5))
- the government has announced the following on the appropriate cap in DBAs:
  (i) maintaining the 35 per cent cap of damages in employment tribunal matters (controversially so, given the VAT rate increase thus decreasing profit costs)
  (ii) 25 per cent of any head of damage in personal injury cases, excluding disbursements and 'after-the-event' premiums
  (iii) a 50 per cent cap in all other civil litigation
- banning the use of referral fees in claims for damages for personal injury or death (s.56) with provision to extend this to other claims.
- recommending that 'qualified one way costs shifting' be introduced. Thus a successful claimant would be able to recover their costs but a successful defendant would not, unless the claimant acted unreasonably in pursuing the proceedings.

QOCS has not been implemented by LASPO. However, on 10 July the Ministry of Justice stated that it would be introduced in personal injury claims, applying to all claimants whatever their means. The claimant would pay costs in claims that are lost and discontinued during proceedings but only where they fail to beat the defendant's part 36 offer or the claim is fraudulent or struck out as disclosing no reasonable cause of action, otherwise as an abuse of the court's process or likely to obstruct the just disposal of the proceedings. The statement notes that part 36 CPR would override QOCS but only up to the level of damages recovered by the claimant.

Part 36 offers

S.55 LASPO enables changes to the CPR so that a defendant may be ordered to pay an additional sum where judgment is 'at least as advantageous' as an extant offer by the claimant. The 10 July statement confirmed the uplift as 10 per cent of damages in monetary claims and 10 per cent of costs in non-monetary claims. In mixed claims, it would be limited to 10 per cent of the damages element of the claim. For claims above £500,000, the percentage uplift would be tapered to give a maximum uplift of £75,000. In a split trial, only one sanction would apply.

The report noted that this did not need to apply to claimants because, by refusing a reasonable offer, they would lose the substantial benefits of QOCS. These changes are in addition to the sanctions under part 36 and will require practitioners to review part 36 offers carefully.

Case management

The report made extensive recommendations to improve case management in the civil courts. Final approval of amendments to the CPR is anticipated this autumn, for implementation in April next year.

The focus was to improve efficiency in case management, primarily with decisions on the papers using standard directions. Where a CMC is required, the report recommended more active, interventionist case management by judges, largely using existing powers under rule 32. In particular:

- limiting the length of witness statements or requiring parties to provide a one-page summary with cross references to the full statement
- using costs sanctions where directions are not met, or even without specific directions, where witness statements are prolix or irrelevant
- imposing costs sanctions where expert reports stray materially beyond the issues
- recommending a rule change to require a party seeking permission to adduce expert evidence to furnish an estimate of costs
- drawing up the timetable for the action as early as possible, including fixing the trial date/window from the outset
- being less tolerant of delays and breaches of orders with a specific amendment to rule 3.9 regarding relief from sanctions, so the court must consider the need a) for litigation to be conducted efficiently and at proportionate costs; and b) to enforce compliance with rules, practice directions and court orders.

Docketing in multi-track cases, assigning them to the same, appropriately specialised, judge throughout the case management process, was also recommended to enable more active case management.

There has already been a shift in approach to stricter case management: the Court of Appeal in *Guntrip v Cheney Coaches Ltd* and in *Fred Perry Holdings Ltd v Brands Plaza Trading Ltd & anor* cited the report and specifically that the courts have lost sight of the damage which the culture of delay and non-compliance is inflicting on the civil justice system.

The final major recommendation was to introduce concurrent expert evidence, or 'hot tubbing'. In this process experts are sworn at the same time and the judge chairs a discussion between experts. Counsel may join in and ask questions of the experts

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when permitted and the experts can ask each other questions. It has been recommended that it become an optional procedure within rule 35 to be adopted at the direction of the judge.

Hot tubbing represents a major change in how litigation involving experts operates. Parties will have less control over how expert evidence comes out and the loss of the adversarial approach can be seen both positively and negatively. There is concern that an expert's force of personality will become more important than the substance and that discussions may become sidetracked. Alternatively, a more discursive approach may enable and require the judge to become more engaged with the detail of the issues at stake. Whatever the view, it is clear that different skills will need to be applied in preparing for trials.

Costs management

The costs management changes that would have the greatest impact on employment practitioners relate to appeals. Until a separate review of costs in appeals, the report recommended that appellate courts should have the discretion, upon granting permission to appeal or receiving an appeal from a no costs jurisdiction, to order each side to bear their own costs of appeal or to impose a cap on recoverable costs. The basis and circumstances for exercise of the power remain unclear but, if introduced, it will have a major impact on the decision to appeal beyond the Employment Appeal Tribunal.

The report made further cost management recommendations for civil cases:

- defining proportionality of costs and enabling the capping of costs where they are disproportionate despite being reasonable
- making it explicit that because costs were necessarily incurred does not make them proportionate, thus reversing *Lownds v Home Office*
- amending rule 44.4(1), making clear that when assessing costs, the court should allow reasonable amounts in respect of work and service actually and reasonably done or supplied, ie abolishing the common law indemnity principle
- more active costs management using a standard costs management procedure, specifically:
  (i) filing and exchanging costs budgets within 28 days of filing the defence or be treated as having filed a budget comprising only the applicable court fees
  (ii) the ability to make a 'costs management order' at any time, recording the extent of agreement, or the court's approval, of budgets
  (iii) departure from the last approved or agreed budget in a costs assessment only with good reason
- changes to the detailed costs assessment process including greater use of interim payments
- extending the fixed costs regime to all fast track personal injury litigation and an overall limit for other fast track litigation
- establishment of a costs council to review guideline hourly rates and fixed costs.

Great care will be required when the new rules come into force, given the serious consequences of failing to meet the requirements, as shown by *Henry v News Group Newspapers Ltd,* a pilot scheme judgment, where costs of approximately £270,000 were disallowed because the claimant had failed to inform the court or defendant that they had exceeded their budget.

Conclusion

The changes being introduced are extensive with a very significant impact on claims in the civil courts. This will inevitably spill over into the tribunals, via the increase in general damages, but also perhaps into more active case management. Practitioners need to be ready for the changes to the CPR and particularly the strict costs management processes.

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Cases referred to:

- *HM Prison Service v Johnson* [1997] ICR 275
- *Lownds v Home Office* [2002] EWCA Civ 365
- *Vento v Chief Constable of West Yorkshire (No 2)* [2002] EWCA Civ 1871
- *Da'Bell v NSPCC* [2010] IRLR 19
- *Fred Perry Holdings Ltd v Brands Plaza Trading Ltd & anor* [2012] EWCA Civ 224
- *Guntrip v Cheney Coaches Ltd* [2012] EWCA Civ 392
- *Henry v News Group Newspapers Ltd* [2012] EWHC 90218
- *Simmons v Castle* [2012] EWCA Civ 1288