

Criminal Defence Costs – recovery at Legal Aid rates

A new regime for costs awards to defendants in criminal cases has been introduced by the new Costs in Criminal Cases (General) (Amendment) Regulations 2009 taking effect from 31 October 2009. This will apply to defendants, including companies, who are charged with criminal offences and later acquitted.

A Defendant's Costs Order can be made where a charge brought against a defendant is withdrawn before trial, the defendant is acquitted of an offence or successfully appeals a conviction or sentence. Currently a court can award costs to the defendant considered reasonably sufficient to compensate the defendant for any expenses properly incurred in its defence. In the case of a defendant who pays privately for legal representation, the Order can cover the costs of legal representation. Those costs will usually be paid by central funds and not the prosecuting agency. The new Regulations will only permit an award for costs calculated in accordance with the Legal Aid scale of costs, regardless of the amount actually incurred by the defendant. The Ministry of Justice has produced the rates and scales.

A defendant who is acquitted and awarded costs from central funds is likely to find the award is substantially below the amount actually incurred. The shortfall is likely to be substantial in the case of corporate defendants.

The new Regulations apply to all proceedings and appeals commenced in England and Wales on or after 31 October 2009 and all cases committed or sent to the Crown Court after 31 October 2009. They amend the earlier Costs in Criminal Cases (General) Regulations 1986 and apply to payments made from central funds under a Defendant's Costs Order made pursuant to Section 16 of the Prosecution of Offences Act 1985.

A full public consultation was undertaken with a total of 93 responses received from individual solicitors, barristers, professional bodies and members of the public. In its Explanatory Memorandum to the

Regulations the Ministry of Justice accepts that overall responses to the proposals were in favour of maintaining the current system whereby defendants are entitled to claim their legal costs if they are acquitted. Respondents considered the existing approach to be both fair and transparent. Any changes were commonly seen as unjust. The Government have taken the view that public funding should be prioritised for those who cannot afford to pay for their own representations and those who can afford to pay towards the cost of their defence should do so. The Government have indicated they intend to save between £22,000,000 and £25,000,000 annually by making the changes.

The consequences are likely to be that a privately funded defendant will need to meet a significant proportion of its own costs, even if it is acquitted and receives a Costs Order in its favour.

The Regulations do not amend Section 19 of the Prosecution of Offences Act 1985 allowing costs to be awarded against any party (including a prosecuting authority such as the Health and Safety Executive) if those costs have been incurred as a result of an unnecessary or an improper act or omission by or on behalf of that party. This leaves open a possibility that a prosecuting authority may itself be required to pay all or part of the defendant's costs rather than an award being made against central funds. Such award may be for the full amount of costs unnecessarily or improperly incurred. However, the prospect of actually getting an Order under Section 19 has always proved to be very limited and awards are rarely made.

There may also be a prospect for arguing the level of any prosecution costs awarded against a defendant should be limited in accordance with the rates applying to Defendant's Costs Orders as contained within the new Regulations. In prosecutions by the Health and Safety Executive and Environment Agency, prosecution costs can be substantial, particularly where solicitor agents and counsel have been instructed.

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