

**STANDARD TERMS AND CONDITIONS  
FOR CLAIMANT EMPLOYMENT TRIBUNAL AND EMPLOYMENT  
APPEAL TRIBUNAL WORK**

**TREATED AS ANNEXED TO THE CONDITIONAL FEE AGREEMENT**

**BETWEEN SOLICITOR AND COUNSEL FOR CLAIMANT EMPLOYMENT  
TRIBUNAL AND EMPLOYMENT APPEAL TRIBUNAL WORK**

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## **INTRODUCTION**

1. These standard terms will, where so indicated, be incorporated into an Agreement made between a Solicitor and a Counsel.

## **TERMINOLOGY**

2. The words “Solicitor”, “Counsel”, “Client”, and “Opponent” herein are defined in “the Agreement” made between a Solicitor and a Counsel which expressly incorporates these terms.

## **CONDITIONS PRECEDENT**

### **Papers provided to Counsel**

3. The Solicitor should have provided Counsel with the following documents:
  - (1) a copy of any conditional fee or other agreement between the Solicitor and the Client and the Law Society's Conditions as they apply to the claim or a copy of any relevant collective conditional fee agreement;
  - (2) all relevant papers and risk assessment material, including all advice from experts and other solicitors or barristers to the Client or any Litigation Friend in respect of the claim, which is currently available to the Solicitor; and
  - (3) any offers of settlement already made by the Client or the Opponent.

### **Solicitor’s Compliance with Statute**

4. The Solicitor confirms that any conditional fee agreement between the Solicitor and the Client complies with sections 58 and 58A of the Courts and Legal Services Act 1990 and the Conditional Fee Agreements Order 2000.

## **OBLIGATIONS OF COUNSEL**

### **To act diligently**

5. Counsel agrees to act diligently on all proper instructions from the Solicitor subject to paragraph 6 hereof.

### **Inappropriate Instructions**

6. Counsel is not bound to accept instructions:
  - (1) to appear at any hearing where it would be reasonable
    - (a) for Counsel to consider that Counsel's fees would not be allowed on assessment or
    - (b) for the Solicitor to instruct a barrister of less experience and seniority, (albeit that Counsel shall use his/her best endeavours to ensure that an appropriate barrister will act for the Client on the same terms as this agreement)
  - (2) to draft documents or advise if a barrister of similar seniority would not ordinarily be instructed so to do if not instructed on a conditional fee basis;
  - (3) outside the scope of this agreement.

## **OBLIGATIONS OF THE SOLICITOR**

7. The Solicitor agrees:
  - (1) to comply with all the requirements of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 and the Employment Appeal Tribunal Rules 1993 and the Employment Appeal Tribunal Practice Direction and Practice Statement 2004 and the Solicitors' Client Care Code;
  - (2) to act diligently in all dealings with Counsel and the prosecution of the claim;
  - (3) to liaise with or consult Counsel about the likely amount of Counsel's fees before filing any estimate of costs in the proceedings, and to provide a copy of any such estimate to Counsel;
  - (4) to consult Counsel on the need for advice and action following:
    - (a) the submission of a grievance;
    - (b) the service of the ET1 and if possible before any directions hearing;
    - (c) the submission of a questionnaire in a discrimination claim; and
    - (d) the exchange of factual and expert evidence;

- (5) to deliver within a reasonable time papers reasonably requested by Counsel for consideration;
- (6) promptly to bring to Counsel's attention:
  - (a) any offer to settle the action or any of the issues in it;
  - (b) any evidence information or communication which may materially affect the merits of any issue in the case;
  - (c) any other factor coming to the Solicitor's attention which may affect Counsel's entitlement to fees whether before or after the termination of this agreement;
- (7) promptly to communicate to the Client any advice by Counsel:
  - (a) to make, accept or reject any offer to settle the action or any of the issues in it
  - (b) to incur, or not incur, expenditure in obtaining evidence or preparing the case;
  - (c) to instruct Leading Counsel or a more senior or specialised barrister;
  - (d) that the case or an substantial issue in the case is likely to be lost;
  - (e) that damages and costs recoverable on success make it unreasonable or uneconomic for the action to proceed;
- (8) promptly to inform Counsel's clerk of any listing for trial or any hearing;
- (9) to deliver the brief to Counsel in accordance with the agreement between the Solicitor and Counsel
- (10) to inform Counsel promptly if the case concludes at any time before the date fixed for trial
- (11) if any assessment of costs takes place in the absence of Counsel, to make representations on Counsel's behalf in relation to his/her fees
- (12) to inform Counsel in writing within 2 days of any reduction of Counsel's fees on assessment in the absence of Counsel; and
- (13) when drawing up a costs bill at any stage of the case to include in it a claim for interest on Counsel's fees.

## **TERMINATION**

### **Termination by Counsel**

8. Counsel may terminate the agreement if:
  - (1) Counsel discovers the existence of any document which should have been disclosed to him under clause 3 above and which materially affects Counsel's view of the likelihood of success and/or the amount of financial recovery in the event of success;
  - (2) Counsel discovers that the Solicitor is in breach of any obligation in paragraph 7 hereof;
  - (3) the Solicitor, Client or any Litigation Friend rejects Counsel's advice in any respect set out in paragraph 7(7) hereof;
  - (4) Counsel is informed or discovers the existence of any set-off or counter-claim which materially affects the likelihood of success and/or the amount of financial recovery in the event of success;
  - (5) Counsel is informed or discovers the existence of information which has been falsified or should have been but has not been provided by the Solicitor, Client or any Litigation Friend, of which Counsel was not aware and which Counsel could not reasonably have anticipated, which materially affects the merits of any substantial issue in the case;
  - (6) Counsel is required to cease to act by the Code of Conduct of the Bar of England and Wales or Counsel's professional conduct is being impugned; provided that Counsel may not terminate the agreement if so to do would be a breach of that Code, and notice of any termination must be communicated promptly in writing to the Solicitor;
  - (7) a costs capping order is made which Counsel reasonably believes may adversely affect the recoverability of his or her normal fees and/or his or her percentage increase;
  - (8) if the Opponent receives Community Legal Service funding;
  - (9) if the Client or the Opponent becomes insolvent.
  - (10) the Client unreasonably fails to co-operate
  - (11) Discovery by Counsel that Client has legal expenses insurance covering the claim and Counsel considers it unreasonable to use a CFA.

### **Termination by the Solicitor**

9. The Solicitor may terminate the agreement at any time on the instructions of the Client or any Litigation Friend.

### **Automatic Termination**

10. This agreement shall automatically terminate if:
  - (1) Counsel accepts a full-time judicial appointment;
  - (2) Counsel retires from practice;
  - (3) the Solicitor's agreement with the Client is terminated before the conclusion of the case;
  - (4) Legal Services Commission funding is granted to the Client;
  - (5) the Client dies.

**Client becoming under a Disability**

11. If the Client at any time becomes under a disability then the Solicitor will:
- (1) consent to a novation of his Conditional Fee Agreement with the Client to the Litigation Friend and
  - (2) where appropriate, apply to the Court to obtain its consent to acting under a conditional fee agreement with the Litigation Friend. Thereafter, the Litigation Friend shall, for the purposes of this agreement, be treated as if he/she was and has always been the Client.

**Counsel taking Silk**

12. If Counsel becomes Queen's Counsel during the course of the agreement then either party may terminate it provided he/she does so promptly in writing.

**COUNSEL'S FEES AND EXPENSES**

**13. Counsel's Normal Fees**

- (1) Counsel's fees upon which a success fee will be calculated (the normal fees) will be calculated on the basis of the figures contained in the agreement between the Solicitor and Counsel.
- (2) To the extent that the hours of preparation set out in that agreement are reasonably exceeded then Counsel's hourly rate will apply to each additional hour of preparation.
- (3) If the case is settled or goes short Counsel will consider the Solicitor's reasonable requests to reduce his/her brief fees as set out in the agreement.
- (4) Counsel's normal fees will increase on each anniversary of the date of this agreement. The increased normal fee will be 105% of that charged in the preceding year.

**Counsel's Success Fee**

14. The rate of Counsel's success fee and the reasons for the success fee will be as set out in the agreement between the Solicitor and Counsel.

**Counsel's Expenses**

- 14A If a hearing, conference or view takes place more than 25 miles from counsel's chambers the solicitor shall pay counsel's reasonable travel and accommodation expenses which shall:
- (1) appear separately on counsel's fee note;
  - (2) attract no success fee and

- (3) subject to paragraph 16 be payable on the conclusion of the claim or earlier termination of this agreement.

## **COUNSEL'S ENTITLEMENT TO FEES**

### **(A) If the Agreement is not Terminated**

#### **15. Definition of "success"**

- (1) "Success means the Client becoming entitled, whether pursuant to a decision of the employment tribunal or Employment Appeal Tribunal or agreement between the parties to the remedy referred to in the Agreement and where the Client's entitlement to that remedy is pursuant to a decision of the employment tribunal or Employment Appeal Tribunal, the Opposing Party, or in the case of multi party litigation, any Opposing Party is not allowed to appeal against the relevant decision or has not appealed against the relevant decision or had entered into a settlement agreement.
- (2) "Success" means the same as "win" in the Conditional Fee Agreement between the Solicitor and the Client.
- (3) Subject to paragraphs 18 & 21 hereof, in the event of success the Solicitor will pay Counsel his/her normal and success fees.
- (4) If at any stage of the case a costs order or agreement is made which entitles the client to a payment of costs whatever the outcome of the case then counsel shall be entitled in any event to payment of his normal fees in respect of the work covered by the costs order or agreement, with his success fee thereon becoming payable if the client's claim ultimately results in success.

#### **Failure**

16. Subject to paragraph 17 (1) hereof, if the case is lost or on Counsel's advice ends without success then Counsel is not entitled to any fees or expenses.

#### **17. Errors and Indemnity for Fees**

- (1) If, because of a breach by the Solicitor of his/her duty to the Client, the Client's claim is dismissed or struck out:
  - (a) for non compliance with an interlocutory order; or
  - (b) for want of prosecution, or
  - (c) by rule of court

the Solicitor shall (subject to sub paragraphs (3) - (6) hereof) pay Counsel such normal fees as would have been recoverable under the Agreement.

- (2) If, because of a breach by Counsel of his/her duty to the Client, the Client's claim is dismissed or struck out:
- (a) for non compliance with an interlocutory order; or
  - (b) for want of prosecution, or
  - (c) by rule of court
- Counsel shall (subject to sub paragraphs (3) - (6) hereof) pay the Solicitor such basic costs as would have been recoverable from the Client under the Solicitor's agreement with the Client.
- (3) If, because of non-compliance by the Solicitor of the obligations under sub-paragraphs (1), (2), (10), (11) or (12) of paragraph 7 above, Counsel's success fee is not payable by the Opponent or the Client then the Solicitor shall (subject to sub-paragraphs (5) to (7) hereof) pay Counsel such success fees as would have been recoverable under the Agreement.
- (4) No payment shall be made under sub paragraph (1), (2) or (3) hereof in respect of any non-negligent breach by the Solicitor or Counsel.

Adjudication on disagreement

- (5) In the event of any disagreement as to whether there has been an actionable breach by either the Solicitor or Counsel, or as to the amount payable under sub paragraph (1), (2) or (3) hereof, that disagreement shall be referred to adjudication by a panel consisting of a Barrister nominated by ELBA and a Solicitor nominated by the Law Society who shall be requested to resolve the issue on written representations and on the basis of a procedure laid down by agreement. The costs of such adjudication shall, unless otherwise ordered by the panel, be met by the unsuccessful party.
- (6) In the event of a panel being appointed pursuant to sub paragraph (5) hereof:
- (a) if that panel considers, after initial consideration of the disagreement, that there is a real risk that they may not be able to reach a unanimous decision, then the panel shall request the Law Society (where it is alleged there has been an actionable breach by the Solicitor) or ELBA (where it is alleged that there has been an

- actionable breach by Counsel) to nominate a third member of the panel;
- (b) that panel shall be entitled if it considers it reasonably necessary, to appoint a qualified costs draftsman, to be nominated by the President for the time being of the Law Society, to assist the panel;
  - (c) the Solicitor or Counsel alleged to be in breach of duty shall be entitled to argue that, on the basis of information reasonably available to both the Solicitor and Counsel, the claim would not have succeeded in any event. The panel shall resolve such issue on the balance of probabilities, and if satisfied that the claim would have been lost in any event shall not make any order for payment of fees or costs.

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- (7) the amount payable in respect of any claim under sub paragraph (1) or (2) or (3) shall be limited to a maximum of £25,000.

**(B) On Termination of the Agreement**

**Termination by Counsel**

- 18. (1) If Counsel terminates the agreement under paragraph 8 then, subject to sub-paragraph 2 hereof, Counsel may elect either:
  - (a) to receive payment of normal fees without a success fee which the Solicitor shall pay not later than three months after termination: ("**Option A**"), or
  - (b) to await the outcome of the case and receive payment of normal and success fees if it ends in success: ("**Option B**").
- (2) If Counsel terminates the agreement because the Solicitor, Client or Litigation Friend rejects advice under paragraph 7(7) (d) or 7(7)(e) Counsel is entitled only to "**Option B**".

**Termination by the Solicitor**

- (3) If the Solicitor terminates the agreement under paragraph 9, Counsel is entitled to elect between "**Option A**" and "**Option B**".

**Automatic Termination and Counsel taking silk**

- (4) If the agreement terminates under paragraphs 10 or 12 Counsel is entitled only to "**Option B**".

### **Challenge to fees**

19. If the Client or any Litigation Friend wishes to challenge:
- a) the entitlement to fees of Counsel or the level of such fees following termination of the agreement ;or
  - b) any refusal by Counsel after signing this agreement to accept instructions,

the Solicitor must make such challenge in accordance with the provisions of paragraphs 14 and 15 of the Terms of Work upon which barristers offer their services to Solicitors (Annexe D to the Code of Conduct of the Bar of England and Wales).

### **Return of Work**

20. If Counsel in accordance with the Bar's Code of Conduct is obliged to return any brief or instructions in this case to another barrister, then:
- (1) Counsel will use his/her best endeavours to ensure that an appropriate barrister agrees to act for the Client on the same terms as this agreement;
  - (2) If Counsel is unable to secure an appropriate replacement barrister to act for the Client on the same terms as this agreement Counsel will not be responsible for any additional fee incurred by the Solicitor or Client.
  - (3) Subject to paragraph 21(3) hereof, if the case ends in success Counsel's fees for work done shall be due and paid on the conditional fee basis contained in this agreement whether or not the replacement barrister acts on a conditional fee basis; but
  - (4) If the Solicitor or Client rejects any advice by the replacement barrister of the type described in paragraph 7(7) hereof, the Solicitor shall immediately notify Counsel who shall be entitled to terminate this agreement under paragraph 8(3).

## **ASSESSMENT AND PAYMENT OF COSTS / FEES**

### **Costs Assessment**

21. If:

- (1) a costs order is anticipated or made in favour of the Client at an interlocutory hearing and the costs are summarily assessed at the hearing; or
- (2) the costs of an interlocutory hearing are agreed between the parties in favour of the Client; or
- (3) an interlocutory order or agreement for costs to be assessed in detail and paid forthwith is made in favour of the Client:  
Then:
  - (a) the Solicitor will include in the statement of costs a full claim for Counsel's normal fees; and
  - (b) the Solicitor will promptly conclude by agreement or assessment the question of such costs; and
  - (c) within one month of receipt of such costs the Solicitor will pay to Counsel the amount recovered in respect of his/her fees, such sum to be set off against Counsel's entitlement to normal fees by virtue of this agreement.
- (4) If the level of any success fee is assessed and either reduced or disallowed on assessment on the ground that the level at which the success fee was set was unreasonable in view of the facts which were or should have been known to counsel at the time it was set, such amount ceases to be payable under this agreement unless the court is satisfied that it should continue to be so payable.
- (5) Any failure to obtain an order on assessment that Counsel's normal fees should be paid by an Opponent shall not effect Counsel's entitlement to his/her normal fees in full under this agreement unless the court orders otherwise.

#### **Solicitor's Obligation to pay**

22. (1) The amounts of fees and expenses payable to Counsel under this agreement:
  - (a) are not limited by reference to the damages which may be recovered on behalf of the Client; and
  - (b) are payable whether or not the Solicitor is or will be paid by the Client or Opponent.
- (2) Upon success the Solicitor will promptly conclude by agreement or assessment the question of costs and will pay Counsel promptly and in any event not later than one month after receipt of such costs the full sum due under this agreement.

#### **Interest**

23. The Solicitor will use his best endeavours to recover interest on costs from any party ordered to pay costs to the Client and shall pay Counsel the share of such interest that has accrued on Counsel's outstanding fees.

24. **Challenge to Counsel's Fees**

The Solicitor will inform Counsel's clerk in good time of any challenge made to his fee and of the date, place and time of any detailed costs assessment, the Client or Opponent has taken out and provide Counsel with the opportunity to make written or verbal representations in support of his/her fees at any assessment and unless Counsel is present or represented at the assessment hearing will place Counsel's relevant details and any written representations before the assessing judge and argue Counsel's case for his/her fee.

**Agreement on Fees**

25. If the Opponent offers to pay the Client's legal fees or makes an offer of one amount that includes payment of Counsel's normal fees at a lower sum than is due under this agreement then the Solicitor:

- (a) will calculate the proposed pro-rata reductions of the normal and success fees of both Solicitor and Counsel, and
- (b) inform Counsel of the offer and the calculations supporting the proposed pro-rata reductions referred to in paragraph (a) above, and
- (c) will not accept the offer without Counsel's express consent.

If such an agreement is reached on fees, then Counsel's fees shall be limited to the agreed sum unless the court orders otherwise.