



MASTER OF
THE ROLLS

GUIDELINE HOURLY RATES

Background

Guideline Hourly Rates (GHRs) were originally issued by the former Supreme Court Costs Office (SCCO) at the request of the then Deputy Head of Civil Justice (Sir Richard Scott V-C). They were issued by the SCCO until 2006 as part of the SCCO's Guide to Summary Assessment. Since 2007, the Master of the Rolls, as Head of Civil Justice, has issued the GHRs. He did this in the light of advice given by the Advisory Committee on Civil Costs (ACCC) in 2009 and 2010. In 2011, however, Lord Neuberger MR declined to accept the recommendations of the ACCC for 2011 and asked for more detailed evidence to support them. The responsibility for recommending GHRs was then transferred by the Ministry of Justice from the ACCC to the Civil Justice Council (CJC) and more particularly its Costs Committee.

The Costs Committee of the CJC was asked to conduct a comprehensive, evidence-based review of the GHRs and to make recommendations to the Master of the Rolls. Pending the outcome of this review, the GHRs have remained fixed at the level of the rates promulgated in 2010.

The chairman of the Costs Committee was Foskett J. A full list of the other members of the committee is set out at Appendix 1 (page 54). The committee was assisted by expert economists, Professors Fenn and Rickman. Neither I nor my predecessor took any part in the committee's deliberations.

The committee's report was delivered to me at the end of May 2014. A summary of the committee's recommendations is annexed as Appendix 1 to this document. The report itself is annexed as Appendix 2. The committee's terms of reference are set out at p 52 of the report.

It is important to emphasise that the GHRs are guideline rates. The original intention was to provide the judiciary and others with a simplified scheme of rates to be used in undertaking summary assessments of costs. As Lord Phillips MR explained in 2004:

“The Guide is intended to be of help and assistance to judges, but it is not intended as a substitute for the proper exercise of their discretion having heard argument on the issues to be decided.”

It is also important to emphasise that the guidelines were originally intended to be broad approximations of actual rates in the market. As Sir Rupert Jackson noted in his Final Report on Review of Litigation Costs “the aim of the GHR should be to reflect market rates” (Chapter 44, paragraph 3.12).

The Committee’s recommendations on GHRs for 2014

As I have indicated, the committee's task was to make evidence-based recommendations. The committee has made recommendations, but it is plain from its report that these are put forward with considerable reservations. I will refer to these reservations later. The proposed changes relating to the GHR are summarised in recommendations 2 to 9 of the report. The proposed new rates are set out in Tables 1 and 2 of the summary. I shall start with these.

Summary of the Committee’s methodology on rates

The committee’s approach was to focus on “what it costs lawyers to run their practices”. It concentrated on solicitors and adopted the “expense of time” (EOT) approach. This requires estimating the cost to law firms of an hour of fee-earner time, taking into account the full salary cost paid to fee-earners for those hours and the expenses of the firm that need to be recovered from hours billed for the firm to break even (including a wide range of costs and overheads). Once this figure has been arrived at, a percentage mark-up is added to represent a reasonable profit element.

The data available to the committee are described in section 4 of the report. The principal data comprised (1) the Practising Certificate Holders’ Survey (PCHS) and the Trainee Solicitors’ Survey conducted annually by the Law Society’s Research Unit which is based on 1500 randomly selected individuals from private practice; (2) the Firms’ Finance Survey (FFS) which was undertaken in 2011 based on a national random sample of 300 firms from sole practitioners to 25 partner firms; (3) the Law Management Section Survey (LMS) which is conducted by the Law Society’s Research Unit on the basis of a self-selecting voluntary exercise, with most participants having 5-25 partners; and (4) the committee’s own survey which yielded 148 responses and which is summarised at paragraphs 4.12 to 4.18 of the report.

Important points to note about these data are that (i) the PCHS produced useful information from 1500 randomly selected individuals on billable hours and gross salaries, but none about costs or profitability; (ii) the FFS produced information from 300 randomly selected firms on turnover, costs (salaries and overheads) and chargeable hours, with some distinctions between different types of work, but not types of fee earner; (iii) the LMS covered fee income, income receivable, ratio of fee earners to equity partners and the costs of running a solicitors’ practice over and above the payments (real and notional) made to fee-earners in small to medium size firms; and (iv) the committee’s own survey was intended to provide a broad cross-check and fill in some of the gaps in the other data.

Section 5 of the report contains a detailed analysis of the committee's methodology to which reference should be made.

The Committee's proposed rates and the reservations expressed

With the support of its expert advisers the committee expresses the unanimous view that the proposed new GHR rates are "consistent with the objective evidence-base (derived from all areas of practice) that it had at its disposal" (section 7.3). Table 1 (section 7.4) shows the current GHRs by band/grade and Table 2 shows the percentage changes. It will be seen that the percentage changes range from substantial reductions (ranging from 10% to 36%) to substantial increases (ranging from 5% to 18%). The majority of the changes (18) would involve reductions; only 7 would involve increases.

Before setting out its reservations, the committee refers to what can be described as an "impact assessment" of the likely effects of the proposed changes (sections 7.6 to 7.11). This seeks to demonstrate the net effect of the adoption of the new GHRs on fee income from litigation work assuming no changes in current staffing levels or levels of work. For all fee-earners (including trainee solicitors, legal executives, paralegals and other non-qualified fee-earners) the net reduction in fee income would be 5.14%; and for all qualified fee-earners, the net reduction would be 2.23%. The committee says that "thus presented and thus analysed, the overall net effect of the changes could be seen as relatively small" (section 7.12).

The concerns expressed by the committee relating to the proposed new rates are that (1) the LMS survey and its own survey suffer from the "self selection" nature of the respondents who replied: they were not randomised surveys; (2) all of the surveys relied on were based on the responses of a very small part of the large community of civil litigation solicitors throughout England and Wales; (3) the respondents to the LMS Survey will not have engaged in a significant amount of multi-track litigation; and (4) consideration ought to be given to measures to lessen the immediate impact of the proposed changes.

The fourth concern has led the committee to recommend that the new GHRs should be phased in over two years.

My conclusions on the proposed rates

I have given very careful consideration to the recommendations for new rates, but regret that I cannot accept them. The concerns expressed by the committee lead me to conclude that the evidence on which its recommendations are based is not a sufficiently strong foundation on which to adopt the rates proposed. In my view, the first and second concerns, when taken together, are particularly compelling. A relatively small non-randomised survey cannot be a secure basis for determining what it costs solicitors to run their practices. This shortcoming in the evidence is fundamental.

As regards the "impact assessment" to which I have referred, the committee itself recognises that the effect of the changes on individual firms could vary: the overall impact assessment masks wider changes in different bands and for different grades as well as potentially differing regional impacts. I am also conscious of the fact that, although the committee (rightly in my view) has not taken into account the impact of the Jackson cost reforms, these reforms have contributed, in the short term at least, to considerable uncertainty. In these circumstances, it is all the more important that the evidence on which any changes are based is reliable.

I consider that it would be wrong in principle to accept the proposed new GHRs on the basis that their effect could be mitigated by phasing in the new rates over a two year (or indeed any other) period. Phasing in would be acceptable if the new rates were sufficiently evidence-based. But phasing in cannot overcome the shortcomings in the evidence.

My conclusions on other recommendations

There are, however, several recommendations that I can accept. These are that there should not be an additional Grade A star (section 6.3); that separate GHR bands specific to specialist fields of civil litigation should not be introduced (section 6.6); and that separate rates should not be introduced for detailed assessments of costs, but that there should be greater flexibility in detailed assessments than would ordinarily be shown in summary assessments (section 6.7). I am persuaded by the reasons given by the committee for these recommendations in the respective sections of its report.

I also accept the recommendations to amend the criterion for Grade A fee earners so that it includes Fellows of CILEX with 8 years' post-qualification experience (section 6.1); and that Costs Lawyers who are suitably qualified and subject to regulation be eligible for payment at GHR Grades C or B, depending on the complexity of the work (section 6.2). Both of these recommendations were supported by persuasive evidence and arguments. I propose to introduce these changes on 1 October 2014.

On the other hand, I cannot accept the recommendation to introduce a new Grade E (section 6.4) for paralegals. As the committee acknowledged, there are no comprehensive data in respect of the range of paralegal salaries or costs. In the absence of such data, there is no proper basis for concluding that the recommendation reflects the market. Until reliable evidence of the market is available, Grade D rates will continue to be the starting point for assessment.

The way forward

For the reasons I have given, I have reached the conclusion that I cannot make any change to the rates at the present time.

I have considered whether, as a temporary measure, I might revert to the previous solution of altering the current rates in line with inflation. But this would be arbitrary and would be difficult to justify in the light of the recommendations (albeit not sufficiently evidence-based) that the average rates should in general be reduced.

It seems to me that efforts need to be made to obtain far more comprehensive evidence than it was possible for the committee to obtain. The resources available to the committee were exiguous. It has done sterling work. All members, in particular its chairman Foskett J, invested a huge amount of time and effort into the process. The members of the committee and its expert economists all gave their services without charge. I am extremely grateful to every one of them. They produced a report of real quality. But the value of such a report ultimately depends on the quality of the data on which it is based.

The present situation is deeply unsatisfactory. GHRs are needed to guide summary and detailed assessments of costs. There needs to be public confidence that there is a reliable basis for them. I propose, therefore, to have urgent discussions with The Law Society and the Government to see what steps can be taken to obtain evidence on which GHRs can reasonably and safely be based.

I have reached my conclusions after the most careful consideration and with considerable regret. But it would be wrong to make decisions as to appropriate GHRs which are not based on sufficiently robust evidence. It is imperative that sound and reliable evidence is obtained.

The Rt Hon Lord Dyson

Master of the Rolls and Head of Civil Justice

28th July 2014