

BROADCASTING STANDARDS AUTHORITY

Practice Note: Costs awards in favour of complainants

Background

This practice note has been issued to give guidance to complainants and broadcasters on the issue of costs awards.

Section 16(1) of the Broadcasting Act 1989 provides:

...the Authority may, in any proceedings, order any party to pay any other party such costs and expenses (including expenses of witnesses) as are reasonable, and may apportion any such costs between the parties in such manner as it thinks fit.

Costs awards are ordinarily to recompense in part a successful complainant for legal costs which have been incurred (but may be costs other than legal fees incurred during the complaints process).

Principles

There are some principles which we apply when we consider applications for orders of costs and these include:

- This is a jurisdiction which needs to be, as far as possible, accessible to participants without the need for legal advice and legal help in the preparation and presentation of submissions.
- We recognise and respect the freedom of complainants and broadcasters to involve their lawyers but they need to recognise that any recompense for costs cannot be assumed to follow.
- There will be exceptional cases where the assistance of lawyers will be desirable and appropriate and in these cases, issues of costs will properly arise.

Quantum of Costs

In all but the most exceptional cases, the most that is likely to be recoverable in an award of costs is a contribution to the costs actually incurred.

Different lawyers have different methods of fees assessment, different levels of relevant skills and experience, and different approaches to the work that they do. Different complainants have different approaches to the extent that their lawyers need to be involved and to the extent of their willingness to accept the impact of fees. In these circumstances, and in this jurisdiction, fees charged by lawyers to complainants vary widely and we are not able to approach the quantification of costs awards solely or substantially by judging what proportion of actual costs should be allowed.

Moreover, what costs are “reasonable” as between the complainant and the complainant’s lawyer is not something which we are ordinarily able to judge as we would usually have insufficient detail of what work was asked for, what was done, and what was involved in the work being done. We do, however, ask complainants to provide invoices for any legal costs incurred.

In these circumstances our approach to the quantification of an award of costs must be broad-brush and objective, and must take into account a range of factors.

The Factors

The factors which we will take into account when considering any application for costs in favour of a successful complainant and in quantifying any such order will include the following:

- the complexity of the issues raised
- the number of issues raised
- the complexity of the factual background
- the number of substantive submissions that needed to be made
- whether the proceeding required resolution of any interlocutory or procedural issues
- any aggravating or mitigating factors
- the need for the complainant to have incurred costs to the extent that costs were incurred or at all
- the amount of costs incurred
- the resources available to the parties
- the nature and importance of the complaint to the complainant
- the nature and importance of the complaint and the public interest.

BSA Retains Ultimate Discretion

This practice note is intended to provide a guide to the principles we will consider in determining whether or not to award costs and if so, the amount of any award. We retain overall discretion and in any particular case may take into account such factors as we think should fairly and appropriately be taken into account.

This Practice Note replaces the Advisory Opinion on Costs Awards issued 21 April 2006.

Issued by the Broadcasting Standards Authority pursuant to s21(d) of the Broadcasting Act 1989

**P J Radich
Chair
June 2012**