

Crime doesn't pay – the Bar on strike

By Anthony Cheshire SC

On 7 April 1993, my career as a barrister began with a trip to a Magistrates Court in North London in what may have been the seminal social security fraud case of *DSS v Smith*, but from my recollection was at least a triumphant adjournment application, for which I was paid £65. On 23 April 1993 I did my first plea in mitigation, for which I was paid (six months later) £31.50, and on 6 April 1993 my first criminal trial, for which I was paid (four months later) £42. By the end of my first year in practice I had made a profit before tax of £3,322. The following year my profit had risen to £16,456.

Thereafter, my earnings increased from year to year, which reflected the fact that I was making my way in civil work and rapidly left criminal law behind. Although in retrospect I am not sure how I survived those early years, I was only 23 at the time and this was my first 'real job'. So my overheads were low and my demands were pretty much limited to paying the rent and using the £5 notes that were left over as 'drinking vouchers'. As I got older and my standard of living expanded, so did my income.

Those who stayed or started practising in criminal law, however, were not so lucky.

In May 2018, amid concerns for the future of the criminal legal aid system and after years of discussions and negotiations, the United Kingdom Ministry of Justice agreed to a review of criminal legal aid fees for the bar. An independent report was commissioned, which eventually reported in November 2021.

Statistics gathered by the Criminal Bar Association (the CBA) recorded that 23% of criminal legal aid barristers worked more than 60 hours a week, but their average annual income after expenses for the first three years of practice was only £12,200 (compared with an average household income in the UK of £30,500). Due to a failure to increase rates in accordance with inflation and also various cuts, the real rate of pay for criminal legal aid work fell by 28% over the last two decades. Over 20% of criminal legal aid barristers have left the profession since 2016 and during that time



the number of junior barristers specialising in crime fell by 11%. In addition, during the pandemic average earnings from criminal legal aid work fell by 23%.

The independent review recommended a 'minimum' 15% increase to all criminal legal aid fees and that it should be introduced 'as soon as possible' with 'no scope for further delay'.

In March 2022, the government announced that it would introduce the minimum figure of 15%, but only from October 2022 and then only in relation to new matters. In addition, by that time inflation was rising, further diminishing the effect of the proposed increase.

In the face of this, the CBA maintained its position that there should be an immediate 25% increase to all criminal legal aid matters and 94% voted for action, which commenced on 11 April 2022.

Initially, this involved not accepting returns, but in June 82% voted to an escalation of 'days of action'. This involved effectively going on strike two days per week, which gradually increased to one-week-on/one-week-off. In addition, new briefs were not accepted. In August, there was a further ballot, where 80% voted to escalate action to continuous strike-action, which commenced on 5 September 2022. There were, however, exceptions for certain types of matters.

The action was not well received by the government. Then Justice Secretary Dominic Raab described the action as an 'unnecessary and irresponsible strike', whose

effect would be to 'cause delays for victims and the wider public'.

In June 2022, the Lord Chief Justice Lord Burnett entered the fray, while maintaining that he was not. He issued guidance to the judiciary, stressing that although the judiciary was not a party to the dispute and would 'not enter into the substance of the dispute', cases where a barrister had indicated that there would not be an attendance at court because of the days of action, should remain listed. Lord Burnett continued that in such cases:

Judges should seek an explanation in open court as to the current position. If an instructed barrister does not attend, the judge should ask the defendant, if present, whether they have discussed the matter with their barrister and whether they have agreed to their barrister's non-attendance.

It will be a matter for the CPS in each case, to decide whether to make an application for wasted costs.

A failure to attend at court, having accepted instructions, may amount to professional misconduct... All cases in which there is non-attendance should be referred to the Senior Presiding Judge's Office to consider whether to involve the Bar Standards Board.

The question whether a failure to attend amounts to professional misconduct, will then be a matter for any disciplinary process.

Perhaps unsurprisingly this was not received well by the bar. Indeed, Lord Burnett's intervention seems rather to have stoked the fires. An open letter to the Times, signed by over 70 QCs (perhaps I should add here 'as they then were'), responded to Lord Burnett in forthright terms:

...the timing, contents and tone of the guidance is being read by many of us who prosecute, defend, sit as part-time judges, and importantly, are trying to do right by the system, as a pressure tactic, designed to intimidate barristers not to take part in a series of planned walk outs.

Many are concerned that the independent office of the Lord Chief Justice now risks being perceived as doing the job of a partisan enforcer for a government whose degrading of the justice system has drained it of the very professionals it relies on.

The CBA issued guidance to its members, stressing that the 'guiding principle at all times should be to give notice and seek to minimise harm, to any affected person, in order to mitigate the risk of regulatory proceedings in the event that a complaint is made against you'. This included giving 'prompt notification' to the instructing solicitor, the lay client and the court and considering whether any failure to attend court 'might have serious consequences for the administration of justice or the interests of third parties'. The CBA sought to reassure its members:

The criminal Bar is one family. As we move through the coming weeks, we will continue to maintain our solidarity and we will support each other. We have strength in numbers and we have the courage to see this through.

The London Criminal Courts Solicitors Association issued a statement of support, referring to Lord Burnett's statement as 'threats of regulatory water cannons.'

Anecdotal reports are that many defendants were sympathetic to the strike action, notwithstanding the resultant delays in their cases being dealt with; and that many judges supported the strike action. Indeed, in the face of further delays in criminal trials, several defendants who otherwise would have been kept on remand were granted bail.

This seems to have provided some impetus to the government, together with the merry-go-round of prime ministers and ministers. Brandon Lewis served as Justice Secretary only between 6 September and 25 October 2022, but in that time the government reiterated its offer of a 15% increase, but this time it was to be immediate and, importantly, backdated to include existing matters.

On 10 October 2022, the CBA voted by 57% to accept this offer from the government and the strike was suspended. CBA Chair, Kirsty Brimelow KC, issued a statement:

As barristers who have committed our lives to the public service of defending and prosecuting in criminal cases, we have been shabbily treated in the past by government. We are hoping for a new relationship with government and hope treatment will not be shabby moving forwards.

...

The criminal justice system remains chronically underfunded.

...

It remains the government's responsibility to stop the criminal justice system tipping over the cliff edge. Barristers should not have to fight so hard again to bring this responsibility back home to government. Barristers should not again have to endure working all hours to ensure that cases are brought to courts while government pares criminal legal aid fees to the bone. The offer from the government is an overdue start.

...

Goodwill of criminal barristers is exhausted. The long-term reform does depend on continuing, constructive engagement with government.

Otherwise, our members remain ready to act again.

It is clear that there was a significant divide in the criminal bar based upon age. The more senior members of the bar were keen to return to work, likely reflecting the ordinary and pressing financial obligations of age, whereas the younger members were perhaps more focussed on their longer-term futures. As one young barrister said:

It's quite clear to me from the people I've spoken to that there's a big divide between seniors and juniors. If you're

further advanced in your career than a 15% increase on your fee income is probably quite attractive. If you are, like I am, typically doing hearings, which are of a fixed fee, £90 or £125, which often require you to travel a great distance for court – and travel expenses aren't reimbursed – that change is significantly lower.

It is clear that a 15% increase in fees does not remedy the 28% drop over the last two decades and the increase will be significantly wiped out by inflation, currently running at about 10% per annum.

It remains to be seen how the new Criminal Legal Aid Advisory Board, introduced as part of the reforms, will function and whether it will satisfy the needs of the criminal bar and the government. Given the tension inherent in having a publicly funded private criminal defence bar, I suspect that there will be ongoing skirmishing and another significant fight (or fights) in the years ahead. I have not yet heard whether there have been any referrals to the Bar Standards Board of barristers who took part in the days of action. One could express the hope that commonsense would prevail, but law and politics do not always make good bedfellows with each other let alone with commonsense! **BN**

