

FIXED/CAPPED FEES FOR SEND TRIBUNAL ('SENDIST') APPEALS

The vast majority of our clients like to instruct us by way of a fixed/capped fee for conducting their case. This factsheet provides information on the fixed/capped fees that we charge for SEND Tribunal appeals and explains the reasons why we offer this method of payment. We apologise that it is a very detailed document but believe that it is fairer for clients to know in advance the way that we charge rather than having to ask questions later. Please read it very carefully.

INTRODUCTION

Unfortunately, many clients (particularly those who may have never used a solicitor before) and their solicitor usually approach their relationship from quite different perspectives. To a solicitor, satisfaction from doing a job well comes from doing it well technically but clients see legal services differently. They already take it for granted that the solicitor has the necessary expertise to handle their case as this is why they approached them in the first place. Value for money, care and friendliness, ease of use and speed of service are usually the most important factors.

HOW SOLICITORS NORMALLY CHARGE

The normal way in which solicitors charge their clients is on the basis of an hourly rate. An hour is divided into 10 units – i.e. 6 minutes represents 1 unit of time. Charges are calculated by reference to the time spent by the solicitor and other staff dealing with the matter. Chargeable work includes time spent advising the client, attending on the client or other relevant people, on preparing and/or perusing papers, drafting or considering correspondence, making or receiving telephone calls, preparing for and attending hearings, conferences with counsel or other meetings, travelling & waiting, etc.

Although routine letters, emails and telephone calls are charged as 1 unit of time, any other time spent advising, in attendance, undertaking preparation and perusal, is charged by the time actually taken in units. Wherever possible, work is delegated to the most cost effective but competent

member our staff which helps keep costs to a minimum. Work of a purely administrative nature is usually not chargeable.

WHAT CLIENTS FEEL

But because they are paying via an hourly rate, clients often feel that when they are speaking to their solicitor or asking for work to be done, *'the meter is constantly ticking'* and that using a solicitor is like *'jumping into a black hole with their cheque book not knowing where it is going to end'*. As every legal case is always different from the next, it is often not possible for the solicitor to give more than a rough estimate of what the overall costs may be.

This estimate may also need to be revised a number of times during a case depending on the way that it develops. This is particularly so where another party is causing the solicitor to do a lot of unforeseen work or because the client themselves is causing a lot of extra work to be incurred by the solicitor, perhaps by calling them continuously.

WHAT CLIENTS WANT

Potential costs are a great concern to all clients and, understandably, they are unable to make sense of some solicitor's general reluctance to be open about them. Above all, what clients want from their solicitor is to have confidence and peace of mind. These are perceived by the solicitor's trustworthiness and integrity which also goes to the way in which the solicitor deals with the question of their legal fees.

Experience has shown us that the way in which a solicitor explains legal costs to their client and how they discuss the method of billing with them will have a serious impact on their client's ultimate perception of fairness for the price charged. When the client receives a bill unexpectedly and for more than they had anticipated (even if the solicitor has ultimately been successful on their behalf) it can often unnecessarily undermine the solicitor and client's good relationship.

Clients these days also no longer necessarily want to instruct a solicitor on a standard hourly basis. Many would rather have some piece of mind knowing up-front what the overall costs may be at the beginning rather than only finding out at the end as they are worried about potential high fees, hidden costs or surprises, and escalating costs outside of their control.

OUR APPROACH

Douglas Silas Solicitors believe that clients need to know about potential costs from the outset wherever possible, so that any uncertainty can be avoided. We are also scrupulously fair and transparent about our fees. Although in many cases we are not able to give more than a rough estimate of what the overall costs may be and will therefore have to charge on an hourly basis, because of our specialist experience of dealing with appeals to the SEND Tribunal we have a fairly

good idea of the work involved and the potential overall costs. We are therefore able to offer our clients the option of paying a fixed/capped fee.

OUR FEES

Our current hourly rates are £250 an hour inclusive of VAT for Douglas Silas and £150 an hour inclusive of VAT for other members of our staff. Our rates may at first seem high but reflect the very high level of expertise and experience that we have in dealing with cases and the personal care and attention that we always give to our clients and their cases.

Obviously, there are different types of appeals and some cases take longer than others. However, our successful track record and experience of normally handling the more difficult or complicated types of appeals/claims have allowed us to analyse the costs of claims quite well.

We have found during the past few years that Tribunal appeals against the contents of a statement which proceed right up to hearing take up on average the equivalent of about 45-55 hours from beginning to end which is roughly equivalent to around £11,000 to £13,000 inclusive of VAT (excluding disbursements). This is because most, but not all, of the work is done by Douglas himself.

Other types of appeals such as appeals against refusals to assess/reassess; refusals to change the name of a school on a statement; refusals to make a statement or decisions to cease to maintain a statement, take up on average 30-40 hours from beginning to end which is roughly equivalent to around £7,000 to £9,500.

We therefore consider that a fair fixed/capped fee to charge clients is **£11,500 inclusive of VAT (excluding disbursements) (i.e. £10,000 plus VAT) for appeals against the contents of a statement** and **£8,050 inclusive of VAT (excluding disbursements) (i.e. £7,000 plus VAT) for other types of appeals**. These fees will normally come into effect from the time of confirmation of a client's instructions but if we are required to do other work before there is a decision/statement to appeal against we may have to charge for this on our normal hourly basis.

The work covered by our fixed/capped fee includes all normally chargeable work such as all communication with the client; preparation of the appeal itself, dealing with the other parties involved (such as the SEND Tribunal, the LEA, witnesses and schools); instructing experts (such as educational psychologists, speech and language/occupational/physio therapists etc.), consideration and drafting of correspondence and other documents; consideration of the LEA's evidence and reply to the appeal and preparation for a case management hearing; and taking all other pre-hearing steps (including preparation of further evidence and a working document in appeals against the contents of a statement).

It will also include preparing for and attending the SEND Tribunal hearing in order to represent the client and then consideration of the final decision with them afterwards. The fixed/capped fee will still apply even if a client has taken some of these steps already, although if a substantial amount of work has already been done it may be more sensible for the client to then instruct us on our normal hourly rate.

Please note that the fixed/capped fee is also only applicable to SEND Tribunal appeal hearings taking place in Greater London and/or which last for a one day hearing. Where a Tribunal hearing takes place outside of London and/or where it ends up lasting for more than one day, an additional charge will be made to the client, either for a further agreed fixed/capped fee or according to the actual extra costs incurred at our normal hourly rate.

STRIKE OUT APPLICATIONS/PRELIMINARY HEARINGS

Also, where there is an application by an LEA to strike out an appeal or a preliminary issue is raised that requires an oral hearing, we will need to charge work done in respect of this as a separate matter either for a further fixed/capped fee (which we will always try to agree beforehand) or according to the actual extra costs incurred to the client at our normal hourly rate.

These cases are fortunately unusual but we must point out that in recent years we have noticed that some LEAs seek to try every possible way of having an appeal/claim dismissed at the earliest opportunity and sometimes try this tactic even if there is little chance of them being successful.

ADJOURNMENTS JUST BEFORE/AT HEARING.

It is regrettable for us to have to report that sometimes LEAs fail to deal with Tribunal appeals properly until the very last minute. Unfortunately we have experience of cases where we have managed to manoeuvre clients into a very good position just before the hearing, even having given the LEA ample opportunity to present their case properly, to then find that the LEA makes a last minute attempt to get an adjournment so that they can then get further evidence together. An adjournment application is sometimes even made just a week or less before the hearing.

Even where we have managed to successfully oppose the request and have it refused by the Tribunal, an LEA representative can still turn up at the hearing, sometimes even without having any evidence or witnesses with them and renew their application before the Tribunal panel hearing the case. Although, Tribunal panels are usually quite strict about granting adjournments on the morning of the hearing, unfortunately, they sometimes still grant one because they are concerned that if they do not they may be accused of being unfair to the LEA and faced with their decision being appealed to the Upper Tribunal, if deciding in the parents' favour. This is regrettable.

Since we have usually done most of our preparation by a week before the hearing, if an adjournment request is granted after that time (either before or at the hearing) we are then effectively required to do a lot more additional work on the case, particularly if we have to comply with a number of further Tribunal directions before the hearing can be reconvened, sometimes many weeks/months down the line. As LEAs may also then produce new evidence, the nature of the appeal or the type of work required often changes so that we find ourselves having to re-prepare and re-argue the appeal.

In these situations (i.e. where adjournments are requested in the last 7 days before an appeal – not including the day of the appeal itself) we will then have to charge our clients for all the work that has been incurred up until that point, which may even be up to the whole fixed fee amount if we have already exceeded it. We then will either offer clients a further fixed fee for any work we have to do after the adjournment until the end of the next hearing or charge them for the further work at our normal hourly rates, in the same way, as we do when a hearing goes on for more than one day.

We realise that this places a great financial burden on our clients and we will always argue as strongly as possible to try and prevent the Tribunal granting an adjournment for precisely this reason.

WHERE A CLIENT CHANGES THE NATURE OF THEIR APPEAL

Sometimes, a great deal of additional work is also caused by the clients themselves because, for example, they decide during the course of an appeal that they wish to change the school or type of school that they are appealing for or because they want to seek alternative expert reports or further opinions than normal. We fully understand that sometimes this becomes necessary because of a change of circumstances or the coming to light of new evidence but this can also then mean that, like we have stated above in relation to adjournments, we are effectively required to re-prepare and re-argue their case.

In these circumstances though, we sometimes find ourselves exceeding the work that we are doing under the fixed fee by more than the £1,000 which we are usually prepared to/expecting to do. Therefore, we have to reserve the right to terminate a fixed fee if we are required to go above £1,000 more than the fixed fee (i.e. £12,500 or £9,050 depending on the type of appeal) where a client has been the cause of the additional work by changing the nature of their appeal from the one originally lodged.

SWINGS AND ROUNDABOUTS

As you would expect, there will be some cases where a client may end up spending more than they may have been charged if they had instructed us on an hourly basis. However, there will also be, more usually, cases where a client may end up saving themselves money in this way. It is always going to be 'swings and roundabouts'.

Aside from the potential costs savings though, the main benefit to the client by instructing us on a fixed/capped fee basis is by them knowing exactly how much they will have to pay from the outset and then be able to budget accordingly. It also means that the constant worrying about legal costs should not get in the way of the solicitor/client relationship which may sometimes undermine the strength of a case because relevant information may not be communicated or steps may not be taken because a client is/we are worried about incurring further costs.

CASES SETTLED PRIOR TO HEARING

Where cases are settled prior to the SEND Tribunal hearing, either because the LEA agrees to do all (or almost all) of what the client is seeking or because a client themselves decides they do not wish to proceed further, then, provided the case is settled more than seven days before the hearing, rather than charging the client the whole fixed/capped fee, which may be harsh, we will only charge clients for the work that we have incurred on their behalf at our normal hourly basis until that time plus a further 10% to reflect the risk we have taken on agreeing to a fixed/capped fee which may also have worked in the client's favour if we had ended up doing more work than the fee agreed to.

For example, if only £2,000 worth of work has been incurred when the case concludes we will charge the client £2,200 but if £6,000 worth of work has already been incurred we will charge them £6,600. This amount will usually be less than the fixed/capped fee but, where there has been intense activity in order to bring about a settlement without resort to a hearing, particularly in the last few days before the hearing, the overall costs may actually be close to or even more than the fixed/capped fee agreed. If so, we will still honour the fixed/capped fee agreement.

CASES WHICH NO LONGER HAVE 'REASONABLE PROSPECTS OF SUCCESS'

Whenever we take a case on, we have either impliedly or explicitly agreed that there are 'reasonable prospects of success' in bringing an appeal (i.e. at least a 51% chance of success). This may be even where the appeal is a difficult one and where other solicitors have said that the case cannot be won.

However, sometimes new evidence comes to light or things change in an appeal whereby we have to advise a client that they no longer, in our opinion, have 'reasonable prospects of success' (i.e. less than 51%). When this happens we will be unable to continue acting under the fixed fee

arrangement if the client wishes us to act still. With our 'capped fee' arrangement the client will only be charged for the work that we have already incurred. We will not charge any uplift as we would do for cases that we succeed with.

If, despite our advice, a client still wishes us to continue acting on their behalf (for example, because they may wish to pursue the appeal for other reasons, we may be willing to continue (at our discretion) to act but will then need to charge the client from that point onwards at our normal hourly rate.

DECIDING HOW TO INSTRUCT US

Clients will need to decide from the outset of their case whether they wish to instruct us on an hourly basis or on a fixed/capped fee basis and to confirm this to us in writing. It will be within our discretion as to whether we are willing to switch from an hourly rate to a fixed/capped fee rate at a later time during the case. Although we will normally be happy to offer a fixed/capped fee if the client has previously instructed us on an hourly rate, we will be unable to assure them that the fixed/capped fee they will be offered will be the same as they would have been able to avail themselves of at the beginning of the case.

RECOVERY OF COSTS

It is also important to stress that in SEND Tribunal appeals, even where a client is ultimately successful, they are very rarely able to recover any costs incurred in bringing the appeal. Whilst the Tribunal does retain a discretion to award costs in cases it is only where the LEA has behaved in a 'unreasonable' manner and the Tribunal is often reluctant to find this.

As an example, after dealing with literally hundreds of SENDIST appeals over the past 12 years or so Douglas has only been successful in two appeals so far in getting an award of costs made against an LEA. The award in those cases (£1000 and £1500) is still only a fraction of the total costs the clients had to pay out in legal and expert fees.

MONTHLY PAYMENTS

Like all solicitors, we require our clients to provide us with monies on account of legal fees during a case which is kept on a 'client account' and which is not touched until work has been incurred and billed for. Usually we ask for three or four payments during a case. However, we appreciate that legal fees are often very difficult for clients to pay off in this way. We therefore can offer clients the option of paying their legal fees through monthly payments during the course of their case.

Since an average SENDIST appeal takes approximately 5 - 7 months from beginning to end, we suggest that clients agree to pay us through six, monthly instalments after paying an initial sum

when they first instruct us. In this way, they can also know that by the time their case is concluded their legal fees are paid up.

STANDING ORDER

By way of an incentive, if clients agree to pay us by Standing Order and agree to sign a bank/building society mandate to allow for this we are able to offer a reduction in our fees by £250 to either £11,250 or £7,800 depending on the type of appeal we are dealing with (both excluding disbursements).

If agreeing to pay by standing order clients will be required to let us have an initial deposit of £1,500 (usually by cheque or BACS payment when confirming our instructions) followed by six monthly payments of £1,625 in respect of appeals for £11,250 or a deposit of £1,500 followed by six payments of £1,050 in respect of appeals for £6750 plus VAT. In this way, either by the time or soon after the appeal has been completed all of our legal fees will have usually been paid up (excluding disbursements but for which we will ask for a further cheque at the end of the case).

CREDIT CARD PAYMENTS

We are also able to accept payments by credit card and, where clients can give us their written authority to deduct monthly payments from their credit card without us needing to return to them each month for to ask for this, we are able to offer the same incentive as for standing orders (i.e. a reduction in our fees by £250). Where an authority or mandate is not signed, we will be unable to offer the reduction. **Please note, that to cover charges levied by the card companies, an additional 1.75% will be added to the fee for all card transactions we undertake.**

LUMP SUM PAYMENTS

Some of our clients ask us at the outset if they can pay all of their legal fees in one go at the beginning of the case! Whilst this initially seems a strange question, they have explained to us that their logic in saying this is because they already have access to funds and would prefer to know that they have paid off all their fees as soon as possible and then not lull themselves into a false sense of security every month by thinking that they have more money in their account than they really do, after taking into account the monthly payments that will be taken out later.

We also see the logic in doing this and, of course, always welcome clients settling their fees at the earliest opportunity. As we pride ourselves on being meticulously fair about how we deal with our fees, we will accept one-off payments like this by paying them directly into our client account and only billing the client through the course of the case (as we do anyway for all of our clients) for the actual work that we have done in the case up to that point. This means that a client will always be safe in the knowledge that if matters do settle before the end of the case, any monies not used can be refunded to them easily.

We also recognise the benefit for ourselves as well as a client in paying our fees in one go. In order to reflect this we believe it is fair to also offer a £500 discount to that we offer for clients paying by monthly standing order so that our fees are then £11,000 or £7,550 (both excluding disbursements) depending on the type of appeal we are dealing with.

UNREASONABLE BEHAVIOUR

Please note that it is implied in any fixed/capped fee agreement that the work to be done by us will be the normally expected type of work we would undertake when conducting an appeal. Obviously some appeals take up more time than others due to their complexity. This is something that we have already taken into account when setting the level of our fees and have covered by way of additional fees for when appeals are adjourned, are heard out of London, or if they take a different course than usual (e.g. preliminary hearings or adjournments).

Even though we may be out-of-pocket at the end of the case, it is more important for us to know that we have done everything necessary to prepare and represent our client in an appeal. As an example of this, we have even been known to advise a client to continue to a full hearing after an LEA has made a reasonable offer of settlement beforehand because we believed that the appeal was a strong one and the client would get more from a successful decision, even though we had already incurred more than the fixed/capped fee at that point! We were right in that appeal as our client won everything that was being sought. Of course, we recognise that any final decision on whether to proceed or not is our client's.

However, where it appears to us that a client is taking unreasonable advantage of a fixed/capped fee agreement by asking us to do work that we would not normally do (e.g. corresponding with the LEA/school or other parties on matters which the client would usually be expected to deal with themselves or asking us to make excessive and sometimes unnecessary amendments to long documents) we reserve the right to terminate the fixed/capped fee agreement with seven day's notice to a client and then charge them at our normal hourly rates.

We sincerely hope that this never becomes necessary and trust that our clients will also not seek to undermine what is usually a mutually beneficial arrangement.

We hope that this information in this factsheet is helpful and that it explains things fully. However, if you wish to clarify any matter further you should not hesitate to contact us personally to discuss the matter.