



# NHS Investigations: Claiming Staff Time

There are some circumstances when a party can recover damages for the time staff spend dealing with the consequences of a wrong or breach of contract.

Claimants that have suffered a 'wrong' may be able to claim for staff time that has been spent rectifying that wrong.

## Staff diverted from normal work to deal with the consequences of a wrong

Any staff that have spent time away from their routine work dealing with the consequences of the wrong caused by a breach of contract are able to claim for this time. To make such a claim, detailed records should be kept of all time that has been spent dealing with those consequences. Without such detailed records, the courts may decide that the loss has not been established. Retrospective assessments may be possible but the more detailed and accurate that the records are, the more persuasive they are to the courts. In the case of *Bridge UK.com Ltd (t/a Bridge Communications) v Abbey Pynford plc* [2007] EWHC 728 (TCC), a 20% deduction was applied to the award on the basis of using a retrospective analysis. It was held that while this was a valid method of calculation of time spent, the deductions reflected the inherent uncertainty of using such a retrospective method.

There are two elements to making such a claim:

First, the claimant will have to detail the amount of time staff have spent overcoming the effects of the wrong. Secondly, that in being diverted away from their routine work to deal with the wrong, the claimant has suffered significant disruption to their business.

Once these points are established, the courts will assume that the loss is equal to the value of employing the staff involved during the period they were away from their work (*Aerospace Publishing Ltd and another v Thames Water Utilities Ltd* [2007] EWCA Civ 3). Practically, the costs of the staff that are diverted away from their routine work to deal with the wrong would generally be calculated using a notional hourly rate.

## Defences

There is a potential defence available if the defendant can prove that the staff that have been diverted away from their normal duties would not have been working to full capacity had they not been diverted, as this would mean that there has been no disruption to business.

## Staff working outside of normal hours or hiring of staff

The claimant could also seek to recover damages should they hire new staff, or if existing staff deal with the consequences of the breach or 'wrong' outside of their normal working hours.

The difference to recovery on this basis rather than when diverting staff is that the claimant would be entitled to the actual sum that it has paid to staff rather than being awarded a sum using the assumptions permitted in *Aerospace*.

As with the costs of diverting staff, these costs will need to be evidenced. The case of *4 Eng Ltd v Harper and another* [2008] EWHC 915 (Ch), considered that when having to deal with the consequence of a wrong it may be better to use this latter approach in order that the costs can be recovered in full, provided that they are reasonable.

## Staff time spent dealing with litigation

Staff time spent dealing with litigation is not recoverable. The only exceptions to this rule are:

- when a claimant has used a member of staff to act as an expert. The member of staff must be an "expert" in a true sense and the work carried out must be the work of an expert (*Richards & Wallington (Plant Hire) Ltd v A Monk & Co Ltd* (1984));
- the second exception to this rule is where the claimant is acting as a litigant in person; their costs can be recoverable under CPR 46.5.

## Recoverability of time spent investigating a wrong: litigation

Costs will only be recoverable if they are not incurred in the context of pending litigation.

Although Newey J's judgment in *Avrahami and others v Biran and others* [2013] EWHC 1776 (Ch) (at paragraphs 290- 299) provides a clear explanation for the reason why the costs of the investigation were recoverable in *4 Eng Ltd* but irrecoverable in *Aerospace Publishing*, his judgment leaves a number of questions still to be answered by future cases. For example:

- What would the position be if an investigation into a wrong began before proceedings were started but continued after they were commenced?
- What would the position be if an investigation was completed before proceedings were started but there is clear evidence that the purpose of the investigation was to prepare for litigation?
- What would the position be if an investigation was started after proceedings were commenced but there is clear evidence that the purpose of the investigation was to deal with the consequences of the wrong?

The courts approach to this is likely to be to consider the dominant purpose of the investigation into a wrong. It would be sensible for any party seeking to undertake an investigation of this nature to record the purpose of the investigation at the outset, to maximise the prospect of staff time being recoverable, where appropriate.

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