Digest of evidence to the Justice Committee Inquiry

This document supports the Library's briefing *Employment tribunal fees* (SN07081), 13 May 2016.

Section 7 of that briefing identifies a number of themes revealed in evidence submitted to the House of Commons Justice Select Committee inquiry into courts and tribunals fees and charges.[1]

The following provides extracts from that evidence, grouped into the themes summarised in section 7 of the briefing.

Contents

[1] See: Courts and tribunals fees and charges – Publications, Parliament website

1.1 The principle of charging a fee

Shailesh Vara MP, Parliamentary Under-Secretary of State, Minister for the Courts and Legal Aid

If we are to secure sustainable funding of the courts and tribunals, we must also look to those who use the system to contribute more where they can afford to do so.[2]

Jonathan Smithers, President, Law Society of England and Wales

I do not think that there is any proposal that all fees are abolished. I go back to the point made earlier about proportionality, affordability and the necessity for people to be able to take those properly, particularly employees[3]

Chantal-Aimée Doerries, Chair, the Bar Council

Our members who practise in the employment tribunals have very much formed the conclusion that the challenge at the moment is the level of fees in terms of access.[4]

Rosalind Bragg, Maternity Action

There are employees who do not face unlawful treatment as a result of the deterrent effect of the employment tribunal. There are employers who do not face unfair competition from other businesses that reduce their costs by non-compliance with employment rights. There are also broader social and economic benefits from enforcement of employment law.

…

It would be appropriate for taxpayers to pay the costs of tribunals.

Chair: Whatever the cost.

Rosalind Bragg: Indeed.

…

The question, I would suggest, is about the public policy goals of running a tribunal process. In the case of tribunal claims, I would imagine that the goal is to reduce discrimination, so I would see the question of financial risk as inappropriate in that circumstance.[5]

Emma Wilkinson, Citizens Advice

Any costs for a user need to be set at a level that does not exclude the most vulnerable members of society from the employment tribunal process.

…

We would advocate that any tribunal fee level creates an access to justice environment for claimants. We understand that, practically speaking, there may need to be some level of fees. In our "Fairer fees" report, we asked what level of fees people would be willing to pay, and 90% of people said that they would not be put off by a £50 fee.

…

there is the possibility of introducing a low-value, simple claim level in addition to the current type A claim, where simple claims could be resolved via a non-tribunal procedure, possibly on the papers.[6]

Sybille Raphael, Working Families

We deal with people who have just lost their income and are incredibly scared about the future. Paying any kind of fee looks like throwing good money away for something that is highly uncertain.[7]

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2 09 Feb 2016 - Courts and tribunals fees and charges - oral evidence
3 Ibid.
4 Ibid.
5 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence
6 Ibid.
7 Ibid.

Sally Brett, TUC

You could end up making a very small contribution to the cost of running the system, but you still have the cost of administering the collection of that fee.[8]

Michael Mealing, Federation of Small Businesses

The fundamental principle that we would advocate is that there should always be some level of fee. We can argue about what that should be, but there should be some financial risk attached to the ability to take an employer to a judicial situation and incur really substantial costs for a small employer.[9]

Federation Of Small Businesses

the FSB has always maintained the view that the level at which ET fees are set should be proportionate and should not prevent workers with a genuine grievance from seeking redress, especially if alternative forms of resolution have been unsuccessful. We are not convinced that this is the case with the current fee levels, and believe there is a valid case for fees to be lower.

…

we have argued in favour of a two-tier system where a small 'starting' fee would be levied on claimants that would otherwise receive a full waiver, while a higher set of fees would be charged for claims valued by the claimant as being worth over £30,000.[10]

The Law Society of Scotland

The Law Society of Scotland has argued strongly for the abolition of employment tribunal fees.[11]

CBI

Fees should encourage mediation and conciliation, while discouraging weak or misguided claims, and protecting access to tribunal as a last resort. If the review concludes that fees have restricted access to justice then the balance of fees and remissions should be recast.[12]

Fawcett Society

Fawcett recommends … the abolition of fees[13]

Citizen's Advice

Hearing fees should be reduced to a lower level to make them a low cost and affordable way of resolving employment disputes where conciliation has failed.

If fees are to remain at current levels for complex cases, they should be lower for low value, simple claims such as non-payment of wages and other statutory amounts

Alternatively, there should be non-tribunal procedures for resolving low value or simple claims[14]

Equality and Diversity Forum

The EDF strongly opposes fees being charged for access to the Employment Tribunals (ETs) and the Employment Appeal Tribunal (EAT). These tribunals were set up to prevent industrial unrest and provide an easily accessible method for resolving industrial disputes so as to prevent employees resorting to direct action or taking matters into their own hands. If a fee is to be charged that is not inappropriate we believe that it would have to be set at a purely nominal level, and in that case the cost of collection would barely justify its imposition.[15]

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8 Ibid.

9 Ibid.

10 Further written evidence from the Federation of Small Businesses, FEE0111 17 November 2015

11 Further written evidence from The Law Society of Scotland, FEE0119 22 March 2016

12 Written evidence from CBI, FEE0084 13 October 2015

13 Written evidence from The Fawcett Society, FEE0082 13 October 2015

14 Written evidence from Citizens Advice, FEE0065 13 October 2015

15 Written evidence from the Equality and Diversity Forum

TUC

The TUC opposed the introduction of employment tribunal fees and we repeat our call for them to be abolished as a matter of urgency[16]

Prospect

Prospect fundamentally believes that tribunal fees should be abolished.[17]

South Eastern Circuit

Even if it were accepted that there is a place for fees in the Employment Tribunal system, those fees are set at a disproportionately high level.

…

The position is significantly starker when fees are compared with actual average ET awards.[18]

Peninsula Business Services Limited

[fees help] to put parties on a more equal footing as there is always a cost to respondents in defending claims.[19]

Council of Employment Judges

The position in Germany also suggests the present position in Great Britain is extreme. In Germany the losing party pays a fee to the Employment Court. It is paid at the end of the proceedings. It is not, therefore, an upfront cost for either party. The amount of the fee (Gebuhr) depends on the value of the claim (Streitwert). The Streitwert is stated in the claim but is reviewed at the end of the hearing and is determined by judicial order.... The equivalent of the British type B fee is only payable by the losing party when the claim is worth 200,000 Euros or so.[20]

Judge Brian Doyle, President, Employment Tribunals (England & Wales)

We would recommend a reclassification and a recalibration of the issue and hearing fees. To do so would prompt a modest recovery in the volume of claims being presented to the Employment Tribunals, thus contributing to the objective of recovering part of the costs of the ET system, while maintaining access to justice. Yet fees would continue to act as a proportionate disincentive to claimants regarding the Employment Tribunal as a first resort. A recalibrated fees scheme would encourage early conciliation and other alternative dispute resolution.

The reclassification of the fees system might replace Type A and Type B claims with the more logical division of claims into Short Track, Standard Track and Open Track cases. The three track classification has been used by the Tribunal for over 10 years to manage its caseload. It more logically reflects the real cost of processing claims than a simple two type classification (the effect of which is most keenly felt in respect of unfair dismissal cases).

Short Track cases (unpaid wages, etc) are typically brought to a hearing within 10 weeks. That hearing is usually a short hearing of one or two hours duration. Short track cases require very little administrative or judicial intervention and normally do not require any sophisticated case management.

Standard Track cases (unfair dismissal, etc) are characteristically brought to a hearing within 20 weeks. That hearing is typically a one or two days hearing. Standard Track cases require relatively more administrative or judicial intervention than short track cases, but usually they require only standard case management orders.

With Open Track cases (discrimination, etc) we aspire to bring them to a case management hearing within 8 weeks and to list them for a preliminary hearing as soon as possible and for a final hearing within 30 weeks. They are mostly multi-day hearings of 3+ days duration. They do require greater administrative and judicial intervention and more sophisticated case management.

If a three track fees system were to be accepted, then attention could focus upon how fees might be calibrated between the three tracks. The level at which fees are set is entirely a matter for decision by

16 Written evidence from TUC, FEE0054 13 October 2015
17 Written evidence from Prospect
18 Written evidence from the South Eastern Circuit
19 Written evidence from Peninsula Business Services Limited
20 Written evidence from the Council of Employment Judges

Ministers. We hesitate to suggest what the fee levels might be. Wesimply recommend that there be a differential between the three tracks and a step effect from issue to hearing to encourage settlement. What actual figures are ascribed to each track and to issue or hearing fees is a matter of policy and not for us.

A recalibrated fees system could be modified further by providing a discount for presentation online, for dealing with correspondence electronically and for payment online. A further discount could be offered for dealing with "hearings" online or on the papers (that is, without a hearing in person), where it is appropriate to do so.

Further charging points could be incorporated in the scheme to encourage efficiencies. For example, where standard case management orders had been issued, or where a case management hearing has been held, a fee might be chargeable for applications made thereafter or further preliminary hearings or case management. The intention would be that the Tribunal provides an appropriate level of management of the case as part of the initial fees and the parties are then encouraged to prepare for the final hearing without further intervention from the Tribunal. However, provision would need to be made to ensure that a party who makes an application, but is not the cause of having to do so, is not penalised by having to pay a fee.[21]

Rt Hon Sir Ernest Ryder, Senior President of Tribunals

The classification into type A and type B is too simplistic. It does not match the three-part classification that the employment tribunals use, which is short, standard and open. You might note that the Government's original proposals in relation to employment tribunal fees used the classification that the tribunal judges use. That was superseded by the type A and B, rather more simplistic, formulation.

To give you an example of why it is difficult, type B will range from a simple one to two-day unfair dismissal case, which may have had a couple of hours of case management at a separate hearing, through to a multi-party, complex equal pay or discrimination case that can last days, and sometimes weeks if it is a test case. That may itself have had one to two days' worth of case management hearings preparing for the main issue to be heard. If fees are going to be levied in the way that they are and as they are proposed, it is right to say that employment tribunal judges would prefer them to match the classifications used in the tribunal, which are there for a good reason—they actually match the work that the judges recognise.[22]

Equality and Human Rights Commission

Although type 'B' claims are generally more complex – such as claims for discrimination or unfair dismissal, this category also includes claims under the Working Time Regulations 1998. Apart from claims for annual leave, all other claims under these regulations – eg for rest breaks, daily rest or weekly rest – are included in the type 'B' category even though they involve no financial loss and are generally uncomplicated.[23]

21 Written evidence from the Employment Tribunals (England and Wales) - Judge Brian Doyle

22 26 Jan 2016 - Courts and tribunals fees and charges - oral evidence

23 Written evidence from the Equality and Human Rights Commission

1.2 Settlement/early conciliation

Rt Hon Sir Ernest Ryder, Senior President of Tribunals

The Council of Employment Judges and the leadership judges would all say that there is clear behavioural material as to the way in which respondents are behaving. They are avoiding engagement in conciliation processes and waiting for the next fee to be paid, which means that settlement opportunities are lost.[24]

Shailesh Vara MP, Minister for the Courts and Legal Aid

It is important to remember that, for example, in the first 12 months of the ACAS conciliation procedure, ACAS handled some 83,000 cases. That is 83,000 cases which, alternatively, might well have ended up before the employment tribunal. Instead of people going to the employment tribunal, there is now a free service, which I hope this Committee would welcome, where people can go and try to resolve an issue in conciliation, rather than going to the employment tribunal. It is important to remember that, before the employment tribunal fees came into place, the trend of the number of cases going to tribunal had been going down. We also have to remember that the economy has been picking up, and employment is increasing. There have been changes to employment law. All those factors may well have contributed to the number of cases diminishing in the employment tribunal.

…

My point is that, were it not for the conciliation service, many of those cases would have ended up at the employment tribunal. ACAS conciliation is actually taking away cases that would otherwise have ended up in an employment tribunal. People say that it is the fees that have driven away the cases, but I would say that that may well not be the case. It is just that there is an alternative free process rather than paying fees for the employment tribunal and possibly using lawyers. Why would anyone want to pay lawyers and pay fees when they have a free system that they may be able to use?[25]

Jonathan Smithers, President, Law Society of England and Wales

We certainly have anecdotal evidence from many of our members who advise employers, who say that the employers will now make a different value judgment as to the ability of the employee or former employee to bring a claim, based on the amount of the fees.[26]

Stephen Cavalier, Thompsons Solicitors (oral evidence)

I hope that the Justice Committee would have some influence over a specific matter such as that and over the fact that Government Departments are among the worst offenders for not participating in early conciliation through ACAS. We have found that in our experience Government Departments do not engage in early conciliation. The worst among those offenders is the National Offender Management Service, which is very poor at engaging. If there is any influence that the Committee could bring to bear on that—I know that there are distinguished former Government lawyers among us—that would be very helpful.

…

Employers sit on their hands and do not engage.[27]

Stephen Cavalier, Thompsons Solicitors (written evidence)

ACAS published a study of the efficacy of the Early Conciliation scheme: a scheme that is compulsory only in the sense that it must be triggered before an Employment Tribunal claim may be lodged, however, once triggered there is no obligation for a party to engage with it. ACAS' research notes that 22% of those who triggered it 'Just wanted to see if a settlement could be reached, and did not have a desire to submit an Employment Tribunal claim', 55% 'Had to, in order to submit a tribunal claim, but was also keen to see if a settlement could be reached' and 20% 'Had to, in order to submit an Employment Tribunal claim'. The JSC should be very cautious in accepting any assertion that the

24 26 Jan 2016 - Courts and tribunals fees and charges - oral evidence
25 09 Feb 2016 - Courts and tribunals fees and charges - oral evidence
26 09 Feb 2016 - Courts and tribunals fees and charges - oral evidence
27 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence

number of cases handled by ACAS each relate to a claim that would otherwise have been issued at tribunal.[28]

Sybille Raphael, Working Families

They think, and with good reason, "There is quite a big chance that this employee won't be able to pay the £950 for the hearing fee, so we're not going to waste our time negotiating beforehand."

Kate Booth, Eaton Smith LLP

I sit on both sides of the fence. When I advise an employer, why would they engage in early conciliation? You wait for the employee to pay a fee. Ultimately you want to call their bluff—are they prepared to put their money where their mouth is?—so you sit back and see whether they do it. There is absolutely no incentive to engage in it early, unless you know that you are going to go down. Why would you?

Sally Brett, TUC

I endorse that. From what we hear from our trade unions, it is often the case that employers, and some Government Departments, do not engage until the hearing fee has been paid. If the individual has paid the hearing fee and there is then a settlement—serious discussions are undertaken, a settlement is reached and the hearing does not go ahead—there is no automatic refund of that hearing fee to the individual.[29]

Michael Mealing, Federation of Small Businesses

Because it is so expensive to resist a weak claim, I am afraid that it is becoming very common to buy off weak claims, as it is cheaper to do so than to resist them successfully. That is the primary reason why we welcome the drop in claims. The early conciliation facility is, in many ways, doing the same job—weak claims are being bought off—but claimants are aware of the fees and would certainly be less hesitant about going forward without them. The federation therefore welcomed the introduction of fees.

. . .

they are encouraged to settle, whether or not they feel that any unfairness has been involved.[30]

Plumstead Community Law Centre

We have used ACAS early conciliation in all cases. We find this process frustrating. We have submitted over a 100 conciliation claims. 99% have had negative results. It is unnecessarily time consuming and bureaucratic. We feel that employers want to see if someone will pay £250 before they even consider talking.

Once we start cases whereas before the introduction of fees most would settle very early on, now cases will continue and are significantly more likely to go to a full hearing. We feel that employers will wait to see if employees actually have £950 to pay to the Tribunal and thus there is no incentive to settle.[31]

Liverpool Law Society Employment Committee

There is a practice amongst some respondents, particularly SME employers to wait to see if the claimant pays the issue and hearing fees before discussing settlement. This does not appear to be the practice amongst larger private or public sector employers. There is also experience of an increase in those claims that are withdrawn before the hearing fee is incurred.[32]

Prospect

The fees can act as a disincentive for the employer to settle. We suspect in many cases employers will wait until the last minute and hope the hearing fee will dissuade the Claimant from proceeding with

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28 Written evidence from Stephen Cavalier, Chief Executive of Thompsons Solicitors
29 Ibid.
30 Ibid.
31 Written evidence from Plumstead Community Law Centre
32 Written evidence from the Liverpool Law Society Employment Committee

the case. This is counter-productive to the Government's stated aim of encouraging early resolution of employment disputes.

There is no refund of fees where the case is withdrawn or settled before hearing, as a very large proportion of cases are. This means hearings are 'paid for' which are not required. This is unfair to claimants who very reasonably agree to compromise on their claims. Particularly claimants may find that employers wait until after the hearing fee of £950 is paid before entering into any meaningful discussions on settlement, in the hope that the Claimant will drop out. This occurs in union backed cases as well as for unrepresented claimants. And whilst claimants and their advisers may seek to include recovery of fees into a settlement, often this is not agreed by the employer. [33]

South Eastern Circuit

We understand anecdotally from some solicitors and HR professionals with whom we have spoken that, when advising employees on the risks of dismissing a particular employee, they are now in the habit of advising that lower paid employees are less like to be able to afford fees and therefore less likely to bring a tribunal claim.[34]

Peninsula Business Services Limited

We used to be regularly involved in defending claims that had no genuine prospects of success but were being pursued solely on the basis that it was known that there would be a cost to an employer in defending the matter and the hope that an economic offer to settle the case would be made.[35]

Council of Employment Judges

One salaried judge reported being told by a solicitor representing a large public sector employer that judicial mediation (for which a respondent must pay a fee and Treasury approval is required for mediation and settlement) was not now possible because Treasury approval is only granted for the settlement of non-contractual claims in exceptional circumstances. This does not suggest that fees have encouraged public sector employers to seek alternative means of resolving their disputes.

…

One fee-paid judge said that his firm was advising employer-clients that they are at much less risk of Tribunal claims for unpaid wages, notice pay or holiday pay if they refuse to pay or simply ignore post-employment claims of this type. These were once common claims in the Employment Tribunal.[36]

Employment Tribunals (Scotland)

Anecdotal evidence, relayed through members of the ET National User Group (Scotland)), suggests that the introduction of fees has had a negative impact on settlement of cases in some circumstances, with some employers declining to settle on the basis that they consider it unlikely the claimant will be able to pay the fees which will be required (particularly the hearing fee).[37]

33 Written evidence from Prospect
34 Written evidence from the South Eastern Circuit
35 Written evidence from Peninsula Business Services Limited
36 Written evidence from the Council of Employment Judges
37 Written evidence from Employment Tribunals (Scotland)

1.3 Remission

Rt Hon Sir Ernest Ryder, Senior President of Tribunals

[remission] does not work well in the tribunals. The best example is in employment. For example, say you are a pregnant woman who has been sacked or who has a redundancy payment, you have a small amount of money and a short limitation period within which that money may be dissipated, but you start off with savings. If you are a pregnant woman saving for your baby—for the toys, the bedding and so on—that money falls to be taken into account. All those small capital elements might prevent you from getting remission of fees in an employment tribunal case.[38]

Emma Wilkinson, Citizens Advice

First, we welcome the changes that have been brought with the help with fees scheme. Generally speaking, they are moving very much in the right direction.

There are two relevant points in terms of the fee remission scheme. The first is that an awareness issue exists. The second is that the complexity of the eligibility requirements is particularly harsh for vulnerable clients within our client base. Our research shows that three in 10 people who responded to the survey did not know that the fee remission system existed. Of those who knew that the system existed, 51% who thought that they were not entitled to full or part remission were in fact entitled to full or part remission. We would advocate for changes to the fee remission system to be part of a wider discussion within the employment tribunal system, to raise awareness and to assist with understanding the eligibility requirements.[39]

Sybille Raphael, Working Families

In our experience, the fee remission system is very low and very unfair. For instance, if you have just above £3,000 in savings—I believe that we want to encourage people, especially low-paid employees, to save—you cannot benefit from the fee remission system. We have terrible cases of women who were sacked the minute they told their employers that they were pregnant and who have absolutely no income, but cannot bring a claim for unfair dismissal because there is no way that they can spend nearly half their savings on a highly uncertain employment tribunal claim—especially when we know that, even if they win, there is a 50% chance that the employer will not pay anything, so she will be £1,200 worse off for having dared to claim her rights to her salary. The fee remission system really needs to be reviewed on that front.[40]

Sally Brett, TUC

It is potentially sex discriminatory. The lower-earning partner in a household is frequently the woman, particularly if there are children and she has taken the primary responsibility for caring and reduced her hours. We know that often when women want to reduce their hours to accommodate caring responsibilities they have to take lower-paid, part-time work. They then experience discrimination or a problem at work and lose their job. They are in a position where, effectively, they have to get their partner's permission to help to fund their case and take it forward.[41]

Shantha David, Unison

Which may or may not succeed. I have an actual example of some of our clients who are on national minimum wage and are trying to bring claims for unpaid wages. They do not have things like their payslips, because they are not being paid properly or they have not received payslips, so they cannot access the remission system, or their partner is also on national minimum wage, which means that they earn more than the threshold. The threshold is £24,660. Two people earning national minimum wage will earn about £26,000, so they would not be entitled to any remission for a claim to enforce rest breaks, for example. If a person who is a carer was not getting their rest breaks or not being paid their wages, they would not be entitled to remission. We are talking about people who are earning approximately £13,000 to £14,000.[42]

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38 26 Jan 2016 - Courts and tribunals fees and charges - oral evidence

39 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence

40 Ibid.

41 Ibid.

42 Ibid.

Michael Mealing, Federation of Small Businesses

I do not think that the remission system is perfect at the moment. There should be a remission system, but I still feel that it is not appropriate for this to be a totally no-cost option.[43]

UNSION

The remission scheme uses a household rather than an individual income test. This places people on a low income with a higher earning partner, usually women, at a particular disadvantage as they effectively have to gain their partner's permission and financial support to pursue a tribunal claim.[44]

Fawcett Society

Women tend to have lower incomes on average and therefore are less likely to be able to afford tribunal fees. The fees remission is calculated depending on the level of household income, which relies on each adult have equal access to the household resources including savings. In practice we know that intra-household sharing is often deeply uneven with women often being at a disadvantage. Therefore, women are likely to have to pay the tribunal fees even though their own income is below threshold. As the TUC note in their evaluation of tribunal fees, the savings level to disqualify most individuals from fee remission is £3,000, which forces many women to choose between their own justice and the ability of the family to afford school uniform, holidays and university fees

…

Due to their lower incomes and patterns of employment, women find it much harder to build up independent savings. Having to expend capital on acquiring due process and compensation is, as a result, more risky for women. In particular, women suffering from pregnancy discrimination will be reducing their participation in the labour market whilst facing higher costs due to their new baby, and for them the prospect of divesting capital is especially daunting.

If the Committee ultimately decides to recommend the maintenance of tribunal fees, we would strongly urge the Committee to at least recommend the Government significantly raises the savings and incomes thresholds for tribunal fee remissions. We suggest the JSA threshold of £16000 of savings may be more appropriate.

…

Having a child represents a significant increase in household costs. For the few who are willing and able to take a claim to tribunal, the fees represent a significant barrier again forcing women to choose between money for their new child or their own justice. Due to the unexpected double disruption faced by pregnant women who when having their child are discriminated against in the workplace, the Fawcett Society calls for the Government to double the time limit in which these women can make a claim from three months to six.[45]

Equality and Diversity Forum

there are the following problems-

- refugee and migrant workers will have difficulties understanding and completing the necessary forms.
- some people with disabilities will have difficulties navigating the process.
- assessment on basis of household income means that remission may not be available to dismissed individuals whose partner is still earning. This can mean, for example, that a woman seeking to bring a sex discrimination case may need to get her partners permission in order to be able to bring a case.[46]

TUC

The remission scheme that is now in place is even more ungenerous than the original. A further 'disposable capital' test was introduced in October 2013. This means that people who are in a household which has savings or investments of more than £3,000 will not qualify for a remission. Analysis commissioned by the TUC reveals that older workers are particularly disadvantaged by this test.

43 Ibid.
44 Written evidence from UNISON
45 Written evidence from The Fawcett Society
46 Written evidence from the Equality and Diversity Forum

Three in five households with at least one worker aged 50 to 60 have built up savings of £3,000 or more. It also penalises the one in five households with at least one disabled worker who has such savings and it is likely to disqualify some of the women who experience pregnancy discrimination each year if they have set aside money to help fund their maternity leave.[47]

Prospect

Within our union cases, since the introduction of fees, we have not had a single member successfully applying for remission.[48]

South Eastern Circuit

In the civil courts the following disposable capital thresholds apply:

Court or tribunal fee	**Disposable capital threshold**
Your court or tribunal fee is:	Your, and your partner's disposable capital is less than:
Up to £1,000	£3,000
£1,001 - £1,335	£4,000
£1,336 - £1,665	£5,000
£1,666 - £2,000	£6,000
£2,001 - £2,330	£7,000

It is notable that for both the ET and EAT the disposable capital threshold is set at £3000 - even though for Type B single claims the combined issue and hearing fee is £1200, and for the EAT the fees are £400 to lodge an appeal, and £1200 hearing fee; a combined total of £1600. The disposable capital threshold therefore appears to be lower in the employment field than for civil courts.[49]

Employment Tribunals (Scotland)

The capital limits do not take into account that those who are involved in employment disputes may be more likely than the vast majority of litigants in other fora, to have an artificially inflated capital balance for a short period of time just at the point in time when the assessment requires to be made. The rules of the remission scheme mean that redundancy payments are treated as capital. Redundancy payments are designed to provide individuals with a financial cushion to cover a period of unemployment (to that extent, they could more properly be considered to be a form of income replacement). Furthermore, there are many employment claims where a redundancy payment has been paid but there is an issue about whether there was, in fact, a genuine redundancy. Should an unfair dismissal claim be pursued successfully then any such redundancy payment that has been made will fall to be offset against the unfair dismissal basic award which will thus be reduced to zero. In effect, the payment made by the employer could on this view be more properly characterised as a payment towards the sum due in respect of compensation for unfair dismissal.

The inclusion of redundancy payments and the definition of capital also appears, on the face of it, to discriminate against older workers. The size of a redundancy payment will increase dependent upon length of service which will be age related. Thus, the inclusion of redundancy payments within the capital assessment disproportionately disadvantages those involved in Employment Tribunal proceedings and older workers.

…

Many ET claimants will have received a payment on termination of employment (redundancy pay/notice pay/holiday pay etc) which is designed as a form of income replacement to tide them over a period of unemployment but since this is treated as capital, and the assessment needs to be made very quickly after the termination of employment has occurred, these individuals will be undergoing the assessment

47 Written evidence from TUC
48 Written evidence from Prospect
49 Written evidence from the South Eastern Circuit

when they have an artificially inflated capital sum which they have only had a very limited time to use for the purpose for which it was intended (income replacement). Litigants in the civil courts, in receipt of such sums, would normally have much more time to legitimately use such payments for their true purpose prior to requiring to make their claim, thereby reducing their capital to a lower level by the time they are subject to the capital assessment requirement.[50]

1.4 Vexatious claims

Jonathan Smithers, President, Law Society of England and Wales

if they are vexatious, they will be dealt with in the tribunal. I do not think that there is any evidence to suggest that the increase in fees has stopped vexatious claimants; indeed, the numbers are quite similar. Those who are vexatious will want to carry on prosecuting their claims regardless.[51]

Rosalind Bragg, Maternity Action

We see no evidence that fees are effective in removing weak or vexatious claims…. There is little doubt that we are losing many claims that are well founded, as well as potentially some claims that are a bit weaker.

…

It is very difficult to determine whether a complaint is or is not well founded without pursuing it through advice services or through the tribunal. We certainly assume that women are approaching their claims with good intentions. The evidence does not provide support for the perception that there is a significant number of vexatious claims from pregnant women and new mothers. In fact, the evidence for the women we work with is that very few pursue any action of any kind at all; 71% take no action, not even discussing it informally with their manager. I have yet to see evidence that we are dealing with significant numbers of vexatious claims.[52]

Stephen Cavalier, Chief Executive of Thompsons Solicitors

If someone brings a claim that is frivolous, vexatious or otherwise unreasonable and is unsuccessful, the employer can apply for costs. Indeed, at earlier stages of the proceedings, the employer can apply for a pre-trial review for deposits, to deter claims that are without merit. There is simply no evidence that there are loads of these claims washing around the system. If employers are faced with vexatious claims and they are properly advised, they will oppose them. If they succeed, they will apply for costs. That is the appropriate deterrent, and it already existed.[53]

Sally Brett, TUC

Often in many of the cases that trade unions take, because they are involved very early in the workplace—the individual is advised very early on and they attempt to resolve issues in the workplace—it tends to be the very weak, vexatious or frivolous claims that are screened out. The ones that often go all the way to tribunal are those where there are quite complicated issues to determine—quite grey areas. There is a benefit to those being heard at tribunal and being determined by a judge.[54]

Sir Brian Langstaff, President of the Employment Appeal Tribunal

Setting these figures for success, whether whole or partial, against the number of applications received during the period, the number of appeals succeeding in whole or in part as a percentage of applications to appeal which were made was 10.53% of the 940 applications made to the EAT in the 6 months prior to fee introduction, and 10.61% of the applications made after. The database is sizeable: one would expect to see a real difference if there was one. However, there is no statistically significant difference between these figures,

50 Written evidence from Employment Tribunals (Scotland)
51 09 Feb 2016 - Courts and tribunals fees and charges - oral evidence
52 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence
53 Ibid.
54 Ibid.

On the basis that success on appeal is the best measure of whether there was a "good" appeal, our conclusion from these statistics is that the introduction of fees has made no discernible difference to the number of good compared to the number of bad appeals. The statistical evidence is inconsistent with the hypothesis that the introduction of fees has deterred bad appeals.

It must also follow that, to the extent that fees have discouraged applicants from appealing, their introduction has prevented a significant number of worthwhile appeals being brought. A number of appeals which would have been successful immediately before the introduction of fees never now get heard in court.[55]

TUC

A stated aim of the policy was to "disincentivise unreasonable behaviour like pursuing weak and vexatious claims". Tribunals have a range of powers to deal with weak and vexatious claims such as powers to strike out claims, to require a deposit before hearing the claim and to order costs against a claimant. Employment judges have considered it necessary to use these powers in only a small percentage of cases. The tens of thousands of cases that have dropped out of the system since the introduction of fees cannot credibly be put down to weak and vexatious claims being stripped out.[56]

Peninsula Business Services Limited

Companies are still finding themselves having to defend against unmeritorious claims but in the majority of cases these appear to be where the claimant has no income and so is not having to meet the fee personally and is not concerned about being ordered to meet any costs award.[57]

Written evidence from the Council of Employment Judges

EJs' experience is that misguided but determined litigants remain undeterred by fees.[58]

55 Written evidence from Sir Brian Langstaff
56 Written evidence from TUC
57 Written evidence from Peninsula Business Services Limited
58 Written evidence from the Council of Employment Judges

1.5 Reducing burdens on business

Kate Booth, Eaton Smith LLP

There is certainly a high burden to the employer who has to defend a claim. That is part of life as a business, but there are products out there, in terms of legal expenses insurance that a number of my clients take advantage of, so there are ways to safeguard against those costs.[59]

Michael Mealing, Federation of Small Businesses

Because it is so expensive to resist a weak claim, I am afraid that it is becoming very common to buy off weak claims, as it is cheaper to do so than to resist them successfully. That is the primary reason why we welcome the drop in claims. The early conciliation facility is, in many ways, doing the same job—weak claims are being bought off—but claimants are aware of the fees and would certainly be less hesitant about going forward without them. The federation therefore welcomed the introduction of fees. At the time, we would have preferred to see lower fees but a more robust remission system, because it is still possible for people—depending on their domestic circumstances—who are relatively adequately remunerated to have a no-cost option of going to an employment tribunal.

…

We think of an average cost of £8,000 to retain legal representation to fight a case, but often, if a business has only a handful of employees, the cost to the business of the employer—the owner-manager—being tied up in an employment tribunal for days on end and spending many hours preparing the case is even greater, because they are the business's greatest asset.

…

they are encouraged to settle, whether or not they feel that any unfairness has been involved.[60]

James Potts, Peninsula Business Services Limited

We think that the introduction of fees has had a positive effect in relation to the reduction in the number of speculative claims that have been raised. In that sense, I would say that we do not have any particular concern about the reduction in the numbers.[61]

Peninsula Business Services Limited

We used to be regularly involved in defending claims that had no genuine prospects of success but were being pursued solely on the basis that it was known that there would be a cost to an employer in defending the matter and the hope that an economic offer to settle the case would be made. These claims, regularly supported by representatives acting on a contingency fee basis, would often run for some time, with a settlement figure being sought that would meet the costs of the representative. If a settlement was not achieved then the claim would either be withdrawn or the representatives would suddenly cease acting leaving a claimant to run a case alone having been given a false impression of the merits.

We found that our involvement in these cases often stopped them earlier, as representatives realised that they were not going to achieve a quick settlement and so get a significant reward for little work and pursuing unmeritorious claims ceased to be cost effective. However, a number of these claims would continue, particularly when it was known that the Respondent was vulnerable, due to ill health, family bereavement or financial pressures on the organisation, in the hope that the Respondent would bow to the pressure and settle a claim even though they had good prospects of success in defending it. This had the effect of denying access to justice to Respondents.[62]

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59 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence

60 Ibid.

61 Ibid.

62 Written evidence from Peninsula Business Services Limited

1.6 Discrimination claims

The below cites evidence discussing the interaction of fees with discrimination claims. It excludes evidence detailing Ministry of Justice employment tribunal statistics (covered in the statistics section of the Library's fees briefing) and evidence discussing the remission system (covered above).

Rt Hon Sir Ernest Ryder, Senior President of Tribunals

You will see the largest decline of all in the Scottish employment tribunal in relation to sex discrimination cases. That is independently validated by researchers in Scotland, but in any event it can be taken from the discrimination statistics that are published by the employment tribunals service.[63]

Emma Wilkinson, Citizens Advice

In a research report, the "Fairer fees" report, which was published in January 2015, we found that 82% of the clients who participated said that the current level of fees deterred them from bringing an employment tribunal claim, and 47% of potential type B claimants—those bringing unfair dismissal or discrimination claims—said that they would have to save all their discretionary income for six months in order to be able to afford a type B claim.[64]

Rosalind Bragg, Maternity Action

In terms of pregnant women and new mothers, very few women take action when they experience unlawful treatment at work. Research from 2005 found that only 8% of women who had experienced substantive discrimination took any sort of formal action. Within that, 3% took their cases to the tribunal. We are talking about very small numbers of women pursuing action against what are often quite appalling experiences in the workplace. With the advent of fees, we have seen a 40% drop in the number of claims for pregnancy-related detriment and dismissal, so fewer than 1% of claims are coming through.[65]

Discrimination Law Association

The difficulty in accessing the tribunal to enforce employment rights means that the practical value of these rights has been substantially reduced. This includes the rights with which the DLA is most immediately concerned — the equality rights found primarily in the Equality Act 2010. It is worth noting, however, that the impact of the reduced access to other employment rights has fallen disproportionately on women and those from traditionally disadvantaged groups.

Many of our members who deal with front line advice report that they are often approached by individuals with strong potential claims, but once they are aware of the fee, choose not to continue. Most potential employment tribunal claims are about dismissal. This inevitably means that most of the individuals concerned are facing significant economic difficulty. They have lost their job and most face a period of uncertainty. Most do not feel they can run the substantial risk of paying now to enter a tribunal process which will, at best, result in a judgment in their favour many months later.

…

The fees are also wholly disproportionate to the likely rewards at tribunal. One third of race discrimination awards are below £4,000. One third of disability discrimination claims are below £5,000. 23% of sex discrimination claims are below £5,000. The very high awards that create newspaper headlines are exceptionally rare. For most claimants, the fee represents a substantial proportion of the amount they can expect to recover at the tribunal. This, inevitably, has a significant discouraging affect — especially given how often awards go unpaid.[66]

63 26 Jan 2016 - Courts and tribunals fees and charges - oral evidence
64 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence
65 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence
66 Written evidence from the Discrimination Law Association

Professor Catherine Barnard and Dr Amy Ludlow, University of Cambridge

Of those cases that were presented to ETs, the most common claim brought by EU-8 claimants in our sample was for pay (unpaid wages or holiday pay). There was an overrepresentation of sex and race discrimination claims relative to national data on the jurisdictional mix of ET cases disposed of during the same period. Levels of lawyer-led litigation were very low; levels of claimant in person litigation (where the claimant has no legal advice from any source in the Tribunal) was very high (80% in the dataset of 46 cases in which we have greatest confidence that the claimant was an EU-8 migrant worker). We found good evidence to show that ETs took considerable care to do all they could to assist migrants who had not been able to help themselves, in the face of claims that were frequently presented in a disorganised way and claimants who could speak little English. We found no evidence of discrimination by Tribunals. EU-8 migrant claimants were just as likely to succeed in their claim at least in part as they were to fail altogether. They enjoyed greatest success in respect of money claims. Tribunals gave detailed consideration to these claims, even if they were of low value (for as little as £49). The introduction of ET fees may have a deleterious effect on this group of claimants, particularly as regards these low value money claims, although further research is required to substantiate this.

This prompts further questions about how the employment rights of EU-8 migrant workers (and similarly situated domestic workers) could be better protected in practice, particularly given the introduction of fees for accessing ETs. Ideas that might be explored include a simplified ET1 form, the abolition of ET fees, especially for low value cases, a simplified mechanism for claiming unpaid wages, and early neutral evaluation mechanism.[67]

Equality and Human Rights Commission

The EHRC's mid-term report on the UK's progress in fulfilling Universal Periodic Review recommendations raised concerns about the equality and human rights implications of many of the recent changes to civil law justice, including the introduction of Employment Tribunal fees. We raised similar concerns in our recent submissions to the UN on the UK's implementation of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

…

The fees may also have a particular impact on women with the protected characteristic of pregnancy and maternity, where there is evidence of discriminatory treatment by employers. Our recent survey into pregnancy and maternity discrimination (jointly commissioned with the Department of Business, Innovation and Skills) found that one in nine mothers (11%) was either dismissed or made compulsorily redundant where others in their workplace were not; or were treated so poorly they felt they had to leave their employment. Scaling these findings up to the general population suggests that as many as 54,000 mothers a year are losing their jobs.

…

Oral evidence from Disability Rights UK to the House of Lords Committee on the Equality Act 2010 and Disability has also suggested a causal link between the drop in claims by disabled workers and the introduction of fees.

…

In its role as a National Human Rights Institution, the Commission produces shadow reports on the compliance of the UK Government with its international obligations under the human rights treaties that it has ratified. Our recent submission to the UN Committee on Economic, Social and Cultural Rights on the UK's Implementation of the International Covenant on Economic, Social and Cultural Rights has highlighted the potentially disproportionate impact of introducing ET fees on access to justice for women, ethnic minorities groups and people with disabilities. We suggested that the introduction of ET fees has had an indirectly discriminatory effect, which runs counter to the UK's obligations to protect the right to work of all individuals and groups identified by the Committee. We made similar observations in our Mid-term universal periodic review report to the UN.

As part of the UK Independent Mechanism on the Convention on the Rights of Persons with Disabilities (CRPD), the Commission contributed to a report on the progress being made to put CRPD rights into practice in the UK. The report called on the UN CRPD committee to ask the UK government to provide

67 Written evidence submitted by Catherine Barnard and Amy Ludlow, University of Cambridge

evidence of the effect on disabled people of the introduction of fees for ET cases and to detail the steps being taken to ameliorate any negative impact.[68]

The Fawcett Society

The severe lack of funding for help and advice services for women also compounds the problem as 31% of women reported having a low or no awareness of their statutory rights when it came to pregnancy discrimination. Advice lines such as the Maternity Action Helpline report receiving twenty times more calls that they can take each day. If the government want to tackle the issue of pregnancy discrimination it is vital that fund these important services over the long term, and ensure the mechanism by which employers who break the law are brought to justice is accessible for all pregnant women

Evidence shows that pregnancy discrimination remains widespread in workplaces across the public and private sector. For pregnant women and new mothers, the prospect of challenging illegal behaviour from their employers is often outweighed by the sheer physical and emotional energy required for a new baby. The prospect of taking a pregnancy related discrimination case to tribunal is unmanageable for most expectant and new mothers and many will take no action at all.[69]

Equality and Diversity Forum

Charging a higher fee – or the highest fee – to those who believe they have been discriminated against adds another administrative rule to further marginalise those people who have a protected characteristic and deterring them from using a service. We consider that there can be no justification for imposing higher charges for such cases, particularly given that these cases are often brought by people who have suffered significant harm in the workplace, for example, harassment or sexual abuse. We think that discrimination cases should be exempt from the payment of fees.[70]

1.7 Redundancy and impecunious employers

Emma Wilkinson, Citizens Advice (oral evidence)

the very specific circumstance where non-formally insolvent employees are seeking to recover statutory redundancy pay from the Insolvency Service. At the moment they have to get a tribunal award, which will cost them up to £390, and there is no prospect of recovery in those circumstances. There could be an exclusion or a waiver in that very specific circumstance, which would prevent barriers to justice for those people.[71]

Citizens Advice (written evidence)

fees should be waived in cases where employees are required to obtain a tribunal judgment against employers who are not formally insolvent in order to obtain a redundancy payment from the Insolvency Service, or the law should allow for the reimbursement of those fees by the Insolvency Service; or the requirement to obtain a tribunal judgment should be removed in these cases[72]

Stephen Cavalier, Chief Executive of Thompsons Solicitors (oral evidence)

Quite often the redundancy payments service will require the employee—the claimant—to take the case to the tribunal to establish that the employer is insolvent and they are entitled to the funds. Often that will need to go to a hearing, which may be uncontested, but it will be a hearing none the less. At the conclusion of that, they will successfully recover their redundancy payment and other moneys due to them under the statutory arrangements protective award, but they will be out of pocket by the £390 that they will have had to pay because of the fees. That seems to me utterly unjust and unfair. Really

68 Written evidence from the Equality and Human Rights Commission
69 Written evidence from The Fawcett Society
70 Written evidence from the Equality and Diversity Forum
71 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence
72 Written evidence from Citizens Advice

they should be reimbursed those fees by the service as well or the fees should not apply in circumstances where they are clearly not recoverable.[73]

Stephen Cavalier, Chief Executive of Thompsons Solicitors (written evidence)

In the event of an employer becoming insolvent and being unable to pay redundancy payments, an effected employee can make a claim to the Redundancy Payments Office (RPO). Sometimes they are paid just on application but others require Employment Tribunal proceedings to be issued. Redundancy pay claims are type A cases and so attract an issue fee of £250 and a hearing fee of £150.

Incredibly the RPO refuses to reimburse the fees which can mean an individual's payment being reduced by up to £400. The worker, having lost their job, has the limited capped amount available from the government via the RPO reduced by a government imposed fee, forcing them to pay to recover what is lawfully theirs. This demand for payment of the tribunal fee from people when they are most financially vulnerable places the government in breach of international obligations.

Directive 2008/94/EC provides:

> "It is necessary to provide for the protection of employees in the event of the insolvency of their employer and to ensure a minimum degree of protection, in particular in order to guarantee payment of their outstanding claims, while taking account of the need for balanced economic and social development in the Community. To this end, the Member States should establish a body which guarantees payment of the outstanding claims of the employees concerned."

Article 3 provides:

> "Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships."[74]

1.8 Low value claims

Tribunals Judiciary

We consider that the introduction of fees has had a damaging effect upon access to justice. The overall reduction in numbers across all employment jurisdictions, following the introduction of fees, is most starkly seen in the areas of unpaid wages, notice pay, redundancy pay etc, where cases are now rare.[75]

Council of Employment Judges

All bar one of the judges who responded to the survey reported that they now hear far fewer 'money claims', that is individual claims for unlawful deduction from wages, unpaid holiday pay, breach of contract as to notice or for redundancy payments. … Many judges reported that they now hear no money claims at all. Prior to the introduction of fees money claims were often brought by low paid workers in sectors such as care, security, hospitality or cleaning and the sums at stake were small in litigation terms but significant to the individual involved. There are few defences to such claims and they often succeeded. Furthermore, the existence of an effective remedy for workers was a control on the behaviour of unscrupulous employers across these and similar sectors. EJs cannot say whether these claims have now simply moved to other parts of the courts system, for example small claims in the County Court (although the Council does not believe this to be the case). If County Court statistics show that these claims have not been absorbed there, then it calls into question how access to justice in respect of these types of claim is being maintained for lower paid workers.

…

73 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence
74 Written evidence from Stephen Cavalier, Chief Executive of Thompsons Solicitors
75 Written evidence from the Tribunals Judiciary

the EJs' experience that there has been a particularly marked decline in the types of cases brought by ordinary working people, that is, claims for unpaid wages, notice pay, holiday pay and simple claims of unfair dismissal, is borne out by the statistics.[76]

1.9 Treatment of employees and unfair competition

Rosalind Bragg, Maternity Action

There are employees who do not face unlawful treatment as a result of the deterrent effect of the employment tribunal. There are employers who do not face unfair competition from other businesses that reduce their costs by non-compliance with employment rights. There are also broader social and economic benefits from enforcement of employment law.[77]

Sybille Raphael, Working Families

There is also a perverse effect of the fees, because we do not find that employment law is more respected. On the contrary, at Working Families we find that there are rogue employers who consider that they do not have to obey and will not obey the rules, unless they are forced to do so. They are well aware that the fee creates a major barrier to people bringing claims. The fee does not help the good employers who respect the law. Actually, it discriminates in favour of the rogue employers.[78]

South Eastern Circuit

It does not take much imagination to extrapolate from this sort of advice the following potential effects on employer behaviour:

A willingness to mete out rougher justice to poorly paid employees on the basis that the risk of being taken to a tribunal is low;

Calculations being made as to which employees an employer can afford to dismiss based on income.[79]

Discrimination Law Association

The vast majority of employees do not litigate in the tribunal. They rely on their employer obeying the law. Many employers are conscientious. They wish to follow the law and many would treat their employees well regardless of what the law says. However, there are also bad employers, who will only behave reasonably if it is practical for employees to force them to do so. Even good employers are often subject to pressures that make it hard for them to prioritise or take action on equality issues. The fact that employers know it is now significantly more difficult for employees to enforce their rights, makes it much less likely that those rights will be respected. It is easy for bad employers to think 'We know they can't do anything. There is no need for us to follow the law'.

This is not only bad for employees, it is also bad for good employers, who may suffer a short-term competitive disadvantage compared with a bad employer.[80]

76 Written evidence from the Council of Employment Judges
77 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence
78 Ibid.
79 Written evidence from the South Eastern Circuit
80 Written evidence from the Discrimination Law Association

1.10 Examples of deterrence

Kate Booth, Eaton Smith LLP

To look at it slightly from the other side, in my submission I say that between May and August this year 185 queries from employees came through my doors, based on an advertising scheme we were part of. A number were non-respondent after I sent them an email or message with tribunal fees in it. Of the 112 I spoke to, I myself rejected 27 for having no merits and six for being extremely low quantum and, frankly, not worth pursuing, and I think a couple were out of time. That leaves 71% that had merits and were worth allowing to cross the start line, but could not.[81]

Liverpool Law Society Employment Committee

Most of our members receive ad hoc enquiries from individuals seeking advice as to whether they have claims which may have merit. The experience of many of our members is that even if the individual has the basis of a good claim, the mention that there are fees of £250 and £950 to be paid to take their case to a Tribunal is a disincentive to commencing a claim when there is uncertainty as to how long they are likely to be unemployed and there is no guarantee of them recovering the fee.[82]

Citizens Advice

There are also cases where people are not eligible for remissions but the fee level puts the claim beyond their financial reach. We found that fees are high in relation to how much potential claimants are likely to earn, with 43% of respondents to our survey with income of less than £46 per week after essential outgoings. This includes almost half (47%) of all Type B claimants, who would have to put aside all of their discretionary income for 6 months to save the £1,200 fees.[83]

Law School, University of Strathclyde

Our research indicates that many individuals who feel that they have suffered a wrong at the hands of their employer feel powerless to seek a remedy even when advised that they do, in fact, have a viable claim. As one of our participants commented, "Well as far as I'm concerned, for me, there is no law or legal system … as far as it is me getting justice, you know. You've got to pay for justice. What sort of justice is that, you've got to buy it?"[84]

Council of Employment Judges

A number of fee-paid judges who are also employment law practitioners reported the difficulties litigants faced in applying for remission of fees, which they described as a complex and bureaucratic process. One fee-paid judge described spending 2 hours with a client simply completing the paperwork for remission of an issue fee: he had to repeat the process for the hearing fee. He added that about half the clients he advises who have a good claim (that is, with prospects of success of 51% or better) do not proceed with it because of fees.[85]

Simpson Millar LLP

As a consistent user of the tribunal service, our own experience is that individuals with good, meritorious claims are being deterred from bringing claims solely because of fees. Individuals are seeking advice to see if they have a claim and, what they can do about it. However, once advised, they are deterred from taking it further because they are faced with fees of up to £1,200.00.[86]

Kate Booth, Partner, Eaton Smith LLP

Our firm recently took part in a three month trial period of a collective advertising scheme whereby we, and four other firms, paid a fixed contribution towards a joint advertising budget. … The queries generated related to all areas of law … Of these, 185 queries related to employment. … 24.9% were

81 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence
82 Written evidence from the Liverpool Law Society Employment Committee
83 Written evidence from Citizens Advice
84 Written evidence from the Law School, University of Strathclyde
85 Written evidence from the Council of Employment Judges
86 Written Evidence from Simpson Millar LLP

potentially viable claims, but were discontinued with reasons recorded as "cannot afford to pay" or "refusing to pay legal fees".

In the vast majority of queries received the individual wished to bring a claim in the Employment Tribunals to enforce employment rights that they felt had been breached. When the discussion moved on to advice about the Employment Tribunal fees, it quickly became apparent that the individuals were unwilling or, more usually, unable to pay those fees.[87]

Joeli Brearley, Founder, 'Pregnant Then Screwed'

I run a project and campaign called 'Pregnant Then Screwed.' Designed to expose the systemic problem of pregnancy and maternity discrimination, the website is a place for women to tell their stories anonymously and in their own words.

…

I have received over 450 stories from women across the UK. Out of those 450 stories, 32 of them specifically state that Tribunal Fees prohibited them from taking their case further.

…

The women who tell their stories can say whatever they like in the narrative therefore, the above metric does not demonstrate that this has only affected 32 out of 450 victims. Simply, that 32 out of 450 felt this was an important part of their story.[88]

Citizens Advice

Mona worked in a fish and chip restaurant for two years. She had a zero hours term in her contract but it was never exercised and her terms were varied by agreement to 27 hours per week shortly after she started. Mona earned £7 per hour and had a net weekly wage of £180. After two years employment she asked to take her paid annual leave entitlement, was refused, her hours were reduced to 0 and the employer took on other staff to replace her. Mona was not given any work for 5 weeks, following which she resigned.

She was advised that she had strong claims for constructive unfair dismissal (Type B), accrued outstanding holiday pay, notice pay and failure to provide written terms and conditions (all Type A). As Mona's husband was in work, she had a household income that meant she was not entitled to fee remission. However, she could not afford the £1,200 fee to present a Type B claim for unfair dismissal and so brought Type A claims only. This meant that she paid ET fees of £390 rather than £1,200.

Her claim was successful at ET and she was awarded the accrued outstanding holiday pay and notice pay as well as 4 weeks' pay for failure to provide written terms and conditions. The Employment Tribunal agreed that the zero hours term in her contract had been varied to fixed hours, by agreement, as Mona had asserted.

On the facts as they were determined by the Tribunal, Mona had a strong unfair dismissal claim. However, she did not bring it because she could not afford the additional £810 it would have cost her to pursue a Type A claim rather than a Type B claim.

…

Sarah, 48, had worked for 12 years as an assistant chef for a company providing meals on wheels to the local authority. She worked for 30 hours a week and receiving £200 a week, but never received any payslips.

In January this year she was summarily dismissed after the co-owner became abusive to her and her daughter, who was also an employee. The employer physically assaulted her daughter and the police were involved but no charges were brought. Sarah was sacked on the spot with no procedure.

She did not want her job back but sought advice from local Citizens Advice about unfair dismissal. She requested written reasons for dismissal but the employer did not respond.

87 Written evidence from Kate Booth, Partner, Eaton Smith LLP

88 Written evidence from Joeli Brearley, Founder, 'Pregnant Then Screwed'

Sarah was supported through early conciliation which was unsuccessful. She was advised that her claim was worth about £8,000. She sought advice from a solicitor about a 'damages based' agreement but was told this would not be financially viable as solicitor's charges would be up to £6,000. She wasn't confident of recovering any award as the employer - a limited company with 3 employees - could transfer cash and assets to a new company and close the former company down. The company was already in an Individual Voluntary Agreement meaning insolvency was very possible.

Sarah had been living on her mother's property in a caravan and was on a debt management plan. She was on JSA for 5 weeks after losing her job before gaining new employment as a carer. Because her husband earned £400 gross per week she was not entitled to any means tested benefits or to any fee remission. She and her husband had no savings or disposable capital. Both had cars on finance agreements which they needed to keep for their jobs.

Sarah did not feel able to pay the £1,200 needed to take her Type B case.

…

One client came to Citizens Advice after being seriously sexually assaulted and harassed by a colleague who was also her employer's best friend. The client resigned from her employment due to sexual harassment and had a strong claim, but would only be entitled to part remission of her fee. She said that she could not afford to pay the fee and so did not take legal action.

Another client, who was employed from July 2013 as an architect's assistant, has epilepsy which she made her employer aware of before she started employment. She took a period of sick leave due to the medical condition in November 2013 and when she returned to work she was dismissed. The reason given by her employer for her dismissal was that she did not disclose her medical condition (which she says is untrue) and that her medical condition meant that she was a health and safety risk given the type of work they did. The client had a claim for disability discrimination. She would be entitled to part remission of fee only but said that she could not afford to pay the fee and so did not take legal action.[89]

1.11 Enforcement of damages

Rebecca Hilsenrath, Equality and Human Rights Commission

When you are looking at a fee that is a very substantial amount of your possible damages won, and there is limited likelihood of having those damages enforced even if you are successful, it stops being about financial risk and starts being a barrier to justice.[90]

Discrimination Law Association

This is particularly problematic since, even if a claimant is successful at tribunal, the award may not be paid. Ministry of Justice research in 2013 found that only 49% of awards were paid in full and that 35% of successful claimants received no money at all. That research matches the experience of our members.[91]

Law Society of Scotland

It was envisaged that all or part of the tribunal fee paid by the Claimant would be recovered by successful claimants. However, the 2013 Payment of Tribunal Awards study by the Department for Business Innovation & Skills showed that in Scotland only 41% of Claimants received payment of their awards in full, 13% had received payment in part and 46% had not been paid at all. The combination of substantial fees and the uncertainty as to whether any sums awarded, whether that be compensation or fees, will be recovered, are likely to act as a disincentive to the pursuit of legitimate and meritorious claims.[92]

89 Written evidence from Citizens Advice
90 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence
91 Written evidence from the Discrimination Law Association
92 Written evidence from The Law Society of Scotland

1.12 Interaction with time limits

Fawcett Society

Having a child represents a significant increase in household costs. For the few who are willing and able to take a claim to tribunal, the fees represent a significant barrier again forcing women to choose between money for their new child or their own justice. Due to the unexpected double disruption faced by pregnant women who when having their child are discriminated against in the workplace, the Fawcett Society calls for the Government to double the time limit in which these women can make a claim from three months to six.[93]

Equality and Diversity Forum

The initial fee has to be paid at the time of an application unless remission of fees has been granted, in other words during the three month period after the act complained of. We think that this gives rise to considerable difficulties for applicants. People already have problems complying with the three month time limit to get in their application if they also have to resolve the application for remission of fees the time limit should be lengthened.

The process of applying for remission is complex, bureaucratic and difficult to access, this acts as a barrier to accessing the Courts and tribunals (particularly for vulnerable claimants).[94]

1.13 Union support

UNISON

It goes without saying the large bulk of those claims still being taken to Employment Tribunals are taken by unions who cover the fees for its members.[95]

Prospect

Prospect supported his claim to the employment tribunal and paid the issue fee of £250 for his case. At a preliminary hearing in May the case was set down for a full hearing for three days to commence on 28 September. Prospect paid the hearing fee of £950.[96]

Simpson Millar LLP

The low paid are often working in non-unionised industries, so they are even more vulnerable to the exploitation that employment rights are designed to address. Even union members with claims supported by their union, who will have filtered out any unmeritorious claims, may well need to fund the fee themselves, at least at the outset. Some union's legal aid budgets cannot resource the volume of fees needed to resource all the claims of all their members who need access to Employment Tribunals.[97]

1.14 Displacement – particularly Scotland

Law Society of Scotland

The Royal Commission on Trade Unions and Employers' Associations 1968 (Report of the Donovan Commission) (Cmnd3623) recommended that Industrial tribunals, the predecessor of the ET, should be "easily accessible, informal, speedy and inexpensive." The new fees regime means, however, that ETs are one of the most expensive means of resolving disputes, having regard to the fees charged. This can be illustrated by a comparison between the fees for employment tribunals and sheriff courts in Scotland. ETs and sheriff courts in Scotland have concurrent jurisdictions to consider breach of

93 Written evidence from The Fawcett Society
94 Written evidence from the Equality and Diversity Forum
95 Written evidence from UNISON
96 Written evidence from Prospect
97 Written Evidence from Simpson Millar LLP

contract claims and unlawful deductions from wages. A large proportion of these claims will involve relatively small sums of money, in many cases less than £5,000.

A relatively straightforward type A claim before an employment tribunal, such as unlawful deduction from wages will attract an issue fee of £160 and a hearing fee of £230. For those type A claims which can be pursued in the sheriff court, the lodging fee is £18 where the sum sued for is £200 or less, otherwise the fee is £76 for both small claims action, with a value of up to £3,000, and summary cause actions, with a value of up to £5,000. No hearing fee is payable.[98]

Employment Tribunals (Scotland)

Several representatives have informed the President, through the National User Group, that where "money claims" that would previously have been brought to the ET are capable of being pled as breach of contract, they are in some instances, following advice on the matter, now being pursued in the Sheriff Court in Scotland because the associated fees are very much lower. It has not been possible to verify this information due to the way claim related data is gathered in the civil courts. The magnitude of any shift is unclear but the underlying point is that there are some representatives who are advising that it is no longer sensible to pursue access to justice in the forum set up to deal with employment related claims because the fees are, relative to the civil courts in Scotland, much higher. This possible shift of work into the civil courts may be greater in Scotland than in England and Wales given that we understand the relevant civil court fees in Scotland are lower than those in England and Wales.[99]

98 Written evidence from The Law Society of Scotland

99 Written evidence from Employment Tribunals (Scotland)