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Employment tribunal fees

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Employment tribunal fees were introduced during July 2013 by the *Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013* (SI 2013/1893). Prior to that, since the creation of the employment tribunal system, claimants were not required to pay fees to bring their claims. Under the Order, claimants had to pay separate fees to issue their claims and have them heard. Fee levels differed according to the nature of the claim.

On 26 July 2017 the Supreme Court declared the Fees Order to be an unlawful interference with the common law right of access to justice, and quashed it. Employment tribunal and Employment Appeal Tribunal claims no longer attract fees.

The introduction of fees coincided with a steep decline in the number of cases received by employment tribunals. In the year to June 2013, employment tribunals received on average just under 13,500 single cases (brought by one person) per quarter. Following the introduction of fees, the number of single cases has averaged around 4,400 per quarter from October 2013 onwards, a decrease of 67%. The average number of multiple cases (brought by two or more people) received per quarter was just under 1,500 in the year to June 2013 but has averaged around 400 since October 2013, a 72% decrease.[1]

On 11 June 2015 the Conservative Government announced the start of a post-implementation review of tribunal fees. The review was published on 31 January 2017.

On 21 July 2015 the House of Commons Justice Select Committee announced an inquiry into courts and tribunal fees, including employment tribunal fees. The Committee published its report on 20 June 2016, concluding that fees should be reduced, restructured and subject to a more generous remissions system. The Committee was highly critical of the Government's delay in publishing its post-implementation review. On 9 November 2016, the Government responded to the Committee's report. The Government's substantive response on the issue of employment tribunal fees formed a single paragraph of the response document. The Committee's Chair described the response as "offensively perfunctory". The aforementioned review, published on 31 January 2017, provided a point-by-point response to the Committee.

A thematic digest of the evidence submitted to the Committee inquiry as it relates to employment tribunal fees is provided on the landing page for this briefing (see supporting documents).

This note summarises the background to and operation of the fees system, provides a statistical analysis of its impact, and discusses the legal challenges to the Fees Order culminating in the Supreme Court's judgment that it was unlawful.

[1] Ministry of Justice, Tribunals and gender recognition certificate statistics quarterly: January to March 2017 and 2016 to 2017, 8 June 2017, Table ET.1

1. Introduction

Employment tribunal fees were introduced by the *Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013*[2] (the Fees Order), which came into force on 29 July 2013.

The Fees Order was declared unlawful by the Supreme Court on 26 July 2017. Fees can no longer lawfully be taken from prospective employment tribunal/Employment Appeal Tribunal claimants. All fees paid to date will be repaid by the Government.

Prior to the Fees Order, claimants were not required to pay fees to bring tribunal claims or appeals. As Lord Justice Moses noted in *R (Unison) v The Lord Chancellor & Anor*, since employment tribunals were set up by the *Industrial Training Act 1964* (then known as industrial tribunals) "an accessible statutory scheme for giving effect to employment rights … existed at no cost to employer or employee save in very limited cases".[3] The costs of providing the service were borne by the taxpayer.

During the operation of the Fees Order tribunal claimants had to pay issue fees to lodge their claims and a hearing fees for their first substantive hearings, unless of limited means and awarded fee remission. The fee amounts differed depending on the type of claim, with the more complex varieties of claim and multiple claims subject to higher rates. Appeals to the Employment Appeal Tribunal, and certain applications to the tribunal during the course of proceedings, attracted additional fees.

1.1 Resolving workplace disputes consultation

The fees proposal had its origin in the *Resolving Workplace Disputes* consultation (January 2011), in which the previous Coalition Government set out its intention to introduce fees, describing the policy case as follows:

> It is general Government policy that services provided by the State and used by a particular segment of the population should attract a fee to cover the cost of providing that service. This approach helps allocate use of goods or services in a rational way because it prevents waste through excessive or badly targeted consumption.
>
> Providing access to justice is not the same as providing other 'goods' or 'services'. But charging fees for tribunal cases and appeals has the potential to play a central role in our strategy to modernise and streamline the employment dispute resolution system, helping to safeguard the provision of services, at an acceptable level, that are so important to the maintenance of access to justice.
>
> Firstly, a fees mechanism will help to transfer some of the cost burden from general taxpayers to those that use the system, or

2 SI 2013/1893
3 [2014] EWHC 218, para 2

> cause the system to be used. That is fair, particularly if the burden is shouldered by the party who causes the system to be used.
>
> Secondly, a price mechanism could help to incentivise earlier settlements, and to disincentivise unreasonable behaviour, like pursuing weak or vexatious claims. In turns, this helps to improve the overall effectiveness and efficiency of the system.
>
> Thirdly, and more generally, the courts have for some time charged fees for family and civil disputes. We see no fundamental difference between the courts and the employment tribunals in the sense that both consider cases between individuals (party v party disputes). Therefore, introducing a fees system will bring the Employment Tribunal and Employment Appeal Tribunal into line with other similar parts of justice system.[4]

The proposals were set against the background of a 23% reduction in the Ministry of Justice's budget following the spending review, requiring the MOJ to make £2bn of savings.[5] In this context, the Coalition Government argued that employment tribunals should not be excluded from the need to find savings, noting that in "2008/09, the total cost of administering the employment tribunals system was, broadly, £77.8m. In 2009/10, that figure had increased to £82.1m".[6] The Government "concluded that it is right to ask service users to contribute to the costs of running of the system" and proposed to "consult on how best to implement a fees mechanism in the Spring".[7] Opposition Members argued the proposals were not based solely on costs, but also on a desire to make it easier to fire employees.[8]

1.2 Fees consultation

The consultation on fee-charging structures ran from 14 December 2011 to 6 March 2012.[9] In his foreword to the consultation document the then Parliamentary Under Secretary of State for Justice, Jonathan Djanogly, linked the proposals to the aims of promoting economic growth, preventing impediments to recruitment, encouraging alternative dispute resolution, and transferring some of the costs of administering tribunals to their users.[10] The consultation proposed two fee-charging options comprising the following features:

- Option 1: separate issue and hearing fees; three fee levels depending on the type of claim; a system of fee remission; application specific fees; fees for multiple claims;

4 BIS & Tribunals Service, *Resolving workplace disputes: A consultation*, January 2011, pp49-50
5 Ibid.
6 Ibid., p49
7 Ibid., p50
8 First Delegated Legislation Committee 10 June 2013 c21; see below section "Debate in Parliament"
9 Ministry of Justice, *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal,* Consultation Paper CP22/2011, 14 December 2014
10 Ibid., pp3-4

- Option 2: as with Option 1, except: one fee at the point of issue; three levels depending on the type of claim, with a fourth for claims for amounts anticipated to exceed £30,000.

It was thought by some that Option 2 may not have incentivised settlement between a claim's issue and its hearing, and would have required claimants to anticipate in advance the value of their claim, with the tribunal prevented from awarding more if the claimant had not paid the appropriate fee. The Coalition Government published its consultation response on 13 July 2012, concluding in favour of a modified Option 1, the key modification being that three fee levels would be reduced to two.[11]

The consultation received 140 responses: 25 from unions and employee representatives; 29 from legal groups; 31 from business; and 30 from other interested parties.[12] Employee groups strongly opposed the principle of charging fees and so rejected both options, while business representatives supported both although tended towards Option 2. Insofar as any consensus emerged, it was on hearing and issue fees being better than a single charge at point of issue.[13]

1.3 The Fees Order

Section 42(1)(d) of the *Tribunals, Courts and Enforcement Act 2007* empowered the Lord Chancellor to prescribe fees by order in respect of anything dealt with by "an added tribunal". Section 42(3) provides that an added tribunal is one "specified in an order made by the Lord Chancellor". It was this statutory authority that the Government relied upon when it made the *Added Tribunals (Employment Tribunals and Employment Appeal Tribunal) Order 2013,*[14] article 2 of which specified that employment tribunals and the Employment Appeal Tribunal are added tribunals, and the *Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013* ('the Fees Order'),[15] which introduced the system of fees. Both were laid in draft before Parliament on 24 April 2013 and subject to the affirmative resolution procedure.[16] The orders were considered in Committee on 10 June 2013 and approved by the House of Commons on 12 June.[17] Their Lordships debated and approved the orders on 8 July 2013.[18] For an overview of the debate see the below section entitled "Debate in Parliament".

Both orders came into force on 28 July 2013 bringing about, for the first time in their history, a fee charging scheme for employment tribunals and the Employment Appeal Tribunal. On 26 July 2017, the

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11 Ministry of Justice, Charging Fees in Employment Tribunals and the Employment Appeal Tribunal, Response *to Consultation CP22/2011*, 13 July 2012
12 Ibid., p7
13 Ibid.
14 SI 2013/1892
15 SI 2013/1893
16 As required by section 49(5) of *Tribunals, Courts and Enforcement Act 2007*
17 First Delegated Legislation Committee 10 June 2013; HC Deb 12 June 2013 c465
18 HL Deb 8 July 2013 cc74-88

Supreme Court held that the Fees Order was ultra vires and therefore unlawful (see below section, entitled 'Legal challenges').

1.4 Early conciliation

Any discussion of the impact of fees has to consider their interaction with Acas early conciliation, which was introduced on 6 April 2014 and became mandatory for all claims presented on or since 6 May 2014.[19] This introduced a one month period, prior to the tribunal hearing, during which an Acas conciliator must endeavour to promote a settlement. The effect of early conciliation on the number of tribunal claims is considered below (section 3.2).

[19] Introduced by *Enterprise and Regulatory Reform Act 2013*, ss.7-9 and Schedules 1 &2; see *Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 (SI 2014/254)*, as amended

2. The fee scheme

The principal features of the fees scheme were:

- the fee amount differed depending on whether the claim was a Type A or Type B claim;
- claimants had to pay "issue fees" to lodge their claims, and "hearing fees" for their claims' first substantive hearings; issue and hearing fees were also payable in relation to appeals;
- different fees were payable for multiple claims and varied according to the number of claimants;
- if a claimant obtained judgment in their favour, the tribunal could order the respondent to reimburse them; and
- a fee remission scheme operated to exempt those with limited means from paying fees, provided they were able to satisfy defined capital and income criteria.

2.1 Type A and B claims

All claims were subject to fees, the amount of which differed depending on whether the claim was categorised as a Type A or a Type B claim. Fees for Type A claims were less than those for Type B claims. A Type A claim was one in respect of a statutory right listed in Table 2 in Schedule 2 to the Fees Order; for example, a deduction from wages complaint under section 13 of the *Employment Rights Act 1996*. Type A claims raised simpler issues than Type B claims. Article 7 of the Fees Order provided that a Type B claim was any claim other than a Type A claim. Type B claims generally raised more complex issues than Type A claims or involved a greater need for scrutinising evidence; for example, unfair dismissal and discrimination claims.

2.2 Issue and hearing fees

Unless granted fee remission, a claimant had to pay an "issue fee" to lodge their claim, and a "hearing fee" for the claim's first substantive hearing. The fees were:[20]

	Type A	Type B
Issue fee	160	250
Hearing fee	230	950

Article 4(1) of the Fees Order provided when these had to be paid:

> (1) A fee is payable by a single claimant or a fee group—
>
> (a) when a claim form is presented to an employment tribunal ("the issue fee"); and
>
> (b) on a date specified in a notice accompanying the notification of the listing of a final hearing of the claim ("the hearing fee").

Either the issue fee or a fee remission application had to accompany the claim form otherwise the claim would be rejected. If the fee amount was incorrect or the remission application was rejected the tribunal

[20] See articles 6 and 7 of the Fees Order, and Table 3 in Schedule 2

would send the claimant a notice specifying a date for payment; if the outstanding amount was not paid by that date the claim would be rejected.[21] The hearing fee was payable on a date specified at the time when the claimant is notified of the listing of the "final hearing". The final hearing was defined in article 2 of the Fees Order as "the first hearing at which an employment tribunal will determine liability, remedy or costs".

If the claimant wished to appeal the tribunal's judgment to the Employment Appeal Tribunal, additional fees became payable unless remission was granted. The EAT issue fee (£400) and hearing fee (£1,200) were the same for all types of claim.

2.3 Multiple claimants and other fee types

Where a claim was brought jointly by a group of claimants, different fees were payable:[22]

Part A - Type A claim

Type of fee	Number of claimants/amount of fee		
	2-10	**11-200**	**Over 200**
Issue fee	320	640	960
Hearing fee	460	920	1380

Part B – type B claim

Type of fee	Number of claimants/ amount of fee		
	2-10	**11-200**	**Over 200**
Issue fee	500	1000	1500
Hearing fee	1900	3800	5700

These fees were per group claim, not per claimant. In addition to the above, article 11 of the Fees Order provided that other fees were payable in respect of certain applications which a party could make during litigation. These were set out in Schedule 1:

Type of application	Type A claim	Type B claim
Reconsideration of a default judgment	£100	£100
Reconsideration of a judgment following a final hearing	£100	£350
Dismissal following withdrawal	£60	£60
An employer's contract claim made by way of application as part of the response to the employee's contract claim	£160	-

[21] Rule 11 of the employment tribunal Rules of Procedure, as set out in Schedule 1 to *The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* (SI 2013/1237)

[22] *The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013*, Schedule 2, Table 4

2.4 Reimbursement

Although there were limited instances in which the tribunal itself could reimburse a claimant (e.g. if the claimant mistakenly paid a Type B instead of a Type A fee), the question of reimbursement was typically considered in the context of a successful claimant seeking reimbursement from the employer. Rules 75 and 76 of the employment tribunal Rules of Procedure allow a tribunal to order unsuccessful respondents to reimburse claimants; rule 34A(2A) of the Employment Appeal Tribunal Rules 1993 provides a similar power to the Appeal Tribunal. Her Majesty's Court and Tribunal Service (HMCTS) fees guidance provides:

> The general position is that, if you are successful, the respondent will be ordered to reimburse you….[23]

Case law supporting this proposition emerged.[24] Employment tribunals and the Employment Appeal Tribunal retained a broad discretion as to whether or not to order reimbursement, and could order only partial reimbursement if a claimant/appellant succeeded on some but not all points, or no reimbursement if a respondent lacked sufficient means or did not actively oppose an appeal.[25]

2.5 Remission

It was possible to obtain a reduction or waiver of fees provided certain criteria were met. The criteria were set out in Schedule 3 to the Fees Order, as amended by the *Courts and Tribunals Fee Remissions Order 2013*,[26] and explained in HMCTS form EX160A.

There were two tests involved in the remission application: a disposable capital test (DCT) and a gross monthly income test (GMIT). Both had to be satisfied.

The DCT acted as a gateway: if the applicant failed the DCT, their application for remission failed; if they passes it, they proceeded to the GMIT, which determined the remission application. The DCT thresholds were set out in Table 1 of Schedule 3. The most recent threshold for all employment tribunal fees was £3,000, which meant that a claimant must have had less than £3000 in "disposable capital" in order to progress to the GMIT.[27] Disposable capital included, for example, capital held in banks accounts, second homes (the value of the claimant's main dwelling is disregarded), stocks or shares, etc.

The GMIT thresholds for full remission were set out in paragraph 11 of Schedule 3. If gross monthly income fell below the relevant threshold, full remission was available. The thresholds differed depending on the

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23 HMCTS, *Employment tribunal fees for individuals, T435*, 2013

24 See: *Portnykh v. Nomura International Plc* [2013] UKEAT 0448_13_0511; *Old v Palace Fields Primary Academy* [2014] UKEAT 0085_14_1710; *Horizon Security Services Ltd v Ndeze & Anor* [2014] UKEAT 0071_14_1806

25 *Old v Palace Fields Primary Academy* [2014] UKEAT 0085_14_1710, paras 9-12; *Look Ahead Housing and Care Ld v Chetty* [2014] UKEAT/0037/14

26 SI 2013/2302

27 The threshold was £4,000 in the case of the EAT hearing fee of £1,200

claimant's relationship status and whether or not he or his partner had children:

Number of children of party	Single	Couple
no children	£1,085	£1,245
1 child	£1,330	£1,490
2 children	£1,575	£1,735

For those with more than two children, the threshold was the amount specified for two children plus £245 per additional child.[28] For every £10 of income received above these thresholds, the claimant was required to pay £5 towards the fee.[29]

Prior to amendment by the *Courts and Tribunals Fee Remissions Order 2013,* the remission scheme under the Fees Order was based on that which applied in the civil courts (except the Court of Protection). Between 18 April 2013 and 16 May 2013 the Coalition Government consulted on reforming the approach to remission, proposing a single scheme that would apply across all HMCTS operated courts, the Supreme Court and all tribunals, including the employment tribunals and Employment Appeal Tribunal. The Government believed "that a single remission system would be easier for users to understand and access".[30] The consultation response was published on 9 September 2013.[31] The revised remission scheme came into effect in October 2013. One of the key amendments was the removal of "passporting benefits" (e.g. income-based jobseekers' allowance) from the Fees Order; applicants in receipt of those benefits had previously been entitled to full remission. While HMCTS form EX160A indicated that receipt of specified means-tested benefits would still entitle applicants to full remission,[32] there was no mention of that in the Fees Order.

In the Government's review of tribunal fees, published on 31 January 2017 (see below discussion), the Government proposed to increase the gross monthly income threshold for a single person with no children, from the current £1,085, to £1,250, and to increase the other thresholds by the same amount.

2.6 Lord Chancellor's power to remit fees

Under paragraph 16 of Schedule 3 to the Fees Order, as amended, the Lord Chancellor had a power to remit fees if "satisfied that there are exceptional circumstances which justify doing so". The power was rarely exercised: 31 times during the period 1 July 2015 to 30 June 2016, during which 86,130 claims were presented.[33]

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28 Para 11(2)
29 Para 11(3)
30 MoJ, *Fee remissions for the courts and tribunals*, Consultation Paper CP15/2013, April 2013, p10
31 MoJ, Fee remissions for the courts and tribunals – consultation response,
32 Page 7
33 See *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51, para 44

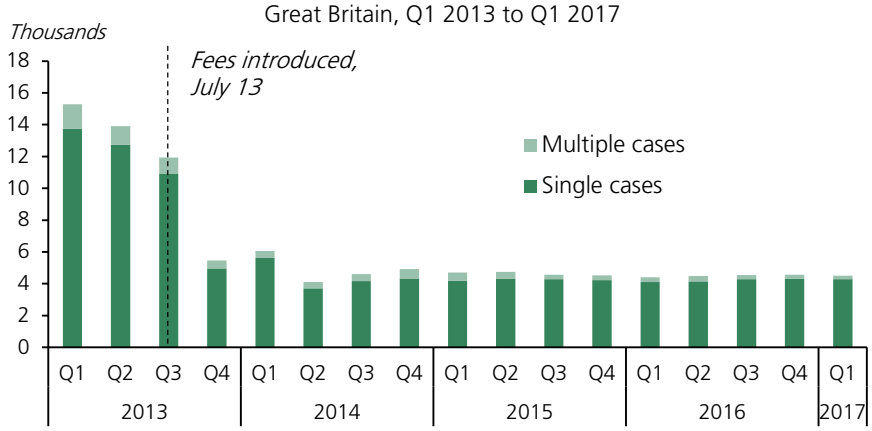
3. Impact on claims

3.1 Number of cases and claims received

The introduction of employment tribunal fees at the end of July 2013 coincided with a steep decline in the number of cases received.

In the year to June 2013, employment tribunals received on average just under 13,500 single cases (brought by one person) per quarter. Following the introduction of fees, the number of single cases has averaged around 4,400 per quarter from October 2013 onwards, a decrease of 68%. The average number of multiple cases (brought by two or more people) received per quarter was just under 1,500 in the year to June 2013 but has averaged around 400 since October 2013, a 75% decrease.[34]

Cases received by employment tribunals
Great Britain, Q1 2013 to Q1 2017



Monthly figures show a spike in the number of new cases (both single and multiple) received in July 2013, probably owing to people wishing to submit claims before fees were introduced. This preceded a sharp fall in new cases in August and September 2013.[35]

Terminology: claims, cases and complaints

Employment tribunal claims are classified as single or multiple claims.

Single claims are brought by a sole employee or worker.

Multiple claims are brought by two or more people (usually against a common employer) where claims arise out of the same circumstances.

Such multiple claims are grouped into one **multiple case** and are processed together. (By definition, the number of single cases equals the number of single claims.) This means the number of cases can offer a better guide to tribunals' workload than the number of claims.

Claims may be brought under one or more different jurisdictions, for example Unfair dismissal or Age discrimination, meaning there may be multiple **jurisdictional complaints** per claim. So the number of complaints exceeds the number of claims, which exceeds the number of cases.

34 Ministry of Justice, Tribunals and gender recognition certificate statistics quarterly: January to March 2017 and 2016 to 2017, 8 June 2017, Table ET.1

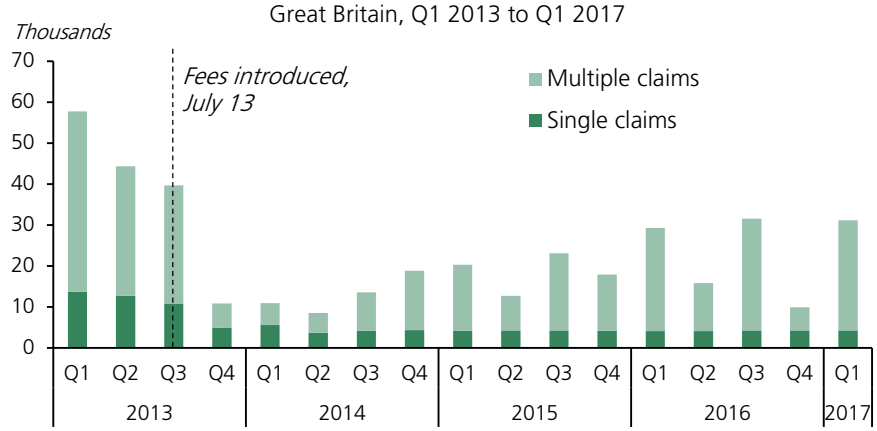
35 Ibid, Annex C, table C.1

Multiple claims and cases

There can be many multiple claims per multiple case. In multiple cases, the fee to be paid depended on the number of claimants in the case (but on a *per claimant* basis was no more than the fee for a single claim).

In some instances, a very large number of claims may be attached to one multiple case. Consequently, although the number of single cases received per quarter exceeds the number of multiple cases, the number of multiple *claims* is generally higher than the number of single claims received as can be seen from the chart.

Claims received by employment tribunals
Great Britain, Q1 2013 to Q1 2017



3.2 Acas Early Conciliation

From the second quarter of 2014, a claimant who wishes to bring an employment tribunal claim must first notify the Advisory, Conciliation and Arbitration Service (Acas) who will offer Early Conciliation. Acas has a statutory duty to promote settlement between parties, although the parties do not have to attempt to settle. Early Conciliation was introduced on a voluntary basis from 6 April 2014 and on a mandatory basis on 5 May 2014. [36]

The legal time limit for bringing the tribunal claim is extended to allow time for discussions to take place: Acas must offer Early Conciliation for up to one month (although there is discretion to extend this by up to two weeks where parties agree extra time may help resolution).

Effect of Early Conciliation on number of cases brought to employment tribunals

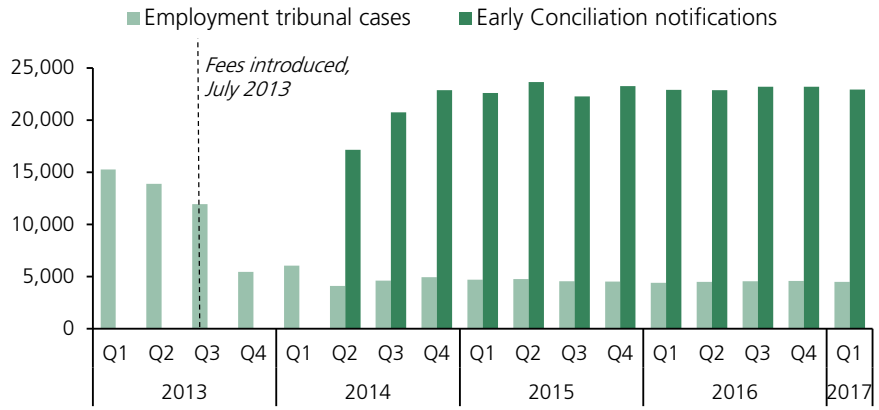
There was a temporary dip in cases in Q2 2014 following the introduction of Early Conciliation, as some cases which would otherwise have been brought to tribunal in April or May 2014 were received later owing to the time taken by Early Conciliation discussions. What is more difficult to determine, however, is the extent to which Early Conciliation has had a lasting impact on numbers of cases: we can only speculate as

[36] Introduced by sections 7-9 of the *Enterprise and Regulatory Reform Act 2013* and the *Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 (SI 2014/254)*

to how many cases would have been received by employment tribunals in the absence of Early Conciliation.

The number of disputes notified to Acas each quarter greatly exceeds the number of cases received by employment tribunals. There were 267,800 "notifications" received by Acas from employees and employers between April 2014 and March 2017, [37] compared to around 54,700 cases brought to employment tribunals in the same period.[38] Indeed, the number of notifications to Acas even exceeds the number of cases received by tribunals prior to the introduction of fees in July 2013, as shown in the chart.

Early Conciliation notifications received by Acas and cases received by employment tribunals



Out of 92,300 notifications dealt with by Acas in the 2016/17 financial year, 16,600 (18%) were formally settled by Acas via Early Conciliation but 16,800 (18%) progressed to an employment tribunal claim. The remaining 58,300 (63%) were not formally settled but did not progress to the employment tribunal.[39]

What explains the almost two thirds of cases not formally settled but which did not progress to the employment tribunal? Some may have been settled informally or the claimant may have decided not to proceed after initial discussions with the conciliator or having heard what the respondent had to say. It is also likely that some individuals wish to avail of the Early Conciliation service but do not want to bring a claim to tribunal on account of the time, anxiety or cost involved. Additionally, there may be still others who have no intention of bringing a claim because they do not think it would be successful, but want to use the Early Conciliation process to air their grievances.

An Acas-commissioned survey asked claimants using Early Conciliation why they had submitted a notification to Acas. Respondents were given three answers to choose from: the majority of respondents (52%)

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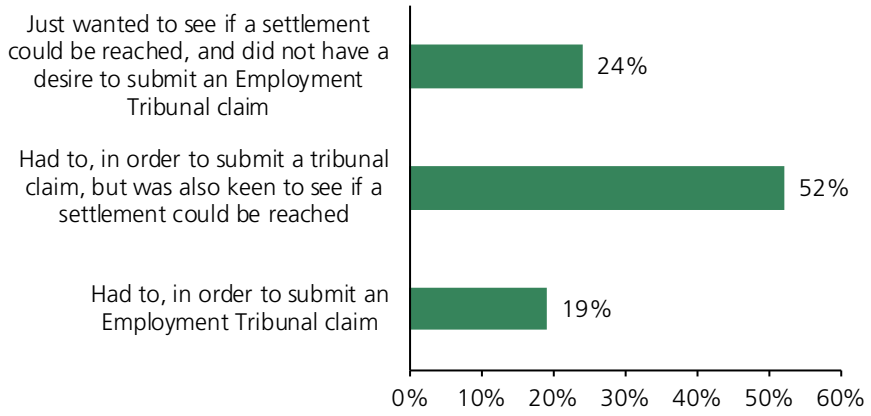
37 Acas, Early Conciliation Quarterly Reports, last update 14 June 2017 (Further statistics on Early Conciliation are provided in Acas' 2016/17 Annual Report)

38 A small proportion of these notifications to Acas may yet proceed to tribunal. On the other hand, the total number of cases may include cases received before Early Conciliation was introduced on a mandatory basis.

39 Acas, Early Conciliation Quarterly Reports, last update 14 June 2017

reported they "had to, in order to submit a tribunal claim, but was also keen to see if a settlement could be reached", while a further 19% said they "had to, in order to submit an employment tribunal claim". Just under a quarter (24%) said they "just wanted to see if a settlement could be reached, and did not have a desire to submit an Employment Tribunal claim".[40]

Reason claimant submitted an Early Conciliation notification



Note: based on a sample of 1,070 claimants whose Early Conciliation cases concluded between September and November 2014

For those claimants whose dispute was not formally settled by Early Conciliation but who still decided against submitting a claim to employment tribunal, the most common reason for not submitting a claim was because "tribunal fees were off putting", reported by 26% of claimants (or their representatives) in this group. A further 20% of claimants in this group said they did not submit a claim because "the issue was resolved".[41]

However, discrepancies between the survey findings and Acas management information mean that the survey needs to be viewed with some caution. In particular, the survey overestimates both the proportion of disputes settled via Early Conciliation and the proportion of people subsequently bringing claims to employment tribunal, compared to the Acas management information and the official tribunals statistics.[42]

3.3 Value of claims

In its judgment of 26 July 2017 declaring employment fees to be unlawful, the Supreme Court observed that the Fees Order had in practice deterred people from bringing claims of low monetary value to employment tribunals:

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40 M Downer et al, *Evaluation of Acas Early Conciliation 2015*, Acas Research Paper 04/15, July 2015, p34. Results are based on a survey of claimants, employers and representatives whose Early Conciliation cases concluded between September and November 2014.

41 Ibid, pp96-7

42 Ministry of Justice, *Review of the introduction of fees in the Employment Tribunals*, Cm 9373, January 2017, pp32-3

> As explained earlier, the statistical evidence relating to the impact of the Fees Order on the value of awards, the evidence of the Council of Employment Judges and the Presidents of the ETs, the evidence collected by the Department of Business, Innovation and Skills, and the survey evidence collected by Acas, establishes that in practice the Fees Order has had a particularly deterrent effect on the bringing of claims of low monetary value. That is as one would expect, given the futility of bringing many such claims, in view of the level of the fees and the prospects of recovering them.[43]

Paragraphs 40-2 and 45-6 of the judgment go into further detail about the evidence from different sources regarding low value claims. Here we focus on trends in the number of claims brought by level of fee and the value of compensation awarded, as reported in the official statistics. (See also the discussion of "Low value claims" in section 7.2 of this paper).

Type A and B claims

As discussed in section 2.1, under the employment tribunal fees regime claims attracted different levels of fee according to their complexity: fees were lower for 'Type A' claims which tend to be more straight forward than 'Type B' claims. Claimants had to pay two fees: an issue fee to lodge their claim and a hearing fee for the claim's first substantive hearing. Since the introduction of fees, most cases brought to tribunal were Type B claims (which involve the higher level of fee).

Between July 2013 and March 2017, 79% of issue fees requested in single cases were for Type B claims. A similar proportion of single cases for which hearing fees were requested (81%) were Type B claims (not all cases for which an issue fee is paid will reach the hearing fee stage). In multiple cases, 48% of issue fees and 54% of hearing fees were for Type B claims.[44]

Looking at **single cases** only, there has been a larger decline in the number of Type A *jurisdictional complaints* brought to tribunal each quarter following the introduction of fees compared to Type B complaints. The number of Type A complaints received per quarter between October 2013 and March 2016 is 71% lower than in the year to June 2013, while the number of Type B complaints is down by 63%.[45]

A larger decline in Type A complaints tallies somewhat with the finding that fees have deterred lower value claims. However, although Type A claims will tend to be of lower value than Type B claims, this will not be universally true. Furthermore, several complaints may be attached to one claim: a single claim may involve both Type A and Type B

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43 The Supreme Court; Judgment: R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) para 97

44 Ministry of Justice, Tribunals and gender recognition certificate statistics quarterly: January to March 2017 and 2016 to 2017, 8 June 2017, Employment tribunal fees tables

45 HM Courts & Tribunals Service management information, published in Ministry of Justice, *Review of the introduction of fees in the Employment Tribunals*, Cm 9373, January 2017, Table 9, p79

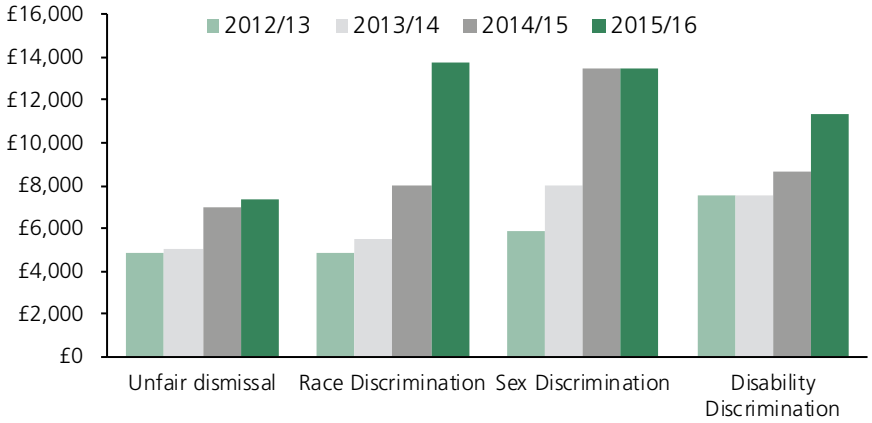
complaints. We need to look for further data to fully understand what is going on.

Value of compensation awarded

Another way to look at this is to consider the value of compensation awarded by employment tribunals. If there has been a decline in lower value claims, then we would expect the proportion of awards involving relatively small sums of money to have decreased, and for there to have been an increase in the average value of award – which is what is observed in the official statistics.[46]

Following the introduction of fees, the median value of compensation awarded in unfair dismissal claims and discrimination claims increased. The chart shows the trend between 2012/13 and 2015/16:[47]

Median value of compensation awarded by tribunals, selected jurisdictions



Source: Tribunals and gender recognition certificate statistics quarterly: April to June 2016; Employment Tribunals and Employment Tribunal Annual Tables, Table E4.

3.4 Fee remissions

Under the employment tribunal fees regime fees may have been waived depending on the claimant's circumstances: fees were remitted in full if the claimant had a "disposable capital" of less than £3,000 and if their gross monthly income fell below the thresholds set out in section 2.5 (for example, £1,085 for a single claimant with no children). If the claimant has gross monthly income above these thresholds up to a certain amount, fees may have been remitted in part.[48] The Government was consulting on changes to the income thresholds, as announced in its *Review of the introduction of fees in the Employment Tribunals*,

[46] Tribunals and gender recognition certificate statistics quarterly: April to June 2016; Employment Tribunals and Employment Tribunal Annual Tables, Table E4.

[47] Published data on compensation awarded by tribunals only cover unfair dismissal and discrimination claims. The chart does not show the trend for religious discrimination, sexual orientation discrimination or age discrimination claims as the number of claims awarded compensation each year tends to be very small.

[48] The monthly income caps above which no remission is available are set out in paragraph 12 of Schedule 3 of *The Courts and Tribunals Fee Remissions Order 2013*.

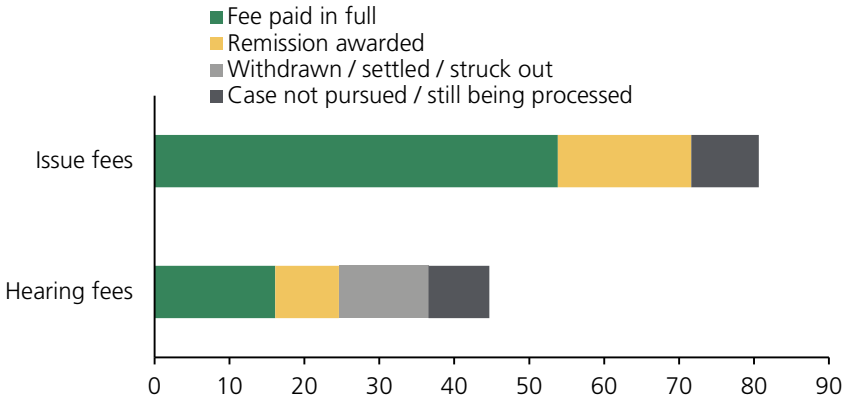
published on 31 January 2017. Section 2.5 of this briefing paper explains the rules for fee remission in more detail.

Remissions for issue fees and hearing fees were awarded separately. From the introduction of fees in July 2013 up to March 2017, remission applications were made in 35,800 cases out of a total of 80,600 where issue fees were requested. 50% of applications resulted in the issue fee being either fully or partially remitted (17,800 cases).[49]

Not all cases for which an issue fee was paid (or remitted) would have reached the hearing fee stage: some cases may have been withdrawn, settled or struck out. Hearing fees were requested in 44,700 cases up to March 2017 and applications for remission of the hearing fee were made in 10,500 cases. 81% of applications resulted in full or partial remission of the hearing fee (8,500 cases).

Applications for remission of the hearing fee were more likely to be granted than applications for remission of the issue fee, but this was not surprising: we may expect individuals who were refused remission a first time to be less likely to submit a second application. Note that for some cases received in Q1 2017, the case may still be progressing through the system and the outcome of the fee request is not yet known.

Fee requests by outcome, Q3 2013 to Q1 2017
Number of cases where a fee was requested (thousands)



In most cases where fee remission was granted, fees were remitted in full. Out of 17,500 single cases where the issue fee was remitted between July 2013 and March 2017, the issue fee was remitted in full in 93% of cases and remitted in part in just 7% of cases.

Trend in proportion of fees remitted

The proportion of cases where the issue fee is remitted has increased since the end of 2013 (remission was awarded in 13% of cases where an issue fee was requested in Q4 2013, rising to 29% in Q1 2017). However, the proportion of cases where the claimant applied for remission in the first place has decreased slightly over the same period. This means a higher proportion of applications are now being granted.

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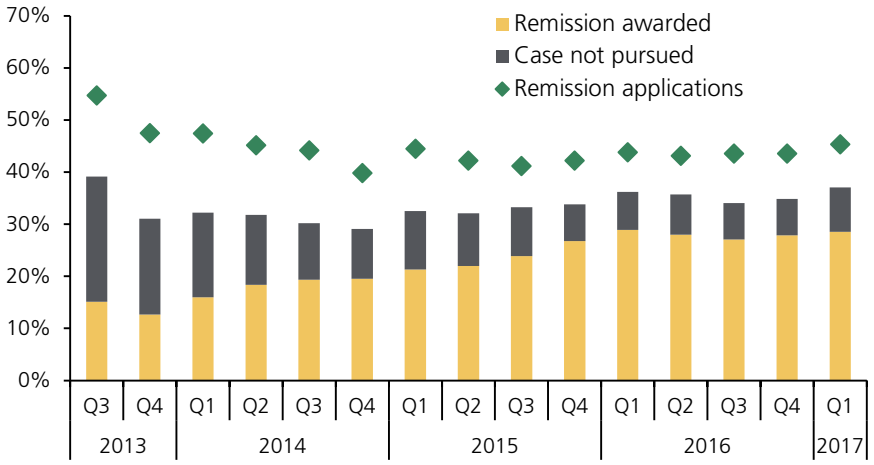
[49] Ministry of Justice, Tribunals and gender recognition certificate statistics quarterly: January to March 2017 and 2016 to 2017, 8 June 2017, Employment tribunal fees tables

It appears that in the initial quarters following the introduction of fees, a significant proportion of claimants applied for remission but then did not pursue their claim when remission was not awarded. As can be seen from the chart below, the proportion of cases not pursued following request of the issue fee has reduced since the end of 2013, despite increasing again in the most recent quarter:

% of issue fees requested by employment tribunals where remission was applied for and awarded
Q3 2013 to Q1 2017



3.5 'Success' rate of cases

One of the arguments in favour of fees was that they might deter vexatious claims at employment tribunals, as noted in section 1.1 of this paper. Various submissions to the Justice Committee's inquiry into courts and tribunal fees stated they saw no evidence that fees had been effective in removing vexatious claims (see section 7.1 for further discussion).

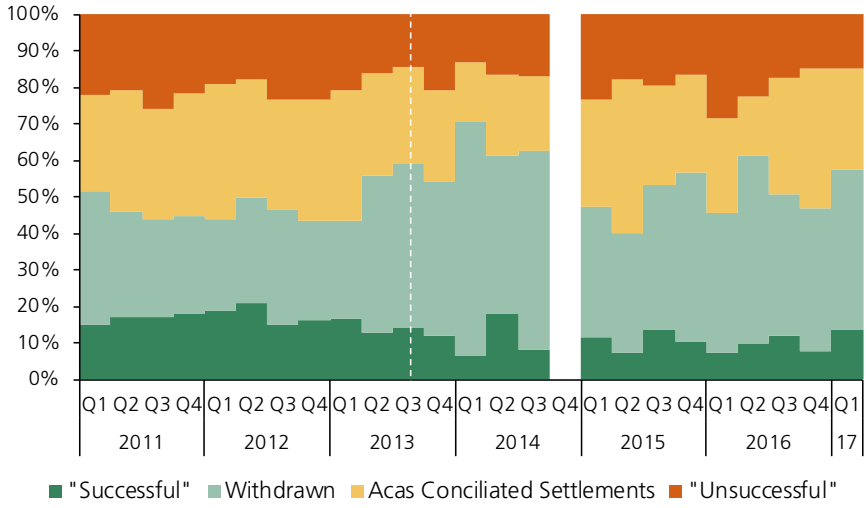
Based on published statistics, it is not possible to give a definitive assessment of the effectiveness of fees in deterring vexatious claims. In theory, we would look at the share of claims that are successful at hearing, but the picture is muddied by the fact that a majority of claims are settled by Acas or withdrawn before they reach a final hearing. Some of these claims that are withdrawn may be settled informally. Therefore, if more claims that have a higher chance of success are being brought to tribunal, this may not necessarily translate to an increase in the share of cases that are successful at hearing; another possibility could be that more of these cases are being settled (formally or informally) before the final hearing.

The chart below shows the broad trend in outcomes between 2011 and 2017, based on the numbers of jurisdictional complaints disposed of by tribunals (there may be several complaints attached to each single or multiple claim, and a claim may be upheld on some jurisdictions but not in others). There is no obvious trend in the proportion of claims disposed that we may count as having been upheld, or the proportion that are struck out or dismissed at a hearing. There has, however, been an increase in the proportion of claims that are withdrawn (including

claims since Q3 2013 where the outcome has been recorded as "dismissed upon withdrawal").[50] Data for Q4 2014 are excluded from the chart as the statistics are skewed by the disposal of a very large multiple case.

Note there is a time lag between a claim being received and it reaching an outcome. Some claims disposed of by tribunals after fees were introduced in July 2013 may in fact have been received in earlier quarters. Consequently, if the introduction of fees did have some impact on outcomes, there may not be a marked change in outcomes immediately from July 2013.

% of complaints disposed of by Employment Tribunals, by outcome: 2011-2017



Notes: "Successful" claims are those that were successful at hearing or where a default judgement is issued.
"Unsuccessful" claims are those that were unsuccessful at hearing, dismissed at a preliminary hearing or struck out (not at a hearing).
Withdrawn claims include those dismissed upon withdrawal.

Source: House of Commons Library analysis of: Ministry of Justice, *Tribunals and Gender Recognition Certificate Statistics Quarterly, July to September 2016,* Table ET.3 Employment Tribunal - Percentage of disposals by outcome and jurisdiction

The issue was also considered in the Government's *Review of the introduction of fees in the Employment Tribunals: consultation on proposals for reform* (31 January 2017). This used a slightly different approach to the one above, but similarly concluded "there has not been a significant change in the outcomes of claims following the introduction of fees."

[50] The new outcome type 'Dismissed upon withdrawal' came into effect in Q3 2014 as a result of the Underhill Review of Employment Tribunal Rules. Under the new rules, an employment tribunal shall issue a judgement dismissing a claim where the claimant withdraws it, unless certain criteria are satisfied.

3.6 Impact of fees on the cost of employment tribunals

HM Courts and Tribunals Service (HMCTS) spent £59.3 million on employment tribunal business in 2016/17. Of this amount, £7.8 million was recouped in (net) income from fees - around 13% of total expenditure. The value of fee income foregone via remission was £3.9 million.[51]

Since 2012/13 net spend on employment tribunals has reduced by 41%.

HM Courts & Tribunals Service spend on Employment Tribunals, 2012/13-2016/17 (£ million)

	Total spend	Net income from fees	Net spend	Fee income foregone via remission
2012/13	86.7	..	86.7	..
2013/14 [1]	76.4	4.5	71.9	0.7
2014/15	71.4	9.0	62.4	3.3
2015/16	65.8	8.6	57.3	3.9
2016/17	59.3	7.8	51.5	3.9

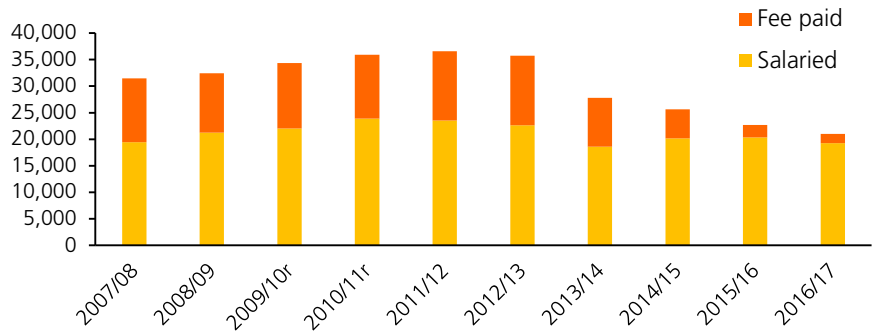
Notes: (1) Figures for fee income in 2013/14 are for the eight months 29 July 2013 to 31 March 2015.

Source:
HM Courts and Tribunals Service, *Annual report and accounts*, various years
PQ 220109, 7 January 2015

Expenditure on employment tribunals has reduced less sharply than cases or claims received, because of the time taken for cases to go through the system and because some costs are 'fixed' (see below).

There were 21,000 'sittings' by judges on employment tribunals in 2016/17, compared to 35,700 in 2012/13 before the new fees regime took effect. The reduction is largely down to fewer fee-paid sittings, i.e. sittings by tribunal judges who are only paid for the days they work rather than those who are paid an annual salary.[52]

Number of sittings by judges on employment tribunals
2007/08-2016/17



51 HM Courts and Tribunals Service, Annual report and accounts, 2016-17, page 75
52 Ministry of Justice, Tribunals and gender recognition certificate statistics quarterly: January to March 2017 and 2016 to 2017, 8 June 2017, Table JSFP.1

Variable and fixed costs

Fee-paid judges are one example of a variable cost (rather than a fixed cost), because a reduction in the number of sittings has a direct impact on costs.

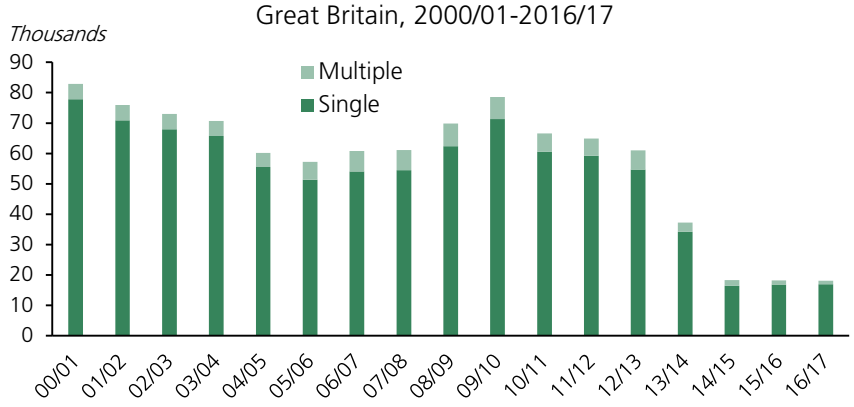
The Impact Assessment for the introduction of employment tribunal fees estimated that variable costs accounted for 69% of the total cost of employment tribunals in 2010/11. The remaining 31% of costs are estimated to be fixed, at least in the short term.[53]

3.7 Longer-term trends

The number of cases received by employment tribunals rose following the economic downturn in 2008 to reach a peak of 78,600 in 2009/10. It subsequently fell to around 61,000 cases in 2012/13, about the same as in 2007/08. Following the introduction of fees in July 2013 the number of cases has reduced sharply. The chart below shows the trend since 2000/01.[54]

The impact of the economic downturn on cases received was reflected by increases in the number of claims relating to Unfair dismissal, Breach of contract, and redundancy during 2008/09 and 2009/10.[55]

Cases received by employment tribunals
Great Britain, 2000/01-2016/17



Looking at the number of **claims** received gives a slightly different picture, owing to an increase in the average number of claims per multiple case from 2006. As with the total number of cases received, the number of claims peaked in 2009/10 but has since declined.

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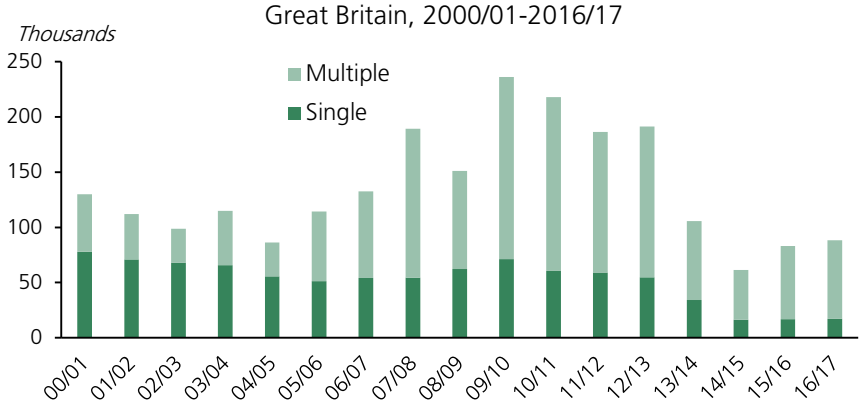
53 Impact Assessment, *Introducing a fee charging regime into Employment Tribunals and the Employment Appeal Tribunal*, IA TS 007, 15 April 2013

54 Figures for single and multiple claims prior to 2006/07 are provisional as a breakdown was not provided at the time the original information was published. 2007/08 figures are provisional due to issues over counting of multiple claim. Ministry of Justice, Tribunals and gender recognition certificate statistics quarterly: April to June 2016 (8 September 2016) and HC Deb 29 Feb 2012 c369-70W

55 There was also a very large increase in 2009/10 in claims brought under the Working Time Directive and Unauthorised Deductions. These increases are likely to stem from a large number of multiple claims attached to a small number of cases.

Claims received by employment tribunals
Great Britain, 2000/01-2016/17



4. Debate in Parliament

4.1 House of Commons

Both the draft Fees Order and the draft Added Tribunals Order were subject to the affirmative resolution procedure, and were considered in Committee on 10 June 2013.[56] The then Parliamentary Under-Secretary of State for Justice, Helen Grant, began the debate by explaining:

> Fees are not intended to deter individuals from bringing a claim, and nor do we believe they will, given the remissions system. The aim is to reduce the taxpayer subsidy by transferring some of the cost to those who use the service, while protecting access to justice for all. Fees will encourage individuals to stop and think about whether a dispute should be settled outside the tribunal system and whether it is really necessary to submit a claim.[57]

John Cryer, a Labour Member, argued that the "number of employment disputes that eventually go to tribunal is already a tiny percentage of the overall number of disputes at work" thus workers already "hesitate before they enter a claim".[58] Labour's Ian Murray asked Ms Grant whether she thought "anyone who must pay £390 to claim £250 of holiday pay would be deterred from going through the system?". Ms Grant responded "I do not think that people will be deterred".[59] On the potential for fee remission to mitigate deterrence of individuals with protected characteristics, the Minister said:

> we will monitor the impact of the proposals on women, other vulnerable groups and any other groups with protected characteristics. The reviews will take place regularly, on an ongoing basis. Our initial analysis has already shown that women and BME groups are likely to fall into the lower income bracket, which of course makes it more likely that they will benefit from full or partial remission.[60]

The Shadow Justice Minister, Andy Slaughter, said:

> employment tribunals serve a function not only in relation to the individual case that they are trying, but to ensure that employers know that if they abuse their power over their employees there is a form of redress. That is effectively what the Government are trying to remove.
>
> …
>
> Under the heading "Advancing equality of opportunity", the Government's equality impact assessment says:
>
> "It is possible that these proposals impact on the duty to advance equality of opportunity if potential claimants with protected characteristics are put off from taking forward discrimination cases due to the introduction of fees."

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56 For an overview of the relevant legislation, see above section entitled "The Fees Order"
57 First Delegated Legislation Committee 10 June 2013 c3
58 Ibid., c4
59 Ibid., c5
60 Ibid., c5

> That is in civil service-ese, but the meaning is utterly clear: this is a discriminatory proposal.[61]

A Conservative Member, Brian Binley, said the proposals would benefit small businesses, which need to be protected from "malicious and vexatious cases" and that tribunals "are now a hunting ground for some members of the legal profession".[62]

Mrs Grant concluded the debate by reiterating that meritorious claims would continue, although then said it was

> not possible to estimate with any degree of confidence what would actually happen, because it is impossible to predict the behavioural impact.[63]

The Committee divided, voting 9 to 7 in favour of the orders.[64] The orders were reported to the House on 11 June,[65] with a division deferred to the following day, whereupon Members voted to approve the orders, by 272 votes to 209.[66]

4.2 House of Lords

Their Lordships debated the orders on 8 July 2013.[67] As with debate in the Commons, the then Minister, Lord McNally, set out the Coalition Government's aim to see tribunal users contribute to their running costs, while noting that

> introducing fees into these tribunals is not an attempt to deter individuals from bringing claims - vexatious or otherwise - and given the mitigations in place we do not believe the provisions of this order will do so.[68]

The Shadow Spokesperson on Justice, Lord Beecham, responded by comparing tribunal fees to existing civil court fees, noting that it costs "between £35 and £70 to issue a money claim of up to £1,000 in the civil courts" whereas it would cost £160 to issue an unpaid wages tribunal claim; issue and hearing fees for Type B claims amounted to £1200, approaching the level of the combined issue and hearing fees of £1600 for a Supreme Court case.[69] His Lordship drew attention to research undertaken by the Ministry of Justice in 2009, which found that 40% of tribunal awards are not paid at all, and fewer than 50% are paid in full, implying that many employees would be required to pay fees in respect of claims for which they will never receive an award.[70]

In responding to the comparison with civil courts, the Minister said:

> The civil courts do not offer a reasonable comparator in this instance as they charge at up to five points in the court process

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61 Ibid., c11
62 Ibid., c16
63 Ibid., c22
64 Ibid., c24
65 HC Deb 11 June 2013 cc312-313
66 HC Deb 12 June 2013 c465
67 HL Deb 8 July 2013 c74
68 Ibid.
69 Ibid., c76
70 Ibid., c77

> and fees are set to recover the full cost. Civil courts process significantly higher volumes of claims and therefore have lower unit costs. In the civil courts, parties open themselves to much wider cost powers, so there are different issues to consider.[71]

On the relationship with unpaid awards, his Lordship said:

> The enforcement of employment tribunal awards is fast-tracked through the civil courts. There are no plans to make any changes as part of the introduction of fees. However, separately the Government have commissioned new research covering England and Wales and Scotland, and the findings are due to be published next year.[72]

A Labour peer, Baroness Donaghy, drew attention to the potential interaction of fees with early conciliation, introduced by section 7 of the *Enterprise and Regulatory Reform Act 2013*. Under that provision claimants must contact Acas prior to submitting a claim; Acas then attempts conciliation between the parties (see above, section 3.2). Baroness Donaghy supported early conciliation, but said of the relationship between that and fees:

> It is a classic result of two government departments[73] approaching a problem and coming up with contradictory results. What kind of mood will the client and the employer be in when they get to ACAS? The employer will hold his ground in the hope that the entry fee to the employment tribunal will be sufficient to put the applicant off. The applicant will feel that the cards are stacked against him or her and will be in no mood for conciliation. That is how to sabotage a perfectly good reform.[74]

Baroness Drake noted that the remission system would not exclude from fees some couples earning the National Minimum Wage.[75]

Their Lordships agreed to the motion approving the draft orders.[76]

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71 Ibid., c86
72 Ibid.
73 Early conciliation was a Department for Business, Innovation and Skills policy, while the fees proposal emanated from the Ministry of Justice
74 Ibid., c80
75 Ibid., c82
76 Ibid., c88

5. Alternative proposals

5.1 Opposition proposals

On 8 December 2014 the Labour Party published a pre-manifesto report, in which it committed to "reform the employment tribunal system to ensure workplace justice is affordable".[77] This echoed a pledge from the then Shadow Business Secretary, Chuka Umunna, in his speech to the Trades Unions Congress during September 2014, in which he said a Labour Government would "abolish the current system, reform the employment tribunals and put in place a new system which ensures all workers have proper access to justice".[78]

In their 2015 General Election manifesto, Labour committed to "Reform the employment tribunal system to ensure workplace justice is affordable."[79]

In August 2016 the current Leader of the Opposition, Jeremy Corbyn, said that the "next Labour government will scrap Employment Tribunal fees so workers can get justice from unscrupulous bosses".[80] The Labour Party's 2017 manifesto said that a Labour government would:

> Abolish employment tribunal fees – so that people have access to justice.
>
> …
>
> Labour will reverse the unfair employment tribunal fees which literally price people out of justice.[81]

5.2 Scotland

On 27 November 2014 the Smith Commission published its report detailing Heads of Agreement on further devolution of powers to the Scottish Parliament. The Report noted that all "powers over the management and operation of all reserved tribunals (which includes administrative, judicial and legislative powers) will be devolved".[82] Lawyers have called for fees to be reviewed if the system is devolved.[83] Section 39 of the *Scotland Act 2016* would enable the transfer by Order of powers over tribunal functions to Scottish tribunals. This would allow the Scottish Parliament to determine Scotland's approach to tribunal fees.

Programme for Government

On 1 September 2015, in her foreword to the Scottish Government's Programme for Government 2015-16, the First Minister of Scotland,

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77 Changing Britain Together, p15
78 Chuka Umunna's speech to the TUC: full text, *New Statesman*, 8 September 2014
79 Labour Party, *Changing Britain Together*, 2015, p15
80 Jeremy Corbyn MP, Twitter, 1:41 pm - 5 August 2016
81 Labour Party, *For the Many Not the Few: the Labour Party Manifesto 2017*, 2017, p48 & 110
82 The Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, 27 November 2014, p21, para 63
83 'Calls for review of "catastrophic" employment tribunal fees', the *Herald*, 3 January 2015

Nicola Sturgeon MSP, said that the Government would "abolish fees for employment tribunals - ensuring that employees have a fair opportunity to have their case heard".[84] The document went on to state:

> We will abolish fees for employment tribunals, when we are clear on how the transfer of powers and responsibilities will work. We will consult on the shape of services that can best support people's access to employment justice as part of the transfer of the powers for Employment Tribunals to Scotland.[85]

[84] The Scottish Government, *A Stronger Scotland - The Government's Programme for Scotland 2015-16*, p3
[85] Ibid., p38

6. Review of fees

Following the introduction of fees, the Coalition Government pledged to review their impact. The Conservative Government commenced the review in 2015, indicating that it would be finished by the end of that year. Throughout 2016 a series of Parliamentary Questions and the Justice Committee asked the Government when the review would be published, to which the answer was invariably "in due course".[86] On 31 January 2017, the Ministry of Justice published its *Review of the introduction of fees in the Employment Tribunals - Consultation on proposals for reform*.[87] The following sections of this note summarise the main conclusions of the review and the issues for consultation, as well as the background to the review.

Summary of main conclusions

The review concluded that the introduction of fees, while discouraging claimants from issuing claims, had not prevented them from doing so:

> While there is clear evidence that ET fees have discouraged people from bringing claims, there is no conclusive evidence that they have been prevented from doing so. We have concluded on this basis that the system of ET fees combined with the standard Help with Fees scheme, and underpinned by the exceptional power to remit fees, means that no one should be prevented from bringing a claim to the ETs because they cannot afford to pay.[88]

Nonetheless, the Government concluded that certain insolvency-related claims should be excluded from fees, because, even if a claimant succeeds in their claim, the fee would likely be irrecoverable from the insolvent employer. Those claims became exempt from fees as at the date the review was published.

The review also argued that there was a case for increasing the fee remission threshold:

> The fall in ET claims has been significant and much greater than originally estimated … there is also some evidence that some people who have been unable to resolve their disputes through conciliation have been discouraged from bringing a formal ET claim because of the requirement to pay a fee[89]

The review estimated that between 3,000 and 8,000 people per year, who were unable to resolve their disputes through Acas conciliation, did not issue a claim because they said they were unable to pay.[90] The Government proposed to address concerns about this by increasing the gross monthly income remission threshold from £1,085 to £1,250, a level approximately in line with the earnings of a person working full-time on the National Living Wage.

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86 For example, written questions 52546; 51088; 906959; 44544; 42840; 40867; 40938; 37594; HL8056; 36702; 35951; HL7215; HL6786; 903255; 21876

87 Ministry of Justice, *Review of the introduction of fees in the Employment Tribunals - Consultation on proposals for reform*, Cm 9373, 31 January 2017

88 Ibid.

89 Ibid, p6

90 Ibid.

The review's terms of reference

The Government assessed the impact of fees against objectives set out in its terms of reference, which were:

- to transfer some of the cost from the taxpayer to those who use the service, where they can afford to do so
- to encourage the use of alternative dispute resolution services, for example, ACAS conciliation
- to improve the efficiency and effectiveness of the tribunal[91]

The Government believed these objectives had been met:

> (i) **the financial objective**: those who use the ETs are contributing around £9 million per annum in fees (which is in line with estimates at the time), transferring a proportion of the cost of the ETs from taxpayers to those who use the Employment Tribunals. …
>
> (ii) **the behavioural objective**: while there has been a sharp, significant and sustained fall in ET claims following the introduction of fees, there has been a significant increase in the number of people who have turned to Acas's conciliation service. There were over 80,000 notifications to Acas in the first year of the new early conciliation service, and more than 92,000 in 2015/16. This suggests that more people are now using conciliation than were previously using voluntary pre-claim conciliation and the ETs combined
>
> …
>
> (iii) **access to justice**: our assessment suggests that conciliation is effective in helping up to a little under half of the people who refer disputes to them (48%) avoid the need to go to the ETs, and where it has not worked, many (up to a further 34%) went on to issue proceedings.[92]

The following sections summarise the review's findings against each of these objectives.

The financial objective

While the Government stated that introducing fees transferred a proportion of the cost of operating the tribunals to users - and so satisfied this objective - the cost recovery was short of the original estimate that fees would recover "around a third of the cost of the tribunal taking into account fee remissions":[93]

> In 2013/14, HMCTS recovered £4.5 million in fee income and remitted fees worth a further £0.7 million in the eight months of the year during which fees were charged. The full cost of the Employment Tribunals for the full year, including the costs of the Employment Appeal Tribunal, was £76.3 million.
>
> In 2014/15, the first full year of ET fees, £9 million was collected in fee income, a further £3.3 million in income was remitted under the fee remission scheme. The overall cost of the Employment Tribunals, including the Employment Appeal Tribunal, was a little over £71 million.

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91 Employment Tribunal Fees Post Implementation Review
92 Ibid., p5
93 Ibid., p27

> In 2015/16, the amount collected in fee income reduced to around £8.6 million, with a further £3.9 million remitted. The overall cost of the Employment Tribunals also reduced to £66 million.
>
> The introduction of fees required some capital investment in IT systems of around £4.5 million. It also incurred project costs of £0.6 million, and ongoing additional operational costs to process claims, determine applications for fee remissions and account for income, of £0.7 million per annum.
>
> The level of income generated by fees has been broadly in line with estimates, transferring a proportion of the cost from the taxpayer to users. The cost recovery rate, which takes into account the value of fees remitted, has however been lower than we originally estimated.[94]

The behavioural objective

The Government's assessment of fees against this objective concluded that the introduction of fees successfully encouraged tribunal users to consider alternative means of dispute resolution; in particular, Acas conciliation. As noted earlier in this briefing, Acas conciliation became mandatory as of May 2014.

The review compared ET claims and the use of Acas voluntary conciliation in 2012/2013 against the same in 2014/15, after the introduction of both fees and mandatory conciliation. The review estimated that, in 2013/14, 23,000 people accessed conciliation.[95] In 2014/15, Acas received 83,000 conciliation notifications, increasing to 92,000 in 2015/16. On this basis, the review document stated:

> the combined impact of fees with the mandatory requirement to consider Acas conciliation, has been successful in encouraging people to use alternative dispute resolution services (and specifically Acas's conciliation) ….[96]

It is difficult to know how much of this success in encouraging the use of Acas conciliation was attributable to the impact of fees, and how much was attributable to the consideration of conciliation being mandatory.

Access to justice

The third objective against which fees were assessed was the protection of access to justice. The review document noted:

> on a best case, conciliation is effective in helping just under half the people who refer their disputes to them to avoid the need to go to the ETs. Of those who are unable to resolve their disputes through conciliation, many people (34% of all people who refer disputes to Acas based on the evaluation of early conciliation) go on to issue proceedings in the ETs.
>
> We have therefore broadly concluded that under this reformed system for dealing with employment related disputes, there continues to be effective access to justice through a combination of conciliation and the option to bring proceedings to the ETs if

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94 Ibid., pp27-28

95 Over the same period, there were 61,000 ET claims, some 5,000 of which had previously been notified to Acas

96 Ibid., p30

> conciliation does not work, supported by Help with Fees and underpinned by the Lord Chancellor's exceptional power to remit fees.
>
> We acknowledge that this evidence also indicates that there is currently a group, which we estimate to be between 3,000 and 8,000 people, who say that they are unable to resolve their dispute through conciliation, but who decide not to bring proceedings because they say they cannot afford to pay the fee. We do not, however, accept that this means that they cannot realistically afford to pay. It is not clear what respondents may have meant when they suggested that there were unable to afford to pay:
>
> - It may, for example, have meant reducing some other areas of non-essential spending in order to save the money;
> - alternatively, they may be unaware of, or believe that they would not qualify for, a fee remission; or
> - they may have been unaware of the Lord Chancellor's power to remit fees in exceptional circumstances.[97]

Notwithstanding these points, the Government highlighted insolvency-related ET claims as being uniquely unsuited to the fees regime. This had been commented on by others, including the Council of Employment Judges in evidence to the Justice Committee (see below). In order to make a claim from the National Insurance Fund for certain State guaranteed payments that an insolvent employer is unable to pay (e.g. redundancy pay), the employee must prove entitlement to those payments, for example, by obtaining an ET judgment against the insolvent employer. In those cases, the successful claimant would have difficulty recouping fees from the losing employer due to their insolvency. The Government therefore decided to exempt from fees these types of claims:

> In some cases, the Secretary of State cannot accept an application for a payment from the fund, for example because the existence of the debt, or its amount, has not been sufficiently proved. In those cases, the claimant may make an application to the ETs to satisfy the Secretary of State that a payment is due. These applications are:
>
> - a reference to the ETs under section 170 of the ERA, which relates to payments under section 166 of the ERA and covers redundancy payments;
> - a complaint to the ETs under section 188 of the ERA which relate s to payments under section 182 of the ERA; and
> - a complaint to the ETs under section 126 of the PSA in respect of payments under section 124 of the PSA, covering certain unpaid pension contributions.
>
> We agree that the nature of proceedings set out above are different from most proceedings before the ETs. These are generally not matters that can be conciliated: the payments are subject to the statutory scheme and in the circumstances set out above the Secretary of State can only make a payment where an ET has made an order to that effect. Furthermore, most applications are made where the employer is insolvent and the

[97] Ibid., pp33-34

> claimant therefore has little or no prospect of recovering the fee from them.
>
> For these reasons, we accept that there is in principle a good case for applying a different fees treatment to these applications.
>
> It is the case that some applications, particularly those made under section 188 of the ERA, are brought against the Secretary of State who would be able to satisfy an order to reimburse fees. However, we believe that there are benefits in applying a consistent approach to the fees charged for the two sets of applications because it provides clarity and certainty to claimants, and it is also simpler for HMCTS to administer. We have therefore decided to exempt from fees all references to the ETs under section 170 of the ERA and all complaints to the ETs under section 188 of the ERA or section 126 of the PSA. **The exemptions will come into effect from today.**

In addition to these exemptions, and while the Government concluded that access to justice had been maintained, the review document noted "some troubling matters":

- the very stark and substantial fall in the volumes of claims brought to the ETs following the introduction of fees, which has been much greater than originally estimated;
- the evidence that some people who were unable to resolve their disputes through conciliation nevertheless did not bring a claim to the ETs because they said they could not afford the fee, despite the financial support available; and
- the assessment, under the Public Sector Equality Duty, of the particular impact that fees have had in discrimination claims[98]

The Government believed "that the best way to alleviate these impacts is to widen access to Help with Fees"[99] and proposed to increase the gross monthly income threshold for fee remission, to bring it broadly into line with a full-time worker on the National Living Wage. The specific thresholds proposed:[100]

	Single		Couple	
Gross monthly income with:	**Current**	**New**	**Current**	**New**
No children	£1,085	£1,250	£1,245	£1,410
One child	£1,330	£1,495	£1,330	£1,655
Two children	£1,575	£1,740	£1,575	£1,900
£245 for each additional child				

The review document contained questions for consultation, which in the main concerned these changes to the remission thresholds (see below).

Equality assessment

The review contains a lengthy analysis of the impact of fees in relation to protected characteristics under the *Equality Act 2010*. The impact of fees on persons with protected characteristics – particularly sex discrimination claims – has been a source of controversy about the fees regime (see in particular the evidence to the Justice Committee, detailed

98 Ibid., p36
99 Ibid.
100 Ibid., p66

below) and part of the basis on which fees were successfully challenged by way of judicial review (see below). The Government's assessment is summarised as follows:

- ET fees are not directly discriminatory.
- There has been no unlawful indirect discrimination from the introduction of ET fees. Any differential impact which may have arisen indirectly from ET fees is justified when considered against the success in transferring a proportion of the cost of the tribunals to users and in promoting conciliation as an alternative means of resolving workplace disputes.
- The evidence is clear that fees have discouraged some people from bringing ET claims, including discrimination claims, but there is no conclusive evidence that ET fees have prevented people from bringing claims.
- Nevertheless, having regard to the duties under section 149 of the Equality Act 2010, this assessment has reinforced the Government's view that **some adjustment to the scheme is desirable** to alleviate the effect that fees have had in discouraging ET claims generally, including workplace discrimination disputes. [101]

The adjustment to the scheme to which the Government refers here was the proposed amendment to the remission thresholds.

Questions for consultation

The review document included questions for consultation. The consultation ran from 31 January 2017 to 14 March 2017. The questions concentrated on the proposed amendments to the Help with Fees scheme:

> Question 1: Do you have any specific proposals for further reforms to the Help with Fees scheme that would help to raise awareness of remissions, or make it simpler to use? Please provide details.
>
> …
>
> Question 2: Do you agree that raising the lower gross monthly income threshold is the fairest way to widen access to help under Help with Fees scheme and to alleviate the impact of fees on ET claims? Please give reasons.
>
> …
>
> Question 3: Do you agree with the proposal to raise the gross monthly income threshold for a fee remission from £1,085 to £1,250? Please give reasons.
>
> …
>
> Question 4: Are there any other types of proceedings, in addition to those specified in paragraph 355, which are also connected to applications for payments made from the National Insurance Fund, where similar considerations apply, and where there may be a case for exempting them from fees? Please give reasons.
>
> …
>
> Question 5: Do you agree with our assessment of the impacts of our proposed reforms to the fee remissions scheme on people

[101] Ibid., p41

with protected characteristics? Are there other factors we should take into account, or other groups likely to be affected by these proposals? Please give reasons.[102]

Background to the Review

The Coalition Government committed to review the impact of introducing tribunal fees although did not indicate when this would occur. On 13 December 2014 the *Independent* reported that the then Minister for Employment Relations, Jo Swinson, wrote to the Minister for the Courts and Legal Aid, Shailesh Vara, to state that there is an increasingly urgent need for the review to take place.[103]

On 11 June 2015 the Conservative Government announced the start of the review, to be carried out by the Ministry of Justice. The Terms of Reference are available here.[104] The announcement indicated the review would be completed by the end of 2015.[105]

A statement accompanying the announcement said the review would assess the effectiveness of fees in meeting their "original objectives, while maintaining access to justice":

> The original objectives were:
>
> - to transfer some of the cost from the taxpayer to those who use the service, where they can afford to do so
> - to encourage the use of alternative dispute resolution services, for example, ACAS conciliation
> - to improve the efficiency and effectiveness of the tribunal
>
> The review will also consider the effectiveness of the new fee remissions scheme, which was introduced in October 2013.
>
> The review will take into account a wide range of evidence including:
>
> - tribunal data on case volumes, case progression and case outcomes]
> - qualitative research on the views of court and tribunal users
> - the general trend of the number of cases appearing at tribunals before the fees were introduced
> - any consequences arising as a result of an improved economy on the number of people being dismissed
> - to what extent there has been discouragement of weak or unmeritorious claims
> - whether there has been any impact because of changes in employment law; and other reasons for changes in user behaviour

In a meeting of the Employment Tribunals' National User Group on 7 October 2015 an official from the Ministry of Justice said:

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102 Ibid., pp64-68
103 Coalition row erupts as workers are 'priced out' of tribunals, *Independent* [online], 13 December 2014
104 'Employment Tribunal Fees Post Implementation Review', Gov.uk, 11 June 2015
105 Ibid.

> At present the internal review report was with the relevant Minister. It was not possible to share the contents of the report at present or to predict how the Minister would proceed. Although there was no fixed timetable, it was hoped that the Minister's position would be known by the end of the year.[106]

A freedom of information request was submitted to the Ministry of Justice on 2 December 2015 requesting a copy of the review:

> On 7th October Bill Dowse reported to the Employment Tribunals National User Group meeting that a review into Employment Tribunal Fees ("the Review") had been completed … I write to request a copy of the Review.[107]

The Ministry of Justice declined the request on 29 December 2015. In its response, the Ministry of Justice said:

> … it is important to correct the statement outlined in the first paragraph of your request. I have reviewed the minutes of the meeting … they confirmed that Bill Dowse informed the meeting that the start of the review had been announced … The minutes do not record that he said the review had been completed. The review is currently underway and will report in due course.

On 11 May 2016 the Government responded to a written question about the outcome of the review, stating "The review is ongoing and will be published in due course."[108] As noted above, throughout 2016 the Government was repeatedly asked about the review's progress in a series of Parliamentary Questions, and the answer continued to be that it would be published "in due course".[109]

On 20 June 2016 the Justice Select Committee published the report of its inquiry into court and tribunals fees (discussed in the following section). During an oral evidence session on 9 February 2016, the Minister for the Courts and Legal Aid, Shailesh Vara, was asked about the review:

> **Marie Rimmer:** The post-implementation review of employment tribunal fees was expected to report by the end of last year. Why has it not been published?
>
> **Mr Vara**: Ms Rimmer, you are absolutely right; we had hoped to make public the findings before the end of last year. It has not happened. I can assure the Committee that the review is well under way. There has been a lot of evidence that we have had to consider, and we want to make sure that we get it right. I am particularly mindful that a lot of attention has been focused on the issue. We are therefore keen to ensure that the final announcement is done comprehensively. I can assure the Committee that it is well under way, and I hope that it will not be very long before we make that announcement.
>
> **Marie Rimmer:** So the cynics are wrong: you are not sitting on it; you are saying that it is not complete.
>
> **Mr Vara**: It is correct that we are not sitting on it.

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106 Minutes of the National User Group meeting held at Victory House on 7th October 2015, p2
107 Employment Tribunals Fees Review, WhatDoTheyKnow
108 Employment Tribunals Service: Fees and Charges: Written question - HL8056
109 For example, written questions 52546; 51088; 906959; 44544; 42840; 40867; 40938; 37594; HL8056; 36702; 35951; HL7215; HL6786; 903255; 21876

> **Marie Rimmer:** When will the review be published? What timescale do you have? It is going on now, isn't it, although it is not completed?
>
> **Mr Vara**: I hope it will be sooner rather than later. It is well under way. I do not want to commit myself to a specific date and find that we overshoot it because I have been over-optimistic. I can, however, assure the Committee that this is something that I am personally following through, and I am urging officials to make sure that we have some sort of announcement as soon as we possibly can.
>
> **Marie Rimmer:** Will you provide the Committee with the details of that review? We would like to use its results to inform our report on this subject. It is very important. There is a lot of concern about employment tribunals.
>
> **Mr Vara**: I accept that there is a lot of concern, and I have taken a lot of questions on the subject during Ministry of Justice oral questions in the House, but I have to say that I cannot recall too many occasions when anybody asked a question in the broader context in which the subject should be considered. I very much hope that, when the outcome of the review is made public, people will take on board that it is a much bigger issue than simply saying that court fees have been introduced, there has therefore been a straight reduction and it must all be down to the court fees. It is not.[110]

In November 2016, the Government responded to the Committee's report.[111] The response document stated that the "Government is finalising the post implementation review of fees and the conclusions will be published in due course".[112]

On 14 December 2016 the Committee held a follow up session, during which it questioned the Minister for Courts and Justice, Sir Oliver Heald QC, about various issues, including the review:

> **Mr Hanson:** Sir Oliver, I know that you are on a bit of a sticky wicket because you are the third Minister dealing with this in the year, after Shailesh Vara and Dominic Raab. We have the post-implementation review of the impact of employment tribunal fees. Why haven't you published it?
>
> **Sir Oliver Heald**: It is not finished. I know it has taken a good deal of time. The Committee is right to say, if it does, that it has been a longer period than it should have been. The review is a thorough and proper review. I can say that we hope to be in a position to publish the conclusions as soon as possible in the new year.
>
> **Mr Hanson**: Is it anything to do with the court case with Unison and the Government not wishing to, as the Chair said earlier, show their hand?
>
> **Sir Oliver Heald**: I cannot really say anything about the case. It would obviously be helpful to have concluded the review before that case is heard in the Supreme Court. There is no question of trying to slow it down for that reason.

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110 09 Feb 2016 - Courts and tribunals fees and charges - oral evidence

111 Ministry of Justice, *Government Response to the Justice Committee's Second Report of session 2016/17 Courts and Tribunals Fees*, November 2016

112 Ibid., p5

> … we are now very close to the point when we will be publishing this, as soon as we can in the new year. The last piece of work being done is looking at some of the points I mentioned just now about the effect on the protected characteristics and so on. That work has not been published because it is not complete, but, when it is, we would like to put it all in the public domain so that people can see that we have done a thorough job in the Department.[113]

[113] Justice Committee Oral evidence: Government Response to the Committee's Report on courts and tribunal fees, HC 880, 14 December 2016, Q6-9

7. Justice Committee inquiry

On 21 July 2015 the House of Commons Justice Select Committee announced an inquiry into courts and tribunal fees. While the inquiry's scope included fees and charges other than employment tribunal fees, its terms of reference included the question "How have the increased court fees and the introduction of employment tribunal fees affected access to justice?"[114] The Committee published its report on 20 June 2016.[115] The Government responded on 9 November 2016.[116]

7.1 The Committee's conclusions and recommendations

The main elements of the Committee's conclusions on fees were as follows:

> We find it unacceptable that the Government has not reported the results of its review one year after it began and six months after the Government said it would be completed.
>
> …
>
> it is a reasonable objective for the Government to seek to reduce the number of vexatious claims through a degree of financial risk for claimants
>
> …
>
> we consider, on the weight of the evidence given to us, that Mr Vara's heavy reliance on the figure of 83,000 cases dealt with at ACAS early conciliation to support his contention that access to justice has not been adversely affected by employment tribunal fees was, even on the most favourable construction, superficial
>
> …
>
> **the regime of employment tribunal fees has had a significant adverse impact on access to justice for meritorious claims**
>
> …
>
> We agree with the assessment of Sir Ernest Ryder, Senior President of Tribunals, that the Type A and Type B categorisation of employment tribunal claims is too simplistic.[117]

While the Committee noted that it did not "have the benefit of seeing the factual basis of the Government's review of implementation of the fees" and that it lacked "the resources or data to undertake economic modelling of the impact of potential changes to the fees regime" it nonetheless indicated options for "achieving the overall magnitude of change necessary to reinstate an acceptable level of access to justice to

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114 Courts and tribunals fees and charges inquiry announced, Parliament website
115 House of Commons Justice Committee, *Courts and tribunals fees*, Second Report of Session 2016–17, HC 167, 20 June 2016
116 Ministry of Justice, *Government Response to the Justice Committee's Second Report of session 2016/17 Courts and Tribunals Fees*, November 2016
117 Ibid., pp38-34

the employment tribunals system".[118] The report set these out as follows:

> We recommend that the Government publish forthwith the factual information which they have collated as part of their post-implementation review of employment tribunal fees. We further recommend that –
>
> - the overall quantum of fees charged for bringing cases to employment tribunals should be substantially reduced;
> - the binary Type A/type B distinction should be replaced: acceptable alternatives could be by a single fee; by a three-tier fee structure, as suggested by the Senior President of Tribunals; or by a level of fee set as a proportion of the amount claimed, with the fee waived if the amount claimed is below a determined level;
> - disposable capital and monthly income thresholds for fee remission should be increased, and no more than one fee remission application should be required, covering both the issue fee and the prospective hearing fee and with the threshold for exemption calculated on the assumption that both fees will be paid;
> - further special consideration should be given to the position of women alleging maternity or pregnancy discrimination, for whom, at the least, the time limit of three months for bringing a claim should be reviewed.
>
> We cannot conclusively judge if such changes would adequately address the constraints upon access to justice in employment tribunals which have been identified. Any changes brought in should therefore be subject to further review and modification as necessary. (Paragraph 79)
>
> We recognize that the above recommendations would have cost implications for the Ministry of Justice, but note that an increase in the number of legitimate claims would in itself bring in additional fee income, and, secondly, we stress again that if there were to be a binary choice between income from fees and preservation of access to justice, the latter must prevail as a matter of broader public policy. (Paragraph 80)[119]

7.2 Evidence to the inquiry

The below draws out some of the themes running through the evidence submitted to the Committee's inquiry. A Library-prepared thematic digest of the evidence as it relates to employment tribunal fees is provided on the landing page for this briefing (see supporting documents).

The principle of charging a fee

The evidence on this was mixed, with some advocating abolishing fees while others supported their retention albeit at a reduced level.

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[118] Ibid., p39
[119] Ibid., pp38-40

The then Parliamentary Under-Secretary of State, Minister for the Courts and Legal Aid, Shailesh Vara, said:

> 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.[120]

Many, particularly unions, recommended abolishing fees. The TUC supported abolition, noting that fees reduced to a nominal level may contribute little to the administrative costs of the tribunal system once one accounts for the costs of collecting the fees.[121]

Advice bodies and campaign groups were split between recommending abolition and recommending reduced fees. Those that supported abolition described tribunals as a public good, highlighting their utility in deterring unscrupulous employment practices.[122]

The Federation of Small Businesses (FSB) believed there was a case for lowering fees but opposed abolition on the grounds that fees introduce an element of financial risk for claimants, deterring speculative claims.[123] The Confederation of British Industry (CBI) said that fees and remissions may have to be recast pending the outcome of the Government review (which has since been published, see above).[124] Peninsula Business Services Limited was alone in voicing largely unqualified support for fees, arguing that fees deterred speculative claims, improved the allocation of tribunal resources, and better balanced the rights of both parties to a dispute.[125]

Some lawyers advocated the abolition of fees (e.g. the Law Society of Scotland[126]) but most argued for lower fees (e.g. the Bar Council;[127] the Law Society of England and Wales;[128] and the Council of Employment Judges[129]), suggesting that the key issue was that fees should be affordable and proportionate to the sums at stake.

The President of Employment Tribunals in England and Wales suggested a recalibrated fees system, aligned with the procedural tracks used by tribunals,[130] a view supported by the evidence of Sir Ernest Ryder, Senior President of Tribunals.[131] Their evidence argued that three fee types matched to the three procedural tracks used by tribunals would more sensibly align the fee amounts to the resources used by tribunals when disposing of claims (notably, the option of three fee types formed part

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120 09 Feb 2016 - Courts and tribunals fees and charges - oral evidence
121 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence; the Government set out estimates of the collections costs in response to a PQ: Employment Tribunals Service: Written question – 220109, 12 January 2015
122 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence, per Rosalind Bragg
123 Ibid.
124 Written evidence from CBI
125 Written evidence from Peninsula Business Services Limited
126 Further written evidence from The Law Society of Scotland
127 09 Feb 2016 - Courts and tribunals fees and charges - oral evidence
128 Ibid.
129 Written evidence from the Council of Employment Judges
130 Written evidence from the Employment Tribunals (England and Wales)
131 26 Jan 2016 - Courts and tribunals fees and charges - oral evidence

of the original fees consultation; see above, section 1.2) . The Equality and Human Rights Commission noted that some claims categorised as the more complex Type 'B' claims were in fact relatively straightforward, for example claims for rest breaks, daily rest or weekly rest under the *Working Time Regulations 1998*.[132]

Settlement/early conciliation

Much of the written and oral evidence concerned the impact of fees on negotiated settlement. Lawyers and the judiciary noted that respondents often refused to engage in negotiations or conciliation as they realised many claimants were unlikely to pay hearing fees.

Some of the evidence discussed the interaction between fees and mandatory early conciliation, primarily by reference to the number of cases handled by Acas and associated statistics (discussed above, section 3.2). The Minister suggested that the decline in claims could in part be attributed to the introduction of early conciliation:

> 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?[133]

Lawyers acknowledged that they advised respondents not to engage in conciliation or settlement; that the prudent course was to call claimants' bluffs, to see whether they paid the hearing fees. Several submissions (e.g. TUC;[134] Thompson's Solicitors[135]) suggested government departments were particularly guilty of this. The submission from the Council of Employment Judges related anecdotal evidence that Treasury

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132 Written evidence from the Equality and Human Rights Commission
133 09 Feb 2016 - Courts and tribunals fees and charges - oral evidence
134 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence
135 Ibid.

approval for settlement would be granted only in exceptional circumstances.[136]

Business representatives said they welcomed the reduced incidence of having to "buy off" claims, given that it is often more economic to settle than defend a case irrespective of its merits, as legal costs are generally irrecoverable and may outstrip the cost of settlement.[137]

Remission

The Committee received a substantial volume of evidence on the remission system, almost all of which was critical, including evidence from business representatives. Criticism was directed at the thresholds for the capital and earnings tests, the interaction with time limits and the particular disadvantage they claimed was suffered by groups with protected characteristics.

A number of submissions (e.g. Sir Ernest Ryder;[138] Employment Tribunals (Scotland)[139]) described the capital test as problematic given that post-dismissal capital could be artificially inflated due to, for example, redundancy pay, a problem exacerbated by the fact capital fell to be assessed during the three months following dismissal.

Citizens Advice cited its own survey which found that three in 10 respondents were unaware of the remission system, and of those that were aware 51% thought they were ineligible for remission.[140]

Unions and advice bodies highlighted the effect on women of basing remissions eligibility on household income, and of assessing capital during pregnancy. As to the former, women tend to have lower incomes which, they argued, increased the likelihood that female claimants would be ineligible for remission based on their partners' earnings rather than their own. They said this meant female claimants were disproportionately reliant on their partners' permission to pursue claims.[141] Regarding the assessment of capital during pregnancy in relation to maternity discrimination claims, the evidence criticised the forced choice between pursuing a claim and preserving capital for the costs of a new baby.[142]

The TUC cited analysis it had commissioned indicating that older workers are particularly disadvantaged by the capital test, suggesting that three in five households with at least one worker aged 50 to 60 would have savings of £3,000 or more.[143]

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136 Written evidence from Employment Tribunals (Scotland)
137 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence (the FSB); Written evidence from Peninsula Business Services Limited
138 26 Jan 2016 - Courts and tribunals fees and charges - oral evidence
139 Written evidence from Employment Tribunals (Scotland)
140 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence
141 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence, per Sally Brett, TUC
142 For example, see Written evidence from The Fawcett Society
143 Written evidence from TUC

The Equality and Diversity Forum voiced concerns about the difficulty refugee and migrant workers might encounter navigating the remissions system and completing the relevant forms.[144]

The evidence from the South Eastern Circuit (which represents lawyers practising in the South East) highlighted the differences between the remission scheme's disposable capital test and the higher thresholds obtaining in the civil courts, where a £1,200 fee would be subject to a £4,000 disposable capital threshold.[145]

Vexatious claims

Unions, lawyers and the judiciary, among others, said they saw no evidence that fees were effective in removing vexatious claims. Typically, their submissions relied on statistics indicating that claim success rates remain relatively unchanged, whereas one would expect to see an increased success rate if vexatious claims had declined disproportionately to meritorious claims (see above, section 3.5).

Jonathan Smithers, President of Law Society of England and Wales, said that "if [the claimants] are vexatious, they will be dealt with in the tribunal" yet those "who are vexatious will want to carry on prosecuting their claims regardless".[146] The Council of Employment Judges said that the experience of Employment Judges is "that misguided but determined litigants remain undeterred by fees".[147] Similarly, the President of the Employment Appeal Tribunal said that appeal fees had not disproportionately deterred weak appeals:

> 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.
>
> …
>
> 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.[148]

Reducing burdens on business

The FSB said it welcomed the drop in claims, primarily because it is expensive for employers to settle claims which lacked merit but are too costly to defend. Their evidence put the average cost of legal representation at £8,000, potentially exceeded by the costs of the employer-manager being tied up with tribunal proceedings.[149] They said the decline in claims indicated that "the introduction of fees should in theory have reduced the perceived risk of taking on staff among small

144 Written evidence from the Equality and Diversity Forum
145 Written evidence from the South Eastern Circuit
146 09 Feb 2016 - Courts and tribunals fees and charges - oral evidence
147 Written evidence from the Council of Employment Judges
148 Written evidence from Sir Brian Langstaff
149 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence, per Michael Mealing

employers".[150] Peninsula Business Services Limited said the introduction of fees has reduced the number of speculative claims,[151] noting in their written evidence:

> 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.[152]

One lawyer who advised both businesses and employees said that there is "certainly a high burden to the employer who has to defend a claim" but that the associated costs could be safeguarded against through legal expenses insurance.[153]

Discrimination claims

Unions, lawyers, advice bodies, campaign groups, the Equality and Human Rights Commission and the judiciary all criticised what they saw as the negative impact of fees on persons with protected characteristics. For the most part the evidence focused on the decline in the number of discrimination claims, particularly claims brought by women, often highlighting the decline in pregnancy and maternity discrimination claims.

Maternity Action, for example, described this decline as problematic in light of the evidence that, prior to fees, only a small proportion of pregnant women and new mothers subjected to discrimination issued claims:

> 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.
>
> …

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150 Further written evidence from the Federation of Small Businesses
151 Ibid., per James Potts
152 Written evidence from Peninsula Business Services Limited
153 Ibid., per Kate Booth

> 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.[154]

The Equality and Human Rights Commission said it had concerns about the equality and human rights implications of fees, particularly in relation to women with the protected characteristic of pregnancy and maternity. Their evidence cited their own research, which found that 11% of mothers in their sample were

> 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

The EHRC noted that it had raised concerns about fees in various reports to the UN.[155]

The Discrimination Law Association said many of its members (e.g. lawyers, advice workers and equality officers) who deal with front line advice report that complainants with strong potential claims choose not to pursue these at tribunal once made aware of tribunal fees.[156]

Professor Barnard and Dr Ludlow described their research into the experiences of EU-8 claimants. Their research sample found EU-8 claimants were disproportionately likely to have claims relating to discrimination, unpaid wages or holiday pay, noting that the low value claims (e.g. for as little as £49) were particularly susceptible to deterrence by fees.[157]

The Equality and Diversity Forum's evidence said that charging the highest fee type to claimants in discrimination cases added "another administrative rule to further marginalise" people with protected characteristics.[158]

Redundancy and impecunious employers

A number of submissions argued that fees were difficult to justify in the context of redundancy claims against impecunious employers.

A redundant employee will be able to apply for payment from the Redundancy Payments Service if his employer is liable to pay him a statutory redundancy payment, refuses to pay but is not formerly insolvent, and the employee has "taken all reasonable steps … to recover the payment".[159] Typically, the Redundancy Payments Service will not pay out unless the applicant has obtained a favourable judgment in the employment tribunal evidencing the employer's liability. Evidence from Citizens Advice and Thompson's solicitors described fees as inequitable in these circumstances, given that if the claimant succeeds at tribunal the employer will likely be unable to, or may refuse

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154 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence
155 Written evidence from the Equality and Human Rights Commission
156 Written evidence from the Discrimination Law Association
157 Written evidence submitted by Catherine Barnard and Amy Ludlow, University of Cambridge
158 Written evidence from the Equality and Diversity Forum
159 *Employment Rights Act 1996*, section 166

to, reimburse the fee, and the Redundancy Payments Service will not. In consequence, the fee will represent an irrecoverable cost of obtaining statutory redundancy pay.[160] Fees were subsequently abolished in these circumstances, on 31 January 2017, when Ministry of Justice published its review of the introduction of fees (see above).

Low value claims

The Tribunals Judiciary and Council of Employment Judges in particular noted a marked decline in low value money claims relating to unpaid wages; notice pay; redundancy pay; and unpaid holiday pay.[161] The Council of Employment Judges said:

> 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.
>
> …
>
> 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.[162]

The treatment of employees and unfair competition

A number of submissions argued that fees were likely to reduce the deterrent effect of employment law, emboldening unscrupulous employers to mete out rough treatment on workers, particularly lower paid employees, on the basis of reduced risk of tribunal claims. Working Families noted "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" and that these employers are aware fees create "a major barrier to people bringing claims".[163] Evidence from the South Eastern Circuit noted that employers may make calculations as to which employees they can afford to dismiss based on income.[164] Those commentators that described the likelihood of these behavioural effects argued that employers who obeyed the law may suffer a short-term competitive disadvantage compared with unscrupulous employers.

Examples of deterrence

Evidence identifying particular examples of the deterrent effect of fees, or citing first-hand experience of deterred clients, came from lawyers, advice agencies, campaigners, academics and the judiciary. Researchers

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160 Written evidence from Citizens Advice; Written evidence from Stephen Cavalier, Chief Executive of Thompsons Solicitors

161 Written evidence from the Tribunals Judiciary; Written evidence from the Council of Employment Judges

162 Written evidence from the Council of Employment Judges

163 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence, per Sybille Raphael

164 Written evidence from the South Eastern Circuit

at the University of Strathclyde Law School described responses from research participants indicating the deterrent effect of fees, commenting that their research indicated many potential claimants "feel powerless to seek a remedy even when advised that they do, in fact, have a viable claim".[165] Citizens Advice highlighted its own research, finding that 47% of respondents to its survey would have to "put aside all of their discretionary income for 6 months to save the £1,200 fees".[166] The evidence from Citizens Advice also provided case studies of claimants whom Citizens Advice had supported but who struggled to afford fees.

Evidence from the Council of Employment Judges reported the experiences of fee-paid judges who also maintain a legal practice, noting that one judge said half the clients he advises who have claims with prospects of success of 51% or better do not proceed with their claims because of fees.[167] Similar experiences were recounted in evidence from law firms. One firm described the outcome of an advertising campaign that resulted in 185 employment law enquiries, 24.9% of which were potentially viable claims but were discontinued due to fees:

> 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.[168]

Enforcement of damages

Several submissions criticised fees by reference to the high incidence of unpaid tribunal awards, drawing on Department of Business, Innovation and Skills research that found only half of awards were paid in full and 35% entirely unpaid.[169] The Law Society of Scotland noted that the proportion of entirely unpaid claimants was even higher in Scotland, at 46%.[170] Rebecca Hilsenrath, Chief Legal Officer at the Equality and Human Rights Commission said:

> 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.[171]

Interaction with time limits

The Equality and Diversity Forum said the remissions process made it more difficult to comply with the three month time limit within which a claim must be issued, and advocated increasing the limitation period.[172] The Fawcett Society argued for doubling the time limit in respect of maternity discrimination claims, given the "double disruption faced by

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165 Written evidence from the Law School, University of Strathclyde
166 Written evidence from Citizens Advice
167 Written evidence from the Council of Employment Judges
168 Written evidence from Kate Booth, Partner, Eaton Smith LLP
169 BIS, *Payment of Tribunal Awards*, 2013, p6
170 Written evidence from The Law Society of Scotland
171 17 Nov 2015 - Courts and tribunals fees and charges - oral evidence
172 Written evidence from the Equality and Diversity Forum

pregnant women who when having their child are discriminated against in the workplace".[173]

Union support for claims

Some unions gave evidence of providing substantial support for claimants by covering issue and hearing fees.[174] Unison said:

> 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.[175]

Evidence from one law firm suggested there were limits to this as some unions' legal aid budgets cannot meet the demand from their members and, in any event, low paid workers often work in non-unionised industries.[176]

Displacing claims in Scotland

Both the Law Society of Scotland and Employment Tribunals (Scotland) suggested that money claims capable of being pled as breach of contract are, following legal advice, being pursued in the Sherriff Court, because the associated fees are much lower.[177] There was no evidence of this phenomenon in England and Wales.

7.3 The Government's response

On 9 November 2016, the Government published its response to the Committee's report,[178] devoting a paragraph to the subject of employment tribunal fees:

> These recommendations relate mainly to matters under consideration in the Government's review of fees in the Employment Tribunals which is considering the impact of the introduction of fees in relation to the principal objectives set, including, insofar as we are able, the impact in relation to characteristics protected under the Equality Act 2010. We will publish the outcome of our review in due course and any proposals we have to adjust the current scheme of fees and remissions will be set out for public consultation.[179]

The Chair of the Justice Committee, Bob Neill MP, made the following statement:

> It is disappointing that the Government Response is so negative in respect of the Justice Committee's recommendations; perhaps more concerning is that it is almost offensively perfunctory, appearing to have been rushed out at short notice and giving little evidence of attention paid to the Committee's detailed evidence and analysis. This is all the more surprising given that Government has had more than four months to produce this reply. I therefore

173 Written evidence from The Fawcett Society
174 Written evidence from Prospect; Written evidence from UNISON
175 Written evidence from UNISON
176 Written Evidence from Simpson Millar LLP
177 Written evidence from The Law Society of Scotland; Written evidence from Employment Tribunals (Scotland)
178 Ministry of Justice, *Government Response to the Justice Committee's Second Report of session 2016/17 Courts and Tribunals Fees*, November 2016
179 Ibid., p5

> intend to raise this matter and possible further steps with the Committee at our next meeting.[180]

In a follow up oral evidence session with the Committee, the Committee questioned the Minister for Courts and Justice, Sir Oliver Heald QC, about the response. Sir Oliver reiterated that the Committee's recommendations would be addressed more fully in the Government's review of tribunal fees.[181]

The review was published on 31 January 2016 and contained a more detailed response to the Committee's recommendations. As discussed above, the Committee recommended:

- that the overall quantum of fees be substantially reduced;
- that the binary distinction between Type A/B claims be replaced by either a single fee, three tier structure or fees set as a proportion of the amount claimed;
- that the disposable capital and monthly income thresholds for remission be increased; and
- that special consideration be given to the position of women alleging maternity or pregnancy discrimination.

The Government did not agree with these recommendations for the most part, save to the extent that it proposed to increase the gross monthly income remission threshold from £1,085 to £1,250 (discussed above in the consideration of the review of tribunal fees).

The Government's specific responses to each of the recommendations are summarised below:

> **The quantum of fee income**
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> …
>
> We do not agree with this recommendation.
>
> …
>
> The Government's view is that it is reasonable to expect people to contribute this level of fee income towards the costs of the tribunals, where they can afford to pay. Additionally, the requirement to pay a fee provides a financial discipline, encouraging people to give serious consideration to the alternative sources of help available, such as Acas's free conciliation service, and to weigh carefully the strength and merits of the claim against the financial outlay required.
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> …
>
> **Fee structure**
>
> …
>
> We do not accept this recommendation.
>
> …

[180] Minister questioned on response to courts and tribunals fees report, Parliament website, 14 December 2016

[181] Justice Committee, Oral evidence: Government Response to the Committee's Report on courts and tribunal fees, HC 880, Wednesday 14 December 2016

During the original consultation on introducing fees in the ETs, the Government set out two options for the structure of fees which sought to balance four criteria:

- recover a contribution from users towards the costs of the ETs where they could afford to do so;
- develop a simple, easy to understand and cost effective fees system;
- maintain access to justice; and
- contribute to the efficiency and effectiveness of the system.

…

We continue to believe that the current structure best meets these criteria. In particular, we believe that it is fair that those who make greater use of the ETs should pay more as a contribution to the overall costs of the system, so that those who bring more complex claims, which consume more tribunal time and resource, should pay more than those who bring simpler claims. The current fees structure also provides an opportunity and incentive for parties, once proceedings have commenced, to continue to negotiate to seek to reach a settlement before the hearing fee is due.

…

the Government decided to implement a two-tier system of fees, under which claims allocated to the fast track attracted Type A fees, and those allocated to the standard and open tracks attracted Type B fees.

The current fee structure does therefore broadly reflect the categorisation of ET claims, although modified so that discrimination claims do not attract higher fees than all other types of claim.

…

We can see the attractiveness of an approach under which fees are charged as a percentage of the value of the claim. In the original consultation, Option 2 was based on a fee structure which, although it did not propose a fee calculated as a percentage of the value of the claim, proposed that a higher fee would be payable where the claimant sought an award over £30,000.

Few respondents to the consultation were in favour of that approach. They pointed out the difficulties in assessing and quantifying the value of a claim at the outset of a case, particularly in an ET case where the claimant may not have legal representation. We believe that the difficulties faced by claimants would be greater under a structure which charged a fee calculated as a percentage of the value of the claim.

Neither do we agree that some types of claim, below a certain financial value, should not attract a fee. We believe that the requirement to pay a fee provides the right financial incentive for people to give serious consideration to the strength of the claim and alternative ways of resolving dispute, such as Acas's conciliation service.

Fee remissions

The Committee recommended that we should increase the capital and income thresholds for a fee remission and simplify the

procedure for applying so that only one application for a remission is required.

… we agree that an adjustment to the Help with Fees scheme is the fairest and most effective way to alleviate the impact of fees on volumes of claims.[182]

…

Maternity and pregnancy related claims

…

There is no evidence that maternity and pregnancy discrimination claims have been particularly affected by the introduction of fees, and there is therefore no reason that they should be treated more favourably as far as fees are concerned than other types of claim. We do not therefore agree that fees for these types of claim should be reduced. Instead, we believe that any concerns about the impact of fees on these types of claim are better addressed through the proposed adjustment to the Help with Fees scheme, under which support would be targeted to those most likely to struggle to pay the fees.[183]

[182] See above discussion of the Government's review of fees

[183] Ministry of Justice, *Review of the introduction of fees in the Employment Tribunals Consultation on proposals for reform*, Cm 9373, November 2016, pp9-13

8. Legal challenges

Since their introduction, tribunal fees were the subject of repeated judicial review proceedings both in England and Wales, and in Scotland.

Until the matter reached the Supreme Court, those challenges failed. On 26 July 2017 Unison succeeded in its appeal to the Supreme Court. The Supreme Court quashed the Fees Order. As such, employment tribunal and Employment Appeal Tribunal fees are now, and have always been, unlawful. The Government has agreed to repay the fees it received. However, a number of questions remain as to how this will be administered. There is also uncertainty about what effect the Supreme Court judgment will have on claimants that were deterred, by fees, from prosecuting a claim within the time limit to do so.

The following summarises these various challenges to fees, and the issues flowing from the Supreme Court's judgment.

8.1 Fox and Partners judicial review (Scotland)

On 1 July 2013, shortly after Unison first issued proceedings in the High Court (see below), Scottish law firm Fox and Partners presented a petition to Scotland's Court of Session, challenging the fees regime. Proceedings were sisted (stayed) on 26 September 2013 pending the outcome of Unison's case.[184] Notably, during the petition's hearing in July 2013, the Lord Chancellor undertook to reimburse fees that had been paid if the Fees Order was found to be unlawful.[185]

8.2 First Unison judicial review

The trades union Unison applied for judicial review of tribunal fees, with the Equality and Human Rights Commission intervening as an interested party. The High Court heard the application on 22-23 October and 4 November 2013. Unison argued that the requirement to pay fees violated principles of EU law, in that fees made it excessively difficult to exercise rights derived from EU discrimination law (infringing the "principle of effectiveness") and disproportionately affected enforcement of those rights vis-à-vis domestic rights (in breach of the "principle of equivalence"). Unison also advanced arguments under domestic equality law, contending that fees were indirectly discriminatory and, in deciding to introduce fees, the Lord Chancellor had acted in breach of the Public Sector Equality Duty.[186]

Judgment was handed down on 7 February 2014; Unison's application was dismissed.[187] The Court reasoned that fees were not inherently

[184] Johnathan Mitchell QC, counsel for Fox and Partners, has on his website provided an overview of the background to the case, here.
[185] *Fox Solicitors Ltd, Re Judicial Review* [2013] ScotCS CSOH_133, para 11
[186] A duty to have "due regard" to equality considerations; see The Public Sector Equality Duty and Equality Impact Assessments, Library standard note SN6591, 22 May 2014
[187] *Unison, R (on the application of) v The Lord Chancellor & Anor* [2014] EWHC 218 (Admin)

unlawful but could be deemed so if they proved discriminatory or rendered it excessively difficult to enforce EU law derived rights. However, proceedings had been brought shortly after the introduction of fees, with insufficient time for the Court to assess their impact. The gist of the judgment was summarised by Lord Justice Moses:

> This brings us to a fundamental difficulty with the whole of this case. Brought as it was in the belief that the lawfulness of the regime had to be challenged as a matter of urgency, and in any event within three months, the Court has been faced with judging the regime without sufficient evidence, and based only on the predictions of the rival parties throughout and after the hearing. Parliament decided, by affirmative resolution, to introduce the regime, authorised by statute, and debated and positively affirmed by both Houses of Parliament. Quite apart from the continuing obligation to fulfil the duties identified in the Equality Act, the Lord Chancellor has himself undertaken to keep the issue of the impact of this regime under review. If it turns out that over the ensuing months the fees regime as introduced is having a disparate effect on those falling within a protected class, the Lord Chancellor would be under a duty to take remedial measures to remove that disparate effect and cannot deny that obligation on the basis that challenges come too late. It seems to us more satisfactory to wait and see and hold the Lord Chancellor to account should his optimism as to the fairness of this regime prove unfounded.[188]

Unison appealed, although proceedings were adjourned by consent on 18 September 2014 in light of new evidence showing a fall in claims since the introduction of fees, prompting Unison to issue fresh proceedings.

8.3 Second Unison judicial review

On 23 September Unison issued its second claim for judicial review. The High Court heard Unison's second application for judicial review on 21-22 October 2014, and, on 17 December 2014, handed down judgment dismissing it.[189] In *Unison (No. 2)* Unison advanced its case on two grounds: an infringement of the EU principle of effectiveness (see above) and indirect discrimination, primarily against females, as it argued that Type B claims (which include discrimination claims) are more often brought by females, who are therefore disproportionately affected by the higher fees. The Equality and Human Rights Commission intervened supporting this argument.

As with the first application, Unison based its arguments on statistical evidence, albeit more recent statistics, contending that the decline in employment tribunal claims demonstrated that the Fees Order infringed the principle of effectiveness. The Court identified the relevant legal test as being "whether it does in practice make access impossible or exceptionally difficult".[190] The Lord Chancellor contended that Unison's claims were of a generalised nature "with an absence of any concrete

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[188] Ibid., para 89
[189] *Unison (No 2), R (on the application of) v The Lord Chancellor* [2014] EWHC 4198
[190] Para 44

examples of specific individuals allegedly denied access to the tribunals".[191] This reliance on statistics in the absence of specific examples proved fatal to Unison's application. Giving the lead judgment, Lord Justice Elias concluded that the Court required examples of actual cases in order to assess whether the principle of effectiveness had been infringed:

> The claimant still does not rely upon any actual instances of individuals who assert that they have been or would be unable to take claims notwithstanding that their income is too much to qualify for remission. Nor did it in its submissions focus upon hypothetical individuals as it did in the first case. Instead, the union essentially relies upon statistics to make good its claim, these being fuller than were available before the court at the earlier hearing, no doubt encouraged by the observations of Moses LJ in the comments recited at paragraph 3 above.
>
> There is no doubt that the reduction in the number of cases brought is striking. The Tribunals Statistics Quarterly for October to December 2013, published on 13 March 2014 show that, comparing the period October-December 2012 with the period same period in 2013 (the Fees Order having come into force on 29 July 2013), 79% fewer claims were accepted by the ET . For equal pay claims, the figure was 83% and for sex discrimination it was 77%.
>
> ....
>
> I suspect that there may well be cases where genuinely pressing claims on a worker's income will leave too little available to fund litigation. But the difficulty with the way the argument has been advanced is that the court has no evidence at all that any individual has even asserted that he or she has been unable to bring a claim because of cost.The figures demonstrate incontrovertibly that the fees have had a marked effect on the willingness of workers to bring a claim but they do not prove that any of them are unable, as opposed to unwilling, to do so.
>
> The question many potential claimants have to ask themselves is how to prioritise their spending: what priority should they give to paying the fees in a possible legal claim as against many competing and pressing demands on their finances? And at what point can the court say that there is in substance no choice at all? Although Ms Monaghan would not accept that this is the task facing the court, it seems to me that in essence that is precisely what the court has to do. In that context, as Moses LJ said in the first Unison challenge, it is not enough that the fees place a burden on those with limited means. The question is not whether it is difficult for someone to be able to pay - there must be many claimants in that position - it is whether it is virtually impossible or excessively difficult for them to do so. Moreover, the other factors which I have identified as potentially inhibiting a worker from pursuing a claim may reinforce the conclusion that the risks inherent in litigation are not worth taking. These factors engender a cautious approach to litigation but do not compel the inference that it would be impossible in practice for some of these claimants to litigate.

[191] Para 5

> In my view, the court can only properly test the argument if there are actual cases which will enable the court to review the income and expenditure of a particular individual or individuals and apply the effectiveness principle in that concrete situation….[192]

In respect of Unison's second ground, indirect discrimination, Elias LJ concluded that Unison had not adduced sufficiently clear evidence of discrimination, and even if there was indirect discrimination it was likely to be justified:[193]

> … the onus is on the claimant to show that there has been discrimination, I am not satisfied that the burden has been discharged here. Even if it has, the extent of any adverse impact is very small. That is relevant to the issue of justification.
>
> ….
>
> The evidence shows that in setting up the fee scheme the government were seeking to achieve three specific and quite distinct objectives: the first was to transfer a proportion (one-third) of the annual cost of running ETs and the EAT to those users who benefit from it and can afford it; second, to make Tribunals more efficient and effective not least by removing unmeritorious claims; and third, to encourage alternative methods of employment dispute resolution so that litigation is not the first resort. This last objective goes hand in hand with the government's promotion of ACAS conciliation which became mandatory for all ET claimants from 6 May 2014. The government considers that it should encourage quicker, cheaper and less emotionally damaging alternatives to the judicial process.
>
> ….
>
> I have no doubt that each of the objectives relied upon in this case is a legitimate one and that the scheme taken overall, particularly having regard to the arrangements designed to relieve the poorest from the obligation to pay, is justified and proportionate to any discriminatory effect. Moreover, the costs are recoverable, in general at least, if the claim succeeds.[194]

Mr Justice Foskett agreed that the application should be dismissed for the reasons discussed, although added:

> As Elias LJ has recorded (at paragraphs 55-56), the effect of the introduction of the new regime has been dramatic. Indeed it has been so dramatic that the intuitive response is that many workers with legitimate matters to raise before an Employment Tribunal must now be deterred from doing so because of the fees that will be demanded of them before any such claim can be advanced. For my part, I would anticipate that if the statistics upon which reliance is placed in support of this application were drilled down to some individual cases, situations would be revealed that showed an inability on the part of some people to proceed before an Employment Tribunal through lack of funds which would not have been the case before the new regime was set in place. However, that assessment has to be seen as speculative until

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192 Paras 54-62

193 Provisions, criterions or practices are not indirectly discriminatory if they can be justified as being a proportionate means of achieving a legitimate aim – s.19(2)(d), *Equality Act 2010*

194 Para 81-90

> convincing evidence to that effect is uncovered. If it is, of course, the Lord Chancellor would doubtless feel obliged to address it.[195]

Unison was granted leave to appeal to the Court of Appeal,[196] with the Court of Appeal later granting leave to join Unison's second judicial review, with the earlier adjourned judicial review.

Court of Appeal judgment

On 26 August 2015 the Court of Appeal rejected Unison's appeal. As with the courts below it, the Court of Appeal concluded that the challenge could not succeed on the basis of statistical evidence alone:

> I have found this part of the case troubling. Like both Divisional Courts, I have a strong suspicion that so large a decline is unlikely to be accounted for entirely by cases of "won't pay" and that it must also reflect at least some cases of "can't pay"; and I have accordingly been tempted by Ms Monaghan's submission that the figures speak for themselves. But in the end I do not think that that is legitimate. The truth is that, looked at coolly, there is simply no safe basis for an untutored intuition about claimant behaviour or therefore for an inference that the decline cannot consist entirely of cases where potential claimants could realistically have afforded to bring proceedings but have made a choice not to. But in fact the difficulty goes further than that. Even if it really were an irresistible inference from the decline in claims that at least some potential claimants could not realistically afford the fees, there is still no basis for forming any reliable view about the numbers of such cases, or how typical they may be; and, for reasons which will appear, that is an important matter. In my view the case based on the overall decline in claims cannot succeed by itself. It needs to be accompanied by evidence of the actual affordability of the fees in the financial circumstances of (typical) individuals. Only evidence of this character will enable the Court to reach a reliable conclusion that that the fees payable under the Order will indeed be realistically unaffordable in some cases.[197]

In the course of his judgment, Lord Justice Underhill noted the Government's review of fees (see above, section 6) suggesting that this may reveal evidence requiring fees to be revisited:

> I would, however, say this. On 11 June 2015 the Lord Chancellor announced a post-implementation review, which would "consider how effective the introduction of fees has been in meeting the original financial and behavioural objectives *while maintaining access to justice* [my emphasis]": it had in fact been made clear before the Divisional Courts that such a review would be conducted in due course. The fact that the evidence put before this Court has not satisfied me that there has been a breach of the effectiveness principle should not, and I am sure will not, preclude the Lord Chancellor from making his own assessment, on the basis of the evidence to which he will have access, on that question. The decline in the number of claims in the Tribunals following the introduction of the Fees Order is sufficiently startling

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195 Para 96

196 UNISON to appeal High Court decision over tribunal fees, Unison website, 17 December 2014 (accessed 12 January 2015)

197 *Unison, R (On the Application Of) v The Lord Chancellor* [2015] EWCA Civ 935, para 68

> to merit a very full and careful analysis of its causes; and if there are good grounds for concluding that part of it is accounted for by claimants being realistically unable to afford to bring proceedings the level of fees and/or the remission criteria will need to be revisited.[198]

Successful challenge in the Supreme Court

On 26 February 2016 the Supreme Court granted Unison leave to appeal the Court of Appeal's decision. The Court heard the case on 27-28 March 2017. Judgment was handed down on 26 July 2017.[199] The Court unanimously allowed the appeal, quashing the Fees Order.

The Fees Order was declared unlawful ab initio, meaning it was from the start unlawful; all fees have been deducted based on an unlawful instrument. The judgment, press summary and video footage of the proceedings can be viewed on the Supreme Court's website, here.[200]

Unlike during argument in the courts below, Unison's case in the Supreme Court was advanced primarily on the basis of the common law right of access to justice.[201] Giving the lead judgment, Lord Reed highlighted the importance of access to justice as a component of the rule of law:

> The constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the "users" who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings. The extent to which that viewpoint has gained currency in recent times is apparent from the consultation papers and reports discussed earlier. It is epitomised in the assumption that the consumption of ET and EAT services without full cost recovery results in a loss to society, since "ET and EAT use does not lead to gains to society that exceed the sum of the gains to consumers and producers of these services".[202]

His Lordship went on to emphasise the public interest in maintaining access to justice as a means of underpinning employment law:

> When Parliament passes laws creating employment rights, for example, it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect. It does not envisage that every case of a breach of those rights will result in a claim before an ET. But the possibility of claims being brought by employees whose rights are infringed must exist, if employment relationships are to be based on respect for those rights. Equally, although it is often desirable that claims arising out of alleged

198 Ibid., para 75
199 *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51
200 R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent), Supreme Court website [accessed 10 April 2017]
201 *R v SoS for Social Security, Ex p Joint council for the Welfare of Immigrants* [1997] 1 WLR 275, 290; See *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51, para 65
202 Ibid., 66

> breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail. It is thus the claims which are brought before an ET which enable legislation to have the deterrent and other effects which Parliament intended, provide Page 22 authoritative guidance as to its meaning and application, and underpin alternative methods of dispute resolution.[203]

The Court did, however, recognise that the imposition of some form of fees could be reconciled with the common law right of access to justice if set at a lower level or mitigated in some other way:

> The 2007 Act does not state the purposes for which the power conferred by section 42(1) to prescribe fees may be exercised. There is however no dispute that the purposes which underlay the making of the Fees Order are legitimate. Fees paid by litigants can, in principle, reasonably be considered to be a justifiable way of making resources available for the justice system and so securing access to justice. Measures that deter the bringing of frivolous and vexatious cases can also increase the efficiency of the justice system and overall access to justice.
>
> The Lord Chancellor cannot, however, lawfully impose whatever fees he chooses in order to achieve those purposes. It follows from the authorities cited that the Fees Order will be ultra vires[204] if there is a real risk that persons will effectively be prevented from having access to justice.
>
> …
>
> In order for the fees to be lawful, they have to be set at a level that everyone can afford, taking into account the availability of full or partial remission[205]

After surveying the evidence, Lord Reed concluded that fees were set at an unaffordable level, and that neither the remission system, nor the Lord Chancellor's rarely used power to remit fees in exceptional circumstances, were sufficient to mitigate this. This conclusion was based on a combination of factors. First, statistical evidence:

> The fall in the number of claims has in any event been so sharp, so substantial, and so sustained as to warrant the conclusion that a significant number of people who would otherwise have brought claims have found the fees to be unaffordable.[206]

Second, the Government's own review of fees estimated that between 3,000 and 8,000 people per year, who were unable to resolve their disputes through Acas conciliation, did not issue a claim because they were unable to pay.[207] This, Lord Reed noted, suggested fees were set at an unaffordable level, a conclusion fortified by consideration of hypothetical examples that indicated the impact of fees on claimants in low to middle income households:

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203 Ibid., para 72
204 "ultra vires" is a term used in public law to describe an action or legal instrument that oversteps the legal authority on which it purports to be based
205 Ibid., paras 86-87, 91
206 Ibid., para 91
207 Ibid., para 93; also see above discussion in section 6

> The first hypothetical claimant is a single mother with one child, working full-time as a secretary in a university. She has a gross income from all sources of £27,264 per annum. Her liability to any issue or hearing fee is capped under the remission scheme at £470 per fee. She therefore has to pay the full fees (£390) in order to pursue a type A claim to a hearing, and fees totalling £720 in order to pursue a type B claim. The net monthly income which she requires in order to achieve acceptable living standards for herself and her child, as assessed by the Joseph Rowntree Foundation in its report, Minimum Income Standards for the UK in 2013, is £2,273: an amount which exceeds her actual net monthly income of £2,041. On that footing, in order to pursue a claim she has to suffer a substantial shortfall from what she needs in order to provide an acceptable living standard for herself and her child.
>
> …
>
> The second hypothetical claimant has a partner and two children. She and her partner both work full-time and are paid the national minimum wage. They have a gross income, when benefits and tax credits are also taken into account, of £33,380 per annum. The claimant's liability to fees is capped under the remission scheme at £520. She therefore has to pay the full fees of £390 in order to pursue a type A claim, and fees totalling £770 in order to bring a type B claim. The net monthly income the family require in order to achieve an acceptable living standard, as assessed by the Joseph Rowntree Foundation, is £3,097: an amount which exceeds their actual net monthly income of £2,866. They therefore have to make further inroads into living standards which are already below an acceptable level if a claim is to be brought.[208]

Third, the Court was swayed by argument that fees restricted access to justice when set at levels that, compared to the amounts at stake, made it irrational to bring claims. While not cited in the judgment, the Court had heard argument based on an influential journal article by Oxford academics Abigail Adams and Jeremias Prassl.[209] As Adams and Prassl argued in their article, the changes in claimant behaviour since fees:

> suggest that litigants have responded to the fee system in a rational way: low value claims are deterred because the cost imposed by fees are disproportionate in the light of monetary compensation and likelihood of recovery.
>
> …
>
> These decisions are wholly consistent with well-established economic models of rational claimant behaviour, best understood through an analysis of the fees' impact on expected claim value: the choice of whether to litigate or not is driven by a claim's expected payoffs once all costs and benefits have been taken into account. A rational claimant will only sue when the benefit she expects from bringing a claim exceeds her expected cost of doing so, viz when the expected value of a claim is positive. At its most basic, the expected value of a claim can be expressed as:
>
> > *Expected value of claim = probability win × payoff when win + probability lose × payoff when lose*[210]

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208 Ibid., para 51, 53

209 Adams, A., Prassl, J., 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees', *The Modern Law Review*, 80(3), 412-442, 2017

210 Ibid., 419, 428

Lord Reed considered how a rational claimant might act when considering whether to pay a Type A fee for a low-value claim:

> If, for example, fees of £390 have to be paid in order to pursue a claim worth £500 (such as the median award in claims for unlawful deductions from wages), no sensible person will pursue the claim unless he can be virtually certain that he will succeed in his claim, that the award will include the reimbursement of the fees, and that the award will be satisfied in full. If those conditions are not met, the fee will in reality prevent the claim from being pursued, whether or not it can be afforded. In practice, however, success can rarely be guaranteed. In addition, on the evidence before the court, only half of the claimants who succeed in obtaining an award receive payment in full, and around a third of them receive nothing at all.
>
> As explained earlier, the statistical evidence relating to the impact of the Fees Order on the value of awards, the evidence of the Council of Employment Judges and the Presidents of the ETs, the evidence collected by the Department of Business, Innovation and Skills, and the survey evidence collected by Acas, establishes that in practice the Fees Order has had a particularly deterrent effect on the bringing of claims of low monetary value. That is as one would expect, given the futility of bringing many such claims, in view of the level of the fees and the prospects of recovering them.[211]

The Court thus concluded that "the Fees Order effectively prevents access to justice and is therefore unlawful".[212]

While it was ultimately this new ground of argument – the common law right of access to justice - that proved decisive, the Government lost its case on all other fronts, namely: that the Fees Order contravened the rule that specific statutory rights are not to be cut down by subordinate legislation passed under the authority of a different Act;[213] that the Fees Order imposed disproportionate limitations on the exercise of EU rights and so was unlawful under EU law;[214] and that the higher Type B fees constituted unjustified indirect discrimination.[215]

8.4 Consequences of the Supreme Court judgment

The immediate consequences of the judgment are that the Fees Order is void. It has been removed from legislation.gov.uk and HM Courts & Tribunals Service is no longer collecting fees.

As noted above, when, at the time of making the Fees Order, it was challenged by way of judicial review in Scotland's Court of Session, the Lord Chancellor undertook to reimburse fees:

> The Lord Chancellor gives an undertaking that if he is allowed to make the Employment Tribunals and the Employment Appeal

[211] Op cit., paras 96-97
[212] Ibid., 98
[213] *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51, para 104
[214] Ibid., para 117
[215] Ibid. para 131

> Tribunal Fees Order 2013, and if following exhaustion of appeal rights, it is found to be unlawful, he will reimburse all fees that have been paid.[216]

Therefore it is likely the Government will be required to reimburse those who paid fees. Indeed, there is legal authority supporting the proposition that

> money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right.[217]

In any event, the Government has confirmed that it intends to take immediate steps to reimburse those who paid fees.[218] It is not at present clear whether those fees will be repaid with interest.[219]

The amount collected in fees, less the value of remission, as at 31 March 2017 was approximately £29.9m, indicating fee income as at 26 July 2017 (the date of the Supreme Court's judgment) would be around **£32m**.[220] There would, in addition, be administrative costs associated with reimbursing fees.

If the Government decides to re-introduce fees at a lower level, there would be further administrative costs; a need for new secondary legislation; and the not insignificant likelihood of further litigation, together with additional legal costs.

Aside from the issue of reimbursing claimants, the quashing of the fees order raises a number of questions, including:

- Will claimants be able to argue for an extension of the normal time limits on the ground that they were deterred by fees?[221]
- Will employers who lost at tribunal, and were ordered to reimburse successful claimants' fees, be able to recover this?
- What effect will the judgment have on claims that were rejected under the Tribunal Rules due to non-payment of fees?[222]

There may be further litigation on some of these points, in particular the question of extending time limits. The issue of reimbursing employers may be settled by the Government, depending on its approach to reimbursing fees. The effect on claims rejected automatically for non-payment of fees turns on the public law consequences of the Supreme Court's decision. The Fees Order was declared to be void ab initio and so has, by definition, always been unlawful. This gives rise to the question of whether actions based on the presumption of its lawfulness

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216 *Fox Solicitors Ltd, Re Judicial Review* [2013] ScotCS CSOH_133, para 11
217 *Woolwich Equitable Building Society v Inland Revenue Commission (No. 2)* [1993] AC 70, 177
218 Employment tribunal fees unlawful, Supreme Court rules, *BBC News*, 26 July 2017
219 Op cit. [1993] AC 70, a case where repayment was ordered with interest
220 See above, section 3.6
221 Tribunal claims must usually be brought within three months of the issue complained of
222 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, rules 11 & 40

are necessarily automatically unlawful given the Fees Order was a nullity; whether there will be a "domino effect".[223]

Some of these issues may yet be settled by the Supreme Court, which invited the parties to make written representations on any consequential relief that maybe appropriate following its ruling.[224]

[223] See Woolf, H; Jowell, J; Le Sueur, A; Donnelly, C; Hare, I., *De Smith's Judicial Review*, 7th Ed, 2013, 4-062; See the summary of the case law in *R. (on the application of TN (Vietnam)) v Secretary of State for the Home Department* [2017] EWHC 59 (Admin), paras 61-95

[224] *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51, para 120

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