



## BRIEFING PAPER

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# Employment tribunal fees

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## Summary

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. Claimants must now pay separate fees to issue their claim and have it heard. Fee levels differ according to the nature of the claim. It is possible for those with limited means to obtain a reduction or waiver of fees provided certain criteria are met.

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.

Since their introduction, tribunal fees have been the subject of repeated judicial review proceedings both in England and Wales, and in Scotland. To date these challenges have been unsuccessful. The trade union Unison brought the judicial review in England and Wales, which is due to be heard in the Supreme Court later this year.

On 11 June 2015 the Conservative Government announced the start of a [post-implementation review](#) of tribunal fees. The Government has recently [stated](#) it will publish the conclusions of the review "in due course".

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.

A thematic digest of the evidence submitted to the 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, discusses the legal challenges to the Fees Order and cites relevant comment.

# 1. Introduction

Employment tribunal fees were introduced by *The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013*<sup>1</sup> (the Fees Order), which came into force on 29 July 2013. Prior to that, 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”.<sup>2</sup> The costs of providing the service were borne by the taxpayer.

Since the Fees Order a tribunal claimant must pay an issue fee to lodge his claim and a hearing fee for its first substantive hearing, unless he or she is of limited means and applies successfully for fee remission. The fee amounts differ 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, attract 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 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

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<sup>1</sup> [SI 2013/1893](#)

<sup>2</sup> [\[2014\] EWHC 218](#), para 2

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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.<sup>3</sup>

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.<sup>4</sup> 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".<sup>5</sup> 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".<sup>6</sup> Opposition Members argued the proposals were not based solely on costs, but also on a desire to make it easier to fire employees.<sup>7</sup>

### 1.2 Fees consultation

The consultation on fee-charging structures ran from 14 December 2011 to 6 March 2012.<sup>8</sup> 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.<sup>9</sup> 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;
- 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

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<sup>3</sup> BIS & Tribunals Service, *Resolving workplace disputes: A consultation*, January 2011, pp49-50

<sup>4</sup> Ibid.

<sup>5</sup> Ibid., p49

<sup>6</sup> Ibid., p50

<sup>7</sup> First Delegated Legislation Committee 10 June 2013 c21; see below section "Debate in Parliament"

<sup>8</sup> Ministry of Justice, *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal*, Consultation Paper CP22/2011, 14 December 2014

<sup>9</sup> Ibid., pp3-4

modified Option 1, the key modification being that three fee levels would be reduced to two.<sup>10</sup>

The consultation received 140 responses: 25 from unions and employee representatives; 29 from legal groups; 31 from business; and 30 from other interested parties.<sup>11</sup> 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.<sup>12</sup>

### 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”. These provided the statutory authority for the *Added Tribunals (Employment Tribunals and Employment Appeal Tribunal) Order 2013*,<sup>13</sup> 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*,<sup>14</sup> which introduced the system of fees. Both were laid in draft before Parliament on 24 April 2013 and subject to the affirmative resolution procedure.<sup>15</sup> The orders were considered in Committee on 10 June 2013 and approved by the House of Commons on 12 June.<sup>16</sup> Their Lordships debated and approved the orders on 8 July 2013.<sup>17</sup> 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.

### 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.<sup>18</sup> 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).

<sup>10</sup> Ministry of Justice, [Charging Fees in Employment Tribunals and the Employment Appeal Tribunal. Response to Consultation CP22/2011](#), 13 July 2012

<sup>11</sup> *Ibid.*, p7

<sup>12</sup> *Ibid.*

<sup>13</sup> [SI 2013/1892](#)

<sup>14</sup> [SI 2013/1893](#)

<sup>15</sup> As required by section 49(5) of *Tribunals, Courts and Enforcement Act 2007*

<sup>16</sup> [First Delegated Legislation Committee 10 June 2013](#); [HC Deb 12 June 2013 c465](#)

<sup>17</sup> [HL Deb 8 July 2013 cc74-88](#)

<sup>18</sup> 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 are:

- the fee amount differs depending on whether the claim is a Type A or Type B claim;
- claimants must pay an “issue fee” to lodge their claim, and a “hearing fee” for the claim’s first substantive hearing; issue and hearing fees are also payable in relation to appeals;
- different fees are payable for multiple claims and vary according to the number of claimants;
- if the claimant obtains judgment in his favour, the employment tribunal may order the respondent to reimburse him; and
- a fee remission scheme operates to exempt those with limited means from paying fees, provided they are able to satisfy defined capital and income criteria.

### 2.1 Type A and B claims

All claims are subject to fees, the amount of which differs depending on whether the claim is categorised as a Type A or a Type B claim. Fees for Type A claims are less than those for Type B claims. A Type A claim is 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 are expected to raise simpler issues than Type B claims. [Article 7](#) of the Fees Order provides that a Type B claim is any claim other than a Type A claim. Type B claims generally raise more complex issues than Type A claims or involve 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 must pay an “issue fee” to lodge his claim, and a “hearing fee” for the claim’s first substantive hearing. The fees are:<sup>19</sup>

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

Article 4(1) of the Fees Order provides when these must 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 must accompany the claim form otherwise the claim will be rejected. If the fee amount is

<sup>19</sup> See [articles 6](#) and [7](#) of the Fees Order, and Table 3 in [Schedule 2](#)

incorrect or the remission application is rejected the tribunal will send the claimant a notice specifying a date for payment; if the outstanding amount is not paid by that date the claim will be rejected.<sup>20</sup> The hearing fee is payable on a date specified at the time when the claimant is notified of the listing of the “final hearing”. The final hearing is defined in [article 2](#) of the Fees Order as “the first hearing at which an employment tribunal will determine liability, remedy or costs”.

Should the claimant wish to appeal the tribunal’s judgment to the Employment Appeal Tribunal, additional fees will become payable unless remission is granted. The EAT issue fee (£400) and hearing fee (£1,200) are the same for all types of claim.

## 2.3 Multiple claimants and other fee types

Where a claim is brought jointly by a group of claimants, different fees are payable:<sup>21</sup>

### 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 are per group claim, not per claimant. In addition to the above, article 11 of the Fees Order provides that other fees are payable in respect of certain applications which a party may make during the litigation. These are 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	-

<sup>20</sup> 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)

<sup>21</sup> *The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013*, Schedule 2, Table 4

## 2.4 Reimbursement

Although there are limited instances in which the tribunal itself may reimburse the claimant (e.g. if the claimant mistakenly pays a Type B instead of a Type A fee), the question of reimbursement is 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 an unsuccessful respondent to reimburse the claimant; 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....<sup>22</sup>

Case law supporting this proposition is beginning to emerge.<sup>23</sup> It should be noted, however, that employment tribunals and the Employment Appeal Tribunal retain a broad discretion as to whether or not to order reimbursement, and may order only partial reimbursement if the claimant/appellant succeeds on some but not all points, or no reimbursement if a respondent lacks sufficient means or did not actively oppose an appeal.<sup>24</sup>

## 2.5 Remission

It is possible to obtain a reduction or waiver of fees provided certain criteria are met. The criteria are set out in Schedule 3 to the Fees Order, as amended by the *Courts and Tribunals Fee Remissions Order 2013*,<sup>25</sup> and explained in HMCTS form EX160A. There are two tests involved in the remission application: a disposable capital test (DCT) and a gross monthly income test (GMIT). Both must be satisfied.

The DCT acts as a gateway: if the applicant fails the DCT, his application for remission fails; if he passes it, he proceeds to the GMIT, which determines the remission application. The DCT thresholds are set out in Table 1 of Schedule 3. At the time of writing, the threshold for all employment tribunal and EAT fees is £3,000, which means that a claimant must have less than £3000 in "disposable capital" in order to progress to the GMIT. Disposable capital includes, 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 are set out in paragraph 11 of Schedule 3. If gross monthly income falls below the relevant threshold, full remission is available. The thresholds differ depending on the claimant's relationship status and whether or not he or his partner has children:

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<sup>22</sup> HMCTS, *Employment tribunal fees for individuals*, T435, 2013

<sup>23</sup> 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

<sup>24</sup> [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

<sup>25</sup> [SI 2013/2302](#)

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 is the amount specified for two children plus £245 per additional child.<sup>26</sup> For every £10 of income received above these thresholds, the claimant will be required to pay £5 towards the fee.<sup>27</sup>

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 said it believed “that a single remission system would be easier for users to understand and access”.<sup>28</sup> Details of the consultation are available on the Ministry of Justice [website](#).<sup>29</sup>

One of the key amendments was the removal of “passporting benefits” (e.g. income-based jobseeker’s allowance) from Schedule 3 of the Fees Order; applicants in receipt of those benefits had been automatically entitled to full remission. While HMCTS form EX160A indicates that being in receipt of specified means-tested benefits will still entitle applicants to full remission,<sup>30</sup> there is no mention of that in the Fees Order.

<sup>26</sup> Para 11(2)

<sup>27</sup> Para 11(3)

<sup>28</sup> MoJ, [Fee remissions for the courts and tribunals](#), Consultation Paper CP15/2013, April 2013, p10

<sup>29</sup> Fee remissions for the courts and tribunals, Ministry of Justice website

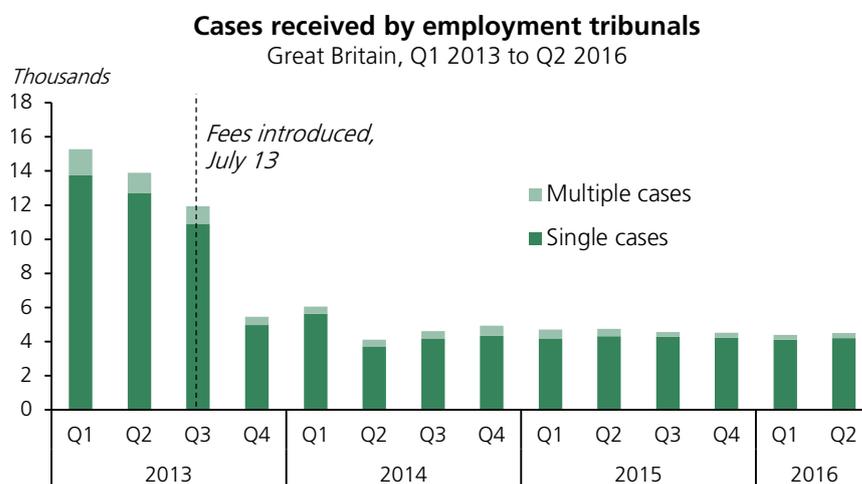
<sup>30</sup> Page 7

## 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 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.<sup>31</sup>



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.<sup>32</sup>

#### 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.

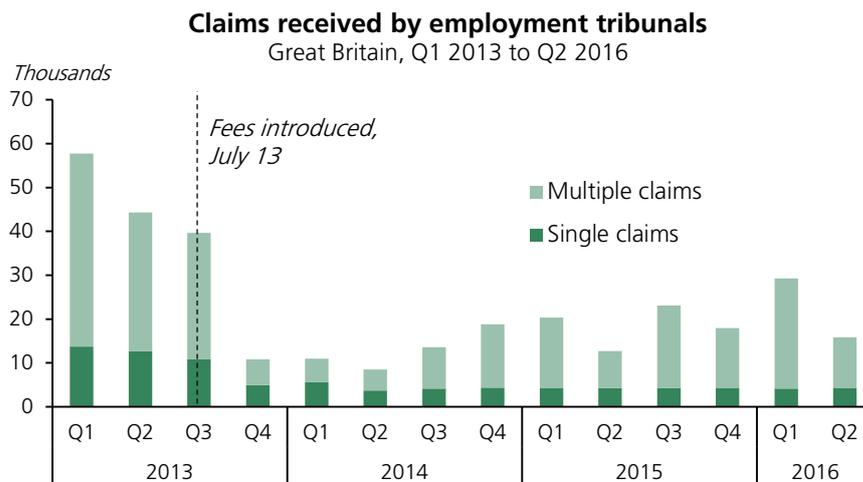
<sup>31</sup> Ministry of Justice, [Tribunals and gender recognition certificate statistics quarterly: April to June 2016](#), 8 September 2016, Table ET.1

<sup>32</sup> 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 depends on the number of claimants in the case (but on a *per claimant* basis is 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.



## 3.2 Acas Early Conciliation

The small dip in new cases in April-June 2014 is likely to arise from the introduction of Early Conciliation in that quarter. Early Conciliation means that a claimant who wishes to bring an employment tribunal claim must first notify the Advisory, Conciliation and Arbitration Service (Acas). 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.<sup>33</sup>

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).

The temporary dip in cases following the introduction of Early Conciliation was to be expected, because the time taken by Early Conciliation discussions means some cases that would otherwise have been brought to tribunal in April or May 2014 will have been received later.

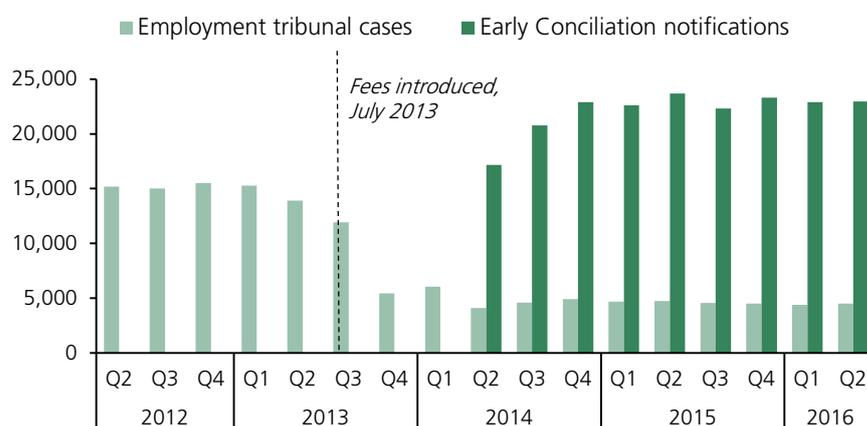
<sup>33</sup> Introduced by sections 7-9 of the [Enterprise and Regulatory Reform Act 2013](#) and the [Employment Tribunals \(Early Conciliation: Exemptions and Rules of Procedure\) Regulations 2014 \(SI 2014/254\)](#)

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

What is more difficult to determine is the extent to which Early Conciliation has had a lasting impact on numbers of cases: we can only speculate as 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 198,500 “notifications” received by Acas from employees and employers between April 2014 and June 2016,<sup>34</sup> compared to around 41,100 cases brought to employment tribunals in the same period.<sup>35</sup> 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 91,800 notifications made to Acas in the 2015 calendar year, 14,800 (16%) were formally settled by Acas via Early Conciliation but 17,700 (19%) progressed to an employment tribunal claim. The remaining 59,400 (65%) were not formally settled but did not progress to the Employment Tribunal.<sup>36</sup>

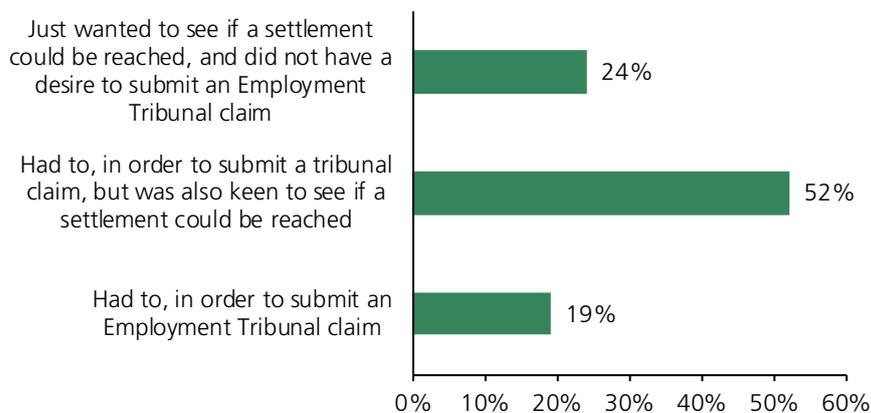
What explains the almost two thirds of cases not formally settled but which did not progress to the employment tribunal? Some may have been settled informally or the claimant may have decided not to proceed after initial discussions with the conciliator or having heard what the respondent had to say. 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

<sup>34</sup> Acas, [Early Conciliation Quarterly Reports](#), last update 22 August 2016 (Further statistics on Early Conciliation are provided in Acas’ [2015/16 Annual Report](#))  
<sup>35</sup> 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.  
<sup>36</sup> Acas, [2015/16 Annual Report](#), p40

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%) 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”.<sup>37</sup>

#### 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”.<sup>38</sup>

### 3.3 Type A and B claims

As discussed in section 2.1, claims may attract different levels of fee according to their complexity: fees are lower for ‘Type A’ claims which tend to be more straight forward than ‘Type B’ claims. Claimants must 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 have been Type B claims (which involve the higher level of fee). Between July 2013

<sup>37</sup> 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.

<sup>38</sup> Ibid, pp96-7

and June 2016, 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, 47% of issue fees and 55% of hearing fees were for Type B claims.<sup>39</sup>

There is anecdotal evidence that the introduction of fees has led to a marked decline in the number of 'low value' claims received by employment tribunals, because the sums at stake are comparable to the fee that must be paid to bring the claim in the first place (see the discussion of "Low value claims" in section 7.2 of this note). There is no easy way to quantify this effect using the statistics on employment tribunal receipts. In the most relevant jurisdictions (for example, Unauthorised deductions or the Working time directive), the trends in claim numbers are obscured by a large influx of multiple claims following the Employment Appeal Tribunal's decision in *Bear Scotland Ltd v Fulton & anor* [2014], concerning holiday pay.

### 3.4 Fee remissions

Fees may be waived depending on the claimant's circumstances: fees are remitted in full if the claimant has "disposable capital" of less than £3,000 and if their gross monthly income falls 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 be remitted in part.<sup>40</sup> Section 2.5 explains the rules for fee remission in more detail.

Remissions for issue fees and hearing fees are awarded separately. From the introduction of fees in July 2013 up to June 2016, remission applications were made in 29,000 cases out of a total of 65,100 where issue fees were requested. 46% of applications resulted in the issue fee being either fully or partially remitted (13,500 cases).<sup>41</sup>

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 27% in Q2 2016). However, the proportion of cases where the claimant applied for remission in the first place is slightly lower. This means a higher proportion of applications are now being granted.

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. The proportion of cases not pursued following request of the issue fee has reduced since the end of 2013, as can be seen in the chart.

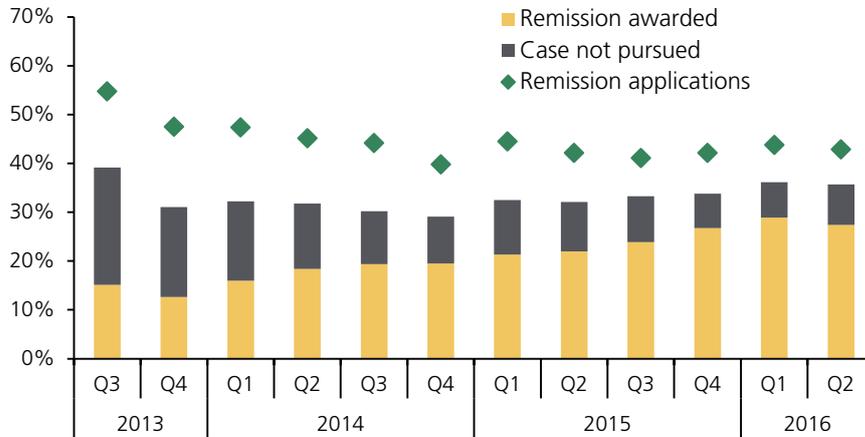
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<sup>39</sup> Ministry of Justice, [Tribunals and gender recognition certificate statistics quarterly: April to June 2016](#), 8 September 2016, Employment tribunal fees tables

<sup>40</sup> 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](#).

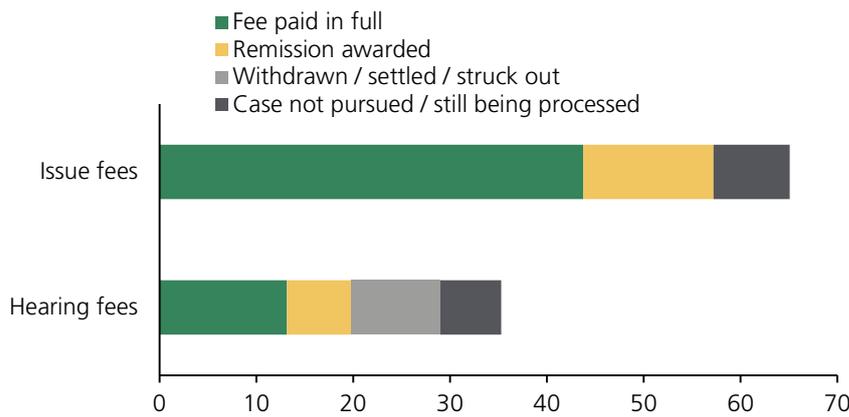
<sup>41</sup> Ministry of Justice, [Tribunals and gender recognition certificate statistics quarterly: April to June 2016](#), 8 September 2016, Employment tribunal fees tables

**% of issue fees requested by employment tribunals where remission was applied for and awarded**  
Q3 2013 to Q2 2016



Not all cases for which an issue fee is paid (or remitted) will reach the hearing fee stage: some cases may be withdrawn, settled or struck out. Unsurprisingly, applications for remission of the hearing fee are more likely to be granted than applications for remission of the issue fee; we may expect individuals who have been refused remission a first time to be less likely to submit a second application. There were 8,200 applications for remission of the hearing fee up to June 2016, out of 35,300 cases where the hearing fee was requested. 80% of applications resulted in full or partial remission of the hearing fee (6,600 cases). Note that for some cases received in Q2 2016, 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 Q2 2016**  
Number of cases where a fee was requested (thousands)



In most cases where fee remission has been granted, fees have been remitted in full. Out of 13,200 single cases where the issue fee was remitted between July 2013 and June 2016, the issue fee was remitted in full in 94% of cases and remitted in part in just 6% of cases.

### 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). However, it is not possible to give a definitive answer to this question using the published statistics. In theory, we would look at the share of claims that are successful at hearing, but the picture is muddled 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.

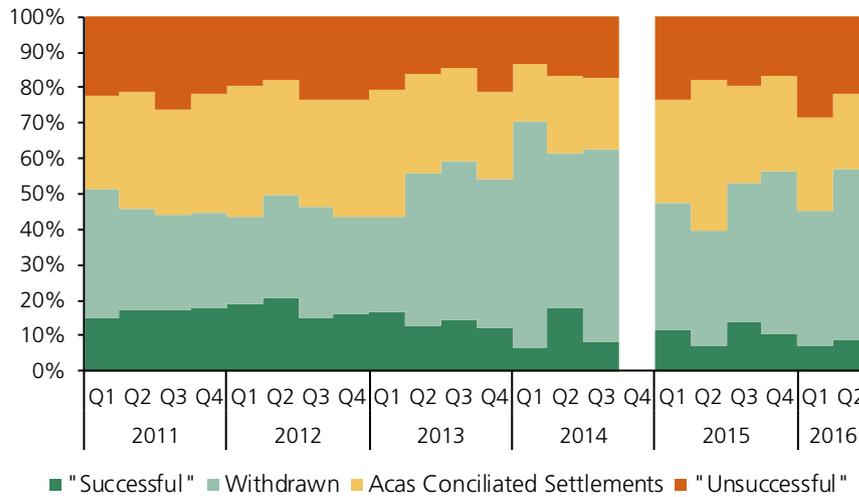
The chart below shows the broad trend in outcomes between 2011 and 2016, based on the numbers of jurisdictional complaints disposed of by tribunals (there may be several complaints attached to each single or multiple claim, and a claim may be upheld on some jurisdictions but not in others). There is no obvious trend in the proportion of claims disposed that we may count as having been upheld by employment tribunals, 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").<sup>42</sup> 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.

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<sup>42</sup> 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.

**% of complaints disposed of by Employment Tribunals, by outcome: 2011-2016**



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, April-June 2016*, Table ET.3  
 Employment Tribunal - Percentage of disposals by outcome and jurisdiction

### 3.6 Impact of fees on the cost of employment tribunals

HM Courts and Tribunals Service (HMCTS) spent £65.8 million on employment tribunal business in 2015/16. Of this amount, £8.6 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.<sup>43</sup>

**HM Courts & Tribunals Service spend on Employment Tribunals, 2012/13-2015/16 (£ million)**

	Total spend	Net income from fees	Net spend	Fee income foregone via remission
2012/13	86.7	..	86.7	..
2013/14 <sup>1</sup>	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

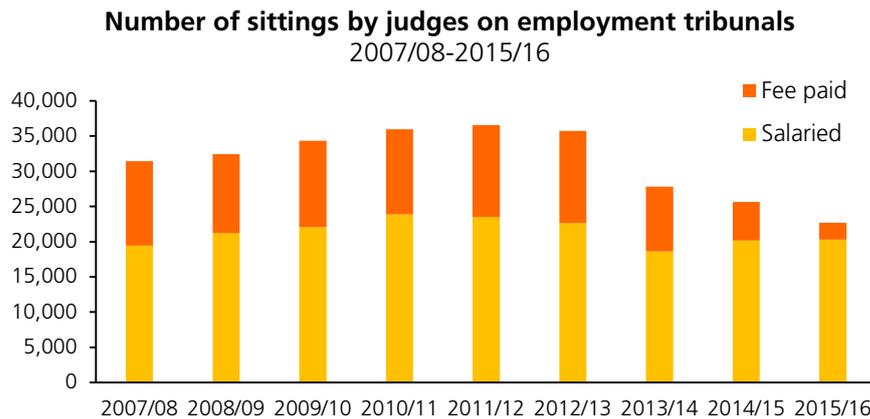
Notes: (1) Figures for fee income in 2013/14 are for the eight months 29 July 2013 to 31 March 2015.

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

<sup>43</sup> HM Courts and Tribunals Service, [Annual report and accounts, 2015-16](#), page 84

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 22,700 'sittings' by judges on employment tribunals in 2015/16, 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.<sup>44</sup>



### 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.<sup>45</sup>

## 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. The chart below shows the trend since 2000/01.<sup>46</sup>

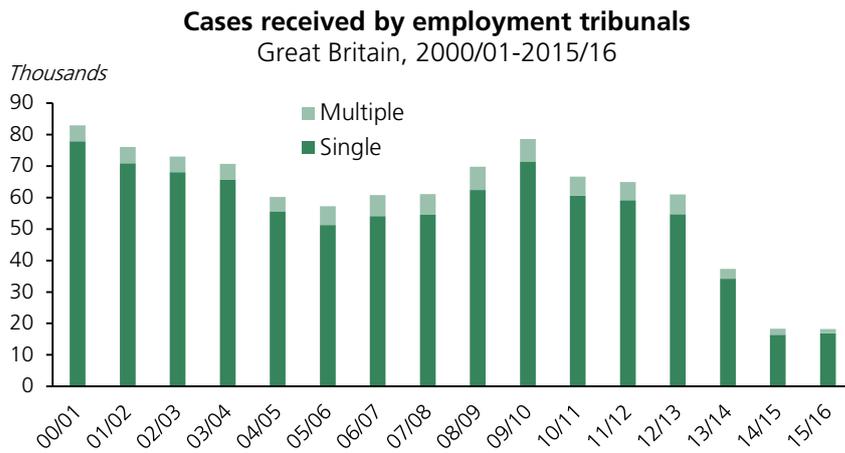
The impact of the economic downturn on cases received was reflected by increases in the number of claims relating to Unfair dismissal, Breach of contract, and redundancy during 2008/09 and 2009/10.<sup>47</sup>

<sup>44</sup> Ministry of Justice, [Tribunals and gender recognition certificate statistics quarterly: January-March 2016](#), 9 June 2016, Table 7.1

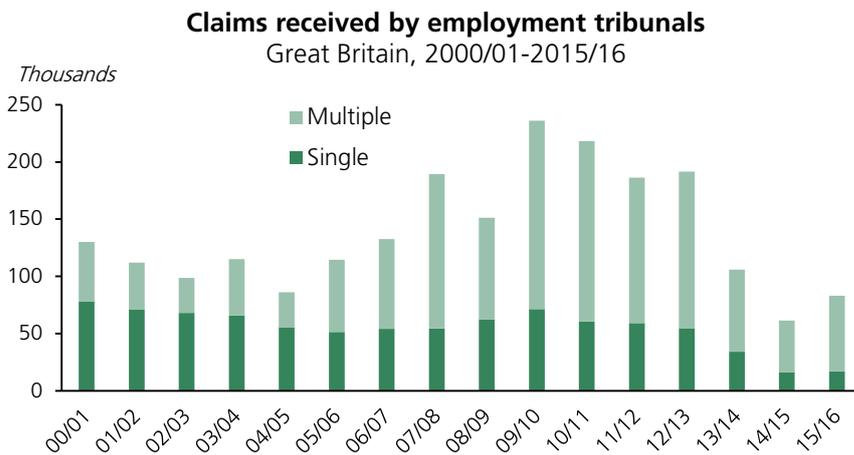
<sup>45</sup> Impact Assessment, *Introducing a fee charging regime into Employment Tribunals and the Employment Appeal Tribunal*, IA TS 007, 15 April 2013

<sup>46</sup> 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](#)

<sup>47</sup> 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.



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.



## 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.<sup>48</sup> 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.<sup>49</sup>

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”.<sup>50</sup> 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”.<sup>51</sup> 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.<sup>52</sup>

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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<sup>48</sup> For an overview of the relevant legislation, see above section entitled “The Fees Order”

<sup>49</sup> [First Delegated Legislation Committee 10 June 2013 c3](#)

<sup>50</sup> *Ibid.*, c4

<sup>51</sup> *Ibid.*, c5

<sup>52</sup> *Ibid.*, c5

That is in civil service-ese, but the meaning is utterly clear: this is a discriminatory proposal.<sup>53</sup>

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”.<sup>54</sup>

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.<sup>55</sup>

The Committee divided, voting 9 to 7 in favour of the orders.<sup>56</sup> The orders were reported to the House on 11 June,<sup>57</sup> with a division deferred to the following day, whereupon Members voted to approve the orders, by 272 votes to 209.<sup>58</sup>

## 4.2 House of Lords

Their Lordships debated the orders on 8 July 2013.<sup>59</sup> 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.<sup>60</sup>

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 amount to £1200, approaching the level of the combined issue and hearing fees of £1600 for a Supreme Court case.<sup>61</sup> 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 will be required to pay fees in respect of claims for which they will never receive an award.<sup>62</sup>

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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<sup>53</sup> Ibid., c11

<sup>54</sup> Ibid., c16

<sup>55</sup> Ibid., c22

<sup>56</sup> Ibid., c24

<sup>57</sup> [HC Deb 11 June 2013 cc312-313](#)

<sup>58</sup> [HC Deb 12 June 2013 c465](#)

<sup>59</sup> [HL Deb 8 July 2013 c74](#)

<sup>60</sup> Ibid.

<sup>61</sup> Ibid., c76

<sup>62</sup> Ibid., c77

## 23 Employment tribunal fees

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.<sup>63</sup>

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.<sup>64</sup>

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<sup>65</sup> 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.<sup>66</sup>

Baroness Drake noted that the remission system would not exclude from fees some couples earning the National Minimum Wage.<sup>67</sup>

Their Lordships agreed to the motion approving the draft orders.<sup>68</sup>

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<sup>63</sup> Ibid., c86

<sup>64</sup> Ibid.

<sup>65</sup> Early conciliation was a Department for Business, Innovation and Skills policy, while the fees proposal emanated from the Ministry of Justice

<sup>66</sup> Ibid., c80

<sup>67</sup> Ibid., c82

<sup>68</sup> 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”.<sup>69</sup> 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”.<sup>70</sup>

In their 2015 General Election manifesto, Labour committed to “Reform the employment tribunal system to ensure workplace justice is affordable.”<sup>71</sup>

### 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”.<sup>72</sup> Lawyers have called for fees to be reviewed if the system is devolved.<sup>73</sup> [Section 39](#) of the *Scotland Act 2016* (which comes into force on 23 May 2016<sup>74</sup>) 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, 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”.<sup>75</sup> 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.<sup>76</sup>

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<sup>69</sup> [Changing Britain Together](#), p15

<sup>70</sup> [Chuka Umunna’s speech to the TUC: full text](#), *New Statesman*, 8 September 2014

<sup>71</sup> Labour Party, [Changing Britain Together](#), 2015, p15

<sup>72</sup> The Smith Commission, [Report of the Smith Commission for further devolution of powers to the Scottish Parliament](#), 27 November 2014, p21, para 63

<sup>73</sup> [‘Calls for review of “catastrophic” employment tribunal fees’](#), the *Herald*, 3 January 2015

<sup>74</sup> *Scotland Act 2016*, [section 72\(7\)](#)

<sup>75</sup> The Scottish Government, *A Stronger Scotland - The Government’s Programme for Scotland 2015-16*, p3

<sup>76</sup> *Ibid.*, p38

## 6. Review of fees

The Coalition Government pledged to review the impact of tribunal fees. The Conservative Government commenced the review in 2015, indicating that it would be finished by the end of that year. At the time of writing, the outcome of the review is unknown.

### Coalition Government

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.<sup>77</sup>

### Conservative Government

On 11 June 2015 the current Conservative Government announced the start of the review, to be carried out by the Ministry of Justice. The Terms of Reference are available [here](#).<sup>78</sup> The announcement indicated the review would be completed by the end of 2015.<sup>79</sup>

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

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<sup>77</sup> [Coalition row erupts as workers are 'priced out' of tribunals](#), *Independent* [online], 13 December 2014

<sup>78</sup> 'Employment Tribunal Fees Post Implementation Review', Gov.uk, 11 June 2015

<sup>79</sup> *Ibid.*

- whether there has been any impact because of changes in employment law; and other reasons for changes in user behaviour

In response to Parliamentary Questions about the evidence received by the review, the Government has said (14 September 2015):

We have received a range of views and evidence from a variety of sources and are giving all relevant material the appropriate consideration.<sup>80</sup>

Another PQ asked about the potential impact of fees on discrimination claims (10 September 2015):

**Jo Stevens (Cardiff Central):** To ask the Secretary of State for Justice, what assessment his Department has made of the effect of the introduction of employment tribunal fees on access to justice for women subjected to pregnancy-related detriment or dismissal by an employer; and what steps he plans to take to improve access to justice for such women.

**Mr Shailesh Vara:** On 11 June we announced the start of the post-implementation review of the introduction of fees in the Employment Tribunals. The review will seek to assess the effect fees have had including, so far as possible, any differential impact on people with protected characteristics and the types of case they bring.<sup>81</sup>

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.”<sup>82</sup>

In a [meeting](#) of the Employment Tribunals’ National User Group on 7 October 2015 an official from the Ministry of Justice (Bill Dowse) said:

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.<sup>83</sup>

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

On 7<sup>th</sup> 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.<sup>84</sup>

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

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<sup>80</sup> [Employment Tribunals Service: Fees and Charges: Written question – 9436, 14 September 2015](#)

<sup>81</sup> [Employment Tribunals Service: Fees and Charges: Written question – 9118, 10 September 2015](#)

<sup>82</sup> [Employment Tribunals Service: Fees and Charges: Written question - HL8056](#)

<sup>83</sup> [Minutes of the National User Group meeting held at Victory House on 7th October 2015, p2](#)

<sup>84</sup> [Employment Tribunals Fees Review](#), WhatDoTheyKnow

do not record that he said the review had been completed. The review is currently underway and will report in due course.

## Evidence to the Justice Committee inquiry

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.

**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.<sup>85</sup>

## 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?"<sup>86</sup> The Committee published its [report](#) on 20 June 2016.<sup>87</sup>

### 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.<sup>88</sup>

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 the employment tribunals system".<sup>89</sup> 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-

<sup>86</sup> [Courts and tribunals fees and charges inquiry announced](#), Parliament website

<sup>87</sup> House of Commons Justice Committee, *Courts and tribunals fees*, Second Report of Session 2016–17, HC 167, 20 June 2016

<sup>88</sup> *Ibid.*, pp38-34

<sup>89</sup> *Ibid.*, p39

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)<sup>90</sup>

## 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.

The 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.<sup>91</sup>

Many, particularly unions, recommended abolishing fees. The TUC supported abolition, noting that fees reduced to a nominal level may

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<sup>90</sup> Ibid., pp38-40

<sup>91</sup> [09 Feb 2016 - Courts and tribunals fees and charges - oral evidence](#)

contribute little to the administrative costs of the tribunal system once one accounts for the costs of collecting the fees.<sup>92</sup>

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.<sup>93</sup>

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.<sup>94</sup> The Confederation of British Industry (CBI) said that fees and remissions may have to be recast pending the outcome of the Government review.<sup>95</sup> Peninsula Business Services Limited was alone in voicing largely unqualified support for fees, arguing that fees deter speculative claims, improve the allocation of tribunal resources, and better balances the rights of both parties to a dispute.<sup>96</sup>

Some lawyers advocated the abolition of fees (e.g. the Law Society of Scotland<sup>97</sup>) but most argued for lower fees (e.g. the Bar Council;<sup>98</sup> the Law Society of England and Wales;<sup>99</sup> and the Council of Employment Judges<sup>100</sup>), 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,<sup>101</sup> a view supported by the evidence of Sir Ernest Ryder, Senior President of Tribunals.<sup>102</sup> 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 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*.<sup>103</sup>

## Settlement/early conciliation

Much of the written and oral evidence concerned the impact of fees on negotiated settlement. Lawyers and the judiciary noted that

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<sup>92</sup> [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](#)

<sup>93</sup> [17 Nov 2015 - Courts and tribunals fees and charges - oral evidence](#), per Rosalind Bragg

<sup>94</sup> Ibid.

<sup>95</sup> [Written evidence from CBI](#)

<sup>96</sup> [Written evidence from Peninsula Business Services Limited](#)

<sup>97</sup> [Further written evidence from The Law Society of Scotland](#)

<sup>98</sup> [09 Feb 2016 - Courts and tribunals fees and charges - oral evidence](#)

<sup>99</sup> Ibid.

<sup>100</sup> [Written evidence from the Council of Employment Judges](#)

<sup>101</sup> [Written evidence from the Employment Tribunals \(England and Wales\)](#)

<sup>102</sup> [26 Jan 2016 - Courts and tribunals fees and charges - oral evidence](#)

<sup>103</sup> [Written evidence from the Equality and Human Rights Commission](#)

respondents often refuse to engage in negotiations or early conciliation as they realise many claimants are unlikely to pay the hearing fee.

Some of the evidence discussed the interaction of fees with 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 can 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?<sup>104</sup>

Lawyers acknowledged that they advised respondents not to engage in conciliation or settlement; that the prudent course is to call claimants' bluff, to see whether they pay the hearing fee. Several submissions (e.g. TUC;<sup>105</sup> Thompson's Solicitors<sup>106</sup>) suggested government departments are particularly guilty of this. The submission from the Council of Employment Judges related anecdotal evidence that Treasury approval for settlement will be granted only in exceptional circumstances.<sup>107</sup>

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.<sup>108</sup>

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<sup>104</sup> [09 Feb 2016 - Courts and tribunals fees and charges - oral evidence](#)

<sup>105</sup> [17 Nov 2015 - Courts and tribunals fees and charges - oral evidence](#)

<sup>106</sup> Ibid.

<sup>107</sup> [Written evidence from Employment Tribunals \(Scotland\)](#)

<sup>108</sup> [17 Nov 2015 - Courts and tribunals fees and charges - oral evidence](#) (the FSB); [Written evidence from Peninsula Business Services Limited](#)

## 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;<sup>109</sup> Employment Tribunals (Scotland)<sup>110</sup>) described the capital test as problematic given that post-dismissal capital may be artificially inflated due to, for example, redundancy pay, a problem exacerbated by the fact capital falls 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.<sup>111</sup>

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.<sup>112</sup> 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.<sup>113</sup>

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 will have savings of £3,000 or more.<sup>114</sup>

The Equality and Diversity Forum voiced concerns about the difficulty refugee and migrant workers may encounter navigating the remissions system and completing the relevant forms.<sup>115</sup>

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.<sup>116</sup>

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<sup>109</sup> [26 Jan 2016 - Courts and tribunals fees and charges - oral evidence](#)

<sup>110</sup> [Written evidence from Employment Tribunals \(Scotland\)](#)

<sup>111</sup> [17 Nov 2015 - Courts and tribunals fees and charges - oral evidence](#)

<sup>112</sup> [17 Nov 2015 - Courts and tribunals fees and charges - oral evidence](#), per Sally Brett, TUC

<sup>113</sup> For example, see [Written evidence from The Fawcett Society](#)

<sup>114</sup> [Written evidence from TUC](#)

<sup>115</sup> [Written evidence from the Equality and Diversity Forum](#)

<sup>116</sup> [Written evidence from the South Eastern Circuit](#)

## 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”.<sup>117</sup> The Council of Employment Judges said that the experience of Employment Judges is “that misguided but determined litigants remain undeterred by fees”.<sup>118</sup> 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.<sup>119</sup>

## Reducing burdens on business

The FSB said it welcomed the drop in claims, primarily because it is expensive for employers to settle claims which may lack 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.<sup>120</sup> 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 employers”.<sup>121</sup> Peninsula Business Services Limited said the introduction of fees has reduced the number of speculative claims,<sup>122</sup> 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

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<sup>117</sup> [09 Feb 2016 - Courts and tribunals fees and charges - oral evidence](#)

<sup>118</sup> [Written evidence from the Council of Employment Judges](#)

<sup>119</sup> [Written evidence from Sir Brian Langstaff](#)

<sup>120</sup> [17 Nov 2015 - Courts and tribunals fees and charges - oral evidence](#), per Michael Mealing

<sup>121</sup> [Further written evidence from the Federation of Small Businesses](#)

<sup>122</sup> *Ibid.*, per James Potts

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.<sup>123</sup>

One lawyer who advises 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.<sup>124</sup>

## 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.

...

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.<sup>125</sup>

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

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<sup>123</sup> [Written evidence from Peninsula Business Services Limited](#)

<sup>124</sup> *Ibid.*, per Kate Booth

<sup>125</sup> [17 Nov 2015 - Courts and tribunals fees and charges - oral evidence](#)

The EHRC noted that it had raised concerns about fees in various reports to the UN.<sup>126</sup>

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.<sup>127</sup>

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.<sup>128</sup>

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.<sup>129</sup>

## Redundancy and impecunious employers

A number of submissions argued that fees are 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".<sup>130</sup> 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 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.<sup>131</sup>

## 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.<sup>132</sup> The Council of Employment Judges said:

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<sup>126</sup> [Written evidence from the Equality and Human Rights Commission](#)

<sup>127</sup> [Written evidence from the Discrimination Law Association](#)

<sup>128</sup> [Written evidence submitted by Catherine Barnard and Amy Ludlow, University of Cambridge](#)

<sup>129</sup> [Written evidence from the Equality and Diversity Forum](#)

<sup>130</sup> *Employment Rights Act 1996*, section 166

<sup>131</sup> [Written evidence from Citizens Advice; Written evidence from Stephen Cavalier, Chief Executive of Thompsons Solicitors](#)

<sup>132</sup> [Written evidence from the Tribunals Judiciary; Written evidence from the Council of Employment Judges](#)

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.<sup>133</sup>

## The treatment of employees and unfair competition

A number of submissions argued that fees are 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".<sup>134</sup> Evidence from the South Eastern Circuit noted that employers may make calculations as to which employees they can afford to dismiss based on income.<sup>135</sup> 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 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".<sup>136</sup> 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".<sup>137</sup> 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

<sup>133</sup> [Written evidence from the Council of Employment Judges](#)

<sup>134</sup> [17 Nov 2015 - Courts and tribunals fees and charges - oral evidence](#), per Sybille Raphael

<sup>135</sup> [Written evidence from the South Eastern Circuit](#)

<sup>136</sup> [Written evidence from the Law School, University of Strathclyde](#)

<sup>137</sup> [Written evidence from Citizens Advice](#)

with prospects of success of 51% or better do not proceed with their claims because of fees.<sup>138</sup> 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.<sup>139</sup>

### 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.<sup>140</sup> The Law Society of Scotland noted that the proportion of entirely unpaid claimants was even higher in Scotland, at 46%.<sup>141</sup> 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.<sup>142</sup>

### 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.<sup>143</sup> The Fawcett Society argued for doubling the time limit in respect of maternity discrimination claims, given the “double disruption faced by pregnant women who when having their child are discriminated against in the workplace”.<sup>144</sup>

### Union support for claims

Some unions gave evidence of providing substantial support for claimants by covering issue and hearing fees.<sup>145</sup> 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.<sup>146</sup>

Evidence from one law firm suggested there were limits to this as some unions’ legal aid budgets cannot meet the demand from their members

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<sup>138</sup> [Written evidence from the Council of Employment Judges](#)

<sup>139</sup> [Written evidence from Kate Booth, Partner, Eaton Smith LLP](#)

<sup>140</sup> BIS, *Payment of Tribunal Awards*, 2013, p6

<sup>141</sup> [Written evidence from The Law Society of Scotland](#)

<sup>142</sup> [17 Nov 2015 - Courts and tribunals fees and charges - oral evidence](#)

<sup>143</sup> [Written evidence from the Equality and Diversity Forum](#)

<sup>144</sup> [Written evidence from The Fawcett Society](#)

<sup>145</sup> [Written evidence from Prospect; Written evidence from UNISON](#)

<sup>146</sup> [Written evidence from UNISON](#)

and, in any event, low paid workers often work in non-unionised industries.<sup>147</sup>

## 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.<sup>148</sup> There was no evidence of this phenomenon in England and Wales.

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<sup>147</sup> [Written Evidence from Simpson Millar LLP](#)

<sup>148</sup> [Written evidence from The Law Society of Scotland; Written evidence from Employment Tribunals \(Scotland\)](#)

## 8. Legal challenges

Since their introduction, tribunal fees have been the subject of repeated judicial review proceedings both in England and Wales, and in Scotland. To date none of these challenges have been successful.

### 8.1 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.<sup>149</sup>

[Judgment](#) was handed down on 7 February 2014; Unison’s application was dismissed.<sup>150</sup> The Court reasoned that fees were not inherently 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

<sup>149</sup> 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

<sup>150</sup> *Unison, R (on the application of) v The Lord Chancellor & Anor* [2014] EWHC 218 (Admin)

account should his optimism as to the fairness of this regime prove unfounded.<sup>151</sup>

Unison appealed to the Court of Appeal, although proceedings were stayed 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.

## 8.2 Second Unison 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.<sup>152</sup> In *Unison (No. 2)* Unison advanced its case on two grounds: an infringement of the 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".<sup>153</sup> The Lord Chancellor contended that Unison's claims were of a generalised nature "with an absence of any concrete examples of specific individuals allegedly denied access to the tribunals".<sup>154</sup> 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%.

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<sup>151</sup> Ibid., para 89

<sup>152</sup> *Unison (No 2), R (on the application of) v The Lord Chancellor* [2014] EWHC 4198

<sup>153</sup> Para 44

<sup>154</sup> Para 5

....

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.

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....<sup>155</sup>

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:<sup>156</sup>

... 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

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<sup>155</sup> Paras 54-62

<sup>156</sup> Provisions, criteria 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*

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.<sup>157</sup>

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 convincing evidence to that effect is uncovered. If it is, of course, the Lord Chancellor would doubtless feel obliged to address it.<sup>158</sup>

Unison was granted leave to appeal to the Court of Appeal.<sup>159</sup>

## 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 judicial review 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

<sup>157</sup> Para 81-90

<sup>158</sup> Para 96

<sup>159</sup> [UNISON to appeal High Court decision over tribunal fees](#), Unison website, 17 December 2014 (accessed 12 January 2015)

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.<sup>160</sup>

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 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.<sup>161</sup>

### 8.3 Appeal to the Supreme Court

On 26 February 2016 the Supreme Court granted Unison leave to appeal the Court of Appeal's decision. The notice on the Supreme Court's website summarises the issues:

The case relates to a Judicial Review of employment tribunal fees. The issue in this case is whether the Court of Appeal erred in its approach to the EU principle of effectiveness; in its approach to indirect discrimination and in concluding that Fees Order was not indirectly discriminatory.<sup>162</sup>

### 8.4 Fox and Partners judicial review (Scotland)

On 1 July 2013, shortly after Unison first issued proceedings in the High Court, Scottish law firm Fox and Partners presented a [petition](#) to Scotland's Court of Session, challenging the fees regime. The petition was founded on broadly the same grounds as Unison's challenge. Proceedings were sisted (stayed) on 26 September 2013 and have been repeatedly since, awaiting the outcome of Unison's case.<sup>163</sup> Notably,

<sup>160</sup> [Unison, R \(On the Application Of\) v The Lord Chancellor \[2015\] EWCA Civ 935](#), para 68

<sup>161</sup> *Ibid.*, para 75

<sup>162</sup> '[Permission to appeal decisions in two Judicial Review cases: employment tribunal fees and the residency test for legal aid](#)', Supreme Court website, accessed 5 May 2016

<sup>163</sup> Johnathan Mitchell QC, counsel for Fox and Partners, has on his website provided an overview of the background to the case, [here](#).

during the petition's hearing in July 2013, the Lord Chancellor undertook to reimburse paid fees if the Fees Order was held to be unlawful:

The Lord Chancellor gives an undertaking that if he is allowed to make the Employment Tribunals and the Employment Appeal 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.<sup>164</sup>

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<sup>164</sup> *Fox Solicitors Ltd, Re Judicial Review* [2013] ScotCS CSOH 133, para 11

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