Written evidence from Mr Richard Dunstan

1. I am a freelance policy researcher and writer, with a particular interest in the employment rights of vulnerable workers. From 2000 to 2013, I worked as employment policy officer at Citizens Advice; since then, I have worked for Working Families and, most recently, Maternity Action. I am a regular contributor to the employment law and policy blog Hard Labour, where I have written extensively about the employment tribunal (ET) fees regime introduced in July 2013. In this submission, I focus on the impact of that fees regime.

ET claim/case types, and claim/case numbers

2. At the outset, it is perhaps worth reiterating that there are two different types of ET case: (a) single claims/cases brought by individual workers; and (b) multiple claimant cases involving tens, hundreds or even thousands of workers, each with an identical (or very similar) claim against the same employer. For example, in 2012-13 – the last full year before fees – there were 54,704 single claims/cases, and 6,104 multiple claimant cases involving a total 136,837 claimants, brought against an overall total of 60,808 employers (give or take some single claims brought against the same employer).

3. Most press and media reports about ET claim/case numbers misleadingly cite the grand total number of claimants (i.e. 54,704 + 136,837 = 191,541 in 2012-13), but that figure gives a grossly inflated impression of the ET system’s workload (as, in most multiple claimant cases, the system will only need to determine one or two lead claims). In this submission I will mostly refer only to single claims/cases.

4. Not only is this the most meaningful measure of the ET system’s varying workload – and, indeed, the measure now favoured by the Ministry of Justice – but, as the vast majority of multiple claimant cases in recent years have been equal pay claims brought against local authorities and NHS trusts, it is also the most relevant measure when considering the impact of ET claim/case numbers on private sector employers. In that context, it is also worth bearing in mind that approximately one-third of all single claims/cases are also brought against public or voluntary sector employers.

The impact of ET fees on claim/case numbers

5. The introduction of fees in July 2013 had an immediate, substantial and sustained impact on ET case numbers: in August 2013, the number of new cases fell off a cliff, and has not recovered since. In the six months up to 31 March 2014 – i.e. up to immediately prior to the introduction of Acas early conciliation – new cases (single claims/cases + multiple claimant cases) were down 62% on the same period in 2012-13, from
30,095 to 11,508. Unfair dismissal claims were down by 64%, sex discrimination claims by 80%, and equal pay claims by 84%. In the words of Lord Justice Underhill in the Court of Appeal in July 2015: “It is quite clear … that the introduction of fees has had the effect of deterring a very large number of potential claimants.”

6. Indeed, according to my calculations, as of 30 June 2015 that “very large number of potential [single] claimants” deterred by fees was somewhere between 47,350 and 52,200, and it continues to rise by some 5-6,000 every quarter. Furthermore, based on historic case outcome trends, about 80% of those individuals would have obtained a favourable judgment or settlement, had fees not been introduced.

7. Such estimates of the number of single claims/cases ‘lost’ to fees are easily obtained by comparing the actual number of such claims/cases against projections that allow for (i) a continuation of the modest downward trend in claim/case numbers between early 2012 and July 2013; and (ii) for the introduction of Acas early conciliation in April/May 2014. From the first quarter of 2012/13 to the first quarter of 2013/14 (the last full quarter before fees) the number of single claims/cases declined by 6.3%. And the introduction of Acas early conciliation was intended to bring about a 17% fall in overall ET case numbers.

8. However, it is arguable that the modest ‘historic downward trend’ in single claim/case numbers would have largely petered out by now, and certainly since April/May 2014 the combined impact of any remaining downward trend and the introduction of Acas early conciliation has been an annual rate of decline of just 15.4%.

9. The following table therefore sets out two alternative projections for the number of single claims/cases, had fees not been introduced, and generates ‘low’ and ‘high’ estimates for the number of such claims/cases ‘lost’ to fees since July 2013 to date. For the ‘low’ estimate (Projection A), it is assumed that claim/case numbers continued to decline at an annual rate of 6.3% over all eight post-fees quarters, and that the introduction of Acas early conciliation caused a further 17% reduction over the last four quarters. And, for the ‘high’ estimate (Projection B), it is assumed that claim/case numbers declined by 3% over the first four quarters, and then by 15.4% over the last four quarters (i.e. the same rate as the actual decline due to the combined impact of Acas early conciliation and any remaining ‘historic downward trend’).

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<th>New ET single claims/cases, quarterly</th>
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<tr>
<td>Projection A</td>
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How many of the single claims/cases ‘lost’ to fees were meritorious?

10. While the officially stated objectives for the fees regime - see, for example, the Government’s announcement (on 11 June 2015) of the terms of reference of its ongoing post-implementation review – do not include ‘deterring potential claimants’, it is (and always was) abundantly clear that this was in fact the principal objective of ministers. For example, in November 2014, the then justice secretary, Chris Grayling, stated that, by introducing fees, the Coalition government was “trying to deal with a situation where it was too easy to go to a tribunal and where employers, often good employers, were easy prey for questionable claims”. And in June 2015, the current justice secretary’s legal counsel, David Barr QC, told the Court of Appeal that the ‘policy problem’ that fees were intended to address was that “there were increasing numbers of [ET] claims and the existing model was unsustainable.”

11. In fact, having peaked in 2010-11, the number of single claims/cases was already falling when ministers announced their intention to introduce ET fees in November 2011. And, by the time fees came into force in July 2013, the (modest) “historic downward trend” in single claim/case numbers now cited by ministers was well established. But it is clear from the statements above that the key outstanding question now is: how many of the 47-52,000 single claims/cases ‘lost’ to fees (as of 30 June 2015) are likely to have been meritorious?

12. There is of course no way of knowing for sure. Because – as noted recently by the Department for Business, Innovation & Skills – “only an employment tribunal can determine whether unlawful discrimination or unfair dismissal has occurred.” And, by definition, none of the 47-52,000 single claims/cases ‘lost’ to fees will ever go before a tribunal.

13. However, in July this year, when giving oral evidence to the Committee on the work of his Ministry, justice secretary Michael Gove appeared to
suggest that *none* of these 47-52,000 single claims/cases ‘lost’ to fees were meritorious, stating:

“There is no evidence yet that the bar being set at a high level has meant that meritorious claims by people who feel they’ve been discriminated against aren’t being heard.”

14. Yet it simply defies logic to think that the impact of ET fees could have been so precisely calibrated by the Ministry in 2012 that some 47-52,000 unmeritorious claims/cases have been deterred by fees in just two years without even one potential claimant with a *meritorious* case being so deterred. Moreover, the available evidence on claim/case outcomes flatly contradicts the justice secretary’s assertion that *none* of the 47-52,000 single claims/cases ‘lost’ to fees were meritorious.

15. Were it the case that all (or even just most) of the 47-52,000 single claims/cases ‘lost’ to fees were without merit, then we could expect the overall success rate of claims to have risen substantially. And, as the average ‘age’ of concluded cases is about nine months, this effect would have become clearly evident in the official outcome statistics from at least the first quarter of 2014/15 onwards, if not earlier.

16. Yet, as the following chart shows, far from rising, the overall success rate has *fallen* in each of the last five quarters, from 79% in 2013/14, to just 62% in the last quarter of 2014/15. In the first quarter of 2015/16 (April to June 2015), the figures for which were published earlier this month, the overall success rate did leap to 75%. However, this figure is substantially inflated by unusually high proportions of (i) equal pay claims being conciliated by Acas or withdrawn (80%, compared to 40% in the same quarter in 2014/15); and (ii) unfair dismissal claims being conciliated by Acas (69%, compared to 32% in the same quarter in 2014/15). And, of course, outcome figures are given in terms of *jurisdictional* claims, not cases, so are easily skewed by one or two large multiple claimant cases. If we remove those two jurisdictions from the picture, then the overall success rate in the first quarter of 2015/16 falls to 62% – the same as in the previous quarter.
17. This tends to confirm the view of experienced employment law practitioners that, by and large, it is the ‘high merit but low value’ claims/cases by relatively low-income workers that have been deterred by fees. Yet, in the words of one (respondent) lawyer, “the fees regime really isn’t preventing [speculative] claims with little merit” by high earners, who can “easily afford” the issue fee of £250 “in the hope of making a return on this investment.”

**Other considerations**

18. In addition to citing the “historic downward trend” in case numbers and introduction of Acas early conciliation as factors that might explain at least some of the dramatic fall in ET case numbers since July 2013, ministers have repeatedly suggested that some potential ET claimants have simply decided to issue the claim in the County Court, where issue and hearing fees are lower, instead of in the ET.

19. It is certainly possible that some single claims/cases have been displaced to the County Court. However, all but a few types of claim can only be brought in the tribunal and – while there is some anecdotal evidence of large multiple claimant cases having been brought in the civil courts instead of the tribunal – I am not aware of any actual evidence of such displacement of single claims/cases. Accordingly, there is no good reason to think that such displacement accounts for more than a very small proportion of the 47-52,000 single claims/cases ‘lost’ to fees since July 2013.

20. Ministers have also stated – repeatedly – that access to justice has been preserved by the existence of the fee remission scheme. A great deal has been said and written about the adequacy or otherwise of that
fee remission scheme, but here I simply note that the theoretical availability of full or partial fee remission to claimants on a very low income – and with less than £3,000 of household savings – has patently not protected access to justice for the 47-52,000 individual claimants ‘lost’ to fees since July 2013. More particularly, it has not protected access to justice for the 80% (i.e. 38-42,000) of those men and women who we can reasonably expect to have obtained a favourable judgment or settlement, had fees not been introduced.

Conclusion

21. Even after allowing for a pre-existing (but modest) downward trend in claim/case numbers, and for the (intended) impact of the introduction of Acas early conciliation in early 2014, the introduction of prohibitively high claimant fees in July 2013 has deterred some 47-52,000 single claims/cases in just two years. All the available evidence – including individual case examples, the experience-based views of a large number of employment law practitioners, and the official statistics on claim outcomes cited above – strongly counters the Government’s apparent position that none of those 47-52,000 single claims/cases were meritorious. And, prior to the introduction of fees, no credible commentator ever suggested that two-thirds of all such claims/cases were “vexatious”, “bogus” or otherwise without merit.

22. Apart from the obvious detriment to the 47-52,000 individuals in question, this amounts to a significant diminution of the ‘deterrence’ value of the ET system, with an associated risk of increased incidence of unlawful employment practice by rogue and dinosaur employers. That is not in the interest of law-abiding employers, who quite rightly expect a level-playing field on which to compete with business rivals.

23. Yet this avoidable damage to access to justice and the ‘deterrence’ value of the ET system has brought negligible financial benefit to the government. In 2014-15, net income from ET fees (after both remission and annual administrative costs of some £1.3m) was just £4.3m – less than half the £10m that, in 2012, the Ministry said it expected fees to generate each year. (There have of course been more substantial operational cost savings due to the two-thirds fall in case numbers, but such savings were never an officially stated objective for the fees).

18 September 2015