Introduction

1. Employment Tribunals (Scotland) (ET (Scotland)) are reserved tribunal which fall within the scope of the Tribunals, Courts and Enforcement Act 2007. They are subject to policy decisions made by United Kingdom government departments, particularly those made by the Ministry of Justice (MOJ). It follows that the decision to introduce fees in employment tribunals applied in the same way to ET (Scotland) as it did to Employment Tribunals (England and Wales). The nature of the scheme (and the associated fee remission scheme) is the same north and south of the border. The decision to introduce fee charging in the Employment Tribunals (ET) was a policy based one. We will therefore, in line with constitutional practice, make no comment on the principle of fee charging and instead focus on the impact of the introduction of fees from a judicial perspective. Our central concerns are the administration of justice and the maintenance of access to justice.

2. More specifically, we will largely restrict our observations to the extent to which the original objectives of fee charging have, in our view, been met. These are described by MOJ in the terms of reference for its post-implementation review of the introduction of ET fees as:-

   a. Financial: transfer a proportion of the cost from the tax payer to those who use the tribunal where they can afford to do so;
   b. Behavioural: to encourage parties to seek alternative ways of resolving their disputes;
   c. Justice: maintain access to justice.

Achievement of Original Objectives

a. Financial

3. MOJ has available to it all the income and expenditure information which will allow it to assess whether the financial objective it set has been met. That having been said, the decline in the number of claims presented has been much more significant than the government estimated that it would be prior to the introduction of fees.²

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4. It was variously stated that there was an intention to recover approximately 33% of the costs of the ET system with it being estimated that £10 million pounds would be recovered in the first year. (That is actually considerably less than 33% of actual costs.) Information produced by Her Majesty’s Courts and Tribunals Service (HMCTS) suggests that between 30 July 2013 and 29 July 2014 £7,287,833 was received in fees. Aside from staffing and other overhead costs associated with fees, additional costs have also been incurred as a result of Employment Judges (EJs) having to deal with various legal issues which have arisen since the introduction of fees (e.g. judicial costs incurred in connection with claim reinstatement provisions in rule 40(5) of ET Rules of Procedure).

5. If the objective is indeed to recover 33% of running costs then the financial information available to date appears to suggest that this has not been met.

b. Behavioural

6. By way of background, we can understand the tendency to assert that when the economy is growing, rather than in recession, there will be a decline in the number of claims made to the ET (irrespective of the position with fee charging). While that may be broadly true the statistical picture over the years show that the ET caseload is affected by a wide variety of factors. In the past, even when the economy was growing, employment tribunals received many more claims than they do now, post fees. While a growing economy (that being what it is suggested currently exists) can result in a reduction in dismissal cases it will normally either have no impact on other types of cases which make up a considerable proportion of the work of the tribunal or it can lead to an increase in certain types of claim (for example, claims connected with discrimination in recruitment, disputes about pay including equal pay, promotion related cases and the like).

7. Had it been the case that the introduction of fees encouraged parties to seek alternative ways of resolving disputes then one would have expected to see a significant rise in the use of pre claim conciliation which Acas operated both prior to and after the introduction of ET fees, and before the introduction of Early Conciliation (E.C.). One would also expect to see a marked rise in settlement rates. However, we are not aware of any significant increase in the use of that alternative method of resolving disputes after the introduction of fees nor any noticeable change in outcomes when the process was used prior to the introduction of EC. Acas will no doubt be able to provide further information on this matter. Anecdotal evidence, relayed through

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3 See the table on page 14 of the House of Commons Briefing Paper (No. 07081, 12 January 2015)
4 For example, over the last year ET(Scotland) has received more than 21,000 claims relating to holiday pay (mostly received as multiple claim cases with fees tending to be paid by trade unions). These claims all raise the same/similar central issues. A superficial assessment of claim numbers would suggest that claims are holding up relatively well but that would not be borne out when one removes these particular claims from the overall total received.
members of the ET National User Group (Scotland)), suggests that the introduction of fees has had a negative impact on settlement of cases in some circumstances, with some employers declining to settle on the basis that they consider it unlikely the claimant will be able to pay the fees which will be required (particularly the hearing fee).

8. It would be reasonable to expect, following the introduction of EC (a free service, the initial contact stage normally being mandatory) that if fees were encouraging parties to resolve their disputes by other means there would be a significant rise in the percentage of claims settled through EC compared to the number of cases which used to be settled by Acas before the introduction of fees. In July 2015 Acas reported that of EC notifications received by them in the period from April to December 2014 (the outcome for these cases largely being known by July 2015) 15% had resulted in an Acas brokered settlement agreement (COT3), 22% progressed to an ET claim and 63% did not progress to tribunal even although the case had not been settled by Acas. We venture to suggest that if the imposition of fees had resulted in a much greater willingness to settle cases one might have expected a significantly larger percentage of settlements through E.C. In Acas Research Paper 4/15 “Evaluation of Early Conciliation”5 the most frequently cited reason for not submitting a claim to the ET, where a case was not settled, was that ET fees were off-putting.

9. ET (Scotland), like its counterpart in England and Wales, operates a judicial mediation scheme in which specially trained judges assist parties, in our most complex, resource intensive cases (likely to last three days or more if a hearing is required), to explore resolution of the case other than by judicial determination. The scheme operates on an entirely voluntary basis with a success rate of approximately 70%; in that regard it should be borne in mind that these are cases in which Acas conciliation has already been offered/tried but which remain unresolved. Since the introduction of fees we have had several instances of parties agreeing to try to resolve the case by mediation but the respondent then deciding not to proceed down this alternative dispute resolution route because a fee of £600 must be paid.

10. Anecdotal evidence from ET system users suggests that one of the reasons why fees may not have been effective as might have been hoped in encouraging parties to seek alternative ways of resolving disputes is because the fees are imbalanced as between claimant and respondent. By and large it is claimants who bear the weight of the fees. The fee system, it is suggested by some users, may be encouraging respondents to delay settlement (work requiring to be done on the case within the ET system in the meantime) or not to settle at all. In this regard it should be noted that in civil courts in Scotland fees require to be paid by both sides in the dispute since the view is taken that, until a judicial determination is made, it is not known which party is in the wrong legally. It is only once a decision is made then normally the unsuccessful party has to reimburse fees paid to the successful party.

11. To the extent that it is suggested that the introduction of fees was, at least in part, to discourage weak and/or vexatious claims\(^6\) one could reasonably expect that if this objective had been achieved then the proportion of claims that are successful at hearing would have risen but in fact, according to MOJ statistics, it appears to have fallen since fees were introduced.

12. Representatives and parties will be in a much better position than we are to comment on the extent to which the behavioural objective identified by MOJ has been met but the information which has emerged about the outcomes following EC does not appear to support any suggestion that there has been a sea-change in the behaviour of parties in terms of their willingness to “resolve” disputes by other means. Rather it points in the direction of a significant number of disputes remaining unresolved following EC with all that may mean for ongoing workplace harmony and denial of justice.

**Justice**

13. We are aware of, but make no comment upon, the views expressed by a wide range of practitioners and organisations to the effect that ET fees have had a detrimental impact on access to justice.\(^7\) We are also aware of the findings of the report jointly produced by the Department for Business, Innovation and Skills (BIS) and the Equality and Human Rights Commission (EHRC) ‘Pregnancy and Maternity Related Discrimination and Disadvantage’ (published 24 July 2015) which suggest that there is still a high level of pregnancy and maternity related workplace discrimination in Great Britain.\(^8\) In Scotland, prior to the introduction of fees, a high proportion of the sex discrimination claims presented to the ET related to pregnancy/maternity discrimination. Sex discrimination claims have declined by over 80% in Scotland since the introduction of fees. By way of example, the number of sex discrimination claims received in Scotland in the first three months of 2015 (fees charged) is approximately 91% less than the number of sex discrimination claims received in the first three months of 2013 (no fees charged) (19 post-fees compared to 227 pre-fees). However, such evidence as there is (for example the BIS/EHRC report) suggests that sex discrimination (of the type that previously made up a

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\(^{6}\) See for example, the Resolving Workplace Disputes consultation document (January 2011) in which it was suggested that the introduction of a fee charging mechanism could “disincentivise unreasonable behaviour, such as pursuing weak or vexatious claims.”

\(^{7}\) See, for example, policy briefing 6/2014 from the University of Bristol which is headed ‘Employment Tribunal Fees Deny Workers Access to Justice’ and which summarises research conducted by Professor Nicole Busby and Professor Morag McDermont). See also the report of the Law Society of Scotland ‘Employment Tribunal Fees – Report – July 2014’ which states that ‘with the reduction in the number of claims brought at employment tribunals, we conclude that this presents a serious challenge to access to justice. Claims that would have been successful are simply not being brought as a result of this change. We believe that urgent review is required’. Also note press release from Law Society of England and Wales issued on 29 July 2015 suggesting ET fees have “undermined access to justice”.

\(^{8}\) For example, if the results of the survey are scaled up to the workforce as a whole they suggest around 54,000 women a year are dismissed (including constructive dismissal) for pregnancy/maternity related reasons.
significant proportion of Scottish sex discrimination claims) is still occurring on a regular basis.

14. The most straightforward cases dealt with in the ET are those commonly referred to as “money claims”. These include claims for unpaid wages, holiday pay, notice pay (breach of contract) and redundancy payments. Normally such cases are the least expensive to deal with in terms of judicial and administrative time. Workers reasonably described as “low-paid” brought a high proportion of the claims of this type we used to receive. Quite often the sum due, while significant to the claimant, is relatively low and, in fact, is less that the amount which would now have to be paid in fees. Data available from MOJ shows that there has been a very steep decline in such claims following the introduction of fees. It is not difficult to understand that some potential claimants may make what it is hard to see as other than a rational decision to the effect that it does not make economic sense to pursue the sum due to them when they are being asked to pay more in fees than the sum due with no guarantee that they will receive reimbursement of the fees. Such individuals would, of course, already be taking the risk that they will not receive any compensation for loss awarded by the tribunal. The research conducted by BIS into enforcement of ET awards attracted a great deal of interest and publicity. The knowledge that there is a significant risk that claimants will end up also out of pocket for trying to enforce their rights, it has been suggested by various organisations at National User Group meetings, tips the decision in favour of not making a claim at all (with all that means for the effective functioning of the employment market – employers who fail to pay sums due are less likely to be challenged than before fees were introduced).

15. Several representatives have informed the President, through the National User Group, that where “money claims” that would previously have been brought to the ET are capable of being pled as breach of contract, they are in some instances, following advice on the matter, now being pursued in the Sheriff Court in Scotland because the associated fees are very much lower. It has not been possible to verify this information due to the way claim related data is gathered in the civil courts. The magnitude of any shift is unclear but the underlying point is that there are some representatives who are advising that it is

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9 Several advisers working with women who consider they have been subjected to pregnancy or maternity related discrimination have indicated to the ET President (user group and other similar interactions) that the requirement to pay fees is the “last straw” for such women who are already concerned about issues such as the possible impact on their unborn child of stress caused by engaging in litigation when pregnant, the impending decrease in their income connected to going on maternity leave, the costs incurred in connection with having a new baby (pram, cot etc) and the like. The knowledge that fees of £1200 may require to be paid is described by these advisers as the factor which tips potential litigants into making a decision that they should not proceed with their case even although it may be a strong one.

10 That decisions of this type are being made very frequently has been suggested to the President at National User Group meetings by several participants including Citizens Advice (Scotland).

11 There is a significant risk of non payment of any award made by the tribunal – see the research conducted on behalf of the Department for Business, Innovation and Skills (BIS/13/1270, published 29 October 2013)
no longer sensible to pursue access to justice in the forum set up to deal with employment related claims because the fees are, relative to the civil courts in Scotland, much higher. This possible shift of work into the civil courts may be greater in Scotland than in England and Wales given that we understand the relevant civil court fees in Scotland are lower than those in England and Wales.

16. Prior to the introduction of fees a significant number of “money claims” would be made against insolvent employers on the basis that the sum found to be due would then be paid by the National Insurance Fund/Redundancy Payments Office. However, since the employer is insolvent there is no realistic prospect of the claimant recovering the fees they have paid to pursue the claim from the employer and there is no other mechanism for reimbursement of them. This may be one of the reasons why there has been a significant reduction in insolvency related claims.

17. So far as what are known as “standard track” claims are concerned (mainly unfair dismissal), similar issues arise to those identified for “money claims” (perhaps a little less acutely) in connection with the level of fees which require to be paid compared to the average award (particularly now the government has imposed a statutory cap on compensation). The high level of non-payment of awards is also relevant here.

18. The fee system as currently structured appears to have a particularly harsh impact in certain types of cases. For example, in protective award cases, the first stage involves the Employment Tribunal (in a claim usually brought by a trade union or employee representative of another type, but sometimes in the absence of either, brought by individual employees), making an award which is stated to apply to a particular class of employees. No specific award is made to individuals at this stage but the judgement will be in terms which will allow the employer to calculate the sum due to each employee falling within the class described. If the employer fails to comply with the protective award judgment, employees in the relevant class can then make a further claim to the Tribunal in which they seek to enforce the protective award judgment. This involves the tribunal making specific financial awards to the claimants which can then be sought from the employer (and legally enforced like any other financial award at that stage). A fee will already have been paid in respect of the first application for the protective award. A union may have paid it but individual employees could have paid it. It seems to be particularly unfair, given the fault would appear to lie with the employer who has failed to pay after the first judgment, that individual employees are made to pay a further fee when they require to bring a claim to the Employment Tribunal in order to obtain a decision which will set out specific sums due. The same holds good in connection with failure to consult in connection with a transfer under the Transfer of Undertakings (Protection of Employment) Regulations.
Justice - The fee remission scheme

19. It is suggested by MOJ that the measure which has been put in place to ensure that access to justice is maintained is the fee remission scheme and that only those who can afford to pay should bear a proportion of the running costs of the system. The issue arises as to whether account has properly been taken of the fact that a very high proportion of ET claimants will recently have lost their job, and therefore be facing a period of financial uncertainty, just at the time when they are being asked to pay fees. While they may have capital which disqualifies them from remission, they are faced with the stark choice of paying what may be a significant sum in fees (if a hearing is required) just at the time when their finances are likely to be at their most precarious. This difficulty is exacerbated by the fact that sums paid on termination of employment, designed at least in part to assist in reducing their current financial difficulties, are taken into account in the remission scheme (see below).

20. Statistical information available from MOJ shows that applications for remission made and granted are significantly below the numbers predicted by MOJ prior to the introduction of fees. User feedback (delivered via the National User Group (Scotland) and other user interactions) is to the effect that the remission system is overly complex, burdensome in terms of documentary requirements, inflexible, too time consuming for users and representatives alike and that it has a disproportionate impact on employment tribunal claimants when compared to pursuers (claimants) in the civil courts. The length of time between payment of the issue and hearing fees can be short (and is increasingly so) and yet claimants who are granted remission of the issue fee are required to apply again in respect of the hearing fee. Aside from the issue of whether this is sensible from an administrative point of view, it is also a requirement that appears to cause considerable confusion and delay.

21. The decision made at the end of 2013 to change the fee remission scheme to take account of disposable capital is policy based and we make no comment on the principle. However, in practice the scheme in place, in our view, particularly disadvantages ET claimants compared to litigants in the civil courts, and undermines the premise that only parties who can afford to pay are required to do so, for the following reasons:

   a. The fee charging scheme in Employment Tribunals involves claimants paying an issue fee and a hearing fee. In Type B claims (the majority of claims) the issue fee is £250 and the hearing fee is £950, making a total of £1200. As each of these fees is treated as a separate fee they are classified, in terms of the remission scheme, as a fee of “up to £1000”. The disposable capital threshold (beyond which remission is unavailable) is £3000. However, if these fees were combined they would be a fee over £1000, in terms of the scheme, and the disposable capital threshold would be £8000. In many cases there is a
relatively short period of time between the payment of the issue fee and the hearing fee (the period is becoming ever shorter as a result of the decline in case load which means that tribunals are able to hear cases more quickly than used to be the case). Since the fees are not treated as combined this means that an individual who has disposable capital of say £3001 is required to pay a fee of £1200 (more than a third of disposable capital). Given the short period of time between the payment of the issue fee and the hearing fee the issue arises of whether it would be appropriate for these two fees to be combined when making the disposable capital assessment.

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

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

c. The remission scheme also operates on the basis that any other payment made on termination of employment (for example pay in lieu of notice or accrued holiday pay) is to be treated as capital. However, payments of this type reflect the income which would have been received had the individual worked their notice period or, as the case may be, the income the individual would have received had they remained in employment but been on holiday.

d. The vast majority of Employment Tribunal claims require to be brought within 3 months of the act giving rise to the claim (subject to short extensions given where early conciliation is part of the process). This is a much shorter limitation period than would apply in most types of claims made to the civil courts. Many ET claimants will have received a payment on termination of employment (redundancy pay/notice pay/holiday pay etc)
which is designed as a form of income replacement to tide them over a period of unemployment but since this is treated as capital, and the assessment needs to be made very quickly after the termination of employment has occurred, these individuals will be undergoing the assessment when they have an artificially inflated capital sum which they have only had a very limited time to use for the purpose for which it was intended (income replacement). Litigants in the civil courts, in receipt of such sums, would normally have much more time to legitimately use such payments for their true purpose prior to requiring to make their claim, thereby reducing their capital to a lower level by the time they are subject to the capital assessment requirement.

22. Just as the decision to charge fees is one for government so the fixing of the appropriate level of fee is a matter for government. However, we proceed on the basis that, at least in part, the dramatic reduction in claims suggests that the fees are too high when one takes into account:

   a. the personal circumstances of many claimants (by the very nature of the claims made to the ET many will have lost their job and be facing financial uncertainty);
   b. the sum likely to be awarded (relatively low in many “money” and unfair dismissal cases);
   c. the risks arising from the fact that there is no guarantee that fees will be reimbursed to a successful party (and in insolvency cases, no realistic prospect of recovery at all);
   d. the level of risk that a successful party will not recover any financial award at all due to the level of non-payment of awards;
   e. the provisions in the remission scheme which mean that ET claimants are disproportionately impacted by the capital test and the fact that the issue and hearing fees are assessed separately even although in many cases the hearing fee requires to be paid a short time after the issue fee.

23. Given the dramatic reduction in the number of claims across all claim types, the information emerging from system users, and the difficulties identified above in connection with the remission scheme (which was designed to maintain access to justice) it is the position of the Employment Judges in Scotland that the objective of maintaining access to justice (including ensuring that only those who can afford to contribute to the cost of running the system are required to do so) has not been met. Put another way, Employment Judges in Scotland consider the fee system has acted to significantly reduce access to justice.

25 September 2015