Written evidence from Working Families

1. Working Families is the UK’s leading work-life balance organisation. We help working parents, carers and their employers find a better balance between responsibilities at home and work. Our legal helpline team gives parents and carers advice on employment rights such as maternity and paternity leave, rights to time off in an emergency, and shared parental leave, as well as helping them to negotiate flexible working. In this submission, we focus on the employment tribunal fees introduced in July 2013, and their impact on the ability of the working parents and carers who contact our helpline team to exercise their family- and work-life balance-related employment rights.

2. This submission is endorsed by the following members of our Families & Work Network: the Child Poverty Action Group (CPAG); the Fawcett Society; Maternity Action; Mumsnet; Netmums; Unite; and the Women’s Budget Group.

3. ‘Denise’, pregnant and employed on a zero-hours contract, contacted the legal helpline in 2014 after her previously regular working hours were suddenly cut substantially simply because she had taken time off for a pregnancy-related illness. When Denise had challenged her employer, pointing out that several extra new staff had been taken on in recent weeks, she had been told “we need people we can rely on”. The helpline team advised Denise her treatment amounted to unlawful pregnancy discrimination, but Denise said there was no way she could afford to pay fees of up to £1,200 to issue and pursue a tribunal claim.

4. Similarly, Camilla, pregnant and until very recently working 30 hours per week as a hotel cleaner on a zero-hours contract, contacted the legal helpline in 2015 after being summarily dismissed for taking time off work due to pregnancy-related illness. The helpline team considered Camilla to have a strong claim for unlawful pregnancy-related dismissal, but she was unwilling to risk up to £1,200 of her savings on issuing and pursuing a tribunal claim. Not without difficulty, Camilla had managed to save just over £3,000 to cover the extra expense she knew would come with having a baby – not least because she would receive only the statutory rate of maternity pay (just 60 per cent of the National Minimum Wage) while on maternity leave. And those savings meant that Camilla would not be eligible for any remission of the tribunal fees.

5. Denise and Camilla are two of more than 50,000 mistreated or exploited workers who appear to have made much the same decision since 29 July 2013, when the upfront fees came into force. For more than 40 years prior to the introduction of the fees, the employment tribunal system provided an invaluable backstop in disputes between individual workers and their employer – a legal remedy of last resort –
as well as a more general incentive to employers to ‘get it right first time’. But in August and September 2013 the number of new cases fell precipitously, and has not recovered since.

6. In the six months up to 31 March 2014, new cases (single claims/cases & multiple claimant cases) were down 62 per cent on the same period in 2012-13, from 30,095 to 11,508, while single claims/cases (on which we will focus in this submission) were down 61 per cent, from 27,353 to 10,588. Cases involving a claim for unfair dismissal were down by 64 per cent, those involving alleged sex discrimination by 80 per cent, and those involving an equal pay claim by 84 per cent. And, as illustrated by the case of Camilla, the fee remission system is not fit for purpose and has failed to protect access to justice: it dismisses workers as ‘wealthy’ enough not to merit any remission when they are poor by anyone else’s standards.

7. However, it was never the explicit intention of ministers to bring about such a reduction in case numbers. As confirmed by the government’s recent announcement of its long-promised Post-Implementation Review of fees, the original policy aims were stated to be to:

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

Furthermore, these objectives were to be achieved “while maintaining access to justice”.

8. Measured against these stated aims, the fees cannot be regarded as any great policy success. According to the HMCTS annual report, in 2014-15 net income from fees (after remission and administration costs) was just £4.3 million – less than half the £10 million that, in 2012, the Ministry of Justice predicted fees would generate each year, and a relatively insignificant sum in terms of the Ministry’s total budget. (There have of course been more substantial operational cost savings due to the two-thirds fall in case numbers since July 2013, but such savings were never an explicitly stated aim of the fees regime).

9. Contacting Acas with a view to early conciliation of a potential tribunal claim is in fact mandatory, so claimants need no ‘encouragement’ from fees to access the service. And it is very hard to see how fees could, by themselves, improve the “efficiency and effectiveness” of the tribunal process – other than by deterring a large part of the caseload. Any increased incentive for claimants to settle their claim early (so as not to have to pay the hearing fee) is likely to have been largely if not
wholly offset by the incentive for respondent employers to wait and see if the claimant is willing and able to pay the hearing fee.

10. The Post-Implementation Review’s stated terms of reference suggest a number of factors that ministers clearly feel might possibly have contributed to the substantial fall in case numbers between the introduction of fees in July 2013, and the introduction of Acas early conciliation in April/May 2014. These include an “historic downward trend” in case numbers that began in 2010-11, perhaps linked to “the improvement in the economy”, “changes to employment law”, and “changes in users’ behaviour”.

11. However, it is already beyond doubt that such factors do not even begin to explain the precipitous and sustained fall in case numbers between late July 2013 and April/May 2014. There were no other significant changes in employment law during that period. And, while there was a gradual decline in case numbers prior to the introduction of fees, quite possibly linked to improvement in the economy, that decline was relatively modest. From the first quarter of 2012/13 to the first quarter of 2013/14 (i.e. the last full quarter before fees), the number of single claims/cases declined by just six per cent.

The ‘historic downward trend’ and ‘early conciliation by Acas’

12. As the following chart shows, even after factoring in both this modest downward trend and the introduction of Acas early conciliation – which was intended to bring about a 17 per cent reduction in tribunal case numbers – in April/May 2014, there remains a substantial difference between the number of single claims/cases we could have expected to see in each quarter since July 2013, had fees not been introduced, and the actual number of such claims/cases.

13. In fact, even after (generously) allowing for these two factors, there were still some 47,200 single cases ‘lost’ to fees, as of 30 June 2015 (i.e. the end of Q1 of 2015/16, the most recent quarter for which official statistics are available). And, as that number continues to increase by some 5,000 every quarter, it is now well in excess of 50,000.
Changes in users’ behaviour

14. There are two potential “changes in users’ behaviour” that might possibly account for some of the 50,000 single claims/cases by individual workers ‘lost’ to fees since July 2013:

- deciding to issue the claim in the County Court, where fees are lower, instead of in the employment tribunal; and

- deciding not to issue a ‘weak’ or ‘unfounded’ claim.

15. 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 – there is no evidence at all of any such displacement of single claims/cases. Accordingly, there is no reason to believe that such displacement accounts for more than a very small proportion of the more than 50,000 single claims/cases ‘lost’ to fees since July 2013.

16. Although never an officially stated aim of the fees, deterring allegedly “vexatious”, “bogus” or otherwise weak or unfounded claims is the one measure by which some ministers have claimed ‘success’ for the policy of introducing fees. In late 2014, the then justice secretary, Chris Grayling, was reported as saying that, by introducing fees, the then 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”.

Source for ‘actual claims/cases’ figures (red): Quarterly tribunal statistics published by the Ministry of Justice. Projection figures (green) assume: (a) a continuation of the ‘historic downward trend’ of 6.5% per year; and (b) a further 17% reduction over the first year of Acas early conciliation.
17. Similarly, earlier in 2014, the then BIS minister Matt Hancock was widely reported as saying that the dramatic fall in cases since July 2013 demonstrated how “tens of thousands of dishonest workers have been squeezing the life out of businesses with bogus employment tribunal claims for discrimination and harassment”.

18. However, if all or even just some “tens of thousands” of the more than 50,000 single claims/cases ‘lost’ to fees since July 2013 were simply “bogus claims for discrimination and harassment” with little if any chance of success, then the overall success rate would by now have risen sharply towards 100 per cent, as the average ‘quality’ of claims would have risen significantly.

19. In fact, as the following chart shows, the overall success rate – that is, the proportion of concluded cases in which the claim was successful at a tribunal hearing, conciliated by Acas, or withdrawn (i.e. settled) – has fallen steadily in recent quarters, from 79 per cent in 2013/14, to just 62 per cent in Q4 of 2014/15. In the first quarter of 2015/16 (April to June 2015), the overall success rate did rise to 75%. However, this figure is 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 2014/5). If those two jurisdictions are excluded from the figures, then the overall success rate falls to 62% – the same as in the previous quarter.

20. In short, the average ‘quality’ of tribunal claims has fallen markedly. (NB: As the average ‘age’ of concluded claims is currently about nine months, the vast majority of the claims concluded in recent quarters will have been issued after the introduction of fees in July 2013).

Conclusion

21. Does any of this matter? Clearly it matters to the more than 50,000 potentially mistreated or exploited workers seemingly priced out of seeking justice through the tribunal system since July 2013, many of whom will be a working parent or carer. On the basis of past case outcome trends, it is reasonable to assume that some 80 per cent of those more than 50,000 men and women would have obtained a favourable judgment (and award) or settlement of their claim.

22. But the denial of access to justice on such a scale also matters if you believe – as we do – that law-abiding employers deserve a level-playing field on which to compete with their business rivals. The employment tribunal system is intended to ensure a more equal power relationship between the most vulnerable workers and their employers, without which – in the words of Winston Churchill more than a century ago – the good employer is undercut by the bad, and the bad employer is undercut by the worst.

23. Largely as a result of the fees introduced in July 2013, the UK’s 1.2 million employers now risk facing a tribunal claim just once every 60 years, on average, and a private sector business just once every century. And that is simply a charter for Britain’s worst employers.

24. A government that truly champions business cannot allow this state of affairs to continue. Working parents and carers need effective access to their family- and work-life balance-related employment rights, and it is in everyone’s interest that they are not deterred from challenging any unfair denial of those rights by prohibitively high tribunal fees.

29 September 2015