Who We Are

We are a team of researchers from the Universities of Bristol and Strathclyde, who have been engaged in a large scale research project examining the experiences of users of the employment tribunal (ET) over the last four years. We focused on access to justice for clients of Citizens’ Advice Bureaux (CAB) who are generally not trade union members and who cannot easily afford to pay for legal advice and representation.

Our responses to the Committee’s specific questions are based on the findings of the research projects outlined in the next section and from our general observations resulting from expertise acquired after several years of working in this field. Our submission will focus on the first of the Committee’s three questions as it specifically relates to the introduction of ET fees:

How have the increased court fees and the introduction of employment tribunal fees affected access to justice? How have they affected the volume and quality of cases brought?

Outline of Research

We followed 159 CAB clients in England, Scotland and Northern Ireland, from early advice appointments and, in some cases, claims to the ET and beyond as they attempted to enforce awards. Although not all of the disputes we tracked emerged as ET claims, all of the individuals concerned were advised that they had viable claims against their employers. This research gave us insight into individuals’ decision-making processes and perceptions during the course of and following their disputes. We also interviewed more than 35 CAB managers and advisers, many of whom have first-hand experience of employment casework including ET representation.

The introduction of fees was not foreseen when we began data collection. However, we captured a number of disputes that commenced in a post-fees environment. 14 of our 133 clients in England and Scotland were involved in disputes following the introduction of fees.

To explore the impact of fees further, we undertook a supplementary project on the experiences of CAB advisers in Scotland which focused on the impact of fees on claims submitted to the ET and

---

1 The programme of research was funded by the European Research Council. Further details can be obtained from our project website: http://www.bristol.ac.uk/adviceagencyresearch
users’ experiences of the remission scheme. An online survey of advisors was conducted in April 2014 in which we asked how the fees and remission scheme impacted on the decision making process of their clients. This was followed up with focus groups in August 2014 enabling us to gather further in-depth information from other advisors on the impact of ET fees.

How has the introduction of employment tribunal fees affected access to justice?

It is worth noting that, even before fees, we found that the experience of pursuing a tribunal claim was extremely difficult for the particular client base in our study, many of whom experienced high personal and financial costs. Consideration of the experiences of these individuals reveals that fees have made the ET unaffordable for many, with those who apply for remission often experiencing an extremely complex and stressful process. Our research indicates that the imposition of ET fees has greatly reduced access to justice for those who cannot afford legal advice and representation and who lack the funds to pay the fees themselves. The rationale underpinning the introduction of ET fees is based on a conception of claimants’ motivation and behaviour as vexatious which is not supported by our findings. In addition to directly ‘pricing-out’ would-be claimants, the existence of fees (regardless of their level) deters those in precarious employment who experience fluctuations in earnings.

The reduction in the number of full ET hearings raises questions of concern about employment law’s future development and sustainability. The lack of case law emanating from the ET and the Employment Appeal Tribunal is likely to have a negative and damaging effect on the evolution of UK employment law, traditionally characterised by its dynamism and ability to develop continuously in line with changes to the socio-economic environment within which it operates. This process, which depends largely on the maintenance of a fair and accessible independent tribunal and court system, will now stall in many important practice areas. The imposition of fees, thus, has a dual negative impact: not only are would-be claimants priced out of the system but the resulting lack of judicial consideration of different types of claims will lead to the stagnation of employment law.

---

Furthermore, the increasingly diluted threat of litigation as a deterrent to bad employment practices is likely to lead to a deterioration of workplace employment relations.

How have they affected the volume and quality of cases brought?

Volume

There can be little doubt that the main cause of the dramatic reduction in the number of ET claims since July 2013 is the imposition of fees. However, other changes to the system of employment law introduced by the Coalition Government alongside fees, notably the extension of the qualifying period for unfair dismissal, have also contributed to the reduction in claims.

14 of the 133 participants in our research in England and Scotland (fees do not apply in Northern Ireland) approached the CAB for advice following the introduction of fees in July 29th 2013. From that sample, fees and/or the remission system acted as disincentives to submitting claims or presented difficulties in having cases heard by the ET. The specific effects on these participants were as follows:

- Two identified fees as an outright barrier to pursuing their claims.
- Two identified fees as a barrier to submitting their claims to the ET and sought settlement through Acas Early Conciliation (EC).
- Two paid the issue fee, but identified the hearing fee as a barrier to attending a full hearing and sought a settlement through EC.
- One paid the issue fee but later abandoned the claim in part due to the cost of the hearing fee.
- Three of the 14 received full fee remission and one received partial fee remission and reached a settlement with the employer after two pre-hearing reviews.
- Three had difficulty proving their eligibility for remission or lacked awareness of the scheme and fees acted as a deterrent from pursuing their claim.

The Scottish CAB advisers we surveyed reported overwhelmingly that “fees act to deter clients from taking a claim” (92% of advisers strongly or somewhat agreed) and that, rather than moving to alternative routes to resolution (46%), “clients are more likely to do nothing about the problems they face at work” (85% of advisers).

Fees clearly have a major influence on the decisions taken by workers involved in employment disputes, acting as an outright deterrent from pursuing formal resolution for some and, for others,
representing one barrier among others. In recent litigation in which Unison unsuccessfully challenged the legality of employment tribunal fees using the process of judicial review,⁴ the standard by which domestic legislation is ruled to infringe rights granted under EU law’s principle of effectiveness was applied, i.e. the domestic processes or remedies must render the exercise of EU rights ‘impossible or excessively difficult’. In the current context this was deemed to mean that “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?” ⁵ In our view, this approach overlooks fundamental, pre-existing barriers to justice.

Many of the participants in our research, having received advice from the CAB, felt that paying a fee was a gamble they were unable to take because of the uncertainty of outcomes and their often unstable financial circumstances. Those who have recently lost their jobs are generally not in a position to pay fees of up to £1,200 with any small amounts of savings needed for future living expenses. Even those with cases identified as ‘strong’ recognise that there is still a risk of losing.

‘Anna’, employed as an architecture assistant, suffers from epilepsy and had informed her employer of this prior to starting her job. Following a period of sick leave due to her medical condition, Anna was dismissed. Her employer claimed that she had not disclosed her medical condition and that her condition presented a health and safety risk. Shocked at losing her job, Anna felt that her employers had dismissed her without going through proper procedures and sought assistance from the CAB. She was informed that she had a strong claim of disability discrimination. However, having started some temporary work, she would be liable to pay ET fees. Anna was advised that there was no guarantee that her claim would succeed, and even if it did, she would not necessarily receive any compensation awarded. Having weighed up the pros and cons of whether she should “risk forking out the £1,000 for this tribunal even though it’s a strong case” Anna concluded that she could not afford to take such a risk and so did not pursue her claim.

---


⁵ Elias, L. J. in R (Unison) v Lord Chancellor and another (No.2), at 62.
It seems likely that fees are contributing to a sense of disaffectedness amongst workers about their ability to enforce their employment rights with many reflecting that pursuing a claim is simply not worth it, even though not resolving the dispute can have a detrimental effect on the individual’s future employment prospects. In particular, a lack of any formal resolution can mean that the worker carries a ‘black mark’ on their employment record, such as an unexplained departure from a job or an inability to request a reference for a new position. This can be especially problematic for those in low paid and/or low or unskilled work. The current economic climate coupled with government policies aimed at encouraging those on benefits to take up work, mean that employers of low wage workers tend to have a pool of available workers to choose from.

‘Lorraine’ worked for a retail company for 6 years before she was suspended over an alleged incident which she denied. Following an internal investigation, Lorraine was dismissed for gross misconduct and appealed. She believed that the investigation was wholly inadequate and, following discussion with Acas, felt that her employer had not followed the Acas Code of Practice. Having lost her appeal, Lorraine visited the CAB where an employment solicitor advised that she had a viable claim for unfair dismissal. Lorraine was in receipt of sickness benefit due to the depression she experienced after losing her job. However, she was ineligible for remission and could not afford to pay the fees so did not pursue her case: “At the end of the day I haven’t got £1,100 for something I might or I might not win ... it’s a gamble. I might as well go to the bookies.” Lorraine now has a reference stating she was dismissed for gross misconduct which is affecting her ability to find other work.

As these individual stories (and others in our study) illustrate, the charging of a fee at any level can act as a barrier for many whose economic circumstances are unstable following the loss of a job and/or a period without pay. Such individuals cannot afford fees even though they may not qualify for remission and/or do not meet the strict test required to show that their ability to pay fees is ‘impossible or excessively difficult’. That there are provisions to allow ETs to order reimbursement of fees is not sufficient in ensuring that those with valid claims are not deterred from bringing them.

**Fee Remission**

Although remission is available for those with specified financial circumstances, many are ineligible due to shared income or a small amount of savings that they are nevertheless unable to spend on
fees with no guarantee of success. Even where claims do succeed, financial awards made by the ET are not easily enforced. As the Government’s own research conducted prior to the introduction of fees has shown, only about half of those given financial awards ever received them with further court action required in many such cases.  

As the following case study demonstrates, applying for remission can be problematic even for those who meet the eligibility requirements as individuals often find it difficult to gather the substantial evidence required to demonstrate income and expenditure for themselves and their partner, particularly when facing a tight deadline to submit their ET claim.

‘Billy’ was dismissed from his job as a van driver. He suspected that his employer was looking to cut costs and had accused him of misconduct as an excuse to sack him. Billy turned to the CAB for assistance where he was advised by a solicitor that he had a viable claim for unfair dismissal. A lot of time was spent attempting to determine whether Billy was eligible for remission and what documents he would need to support his application. Billy had difficulty in locating relevant supporting documentation, which included his wife’s tax returns. His mother-in-law had recently been diagnosed with cancer so his wife was unable to look for these. As the deadline for submitting an application approached, the solicitor suggested that Billy pay the £250 issue fee and then seek reimbursement once he had obtained the required documents. However, Billy felt that there was “no way I could’ve got the funds together ... I had high blood pressure, I was on the sick and couldn’t carry on ... It was just a nightmare!” The remission application was not submitted on time and so the claim could not proceed. However, in a separate incident, a former colleague who took the employer to tribunal managed to secure a remission from fees. Billy remonstrated, “I feel as if I’ve been robbed now, you know, because he’s getting that and I couldn’t get it.”

Our research indicates that many individuals who feel that they have suffered a wrong at the hands of their employer feel powerless to seek a remedy even when advised that they do, in fact, have a viable claim. As one of our participants commented, “Well as far as I’m concerned, for me, there is no law or legal system ... as far as it is me getting justice, you know. You’ve got to pay for justice. What sort of justice is that, you’ve got to buy it?”

---


7 Participant DC032.
**Acas Early Conciliation**

Alternative methods of dispute resolution, such as EC, may offer a solution in some circumstances particularly where the worker is still employed. EC can be used prior to the submission of an ET1 or after submission of an ET1 (but prior to a full hearing) on payment of the issue fee. However, although encouraging dialogue between employers and workers can lead to positive outcomes, this does not necessarily mean that such early settlements are to the satisfaction of both parties and our findings in this respect were mixed⁸. Settlement through EC may not directly address the wrongdoing experienced by the worker - the outcomes achieved are quite distinct from those applicable through adjudication by the ET as conciliation is a neutral process which is not concerned with the quality of the outcome or settlement, or with whether the settlement supports or undermines the social policy objectives behind the applicable legislation. The measure of success in conciliation, i.e. that both parties agree on the outcome, is not concerned with the reasonableness or fairness or justness of that agreement. There is, thus, an implicit assumption that parties know their legal rights and understand the implications of the settlement. This can be viewed as a ‘conflict between the search for compromise, which is at the centre of conciliation and the pursuit of rights’ with “Conciliation … viewed as treating an alleged injustice as equivalent to a disagreement between parties.”⁹

Assumptions concerning awareness of legal rights are of particular concern when related to the participant group in our research which is comprised of individuals who often have little or no access to independent legal advice other than that available through their local CAB (who seldom have sufficient resources to support clients in the conciliation process). Without such guidance individuals often feel vulnerable in negotiations concerning settlement and can perceive Acas’s neutrality as bias in favour of the employer. Further, the confidentiality that is often a requirement of the resulting agreement can mean that a worker is not able to fully explain the circumstances surrounding termination of their previous employment to prospective employers.

Given all of these factors, although we welcome the intervention of Acas in those disputes which can genuinely benefit from EC, we are strongly of the view that it should not be viewed as an alternative

---


to the ET in all cases and nor should it be seen as a substitute for independent legal advice and/or representation.

Quality

That fees are deterring would-be claimants is beyond doubt. However, it is important to consider whether this reduction is in so called ‘weak and vexatious’ claims with little prospect of success, which, as the justification for fees advanced by the Coalition Government suggested, were a particular problem which required a solution. In 2013, then Parliamentary Under-Secretary of State for Justice, Helen Grant proposed in parliament that:

“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.”

Yet, even before fees, our research found that the decision-making processes of individuals involved in employment disputes were largely based on employers’ handling of grievances whether such responses were deemed to be reasonable. Another influencing factor in decisions concerning whether to submit a claim to ET is simply that, in some types of cases – the most obvious example being unfair dismissal – the enforcement of employment rights is the only way in which resolution can be achieved. In other circumstances, where individuals are made aware of ET fees rather late in the dispute perhaps at their first appointment with a CAB adviser, subsequent attempts to seek informal resolution are made too late. In some such cases, the credible threat of litigation which might have encouraged employers to sort things out is now lost due to the barrier represented by fees.

Having to pay a fee is often the final nail in the coffin of access to justice for would-be claimants. For many, fear - often arising from intimidating tactics by employers such as explicit cost threats - coupled with the worry that they will have to represent themselves in a process with which they have little or no experience is simply too much. As well as the financial costs, the psychological and emotional damage caused by the dispute and the circumstances leading up to it, often over several months or even years, take their toll on the individual’s physical and/or mental wellbeing. Within the current legal framework, there is little opportunity for individual litigants to express what actually happened and how it has affected their lives.

---

10 See http://www.parliament.uk/business/publications/hansard/commons/this-weeks-public-bill-general-committee-debates/read/?date=2013-06-10&itemid=417
In this often hostile climate, the advent of fees has focused individual decision-making concerning whether to pursue a claim on affordability rather than on the merit of the case itself. In fact, the number of claims succeeding before the ET has actually slightly decreased since the introduction of fees.\footnote{CAB (2014) \textit{Fairer Fees: Fixing the Employment Tribunal System}, London: Citizens’ Advice, p. 5.} However, we would caution against drawing any broad conclusions about the quality of cases from what might be perceived as ‘success rates’ in ET claims. An ‘unsuccessful’ claim is by no means always a weak or vexatious one as there are many reasons why perfectly viable cases may fail – some of which, in themselves, represent barriers to access to justice. Furthermore, the testing of new and innovative legal arguments and strategies, particularly in the more complex practice areas, is part of law’s dynamism by which the area has traditionally developed. If fees have affected the quality of claims, it is because they have dis-incentivized so-called ‘low-value’ claims, which are nevertheless highly significant to those that bring them. The proportion of Type A claims, typically involving a small amount of unpaid wages, has declined in relation to Type B claims\footnote{Pyper, D. and McGuinness, F. (2015) \textit{Employment Tribunal Fees}, House of Commons Briefing Paper, 7081: 14.} which, due to their complexity, generally take up more time for hearings. The reduction in Type A claims is of particular concern as it is likely that those low-paid workers in precarious forms of employment, typical of the client group in our research, are being exploited by unscrupulous employers.

**Recommendations**

- The immediate abolition of ET fees is the only way that improved access to justice for all workers can be assured.

- Alternative dispute resolution, such as the Acas Early Conciliation scheme, should be encouraged and facilitated in those cases for which early intervention is appropriate (i.e. where the worker is still employed) but should not be promoted as an alternative to a full hearing in all cases.

- All parties to the ET (claimants and respondents) who are unable to afford legal advice and representation should be provided with such either through the service of a duty solicitor, via greater public investment in the voluntary advice sector and/or through a partnership between private legal practitioners and the third sector.

30 September 2015