Written evidence from the South Eastern Circuit

INTRODUCTION

1. The South Eastern Circuit (SEC) represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice and across England and Wales. It is the largest Circuit in the country. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners.

2. These are the written submissions on behalf of the South Eastern Circuit ('SEC') to the House of Commons Justice Select Committee Inquiry into the effects of the introduction and levels of courts and tribunals fees and charges. The written submissions address two areas: civil court fees; and employment tribunal fees.

SUMMARY

3. SEC opposed the increase in civil court fees which was introduced in March 2015. It also opposes the further fee increases proposed in Cm 9123, ‘Court and Tribunal Fees’. We give reasons for this below in section 1.

4. SEC opposes the employment tribunal fees as set out in section 2.

SECTION 1: CIVIL COURT FEES

REQUIRES A GREATER LEVEL OF SCRUTINY

5. Even though such taxation through civil court fees is now permitted in principle, as a result of the power contained in section 180 of the Anti-Social Behaviour, Crime and Policing Act 2014, SEC would not expect a government which claims to have regard to both the needs of victims of injustice and also those of business and trade to use those powers in the way it
already has and proposes to do. The contrast with other fundamental public services is stark: the government would never propose that education or health should be self-funding. The SEC believes that the proposals fail to take into account commercial considerations for litigants and have been made without proper consideration of the wider fiscal effects of the policies.

6. Use of 'enhanced fees' to raise tax is regressive. The value of a civil dispute is a poor indicator of litigant liquidity. Indeed, in our members' experience, the need to sue often coincides with weakened finances. The role of the courts is to compensate for losses sustained, so by definition, the court fees in civil claims are being borne by those whose financial capacity is reduced. For example, the victim whose professional career has been adversely affected by a libel, or a small business whose former employee is unlawfully competing; having taken confidential information and in breach of covenant, or which has been sold substandard machinery for use in its manufacturing process.

7. By contrast, both the current and former MoJ consultation documents wrongly assume a direct correlation between claim value and 'wealth' of the litigant. In our view this error significantly undermines the justification for either the existing 'enhanced fees' or the latest proposals to increase them yet further.

8. It is also odd that the justification for fees is stated to be that those with higher value claims can afford to contribute more, but that in fact those with the highest value claims have the benefit of the cap on fees. The effect is therefore that those with the lowest claims have the highest marginal rate of tax.
WILL NOT ACHIEVE THE STATED AIM OF INCREASING GOVERNMENT INCOME

The SEC believes that both current ‘enhanced fees’ and the further proposed increases are highly unlikely to meet their stated aims of generating £120m more income, as the consultation makes no concession of the substantial risk that case volumes will significantly decrease: a startling omission in light of the recent experience in increased employment tribunal fees (in respect of which see Section 2 below).^{3}

9. As a result, no consideration whatsoever appears to have been given to the wider economic consequences, including loss of revenue to HM Government as a result of reduced profit and turnover in the legal services industry. We think the economic analysis in both consultation documents is both complacent and flawed.

10. At worst, the basis upon which the consultation proceeds might even be said to be disingenuous. If, as stated, the scheme was intended to actually grow the courts' service as a viable business, it might have been expected that the consultation would reveal evidence of market research designed to establish the deterrent effect of different levels of court fee and at different stages of the civil litigation process. Further, it might have been expected that the comparison of fee charging with the courts of other jurisdictions would have been conducted in more depth, given that most of the comparators chosen appear to charge most heavily for actual hearing or court time and not as an upfront fee.^{4}

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1 Introduced by the Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015, passed pursuant to the power contained in section 180 Anti-Social Behaviour, Crime and Policing Act 2014.

2 Court and Tribunal Fees: The Government response to consultation on enhanced fees for divorce proceedings, possession claims, and general applications in civil proceedings and Consultation on further fees proposals (August 2015) Cm 9124, Ministerial foreword.

3 Since July 2013, employees have had to pay up to £1,200 to bring a claim to tribunal. Applications have fallen by 70%, in sex discrimination the drop is over 90%. The proportion of claims won has remained constant, meaning that good claims are no longer being pursued.

4 Annex B to the consultation of January 2015
17. The enhanced fees are undoubtedly a barrier to justice. It is crucial that the scale of this barrier is seen in the context of litigated civil claims being a small minority of all disputes. One of the greatest benefits to society of a well-functioning accessible civil justice system is that it means that people do not have to go to court to vindicate their rights. It is crucial to the promotion of the rule of law that consumers, businesses and individuals know that their rights are easily and readily enforceable. People do not choose to litigate, but it is important that those who have to, can do so. If not, their substantive rights are worthless.

18. As has already been stated, the consultations do not even acknowledge that significant court fees could deter some litigants. The experience in the employment tribunals has shown that even if it were necessary or desirable to reduce the number of claims, perhaps because some were seen as 'a try on', increasing court fees across the board is not the correct tool for the job. It deters just as many, if not more meritorious claims, than bad ones.

19. Hefty court fees will encourage wealthier litigants to defend claims on the commercial risk of actually being sued, rather than the legal and factual merits of their defence. Similarly, those with valid counterclaims may not be able to bring them when faced with a well-resourced claimant. A real-life example of this was given to SEC by a member whose client, a company in Essex employing 25 people, was victim of a fraud by one of its employees on a credit card negligently issued by a bank on the company' account. The company was unable to raise the £3,500 fee to issue a counterclaim and as a result will have to pay back to the retailer the £70,000 spent by its criminal employee, as well as paying both sides' legal costs. The fact that the victim of a breach of contract may have to find up to £20,000 merely to issue a claim can accordingly be a significant bargaining chip in favour of the wrongdoer in negotiations. This undermines the Pre-Action Protocol process, which is a fundamental part of the civil court reforms introduced in 1999.

20. Another real-life example given anonymously by a barrister concerned an SME which was a small-scale road haulier. Its income-generating asset, a lorry, was put out of use due to damage
sustained in a collision with another lorry owned by an extremely well-known large UK commercial road haulage operator. A dispute as to fault for the accident ensued, leaving the SME without a means of generating income and with a significant repair bill. The SME cannot afford to repair the vehicle and pay the court fee. The practical reality for the SME is to negotiate a settlement as quickly as possible and without the need to pay the court fee. This will mean accepting less by way of settlement than the SME should recover, with a resulting adverse impact on the finances of the business.

21. The large haulier gains a commercial advantage against the SME either way: if the claim is dropped, then the smaller business has had to bear the loss caused by its larger competitor. If the negotiations for a claim are pursued, then there is an incentive for the large company to apply pressure by dragging out negotiations until court proceedings are required, in the knowledge that the SME may not be able to wait that long and will most likely take a discount on its losses in the meantime. One SEC member reported that he had noticed that larger organisations were already adopting this approach in negotiations, which was already bearing fruit.

22. Substantial court fees are therefore likely to have a 'chilling effect' on the ability of small to medium sized enterprises and individuals, including consumers, to enforce their civil rights. These are the litigants who are highly unlikely to qualify for any remission of fees, regardless of the design of any remissions scheme. The fees have created an additional risk of under-settlement or withdrawal of claims for reasons related solely to the funding of proceedings. In trade or economic terms the court fees therefore have a market-distorting effect which could act not just as a barrier to justice, but to free market competition as well. It is of concern to SEC that no economic input appears to have been obtained by MoJ when formulating its measures or the new proposals.

23. Another example provided to SEC by a solicitor concerns the situation of a young couple with two small children. They purchased their family home with the benefit of a mortgage loan for the sum of £650,000. In paying that sum they acted in reliance on the professional expertise of a valuer. The expert valuer inspected the property and raised queries which he said required the
benefit of further input from an expert structural surveyor. A surveyor was engaged by the couple and reported that there were cracks in the property but did not identify any generalised subsidence. After receiving the surveyor's report, the valuer simply affirmed his original valuation. In fact, the property was built on unstable ground and is structurally unsound. It may need to be entirely demolished and rebuilt and the actual value could be as low as £350,000.

24. The family cannot raise any more capital secured on the property due to the problems. However, neither the valuer nor the surveyor will accept responsibility for the family's predicament. As a result they have had to spend their savings on reports from several experts, totalling some £20,000. Solicitors are acting on a conditional fee agreement, but it is highly likely that the family will not be able to proceed with their claim should they have to find £10,000 for court fees. They have already told their solicitors that they will end their claims if the fees are increased to £20,000 before the time comes at which the case is ready to be issued.

25. This family does not qualify for any fee remission. Both of the couple work and they and their children are having to live in the unsound property because they cannot afford both the mortgage and rental at the same time. Meanwhile the cracks are growing. It is hard to overstate the injustice of the state effectively removing any prospect of them recovering their life savings and rebuilding their family home through imposition of fees.

26. Another feature of this example is the fact that the solicitors' firm which is acting for the family, which has already taken on the risk of not being paid for its work in the event that the claim does not succeed, cannot afford to fund the court fee upfront. Only the largest litigation firms would be in a position to make this offer to clients, which of itself is likely to present a significant barrier for new and smaller firms wishing to compete in the litigation market.

27. The final point to make arising out this example is that it does not meet the point to state that court costs are recoverable against the unsuccessful defendant at the end of the case. The fact is that the upfront nature of the costs is already having a deterrent effect. Secondly, this approach expects the litigant not only to take the risk of not securing and costs order and not being able to
enforce it. Related to this is the concern that interest is not recoverable on pre-judgment costs and therefore successful claimants are put in the position of lender to the unsuccessful defendant and cannot recover the loss of use of their money.

28. These examples of injustice already being caused illustrate why SEC considers that the enhanced fees order should be repealed and the latest proposals not acted upon.

PERSONAL INJURY AND WRONGFUL DEATH CLAIMS SHOULD BE REMOVED FROM THE FEE SCHEME ALTOGETHER

28. In addition to the above points, SEC also believes that even in the event that the scheme is not repealed, there should be an exemption from enhanced fees for all claims for personal injury and wrongful death.

29. Another real-life example illustrates the point: here a 60 year old man slipped and fell whilst in an hotel in Tunisia. He fractured his ankle so badly that his leg subsequently needed amputation below the knee. He is now unable to work as a result of his injuries and has substantial needs for prostheses, care and assistance as well as his loss of income. Following receipt of expert medical evidence, his solicitors, acting on a conditional fee agreement (no win no fee), have valued his claim for damages against the tour operator at potentially over £500,000. He does not qualify for fee remission, despite being on housing benefit and income-related benefits because he has some modest assets. However, he lives alone and cannot rely on family or friends for financial assistance to pay the court fees. It was only possible to give advice to the claimant as to whether his claim had reasonable prospect of success shortly before expiry of limitation. This has left the claimant with advice that his claim is viable, but only a very short period in which to attempt to raise the court issue fee of £10,000. There has been little or no consideration of the impact of limitation together with the upfront issue fees.
30. It is not acceptable to place victims under this stress in addition to the difficulties of coming to terms with their physical and psychological injuries and during a period of financial constraint. These are not a category of people who are able to 'contribute more' and the value of their claim is typically inversely proportionate to the amount they can afford to spend on court fees.

31. As the Claimant has no means to pay and no means of borrowing the monies, this claim will only proceed if the solicitor's firm agrees to lend the Claimant the money, taking on the risk that the claim fails and the Claimant is left unable to pay. Therefore this Claimant will only be able to bring a claim if he instructs one of the few large personal injury specialist firms. At a time when the government is seeking to encourage alternative business structures in the legal services market, the requirement to be able to lend large amounts of capital to clients is a significant barrier to trade and reduces consumer choice and competition in the legal services market. The fees are therefore also a barrier to entry to the legal services market.

32. The SEC therefore believes that personal injury and wrongful death claimants should be totally exempt from enhanced fees.

**FEE STRUCTURE IS CLUMSY AND INAPPROPRIATE**

33. Even if one starts from the premise that the user should pay for the cost of providing the services, the fees bear little or no relation to those costs.

34. This is because the assumption is wrongly made that all claims go to trial⁵. The second wrongly made assumption is that the cost to the court of resolving the dispute is correlative to the amount in dispute. There is simply no data available from the Courts Service to support the second assumption.

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⁵ This flies in the face of the MoJ's own statistics: see http://open.justice.gov.uk/courts/civil-cases Accessed on 14 September 2015
35. Taking the Commercial Court as an example, there were 1,162 claims issued in 2014. In the same period there were 73 trials. That is to say that fewer than 10% of the claims issued were ultimately decided by a judge following a trial.

36. There is therefore a real problem in having a system which charges a substantial upfront fee: in many cases the only Court time needed is for the determination of a relatively short application, such as a freezing injunction to secure assets. In many others, no court time is needed at all. For those claimants who have the choice of jurisdiction, it must be a relevant consideration that there is no significant prospect of their case actually needing to come to trial. It is one thing to charge a litigant £10,000 or even £20,000 for a 6 week trial (although we should emphasise that, for reasons given elsewhere in this document, we would oppose the increase in court fees in any event, however structured); it is quite another to raise the same charge for a litigant whose application for injunctive relief is issued but resolved by consent without ever entering the door of the court.

37. It is of concern to SEC that no detailed research or consideration has been undertaken into the type and nature of involvement that the civil courts have in different types of proceedings. The one-size-fits-all approach of the current scheme pays insufficient regard to the factors set out by the 2014 Act. Where service users perceive that the charging for the service is unfair or disproportionate, they will, if other options are open to them, take their 'purchasing power' elsewhere.

38. It must be noted that there has been less than 6 months since the imposition of these changes and the long-tail effects will take months, if not years to emerge: unlike Employment Tribunal claims, for which the limitation period is typically three or six months, the limitation period for civil court claims is typically three or six years. SEC is concerned that the perception of England and Wales as a high-cost litigation system will become established and irreversible long before the impact on access to justice is measurable. It is not sufficient to simply ask for 'hard luck stories'. Policy ought to be based on a credible and durable assessment of the risks and using accurate and up-to-date evidence. This does not appear to be of interest to MoJ.
CONCLUSIONS ON CIVIL COURT FEES

39. SEC is concerned that the court fees measures of March 2015 and the latest proposals are based on poor research, inadequate data and false assumptions. The changes which have been brought about pose significant risks to access to justice for both litigants and society as a whole. SEC is concerned that MoJ does not appear willing or able to look either beyond its own departmental remit or to appreciate either the seriousness of the effects or that they might be irreversible later.

SECTION 2: EMPLOYMENT TRIBUNAL FEES

1. In relation to the introduction of employment tribunal fees, we make the following submissions:

   • Evidence shows that the fees are inhibiting access to justice;
   • The aim of deterring weak or vexatious claims has not been achieved;
   • The aim of recouping the costs of the tribunal system from its users is an inappropriate aim;
   • Even if fees were necessary or appropriate, the existing fee structure is disproportionate in a number of respects;
   • The fee remission system does not ameliorate the access to justice problem. Remission thresholds are far too low, especially when compared with the fees required.

EVIDENCE AS TO THE EFFECT OF FEES ON ACCESS TO JUSTICE

2. We have looked at a number of different types of evidence which we believe individually and collectively demonstrate the significant negative effect the introduction of employment tribunal fees has had on access to justice.
EVIDENCE OF MERITORIOUS CLAIMS NOT PURSUED BECAUSE OF THE FEES

3. The starkest evidence is the sheer drop in numbers of employment tribunal claims:

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4. As we discuss further below, the fact that there has been no increase in success rates since the introduction of fees means that, of the 70% of individual claimants deterred in the more recent period, thousands had meritorious claims.

5. We are aware of research conducted by the Citizens Advice Bureau in which an analysis was made of 182 employment cases brought to bureaux between June and July 2014. CAB advisors assessed the strength of these claims and the likelihood of them being pursued and concluded:

- 4/5 of these claims had 50% or better prospects of success;
- Only 31% of the potentially successful claims were certainly going or likely to go to tribunal;
- In more than half of the cases, fees or costs were the deterrent factor;
- Under a quarter of claims worth £1000 or less were likely to be or definitely would be pursued to tribunal.

6. We understand that it was asserted as part of the Lord Chancellor’s defence of the Unison judicial review of employment tribunal fees that this evidence could not be relied upon,

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6 R v The Lord Chancellor [2015] EWCA Civ 935, para 62
because the methodology meant the findings were unreliable and because advisers’ assessment of the merits of these claims was not objective. The latter is of course true of any assessment of merits which could be presented in respect of any individual unlitigated claim.

7. We are concerned that Mr Gove has set the bar impossibly high. No one, bar an employment tribunal which has heard both sides, can persuasively say what is truly a meritorious case. The search for a meritorious individual in any event seems particularly futile to us against that backdrop of statistics which show that, of the many thousands of individuals who have now been deterred from bringing claims, a significant proportion would have been successful.

8. Nonetheless, we offer the following two example cases, provided to us by a specialist employment barrister who does a significant amount of direct access work, with his assessment of their merits.

Example 1

- C managed a property estate. He earned around £40,000. He had only been employed for a few months, hence he was not entitled to claim unfair dismissal. He made various complaints of sex discrimination - each of which was ignored. The last were made in his self-appraisal. This formed part of the appraisal document, the being rest completed by the employer. Shortly after the appraisal he was dismissed. He was given no reason but was simply told that his services were no longer required. He requested a copy of his personnel file. This was refused. He then requested it as a subject data request at which stage it was provided. However, that part of the appraisal where he had complained of sex discrimination had been redacted. This, along with the absence of any reason for dismissal having been given and his pervious sex discrimination claims having been ignored, led to a clear inference that he had been dismissed for those complaints. In other words he had a strong claim for victimisation. His claim for sex discrimination was weak. However, there was no real evidence his complaints had been made in bad faith. He had not found new work. At the end of early conciliation, during which time the employers
had refused to settle, he decided, in the light of the prospective costs and in particular the ET fees, not to proceed.

Example 2

- Again C earned about £40,000. His employer’s attendance procedure expressly stated that it should ascertain whether an employee, against whom disciplinary action is contemplated for absence, has an underlying medical condition. C did - namely, anxiety and depression. He was dismissed, after 10 years employment, for being late on two days and absent for one. His sick note made it clear the absence was due to anxiety. He also, during the disciplinary hearing, said that he had suffered from this throughout his life. Nonetheless, no consideration was given to it (at least none that could be inferred from the disciplinary outcome letter, other relevant correspondences and minutes of the hearing). Thus he had strong claims for disability discrimination and unfair dismissal. Once, however, counsel had advised of the costs, and in particular the ET fees, he decided not to proceed - he did not even try early conciliation.

9. In both of these cases, we are told that counsel offered reasonable competitive fixed fees and that cost overall was a factor but that each prospective claimant told counsel that the ET fees were the deciding factor.

EVIDENCE AS TO HYPOTHETICAL INDIVIDUALS WHO WOULD BE UNABLE REALISTICALLY TO AFFORD FEES BUT WHO WOULD NOT QUALIFY FOR REMISSION

10. Another category of evidence which it has been suggested (not least in the Unison judicial review proceedings) would demonstrate that there has been a negative effect on access to justice is evidence that there are hypothetical individuals who would not be eligible for
remission of fees but, on an analysis of income and outgoings, would not be able to afford to pay the issue and hearing fees.

11. It appears that a number of hypothetical individuals were put forward by Unison in the first judicial review of employment tribunal fees, *Unison 1*, but that there were disputes about the accuracy of the figures in relation to these and/or the assumptions made in relation to them. Ultimately, it appears from the Court of Appeal judgment in the consolidated appeal in both cases, that there was no focus on affordability for notional claimants either in *Unison 2* or in the appeal before the Court of Appeal.

12. The level of difficulty required to demonstrate a breach of the EU principle of effectiveness for the purposes of the judicial review was that it was ‘virtually impossible or excessively difficult’ for an individual to pursue his or her rights under EU law. We would suggest that that is not the appropriate test for the Government to apply in looking more broadly at whether the fees are impeding access to justice and weakening the system of employment rights. We would suggest that, even if there are a large number of cases where fees do not create a difficulty of that order but where the fees are sufficient to deter reasonable individuals from pursuing worthwhile claims, this represents a significant restriction on access to justice. Furthermore, the dramatically reduced risk to an employer of a claim being brought reduces the incentive on employers to respect employment rights of all sorts. It

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9 Per Elias LJ *Unison (No 2), R v The Lord Chancellor* [2014] EWHC 4198
10 See Underhill LJ at para 75, *R v The Lord Chancellor* [2015] EWCA Civ 935:

‘I would accordingly hold that it has not been proved that the Fees Order breaches the principle of effectiveness. 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.’
should be borne in mind that an individual considering a claim will often be in a situation of reduced earnings and/or significant economic uncertainty, eg:

- Recently dismissed and in receipt of no income (such a person will not get fee remission if s/he has savings over the threshold or a partner with earnings over the relevant threshold);
- Pregnant, on or recently returned from maternity leave;
- Suffering from a disability which has caused long-term sickness absence.

Some workers on contracts with no guaranteed hours might on paper be over the income threshold for fee remission but would no doubt hesitate to spend significant sums on tribunal fees when they have no guarantee of any particular ongoing level of earnings.

13. Whilst we acknowledge the difficulties involved in creating realistic hypothetical individuals, we put forward several examples in Appendix A to demonstrate that there is likely to be a large number of individuals not eligible for fee remission who realistically will have insufficient disposable income to pay fees and/or would not be acting prudently in taking any risks with the limited funds they might be able to gather.

14. Looking more broadly at the affordability of employment tribunal fees by vulnerable workers, according to the Joseph Rowntree Foundation a couple with two children will need to earn £40,000 per annum in total to achieve Minimum Income Standard (‘MIS’). The annual gross income of such a couple over which full fee remission will not be granted is £20,820. In relation to a £250 issue fee, there will be no remission at all where the gross income is £26,820. According to the Institute of Fiscal Studies the average income for such a couple with two children is £31,00011, ie a worker in such an ‘average’ household neither achieves MIS nor is eligible for fee remission.

ACAS EVIDENCE

11 http://www.telegraph.co.uk/finance/economics/11447587/Average-incomes-return-to-pre-recession-levels.html
15. The ACAS 2014/15 Annual Report\textsuperscript{12} stated that out of 60,800 notifications to ACAS in the period April – December 2014, 15\% were formally settled and 22\% progressed to an employment tribunal claim.

16. An ACAS survey\textsuperscript{13} showed that of those claimants whose disputes were not formally settled by Early Conciliation and who did not submit a claim, 26\% said it was because “tribunal fees were off putting”. 26\% of the 63\% of people whose case neither settled nor progressed to an ET equates to a total of 9959 people deterred by fees. This suggests some 13,245 people per annum are being put off progressing their claims because of fees.

**ANECeDOTAL EVIDENCE ABOUT THE EFFECT OF THE FEES ON EMPLOYER BEHAVIOUR**

17. We understand anecdotally from some solicitors and HR professionals with whom we have spoken that, when advising employees on the risks of dismissing a particular employee, they are now in the habit of advising that lower paid employees are less like to be able to afford fees and therefore less likely to bring a tribunal claim.\textsuperscript{14} It does not take much imagination to extrapolate from this sort of advice the following potential effects on employer behaviour:

- A willingness to mete out rougher justice to poorly paid employees on the basis that the risk of being taken to a tribunal is low;
- Calculations being made as to which employees an employer can afford to dismiss based on income.

**RATIONALE FOR INTRODUCING FEES**

\textsuperscript{12} http://www.acas.org.uk/annualreport
\textsuperscript{14} A couple of tweets from an HR professional (Karen J Teago) illustrate the point:

Aug 26

All my professional training in assessing risk of #ukemplaw claims has refocused on likelihood of having funds to file claim

Every em’er now considers (or ought to) the ability of em’ee to pay fees in risk assessing proposed course of action

#ukemplaw #tribunalfees
18. The Government’s aims in introducing fees included the following:

- the deterrence of weak or vexatious claims;
- requiring those who use the employment tribunal system to help fund that system.

The former aim has not been achieved and the latter is wrong in principle.

WHAT STATISTICS ON SUCCESS RATES REVEAL ABOUT THE TYPES OF LITIGANTS WHO HAVE BEEN DETERRED FROM BRINGING CLAIMS

19. If the introduction of fees was deterring weak or vexatious claims, one would expect the success rates to have increased after the introduction of fees. This has not proved to be the case.

20. We have considered the statistics produced as Tables 2.2 and 2.3 to the Tribunal and Gender Recognition Certificate Statistics Quarterly January to March 2015. These tables, which show ‘Total number of disposals by jurisdiction, 2007/08 to Q1 2015/2016’ and ‘Percentage of disposals by outcome and jurisdiction, 2007/08 to Q1 2015/2016’ do not demonstrate an increase in rates of success since the introduction of fees. Whilst the number of single and multiple cases has fallen by 67% and 69% respectively the “success” rate in the Employment Tribunal fell rather than increased between 2013 and the last quarter of 2014/2015 from 79% in 2013/14 to 62% in the last quarter of 2014/15. Accordingly the success rate has not increased as a result of the deterrence of weak or vexatious claims.

21. Further the imposition of a fee structure is not the appropriate means to address the issue of weak or vexatious claims, which by their very nature are often pursued by litigants without insight into the merits of those claims, who have no concern for the merits of the claim or who have other reasons for pursuing such claims. The issue of vexatious or unreasonable claims and the deterrence of such claims are matters which are appropriately addressed by the costs regime which is in place in the Employment Tribunals and by the power to strike out.
such claims. The appropriate and effective approach to such claims is active case management, not a fee structure which undermines access to justice, a matter the Government accepted in its response to the consultation.19

RECOVERING THE COSTS OF THE TRIBUNAL SYSTEM FROM USERS IS WRONG IN PRINCIPLE

22. It is the deterrent effect on employers of possible litigation which safeguards the whole system of employment rights in the UK. So every claimant who seeks to enforce his or her rights through the employment tribunal is contributing to a system which benefits all workers. It is wrong in principle that it is employment tribunal claimants, who are often particularly economically vulnerable, who should have to bear the costs of providing that societal benefit. The requirements of and need for access to justice outweigh any benefit from court fees. The (net) fees contributed approximately 13% to the cost of expenditure by HM Courts and Tribunal Service on employment tribunal business in 2014/201520.

ALTERNATIVELY: EVEN IF THERE WERE A CASE FOR FEES, THE LEVELS ARE TOO HIGH

23. Even if it were accepted that there is a place for fees in the Employment Tribunal system, those fees are set at a disproportionately high level. There are fairer ways of allocating a reasonable proportion of the costs to users of the system; see for example the Hard Labour Blog proposal for modest participation fees for both claimants and respondents and more substantial losing fees for respondents: *An Alternative Tribunal Fees Regime: Let’s Do the Maths.*21.

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20 HM Courts and Tribunal Service Annual Report and Accounts 2014-14 page 79
21 http://hardlabourblog.com/2014/04/22/et-fees-do-the-maths/
24. Unless remission applies, the fees that are payable in order to bring a claim (“Issue Fees”) are as follows:

- Type A - £160
- Type B - £250

25. There is then a further “Hearing Fee” to pay prior to the first substantive hearing:

- Type A - £230
- Type B - £950

Type A claims include unlawful deduction of wages, holiday pay, breach of contract claims.
Type B claims include unfair dismissal and discrimination claims.

26. Different amounts are payable in respect of multiple claims and in respect of various applications.

27. According to the ONS\textsuperscript{22}, the 2013 gross median pay for adults working full time was £517.4, which amounts to a gross annual salary of £26,904.80. The provisional ONS figures for 2014 show that the gross median pay for full time adults was £518, which amounts to a gross annual salary of £26,936.

28. Unfair dismissal awards are capped at the lower of £78,335 and a year’s pay (Section 124(1ZA) ERA 1996). The total fees payable to bring an unfair dismissal or discrimination claim (assuming no applications or appeals) amount to approximately 4.5% of the amount it is permitted to award the average claimant (assuming a gross annual salary of £26,904 or £26,936).

\textsuperscript{22}http://www.ons.gov.uk/ons/taxonomy/index.html?nscl=Annual+Earnings#tab-data-tables234
29. The position is significantly starker when fees are compared with actual average ET awards. For a detailed analysis see our Appendix B.

THE FEE REMISSION SYSTEM

30. Our primary contention is that there is a large number of individuals who neither qualify for fee remission nor can realistically afford to pay fees. We have a further concern that there are inexplicable inequities between the employment tribunals and the civil courts in relation to fee remission, particularly when comparing levels of fee charged with the disposable capital test in each jurisdiction.

31. We are also concerned that the information gathering exercise in relation to fee remission has been inadequate and, for example, there has been no enquiry into the reason for withdrawal of a number of claims. See Appendix C below for our fuller analysis of fee remission.

30 September 2015
Appendix A: Hypothetical individuals

**Wholly hypothetical individual:**

Woman dismissed. She lives with her partner in London. Partner earns £2250 gross per month (£1787 net) so the woman would not qualify for fee remission\(^\text{23}\). They have two children of primary school age.

The Joseph Rowntree Foundation’s Minimum Income Standard (‘MIS’) weekly figure for a couple with two children, age 2-4 and primary school age\(^\text{24}\) is £742.53. If one deducts childcare from that figure on the assumption that the woman will discontinue childcare whilst she is out of work, the figure is £576.91, ie £2499.94 per month. The MIS figure includes rent of only £92.42 per week, which is an implausibly low figure for accommodation to house two adults and two children in London\(^\text{25}\). This potential litigant lives in a household which does not achieve MIS but is eligible for no fee remission. Although it is difficult to work out exact figures, if one uses online benefits calculators with plausible invented details eg as to ages of children, postcode etc, it does not appear that the benefits this family would be entitled to (eg tax credits, housing benefit) would take them near to or over the MIS.

**Actual individual (not presently wishing to bring a claim):**

Single woman, no children, working as a nanny.

Earnings - £1159 after tax, NI and pension\(^\text{26}\)

Looking at the relevant figures for outgoings in the Joseph Rowntree MIS ‘basket’:

Rent - £450

Food - £200 per month

Alcohol - £20/£40 per month

\(^{23}\) To qualify for full fee remission, gross household income would have to be <£1,735. This couple’s additional income would mean the woman does not qualify for partial fee remission. See Paragraph 11, Schedule 3, Fees Order 2013.


\(^{25}\) http://homelet.co.uk/assets/documents/HL3729-May-2015-HomeLet-Rental-Index-08.06.15.pdf

\(^{26}\) This will represent a gross figure on which she will not be entitled to fee remission.
Clothing - £0/£30 per month
Water rates - water meter on £25 per month
Council Tax - single person discount £70 per month
Fuel - Gas £25 / Electric £25
Other housing costs - £30
Household goods - £30
Household services - £40
Personal goods and services - £30
Motoring - £60
Other travel costs - £10
Social and cultural participation - £30

This potential litigant has £114 left per month (taking the lower figures for alcohol and clothing).
No doubt she could curtail some expenditure (eg spend no money at all on alcohol or socialising) but it is nonetheless difficult to see how she could find a £250 issue fee or a £950 hearing fee by ‘tightening her belt’.
Appendix B: Level of fees as compared with average employment tribunal awards

Unfair Dismissal
- Median award 2014/15 = £6,955; mean award 2014/2015 = £12,362
- As such, a Claimant is required to pay a fee that is equal to just over 17% of the median award (and approximately 10% of the mean award) in order to bring an unfair dismissal claim to a hearing.

Race Discrimination
- Median award 2014/15 = £8,025; mean award 2014/2015 = £17,040
- As such, a Claimant is required to pay a fee that is equal to approximately 15% of the median award (and approximately 7% of the mean award) in order to bring a race discrimination claim to a hearing.

Sex Discrimination
- Median award 2014/15 = £13,500; mean award 2014/2015 = £23,478
- As such, a Claimant is required to pay a fee that is equal to 8% of the median award (and approximately 5% of the mean award) in order to bring a sex discrimination to a hearing.

Disability Discrimination
- Median award 2014/15 = £8,646; mean award 2014/2015 = £17,319
- As such, a Claimant is required to pay a fee that is equal to just under 14% of the median award (and approximately 7% of the mean award) in order to bring a disability discrimination claim to a hearing.

Religious Discrimination
- Median award 2014/15 = £1,080; mean award 2014/2015 = £1,080
- As such, a Claimant is required to pay a fee that is greater than the average award in order to bring a religious discrimination claim to a hearing.
Sexual Orientation Discrimination

- Median award 2014/15 = £6,000; mean award 2014/2015 = £17,515
- As such, a Claimant is required to pay a fee that is equal to 20% of the median award (and approximately 6.8% of the mean award) in order to bring a sexual orientation claim to a hearing.

Age Discrimination

- Median award 2014/15 = £7,500; mean award 2014/2015 = £11,211
- As such, a Claimant is required to pay a fee that is equal to 16% of the median award (and just over 10% of the mean award) in order to bring an age discrimination claim to a hearing.

This is even more the case when compared with many Type A Claims. The same statistics are not available for Type A Claims as are available for Type B Claims.

Statistics from the Department for Business, Innovation & Skills 2013 Study “Payment of Tribunal Awards” found that the median award across all jurisdictions was £2,600. As such fees for Type A claims amount to 15% of amounts awarded and fees for Type B claims amount to 45% of amounts awarded.

The same study showed that 42% of claimants received less than £2,000, with 11% receiving less than £500.

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Appendix C: Fee Remission.

1. The House of Commons Library produced a Briefing Paper dated 15 September 2015 which sets out in paragraph 2.5 how the fee remission system operates.

2. An applicant must first pass through a gateway of showing that s/he has disposable capital of £3,000 or less.

3. In the civil courts the following disposable capital thresholds apply:

<table>
<thead>
<tr>
<th>Court or tribunal fee</th>
<th>Disposable capital threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>Your court or tribunal fee is:</td>
<td>Your, and your partner’s disposable capital is less than:</td>
</tr>
<tr>
<td>Up to £1,000</td>
<td>£3,000</td>
</tr>
<tr>
<td>£1,001 - £1,335</td>
<td>£4,000</td>
</tr>
<tr>
<td>£1,336 - £1,665</td>
<td>£5,000</td>
</tr>
<tr>
<td>£1,666 - £2,000</td>
<td>£6,000</td>
</tr>
<tr>
<td>£2,001 - £2,330</td>
<td>£7,000</td>
</tr>
</tbody>
</table>

4. It is notable that for both the ET and EAT the disposable capital threshold is set at £3000 - even though for Type B single claims the combined issue and hearing fee is £1200, and for the EAT the fees are £400 to lodge an appeal, and £1200 hearing fee; a combined total of £1600. The disposable capital threshold therefore appears to be lower in the employment field than for civil courts.

5. If an applicant passes through this gateway, s/he must then demonstrate that s/he has gross monthly income below the relevant threshold. This ranges from £1085 for a single person with no children (if a person works 35 hours per week on minimum wage s/he will exceed this level), to £1735 for a couple with two children.
6. Whilst HMCTS form EX160A indicates that receipt of certain ‘passporting’ benefits entitles an applicant to a full fee remission, this is in fact not reflected in the Fees Order.\textsuperscript{28} The Ministry of Justice Tribunals and Gender Recognition Certificate Statistics Quarterly (certainly for January – March 2015, published 11 June 2015\textsuperscript{29}, and for April – June 2015, published on 10 September 2015\textsuperscript{30}) repeats the (incorrect) assertion that “claimants in receipt of certain benefits are entitled to full remission.”

7. Of those who have applied for fee remission, in the first two years of operation – between July 2013 and June 2015, some 44,400 cases resulted in issue fees being requested and remission applications were made in 20,100 of those. Remission was in fact awarded (in full or in part) in 7900 cases.\textsuperscript{31}

8. Figures for the most recent quarter for which statistics are available show that between April and June 2015 there were 5412 cases in which an issue fee was expected; 68\% had full issue fees paid outright and 21\% were awarded a full or partial fee remission (with the remaining 11\% of cases not being taken further). Some 51\% of applications for remission were fully or partially successful.

9. For the same period there were 3050 hearing fees requested; just 26\% had the full fee paid outright. 14\% were awarded full or partial remission – this amounted to some 79\% of hearing fee applications being successful – one assumes that this is because it is those who have been successful in their issue fee application who then apply for a hearing fee remission.

\textsuperscript{28} Employment Tribunals and Employment Appeal Tribunal Fees Order 2013
10. 4% of claims in which a hearing fee is requested were withdrawn – some 111 claims. No enquiry has been made as to why these claims have been withdrawn and whether it is related to inability to pay.

11. 13% of claims settled and 1% were struck out. For some 42% of these 3050 cases, no outcomes have been recorded.