Written evidence from TUC

Introduction

1.1 The TUC comprises 52 trade unions, representing nearly 6 million people who work in a wide variety of occupations and across the public, private and voluntary sectors.

1.2 Trade unions have extensive experience of representing members and helping them to resolve workplace disputes. The TUC believes that it is in the interests of all parties to resolve workplace disputes as swiftly as possible before they escalate. Where it is not possible to do this by using workplace procedures, unions will seek to defend their members’ interests by supporting meritorious claims to an employment tribunal.

1.3 The introduction of employment tribunal fees has meant that ordinary working people have limited recourse to the law to protect their rights at work. Now the government is seeking to prevent working people from relying on trade unions to protect their interests through the Trade Union Bill. The Bill includes measures which will limit the ability of unions to represent members in the workplace, including a reserve power for the government to impose a cap on the amount of time union workplace reps in the public sector can spend accompanying individuals in grievance and disciplinary hearings.

Key points

2.1 The TUC opposed the introduction of employment tribunal fees and we repeat our call for them to be abolished as a matter of urgency. The dramatic 69 per cent fall in the number of cases going to tribunal shows that workers are being priced out of justice and fees are undermining the effectiveness of employment rights.

2.2 Employment tribunal fees are neither a necessary nor an effective way of encouraging early settlement of claims. Early conciliation at Acas became mandatory in May 2014. Acas are receiving high levels of notifications of potential claims from individuals. Fifteen per cent of these claims are successfully conciliated at an early stage. A further 22 per cent progress to tribunal. But it appears that a large proportion drop out of the system with no resolution.
2.3 The remission scheme has not adequately mitigated the impact of fees on low paid workers. The household income and disposable capital tests disqualify many low-paid workers from a full remission.

2.4 The net revenue from tribunal fees accounts for 12.5 per cent of the costs of running the tribunal service. This small percentage increase in funding is outweighed by the huge decline in the number of people accessing justice.

Why access to justice matters

3.1 Statutory employment rights exist to ensure minimum standards of treatment in the workplace. Rights such as the minimum wage, paid annual leave, paid time off for maternity, paternity or parental reasons, rights not to be discriminated against and not to be unfairly dismissed bring important social and economic benefits. If observed, they help ensure decent standards of living, stability of income, job security and equality of opportunity. They can also contribute towards the creation of a committed and engaged workforce, can help reduce sickness absence and support the retention of skilled workers, all of which boosts productivity.

3.2 People who are mistreated at work and who are denied these basic rights must be able to hold their employer to account, ultimately at an employment tribunal if all other reasonable means of resolving a dispute have failed. If access to justice is denied, the rights become illusory. This is bad for the individuals concerned but it has wider implications too. If rogue employers believe they can get away with flouting the law they will do so and they will undercut those who are striving to meet or exceed their legal obligations.

3.3 Many of our employment rights also have a basis in EU law, which requires an effective remedy to be available at national level for any individual whose rights have been breached. Similarly, Article 6 of the European Convention on Human Rights requires access to judicial determination for those who have had their civil rights infringed. Access to justice must be a realistic possibility and not merely theoretical. Putting barriers like high costs in the way of those seeking to apply to a court or tribunal risks undermining the effectiveness of EU-derived rights and could breach Article 6.
Impact of employment tribunal fees

5.1 The main stated policy objective for the introduction of fees was to recover a proportion of the costs of running the employment tribunal service from users who can afford to pay. Ministers repeatedly stated in parliament that fees were not intended to deter individuals from bringing claims. However, the introduction of employment tribunal fees has stopped tens of thousands of workers from going to tribunal each year and, having exhausted workplace procedures and early conciliation, these workers are left with no effective remedy for breaches of their rights.

Impact on volume of cases

5.2 The introduction of employment tribunal fees on 29 July 2013 resulted in a dramatic fall in cases. Figure 1 shows the drop in single and multiple cases and how the record low levels have persisted since.

5.3 In the 12 months to June 2013 (which excludes the peak in July 2013 as some people submitted their claims early to avoid the fees), employment tribunals received an average 4,908 cases a month. Between October 2013 and June 2015 (which excludes the dramatic falls in August and September 2013 partly caused by the early submission of some cases), there was an average 1,505 cases a month. This means that since the introduction of fees the average number of cases going to tribunal each month has fallen by 69 per cent.¹

Figure 1: Impact of tribunal fees on single and multiple cases²


² Tribunals and Gender Recognition Statistics Quarterly (April to June 2015)
5.4 The total number of claims per month is more volatile (figure 2) but the significant drop caused by fees is still evident. The greater volatility in the number of claims compared to the number of cases is mainly due to fluctuations in the number of claims per multiple case. For example, the rise in claims towards the end of 2014 and start of 2015 can be explained by a rise in working time and unlawful deductions from wages claims following the EAT ruling in *Bear Scotland v Fulton* on the calculation of holiday pay. Many of these claims were lodged as multiples and the average number of claims per multiple rose in this period from around 10-14 per case to 24-50 per case.

Figure 2: Impact of fees on total number of claims

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3 Tribunals and Gender Recognition Statistics Quarterly (April to June 2015)
5.5 Table 1 shows that there has been a substantial reduction in the number of claims going to tribunal across all jurisdictions. In most jurisdictions the number has more than halved in the past two years. A range of factors will affect each jurisdiction, for example, some of the recent decline in unfair dismissal and redundancy pay claims is likely to be accounted for by improving economic conditions and the increase in the qualifying period from one to two years for unfair dismissal, while some of the recent variations in equal pay, working time and holiday pay claims will result from bulk submissions or the withdrawal or settlement of multiple claims. However, the dramatic across-the-board drop in numbers immediately after the introduction of fees, which has not been significantly reversed in any area, demonstrates that fees are a major barrier to justice for all kinds of employment dispute.

5.6 For claims like non-payment of wages, fees of £390 (£160 issue fee plus a £250 hearing fee) often exceed the amount of money the individual is seeking to recover. Workers making these kinds of claim are often low paid and are already out of pocket because of their employers’ failure to pay. It is no wonder that there was an 85 per cent drop in such claims in the year after fees were
introduced (the more recent pick up, as already stated, reflects submissions of multiple claims for holiday pay).

5.7 For higher-value claims, such as unfair dismissal and discrimination claims, the fees of £1,200 (£250 for issue and £950 for hearing) are significant sums when compared to the potential awards if a case succeeds. For example, in 2014/15 the median award for an unfair dismissal case was £6,995 and for a race case it was £8,025. People seeking to bring these types of cases are often out of work with no immediate income, having just lost their jobs or resigned because of the ill treatment they have received.

Table 1: Claims by jurisdiction

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<tr>
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<tbody>
<tr>
<td>Age Discrimination</td>
<td>810</td>
<td>601</td>
<td>-26%</td>
<td>218</td>
<td>-73%</td>
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<tr>
<td>Breach of contract</td>
<td>7,804</td>
<td>2,514</td>
<td>-68%</td>
<td>1,949</td>
<td>-75%</td>
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<td>Disability discrimination</td>
<td>1,811</td>
<td>969</td>
<td>-46%</td>
<td>781</td>
<td>-57%</td>
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<td>Equal pay</td>
<td>7,928</td>
<td>1,236</td>
<td>-84%</td>
<td>3,360</td>
<td>-58%</td>
</tr>
<tr>
<td>National minimum wage</td>
<td>122</td>
<td>37</td>
<td>-70%</td>
<td>35</td>
<td>-71%</td>
</tr>
<tr>
<td>Part time workers regulations</td>
<td>204</td>
<td>96</td>
<td>-53%</td>
<td>41</td>
<td>-80%</td>
</tr>
<tr>
<td>Race Discrimination</td>
<td>1,240</td>
<td>502</td>
<td>-60%</td>
<td>500</td>
<td>-60%</td>
</tr>
<tr>
<td>Redundancy - failure to inform &amp; consult</td>
<td>3,635</td>
<td>270</td>
<td>-93%</td>
<td>837</td>
<td>-77%</td>
</tr>
<tr>
<td>Redundancy pay</td>
<td>3,205</td>
<td>866</td>
<td>-73%</td>
<td>738</td>
<td>-77%</td>
</tr>
<tr>
<td>Religion or belief discrimination</td>
<td>248</td>
<td>91</td>
<td>-63%</td>
<td>81</td>
<td>-67%</td>
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<tr>
<td>Sex Discrimination</td>
<td>6,017</td>
<td>1,122</td>
<td>-81%</td>
<td>1,954</td>
<td>-68%</td>
</tr>
<tr>
<td>Sexual orientation discrimination</td>
<td>154</td>
<td>62</td>
<td>-60%</td>
<td>42</td>
<td>-73%</td>
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<tr>
<td>Suffer a detriment / unfair dismissal - pregnancy</td>
<td>388</td>
<td>288</td>
<td>-26%</td>
<td>178</td>
<td>-54%</td>
</tr>
<tr>
<td>Transfer of an undertaking - failure to inform and consult</td>
<td>255</td>
<td>121</td>
<td>-53%</td>
<td>205</td>
<td>-20%</td>
</tr>
<tr>
<td>Unauthorised deductions from wages</td>
<td>21,213</td>
<td>3,133</td>
<td>-85%</td>
<td>9,306</td>
<td>-56%</td>
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<tr>
<td>Unfair dismissal</td>
<td>11,041</td>
<td>4,235</td>
<td>-62%</td>
<td>3,119</td>
<td>-72%</td>
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<tr>
<td>Working Time Directive</td>
<td>52,204</td>
<td>3,255</td>
<td>-94%</td>
<td>11,728</td>
<td>-78%</td>
</tr>
<tr>
<td>Written pay statement</td>
<td>388</td>
<td>133</td>
<td>-66%</td>
<td>67</td>
<td>-83%</td>
</tr>
</tbody>
</table>

Weak and vexatious claims

5.8 A stated aim of the policy was to “disincentivise unreasonable behaviour like pursuing weak and vexatious claims”. Tribunals have a range of powers to deal with weak and vexatious claims such as powers to strike out claims, to require a deposit before hearing the claim and to order costs against a claimant. Employment judges have considered it necessary to use these powers in only a small percentage of cases. The tens of thousands of cases that have dropped out of the system since the introduction of fees cannot credibly be put down to weak and vexatious claims being stripped out.

Reimbursement of fees

6.1 In most successful cases employers have been ordered to reimburse the claimant’s fees. However, reimbursement is not automatic and tribunals retain some discretion. For example, in cases where the claimant succeeds on some of the points but not all, the tribunal has not always ordered full reimbursement. In addition, in cases where the employer is insolvent and the claimant has to apply to the Redundancy Payments Service for redundancy pay there is no employer to order a reimbursement from and it is not recoverable from the National Insurance Fund so the claimant never recoups their fees.

6.2 Potential claimants must also consider whether they are ever likely to receive any of the money awarded to them. Research for BIS shows that only half of tribunal awards are paid in full, even when the individual uses the available enforcement mechanisms to try and secure payment.  

Impact of remission scheme

7.1 When tribunal fees were introduced the government repeatedly claimed that access to justice would not be harmed because the lowest paid would be able to apply for a reduction or exemption from fees through a remission

| Written statement of reasons for dismissal | 212 | 90 | -58% | 45 | -79% |
| Written statement of terms and conditions | 854 | 337 | -61% | 243 | -72% |

5 IFF Research, Payment of Tribunal Awards (BIS, 2013)
scheme. As the then ministers explained to parliament: “Fees are not intended to deter individuals from bringing a claim, and nor do we believe they will, given the remissions system” and “introducing fees into these tribunals is not an attempt to deter individuals from bringing claims – vexatious or otherwise – and given the mitigations in place we do not believe the provisions of this order will do so.”

7.2 The impact assessment for the introduction of tribunal fees estimated that 23.9 per cent of all claimants would receive a full remission. TUC-commissioned research suggested low levels of eligibility among some of the lowest paid workers. For example, this analysis found that only 11.9 per cent of people earning the NMW who are in a couple and do not have children would qualify for a full remission. The remission scheme uses a household rather than an individual income test. This places people on a low income with a higher earning partner, usually women, at a particular disadvantage as they effectively have to gain their partner’s permission and financial support to pursue a tribunal claim.

7.3 The remission scheme that is now in place is even more ungenerous than the original. A further ‘disposable capital’ test was introduced in October 2013. This means that people who are in a household which has savings or investments of more than £3,000 will not qualify for a remission. Analysis commissioned by the TUC reveals that older workers are particularly disadvantaged by this test. Three in five households with at least one worker aged 50 to 60 have built up savings of £3,000 or more. It also penalises the one in five households with at least one disabled worker who has such savings and it is likely to disqualify some of the women who experience pregnancy discrimination each year if they have set aside money to help fund their maternity leave.

7.4 Around two-fifths of those who have made an application for an issue fee remission have been awarded one, while nearly three-quarters of those who have applied for a

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6 Hansard, First Delegated Legislation Committee 10 June 2013 c3 and HL Deb 8 July 2013 c74
7 MoJ Impact Assessment (30/05/2012)
8 TUC Response to Ministry of Justice consultation (March 2012)
9 TUC, At what price justice? The impact of employment tribunal fees (June 2014)
hearing fee remission have got one (the higher success rate for hearing fee remissions is likely to result from those who did not qualify for an issue fee remission not bothering to apply for one for the hearing fee).\textsuperscript{10}

7.5 Since the introduction of fees, claimants have been awarded a remission in 17.7 per cent of cases where an issue fee has been requested. In the vast majority of these cases (94.5 per cent) the claimant has received a full remission. In 15.9 per cent of cases where a hearing fee was requested, the claimant has received a remission and in the majority of these cases (86 per cent) they were awarded a full remission.\textsuperscript{11}

7.6 The fact that the proportion being awarded a remission is lower than was originally predicted partly reflects the stricter criteria in the current scheme but it will also be affected by other factors such as the deterrent effect of the remission application process and some reported problems in proving eligibility.\textsuperscript{12}

**Impact of early conciliation**

8.1 One of the justifications given by the government for introducing fees was to “incentivise earlier settlements”, but the introduction of fees was neither a necessary nor an effective way of encouraging early settlement. The government made early conciliation mandatory in May 2014. This means individuals must notify Acas of a potential claim so they can attempt early conciliation and if they do not they are barred from going to tribunal.

8.2 Acas figures show that over the year from April 2014 until March 2015, it received 83,423 cases for early conciliation. In the period April to December 2014, it reported that a successful settlement was reached in 15 per cent of cases and in 22 per cent of cases the dispute progressed to employment tribunal. This means that some 63 per cent of cases were neither settled by Acas nor progressed further. Acas says that from looking at


\textsuperscript{11} Ibid

\textsuperscript{12} See Citizen’s Advice Bureau, ‘One year on from the introduction of fees to access the Employment Tribunal: Summary of results from a survey of employment cases brought to Citizens Advice bureaux’ (July 2014)
conciliator case notes it believes that in at least 10 per cent of these cases the parties reached an agreed outcome without the need for a formal settlement or that the individual decided not to take the case further after an initial discussion with the conciliator. Even if you discount this further 10 per cent of cases, these figures suggest that more than half of the potential cases notified to Acas remain unresolved.\textsuperscript{13}

**Contribution towards cost**

9.1 The latest accounts from the Ministry of Justice show that in 2014/15 the net income from fees was £9 million. The expenditure on the employment tribunal service was £71.4 million. This means the increase in net income from fees covers 12.5 per cent of the cost of running the employment tribunal service. This 12.5 per cent gain in revenue was achieved at the expense of a 69 per cent drop in cases.

**Recommendation**

10.1 Tribunal fees must be abolished. They have unjustifiably restricted access to justice, leaving many workers with no effective means of enforcing their employment rights. This gives a signal to employers that they are unlikely to face any sanction if they flout the law and undermines compliance and good workplace practice.

**Pregnancy detriment and dismissals: An example of poor compliance, weak enforcement and the impact of early conciliation**

11.1 The EHRC and BIS recently funded a large-scale survey of the experiences of new mothers in the workplace. It highlights the scale of non-compliance with long established maternity rights. The survey findings suggest that 54,000 women a year (one in nine new mothers) are dismissed, made redundant when no other employee is, or are treated so badly while pregnant or on maternity leave that they are forced to leave their jobs.\textsuperscript{14}

\hspace{1cm}\textsuperscript{13} Acas, Early Conciliation Update 4 (April 2014 to March 2015) available at: \url{http://www.acas.org.uk/earlyconciliation}

\hspace{1cm}\textsuperscript{14} IFF Research, Pregnancy and Maternity-Related Discrimination and Disadvantage, First finding: Surveys of Employers and Mothers (EHRC, July 2015)
11.2 Even before the introduction of tribunal fees the number of women going to tribunal to enforce their maternity rights was small, which is unsurprising when you consider the pressure new mothers are under coping with a newborn baby and the short three-month time limit for bringing a claim. In the year 2012/13 prior to the introduction of fees, there were 1,593 claims for pregnancy-related detriment or dismissal. In 2014/15, tribunal statistics show there were 790 claims. This low level of enforcement fuels the poor levels of compliance.

11.3 Acas recorded that they received 1,851 notifications of potential pregnancy-related detriment or dismissal claims in 2014/15. Of these, 308 were settled by Acas at early conciliation stage. It recorded that 545 had progressed to tribunal (of which 264 were settled after further conciliation by Acas) and 998 had neither settled nor progressed to tribunal.15

30 September 2015

15 House of Commons - Written Answers - Department for Business, Innovation and Skills, 10/09/15