Written evidence from Citizens Advice

The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893) introduced the requirement from July 2013 to pay fees in order to issue a claim in the Employment Tribunal (ET) and an appeal in the Employment Appeal Tribunal (EAT) and to pay a further fee to have the claim or appeal listed for hearing.

This submission addresses the following terms of reference of the Justice Committee’s enquiry:
- How has the introduction of these fees affected access to justice?
- How has it affected the volume and quality of cases brought?

The evidence we present below suggests that the introduction of ET fees has acted as a barrier to access to justice for workers whose employment disputes cannot be resolved by non-judicial means.

Citizens Advice recommends that:
- Hearing fees should be reduced to a lower level to make them a low cost and affordable way of resolving employment disputes where conciliation has failed.
- If fees are to remain at current levels for complex cases, they should be lower for low value, simple claims such as non-payment of wages and other statutory amounts
- Alternatively, there should be non-tribunal procedures for resolving low value or simple claims
- Regardless, fees should be waived in cases where employees are required to obtain a tribunal judgment against employers who are not formally insolvent in order to obtain a redundancy payment from the Insolvency Service, or the law should allow for the reimbursement of those fees by the Insolvency Service; or the requirement to obtain a tribunal judgment should be removed in these cases

Introduction

Citizens Advice helps people to solve their problems and changes lives. Last year we helped 2.5 million people with 6.2 million issues from 2,600 locations in England and Wales. 380,000 of those issues related to employment and a further 7.2 million unique visitors sought help from the employment pages of our website citizensadvice.org.uk

We see large numbers of enquiries about problems with basic statutory rights such as national minimum wage, simple wage-theft and holiday rights, helping low paid and non-unionised workers to negotiate with employers and through the employment tribunal system.

Employment tribunals are adversarial tribunals with employers having greater access to paid legal advisers and representatives than workers particularly those who are low paid. We also continue to see widespread problems with non-payment of employment tribunal awards and their enforcement.
Citizens Advice welcomes measures to reduce the burden on business and the tribunal system caused by individuals bringing unmeritorious claims but it is our submission that the introduction of fees has:

- reduced the number of claims brought with a particular impact on discrimination claims
- not changed the proportion of unmeritorious to meritorious claims brought
- prevented the bringing of a large number meritorious claims
- acted as a barrier to access to justice with a particular impact upon low paid workers and women.

Citizens Advice research indicates four particular areas where workers’ access to justice is reduced because of the fees regime:

- Low value ‘Type A claims’, such as for non-payment of wages, notice pay or a redundancy payment, where fees are prohibitive in relation to the amounts owed, given low rates of recovery of compensation in successful claims
- Cases where workers are not entitled to full fee remission because of household income or capital but cannot afford fees, particularly for Type B cases such as unfair dismissal and discrimination claims
- Cases where workers are eligible for partial remission but still cannot afford the fees
- Cases where a redundant employee whose employer is unable to pay redundancy payments but is not formally insolvent is required to make an ET claim before s/he can claim a redundancy payment from the Insolvency Service, and where the Insolvency Service cannot reimburse payment of ET fees

**Reduction in tribunal claims**

A recent House of Commons Library briefing paper on Employment Tribunal fees contains the following statement:

“The introduction of employment tribunal fees at the end of July 2013 coincided with a steep number of cases received.

In the year to June 2013, employment tribunals received on average just under 13,500 single cases (brought by one person) per quarter. Following the introduction of fees, the number of single cases averaged around 4,500 per quarter between October 2013 and June 2015 – a decrease of 67%. The average number of multiple cases (brought by two or more people) received per quarter fell from just under 1,500 to fewer than 500, a 69% decrease.”

Across the same period, Citizens Advice statistics show that:

- our public information website received 3.8 million hits to its employment pages in 2012/13 rising to 7.1 million hits in 2014 / 2015
- across the same period, since July 2013 there has been a significant drop in the number of people coming to Citizens Advice with enquiries about Employment Tribunal claims (as distinct from enquiries about employment-related issues). In 2012/13 we advised on an average of 8,500 ET claim issues each quarter but

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1 House of Commons Library Briefing Paper, Number 7081, 15 September 2015, p11
http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07081
this has decreased rapidly and settled at an average of 5,000 per quarter during 2014/15, a reduction of 41% over the two years since the introduction of fees

- there has been a slight downward trend in the number of people seeking face-to-face advice from Citizens Advice about employment related issues generally as distinct from ET claims, from 263,111 in 2011/12 to 211,691 in 2014/15. This can be partly attributed to the loss of specialist employment advisers in local Citizens Advice services due to the removal of employment from the scope of Legal Aid in April 2103, and the fact that there is already some awareness of ET fees via public information sources but nevertheless demonstrates significant need. The fact that online inquiries have risen significantly, coupled with the drop in face-to-face enquiries, may suggest that people are finding out about the fees regime and giving up before approaching their local Citizens Advice.

Employment Tribunal issues raised at Citizens Advice
This fall in Citizens Advice enquiries about ET claims would be welcome if it was due to fewer problems at work, an increase in satisfactory earlier settlements, or fewer weak or vexatious claims. Our evidence, however, suggests this is not usually the case and people with strong claims are being put off or priced out by the large fees currently in place. Through a survey of local Citizens Advice advisers in July 2014 we found that less than a third of claims with a ‘Very good’, ‘Good’ or ‘50/50’ chance of success were considered likely to be, or were definitely being, taken forward.

Almost a year after the introduction of fees, in May 2014 it was made mandatory to notify Acas of an intention to bring an ET claim via the Early Conciliation procedure before bringing the claim. This requirement did not have a further dampening effect on the number of claims brought to ET, but Acas received 83,400 notifications in 2014/14 compared to about 18,300 cases brought to ETs in the same period.

Of 60,800 notifications made to Acas in April-December 2014, 15% were formally settled but 22% progressed to an ET claim. 63% were not formally settled but did not progress to ET.

It is our case that the figures show that the reduction in ET claims being brought is primarily as a result of the introduction of fees rather than any other factors such as the settling of disputes via Early Conciliation.

Reduction in discrimination claims

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Against the 66% reduction in single case ET applications there has been an 80% reduction in sex discrimination claims. We believe that this is partially due to the changes to the way that Legal Aid is delivered to individuals who have experienced discrimination but that discrimination - particularly in relation to the protected characteristics of disability and pregnancy - is widespread. For example, a 2015 survey of employers and women conducted for BIS and the EHRC into pregnancy and maternity-related discrimination and disadvantage\(^4\) found:

Around one in seven mothers said they were:
- Given unsuitable work or workloads during pregnancy (15%)
- Encouraged to take time off or signed off on sick leave before they felt ready to start maternity leave (14%).

One in 10 reported that they were:
- Encouraged to start their maternity leave earlier than they would have liked (11%)
- Discouraged from attending antenatal appointments (10%).

And around one in 20 said that they:
- Failed to gain a deserved promotion or side-lined in another way (5%)
- Were unfairly criticised or disciplined (5%)
- Were denied access to training (4%)
- Had hours or shift pattern changed against wishes (3%).

### Proportion of unmeritorious and meritorious claims brought

If the introduction of fees was meeting one of the stated aims of discouraging or preventing unmeritorious, vexatious or speculative claims, one would expect to see a reduction in the proportions of claims failing at ET.

However, statistics show that the proportion of successful to unsuccessful claims has not significantly changed.

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Table 2.3
Prevention of meritorious claims

Citizens Advice has undertaken research into the effect of the introduction of fees on the bringing of ET claims.

Fee levels

Research carried out by Citizens Advice in December 2014 found that more than four out of five (82%) people with a problem at work felt that current fee levels would make them less likely to bring an ET claim or deter them from claiming altogether. There is, however, willingness from potential claimants to make some contribution. 90% of our clients said they would not be put off by a £50 charge. In the case study below, a client was advised that there was a strong case for a Type B unfair dismissal claim to be brought but she was only able to afford the fees for a cheaper Type A claim which she won:

“The only reason I did not bring an unfair dismissal claim was because of the excessive fee. I had just lost my job and did not have enough money to pay for the £1,200 fee, nor did I want to take the risk considering that I did not know when I would get another job”.

Case Study - affordability of Type B claims

Mona worked in a fish and chip restaurant for two years. She had a zero hours term in her contract but it was never exercised and her terms were varied by agreement to 27 hours per week shortly after she started. Mona earned £7 per hour and had a net weekly wage of £180. After two years employment she asked to take her paid annual leave entitlement,
was refused, her hours were reduced to 0 and the employer took on other staff to replace her. Mona was not given any work for 5 weeks, following which she resigned.

She was advised that she had strong claims for constructive unfair dismissal (Type B), accrued outstanding holiday pay, notice pay and failure to provide written terms and conditions (all Type A). As Mona's husband was in work, she had a household income that meant she was not entitled to fee remission. However, she could not afford the £1,200 fee to present a Type B claim for unfair dismissal and so brought Type A claims only. This meant that she paid ET fees of £390 rather than £1,200.

Her claim was successful at ET and she was awarded the accrued outstanding holiday pay and notice pay as well as 4 weeks’ pay for failure to provide written terms and conditions. The Employment Tribunal agreed that the zero hours term in her contract had been varied to fixed hours, by agreement, as Mona had asserted.

On the facts as they were determined by the Tribunal, Mona had a strong unfair dismissal claim. However, she did not bring it because she could not afford the additional £810 it would have cost her to pursue a Type A claim rather than a Type B claim.

Remissions

The remissions system is designed to help people on low incomes, but we found that only three in ten people with employment problems were aware of this. The rules about remissions are complex and many falsely believe they will not be eligible for a full or partial reduction in fees. Our research has shown that 51% of those who said they would not claim, because they believed they were ineligible, were in fact eligible to a full or partial fee reduction.

Citizens Advice welcomes the work the government has undertaken to address this issue by making application documents clearer and shorter for applicants. We believe more could be done, such as adding a simple tool on Gov.uk for people to check what level of fee reduction they are entitled to.

There are also cases where people are not eligible for remissions but the fee level puts the claim beyond their financial reach. We found that fees are high in relation to how much potential claimants are likely to earn, with 43% of respondents to our survey with income of less than £46 per week after essential outgoings. This includes almost half (47%) of all Type B claimants, who would have to put aside all of their discretionary income for 6 months to save the £1,200 fees.

Case Study: ineligible for remissions

Sarah, 48, had worked for 12 years as an assistant chef for a company providing meals on wheels to the local authority. She worked for 30 hours a week and receiving £200 a week, but never received any payslips.
In January this year she was summarily dismissed after the co-owner became abusive to her and her daughter, who was also an employee. The employer physically assaulted her daughter and the police were involved but no charges were brought. Sarah was sacked on the spot with no procedure.

She did not want her job back but sought advice from local Citizens Advice about unfair dismissal. She requested written reasons for dismissal but the employer did not respond.

Sarah was supported through early conciliation which was unsuccessful. She was advised that her claim was worth about £8,000. She sought advice from a solicitor about a ‘damages based’ agreement but was told this would not be financially viable as solicitor’s charges would be up to £6,000. She wasn’t confident of recovering any award as the employer - a limited company with 3 employees - could transfer cash and assets to a new company and close the former company down. The company was already in an Individual Voluntary Agreement meaning insolvency was very possible.

Sarah had been living on her mother’s property in a caravan and was on a debt management plan. She was on JSA for 5 weeks after losing her job before gaining new employment as a carer. Because her husband earned £400 gross per week she was not entitled to any means tested benefits or to any fee remission. She and her husband had no savings or disposable capital. Both had cars on finance agreements which they needed to keep for their jobs.

Sarah did not feel able to pay the £1,200 needed to take her Type B case. She said that prior to visiting Citizens Advice she didn’t know anything about tribunal procedure or fees. When she was told the cost would be £1,200 she was shocked and surprised- she said she thought they might be £200.

The case above shows how some people cannot afford to pay tribunal fees yet their household income can prevent them from entitlement to any kind of fee reduction. There are also cases where people are eligible to partial fee reductions, but these reductions are not enough for them to afford tribunal fees. This is a particularly acute problem for Type B cases.

**Case studies: Part remissions aren’t always enough**

One client came to Citizens Advice after being seriously sexually assaulted and harassed by a colleague who was also her employer’s best friend. The client resigned from her employment due to sexual harassment and had a strong claim, but would only be entitled to part remission of her fee. She said that she could not afford to pay the fee and so did not take legal action.

Another client, who was employed from July 2013 as an architect’s assistant, has epilepsy which she made her employer aware of before she started employment. She took a period of sick leave due to the medical condition in November 2013 and when she returned to work she was dismissed. The reason given by her employer for her dismissal was that she did not disclose her medical condition (which she says is untrue) and that her medical
condition meant that she was a health and safety risk given the type of work they did. The client had a claim for disability discrimination. She would be entitled to part remission of fee only but said that she could not afford to pay the fee and so did not take legal action.

Acas survey

An Acas survey of claimants, employers and representatives whose Early Conciliation (‘EC’) cases concluded between September and November 2014 found that, of those claimants whose dispute was not formally settled by EC but who still decided against submitting a claim to ET, 26% said that it was because ET fees were off putting.

Access to Justice

Access to justice requires there to be a balanced playing field. There is an inherent inequality of arms in employment relationships. As working patterns change and become fractured, it is becoming increasingly difficult for workers to access good legal advice and judicial determination where the most basic employment rights have been denied them. This is bad for business and bad for the economy, giving an advantage to employers who flout the law. The introduction of fees at their current levels significantly reduces access to justice, is likely to be indirectly discriminatory in its impact on low paid workers and women, and arguably makes it excessively difficult to exercise rights derived from EU employment law.

Conclusions

The introduction of ET fees has acted as a further barrier to access to justice for workers whose employment disputes cannot be resolved by non-judicial means.

Citizens Advice recommends that:

- Hearing fees should be reduced to restore the Employment Tribunal system to a low cost and affordable means of resolving employment disputes where conciliation has failed
- If fees are to remain at current levels for complex cases, they should be lower for low value, simple claims such as non-payment of wages and other statutory amounts
- Alternatively, there should be non-tribunal procedures for resolving low value or simple claims
- Regardless, fees should be waived in cases where employees are required to obtain a tribunal judgment against employers who are not formally insolvent in order to obtain a redundancy payment from the Insolvency Service, or the law should allow for the reimbursement of those fees by the Insolvency Service; or the requirement to obtain a tribunal judgment should be removed in these cases.

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