Written evidence from UNISON

Introduction

1. UNISON is the UK’s largest public service union with 1.3 million members. Our members are people working in the public services, for private contractors providing public services and in the essential utilities. They include frontline staff and managers, working full or part time in local authorities, the NHS, the police service, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector.

2. As a trade union UNISON regularly engages with employers and government to protect and improve the pay and conditions of all who work in public services as well as the services they provide to society, a role directly affected by the proposals in this consultation.

3. UNISON has a long tradition of helping its members in the work place. Its representatives have extensive experience of representing members and resolving workplace disputes so that claims do not have to be resolved through tribunals. In the event they cannot be resolved, UNISON supports and represents members with meritorious claims in the tribunals.

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?

4. Since fees were introduced in employment tribunals and employment appeal tribunals on 29 July 2013, claimants have to pay a fee of up to £1200 to bring a tribunal claim unless they qualify for fee remission. UNISON continues to oppose the introduction of these high fees that has made it virtually impossible for workers to bring their legitimate claims to tribunal.

Background

The Reasons given for the introduction of fees

5. At the time, Ministers stated that the reason for introducing fees was to recover the costs of running the employment tribunal service from users who could afford to pay. However, the latest accounts from the Ministry of Justice show that in 2014/15 the net income from employment tribunal 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% of the cost of running the employment tribunal service. This 12.5% gain in revenue was achieved at the expense of an overall 69 % drop in claimants bringing claims to the employment tribunal, deterring tens of thousands of workers from seeking justice for breaches of their employment rights from employment tribunals.

6. Another 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.
7. Indeed, the introduction of fees should have seen an increase in the numbers of successful claims at tribunal. Instead, the success rate remains around the same as it did prior to the introduction of fees, at around 12% of all claims lodged in the tribunal.

**Enforcement**

8. Many ET awards simply go unpaid. A Department of Business Innovation and Skills study of 2013 showed that, after enforcement, only 49% of the claimants were paid in full, with a further 16% paid in part, and 35% receiving no money at all. The proportion of awards fully paid in 2013 was lower than in 2008, with 46% of unpaid claimants incurred the further costs of enforcement action. It notes that this was ‘perhaps a particular concern’ in the light of the forthcoming fee regime (as this was written prior to the introduction of fees).

9. A survey of employment cases brought to Citizens Advice Bureau (CAB) (2014) found that 4 in 5 potentially cases assessed as having a better than 50% chance of success are not pursued by people in the ET.¹

10. Discrimination claims are notoriously difficult to prove ([Glasgow City Council v Zafar](https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/employment-tribunal-costs-putting-people-off-valid-claims/) [1998] ICR 120, [AX] 125C) and the levels of compensation awarded in such cases are modest. According to the Employment and EAT Tribunals Quarterly Statistics published in March 2014 in 2012-13 the median awards were as follows:

- race discrimination: £4,831 with 28% of those awarded compensation receiving less than £3,000 and 46% less than £5,000;
- sex discrimination: £5,900 with 22% receiving less than £3,000 and 39% less than £5,000;
- disability discrimination: £7,536 with 18% receiving less than £3,000 and 29% less than £5,000;
- religion and belief discrimination: £4,759 with 30% of those awarded compensation receiving less than £3,000 and 50% less than £5,000;
- sexual orientation discrimination: £6,319 with 33% less than £3,000 and the same proportion less than £5,000;
- age discrimination: £4,499, with 21% less than £3,000 and 54% less than £5,000.

11. According to the Funding Code published by the Legal Aid Agency (an executive agency of the Ministry of Justice) a reasonable person would not litigate a claim with 50-60% prospects of success unless the likely damages were at least four times the likely cost and that would be in the expectation that costs would be fully recoverable in the event of success (CPR, r44.3) [1915@1919], §5(c). In other words, the Government’s position is that such a claim should not be brought. However, the fees alone to bring a claim to a conclusion in the ET will be £1,200 and to appeal a further £1,600. Four times the ET fees alone (ignoring other costs) amount to £4,800. Given that the most recent figures indicate that the median award in, for example, race discrimination cases is £4,831 and in age discrimination cases is £4,499, it is difficult to see how any reasonable person would bring such a claim. Self-evidently, many discrimination claims will attract awards far lower than this. It is quite clear that many discrimination claims will, for the reasonable person, be impossible or excessively difficult to bring.

Impact of fees on ET claims

12. Set against this background, claims were already on the decline, prior to the introduction of fees. However, the introduction of employment tribunal fees on 29 July 2013 has resulted in a dramatic fall in cases. Table 1 sets out the drop in individual claims.

13. Type A claims, such as non payment of wages claims, statement of terms and conditions claim, attract an issue fee of £160 and a hearing fee of £250. Type B claims, such as unfair dismissal claims and discrimination claims attract a fee of £250 and a hearing fee of £950.

14. Many claimants cannot afford to pay the fees at all. Many will be on low incomes. Many will have just lost their jobs, and the ET fee is prohibitively high for most people. The average monthly take home salary is £1,792.27 per month\(^2\). On that salary, remission is not available. Further research by the CAB found that just under half of people with an employment issue would have to save for six months to afford fees of £1,200\(^3\).

15. Indeed evidence from the Citizens Advice Bureau (‘CAB’) demonstrates that, even where advice on prospects of success is available, the fees regime is preventing even individuals with strong claims from proceeding. Its publication, ‘Summary of results from a survey of employment cases brought to Citizens Advice Bureau’, published in July 2014, shows that of the 146 cases assessed as having a Very good, Good or 50/50 chance of success, 45 (31%) are considered by advisers as likely to be, or definitely being, taken forward and that fees or costs were the most dominant reasons put forward by advisers, and were cited in over half of the 68 claims which were assessed as having a Very good, Good or 50/50 chance of success but were unlikely to proceed’.

16. Some claims lodged in the employment tribunal do not attract a monetary award. These are, for example, claims for written pay statements, written statement of reasons for dismissal, written statement of terms and conditions which have dropped by 83%, 79% and 72% respectively when comparing the claims lodged in January to March 2013, with the claims lodged in January to March 2015 (Table 1 below).

17. Comparing these same periods, there has been a shocking drop in claims affecting mainly women: part-time worker regulation claims have dropped by 80%, sex discrimination claims by 67%, national minimum wage claims by 71%, 58 % equal pay claims and 54% of pregnancy discrimination claims.

18. Real life can get lost in statistics. The EHRC and BIS funded a large-scale survey of the experiences of new mothers in the workplace. The findings of this survey were that 54,000 women a year (one in nine new mothers) are dismissed, or made redundant even when there are no other redundancies, or are treated so badly while pregnant or on maternity leave that they are forced to leave their jobs.\(^4\)

19. Very few pregnancy related claims were brought by women which is unsurprising given the pressure on new mothers to cope 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. This low level of enforcement fuels the poor levels of compliance.

20. 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

\(^2\) Office of National Statistics, Annual Survey of Hours and Earnings, 2013 Provisional Results
\(^4\) IFF Research, Pregnancy and Maternity-Related Discrimination and Disadvantage, First finding: Surveys of Employers and Mothers (EHRC, July 2015)
conciliation by Acas) and 998 had neither settled nor progressed to tribunal. The prospect of paying fees during a period when women on maternity leave are on statutory or nil pay, and remission is ineffective (see below), would also prevent many women bringing claims.

21. It goes without saying the large bulk of those claims still being taken to Employment Tribunals are taken by unions who cover the fees for its members.

**Reimbursement of fees**

22. 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.

23. As set out above 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.

**Why remission is not working**

24. Fee remission has not been available for meritorious claims and has not adequately mitigated the impact of fees on low paid workers. The scheme has not been as generous as was predicted and the household income and disposable capital tests disqualify many low paid workers from a full remission.

25. The Equality Impact Assessment of July 2012 prior to the introduction of fees expected between 23.9% of claimants to benefit from full remission and 53% of claimants would benefit from a variable discount on fee rates up to £950, the actual figures suggest that only 3.87% of claimants benefit from any remission.

26. 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.

27. According to the remission scheme, a claimant is not entitled to remission at all unless he or she first satisfies a ‘disposable capital’ test. ‘Disposable capital’ (subject to certain exemptions) is ‘the value of every resource of a capital nature belonging to the party on the date on which the application for remission is made’ and in the case of ‘a resource that does not consist of money,’ its value ‘is calculated as the amount which that resource would realise if sold, less 10% of the sale value; and the amount of borrowing secured against that resource that would be repayable on sale’ For these purposes, the assets of a claimant’s partner are to be treated as the assets of the claimant (whatever the financial arrangements between the couple). Thus, for example, in respect of any fee up to and including £1,000, a

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5 House of Commons - Written Answers - Department for Business, Innovation and Skills, 10/09/15
6 IFF Research, Payment of Tribunal Awards (BIS, 2013)
7 This information is based on a Freedom of Information request obtained by UNISON which showed that only 2,380 remission applications were granted between July 2013 and March 2014 out of a total 61,469 claims lodged at the Employment Tribunal in the same period: see table C.3, Tribunal Statistics Annex C, Tribunal Statistics Quarterly April - June 2014 for numbers of claims lodged in this time.
claimant would have to pay the full fee even if she had no savings or other disposable capital and even if she was on the national minimum wage, if her partner had savings of £3,000 or more.

28. The amount of any remission (which may in fact be zero) is then calculated by applying a 'gross monthly income' test, which again includes the income of a claimant’s partner as well as her own income.

Early Conciliation

29. Early conciliation at Acas became mandatory in May 2014. Of the high numbers of notifications it receives, 70% of claimants did not reach a formal settlement. A private settlement was reached in only 7% of cases.

30. Of the 26% of those that could not reach an agreement through the Early Conciliation, scheme fees were cited as the reason for not pursuing a claim.

31. Other forms of alternative dispute resolution, such as judicial mediation in the ET had enjoyed a 70% success rate until a £600 fee was introduced in July 2013.

Access to justice

32. 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 to not 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.

33. 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 and they will undercut those who are striving to meet or exceed their legal obligations.

34. 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.

Table 1: Claims by jurisdiction

<table>
<thead>
<tr>
<th>Category</th>
<th>Jan-Mar 2013</th>
<th>Jan-Mar 2014</th>
<th>Change compared to Jan-Mar 2013</th>
<th>Jan-Mar 2015</th>
<th>Change compared to Jan-Mar 2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age Discrimination</td>
<td>810</td>
<td>601</td>
<td>-26%</td>
<td>218</td>
<td>-73%</td>
</tr>
<tr>
<td>Breach of contract</td>
<td>7,804</td>
<td>2,514</td>
<td>-68%</td>
<td>1,949</td>
<td>-75%</td>
</tr>
<tr>
<td>Disability discrimination</td>
<td>1,811</td>
<td>969</td>
<td>-46%</td>
<td>781</td>
<td>-57%</td>
</tr>
<tr>
<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>
</tr>
<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>
</tr>
<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>
</tr>
<tr>
<td>Unfair dismissal</td>
<td>11,041</td>
<td>4,235</td>
<td>-62%</td>
<td>3,119</td>
<td>-72%</td>
</tr>
<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>
<tr>
<td>Written statement of reasons for dismissal</td>
<td>212</td>
<td>90</td>
<td>-58%</td>
<td>45</td>
<td>-79%</td>
</tr>
<tr>
<td>Written statement of terms and conditions</td>
<td>854</td>
<td>337</td>
<td>-61%</td>
<td>243</td>
<td>-72%</td>
</tr>
</tbody>
</table>

How will the increases to courts and tribunal fees announced in Cm. 9123 “Court and Tribunal Fees” published on 22 July 2015, and the further proposals for introducing or increasing fees included for consultation in Cm. 9123, affect access to justice?

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35. Unison supports members and their family members making personal injury claims, so that we can assist them in receiving the full compensation they deserve, under our Legal Assistance Scheme. This is despite the fact claimants have faced an onslaught of changes affecting how such litigation is funded, restricting access to justice.

36. Following the introduction of LASPO and seriously reduced fixed fees, the Government has chosen to constantly increase Court fees. These upfront fees are yet another costs burden for claimants generally, who have been injured because of the negligence of another party (either as an ongoing cost during the case or from increased unrecoverable ATE premiums affecting their damages).

37. The Government needs to properly assess the overall impact of these changes over time, rather than introducing further increases once again. It is too early to have evidence of the true effects of these increases, but we know all too well the correlation between tribunal fees and case volumes in the employment tribunal, continuing to increase civil Court fees will have the same chilling effect on access to justice.

38. Addressing inefficiencies in the Courts Service can not simply be achieved by increasing Court fees, limiting individuals ability to assert their rights. Court fees, previously increased to make the Service self financing, are now being increased in an enhanced way without justification. Charging fees over and above the cost of the proceedings to which they relate will inevitably be a barrier to access to justice, and we have no guarantee that revenue will be used effectively for the benefit of Court users, thereby raising the spectre of further increases.

39. We are pleased that the latest announcements on fees recognises that those bringing personal injury claims can be very vulnerable, so that they need to be exempt from the proposed maximum fee for money claims up to £20,000, as well as continuing to be able to use fee remissions. However the fee remissions process does not properly address concerns over access to justice not least as it is too limited, and involves an onerous process.

40. Furthermore other changes, such as increasing general application fees by up to 100% are not reasonable/proportionate. Increases announced despite the vast majority (96%) of respondents to the Government’s consultation in February opposing such a change. Often such applications have to be made to assess the merits of a case pre-issue, or to expedite a case (forcing defendants to comply with court directions/their obligations) making the Court process quicker for the claimant and more efficient for the Courts. Yet these increases will now incentivise defendants not to respond/delay, to deter claims; and in ongoing cases may well prevent these applications being made, or if made they are more likely to be resisted due to the costs involved, making the Court process less efficient. And we are concerned about the effects of such increases for claimants with meritorious yet lower value, complex cases. These changes represent a significant increase, in cases where there is already an incentive for defendants to deny liability and delay, or to outspend their opponent in a fixed costs regime, putting further pressure on the claimant not to claim or to under settle early.

What have been the effects on defendants of the introduction of the criminal courts charge? Has the criminal courts charge been set at a reasonable and proportionate level?
Is the imposition and collection of the charge practicable and, if not, how could that be rectified?

41. Unison supports members defending work related criminal charges through our Legal Assistance Scheme. This removes some of the stress our members face when they are trying to prove their innocence through the Courts, but we are all too aware of the intense pressure our members remain under. Our members are often in low paid work, and as a result of facing such charges their income is inevitably affected. They then also have the prospect of potentially having to pay a substantial sum as a result of this Criminal Courts charge.

42. We are particularly concerned about the imposition of this Charge, and its effect on defendants generally, as we do not feel it has been set at a reasonable/proportionate level. The Charge has been implemented without proper consultation, set too high and crucially is not means tested, making it inherently unfair.

43. Facing fees of £520 - £1,200 should those accused be found guilty, as opposed to a much smaller sum should they make an earlier guilty plea creates a perverse incentive. We fear individuals under significant, including financial pressure, when potentially facing high contributions to fund their representation through the Legal Aid scheme, and fines/victim surcharges, together with this additional Courts Charge, may in some instances decide to enter an early guilty plea on an economic basis thwarting access to justice. Vulnerable individuals extremely worried about the financial impact of defending their innocence may decide not to contest a case simply to safeguard their family and home.

44. Further as the Charge is at a set level, without Court discretion, it is an extremely blunt instrument. Magistrates and Crown Court Judges are in an ideal place, having heard the case to best decide the imposition and level of any such charge. This could then be based on, inter alia the circumstances and severity of the offence, the individual’s ability to pay and the impact it would have on the individual’s family. It is this inflexibility that has a disproportionate effect on those on benefits or on a low income. As a result this charge not only has the potential to criminalise individuals who plead guilty for financial reasons, but those in particular financial difficulty may also find it much harder to rehabilitate as a result of the financial penalties imposed upon them.

45. We also suspect in view of the above the costs of collecting/enforcing this Charge may well severely limit what income will actually be derived from it, and have little confidence that that financial benefit will in fact be used to directly improve the criminal courts system.

1 October 2015