BACKGROUND

I have practiced in employment law for 20 years, during which I have worked in private practice, a Local Authority and in industry.

I currently work in private practice and act for employees and employers on an approximately 40:60 ratio.

SUMMARY

I think the introduction of fees has simply achieved what is statistical fact, namely it has indiscriminately reduced the number of claims.

Effect on Claimants

I do not think the introduction of fees has proportionately reduced the number of vexatious claims which was the main rationale for introducing fees. My experience was that there were not a high number of vexatious claims prior to the introduction of fees anyway. However, I do think that many Claimants acting in person misunderstood the complexity of employment law, particularly the law relating to discrimination and they genuinely believe that they had a case.

I think what is more likely to have reduced vexatious claims, is the complexity of issuing a claim. In my experience the complexity of the application process is beyond the ability of many people, particularly low skilled very young or old aged employees.

Given that the application process is not in your remit I will not comment further other than to say the procedure for issuing a claim and claiming fee exemption was a disgrace, I am aware of several Claimants who qualified for fee remission and had a good claim but we unable to navigate the complex process. I accept that the process has improved a lot since it first started.

I do think the introduction of fees has had a disproportionate adverse effect on Claimants for various reasons including the following

1. The cost
   When an employee has been dismissed, their focus is on reducing all outgoings. They have a limited time of three months less one day to issue a claim so to be told that they may have a case but it will cost them £1,200 in fees if they want to proceed, and they should take comfort from the fact that they should get their £1,200 back in 12 months’ time if they win. If being the operative word because there is no guarantee that they will win and assessing a case from a preliminary discussion is not easy. My experience is that this discussion puts many off bringing a claim.

2. Multiple issue fees
   Any employment tribunal claim issued is limited to acts up to and including the date the claim is filed. This means that if an employee is complaining about discrimination in the workplace, issues a claim and further acts of discrimination takes place, another claim has to be issued which incurs a second issue fee. If the employee is ultimately dismissed, this incurs another issue fee. Since the introduction of fees I am aware of two cases where multiple issue fees have been paid.
3. Hearing fee
   The £950 hearing fee is in my experience too much for many Claimants. Since the introduction of fees, two clients have decided not to proceed with their cases because they felt unable to afford the hearing fee. Several of my clients have indicated that unless they get (as opposed to qualify, because I am aware of people who did qualify but failed to navigate the exemption procedure) for the fee exemption, they are not prepared to take the risk of going to a Tribunal because they cannot afford the hearing fee.

4. Perception of costs awards
   I think the introduction of fees has placed in the minds of many Claimants that if they lose, a costs order will be made against them which is something they cannot afford because they have typically lost their job and have gone into debt whilst being out of work. In one case, the employer failed to pay the December wages to any of its staff. My client, a single mother took out a pay day loan to pay for essentials and presents promised to her children. On paper her job meant that she was not entitled to the fee exemption. My client looked for another job, and when her December wages were eventually paid in mid January she resigned; she resigned because she could not afford to wait to see if January’s wages would be paid. My client had a claim for constructive unfair dismissal which she would have won but was not in a position to pay £1,200 in fees to pursue her claim. Even if she had won her claim the company was in financial difficulties and any award made would probably not have been paid by the company anyway. As a representative I often weigh up the likelihood of whether the company will pay any award made. Whilst I accept that the proportion of employers not paying awards is low, during the last 18 months I have had 3 employers failing to pay awards so any fees paid by the employee will have been wasted. A successful Claimant will be in debt for issuing a claim.

5. Access to legal funding
   Most employee look for a no win no fee funding arrangement. Prior to the introduction of fees, most Claimant cases I took on were on a no win no fee funding arrangement, My success rate was about 95%. Apart from one exceptional case, I now only take on no win no fee cases for employees who qualify for fee exemption when the claim is issued, and are highly likely to qualify when the hearing fee is due. I do not take on cases on a no win no fee basis if the employee is not eligible for hearing fee exemption because unless they pay the hearing fee up front, I have no guarantee that they will pay the hearing fee. I do not take on such cases because if I could do a lot of work up to the date the hearing fee is due, but the claim is then struck out because the client is unable to afford the hearing fee. For that reason it is not worth the risk of taking on any no win no fee case. Unlike personal injury cases where costs are awarded by the court if the claim succeeds, the profit margin on employment cases is so low that it is not worth the risk. I have tried asking client for the hearing fee up front or a regular monthly amount to pay the hearing fee, but clients have been willing to do this.
**Effect on Employers**

For Companies, I believe the introduction of fees has been a helpful. However, personally I think the ACAS early conciliation scheme has been more helpful in reducing the number of claims.

I act for a large retailer with 20,000 employees. Occasionally mistakes are made with employee’s pay which they rectify through early conciliation rather than have to deal with a Tribunal case. For more complex cases, my client will decide early on whether to settle rather than fight.

For smaller employers I think the early conciliation process has had a lesser effect, probably because smaller employers take cases more personally.

I think some employers use the fee system to their advantage. For example, in low value pay disputes. A company can unlawfully deduct pay, or the more usual scenario is not pay notice pay or holiday pay on termination because the company knows that it will cost the employee more in fees to issue a claim to recoup the amount that has been deducted.

I think for small and large employers, the £950 hearing fee has had a significant effect on the way cases are conducted because the employer only knows how serious the employee is when the hearing fee is paid. Most people who have lost their job and issue a claim will qualify for the fee exemption. Shortly before the final hearing they are facing a £950 trial fee which is not something many people can afford, particularly when their savings have been depleted whilst out of work and they are just starting to make ends meet. This means that tactically to delay negotiations until the hearing fee is due because the employee will be under most pressure when faced with having to pay the hearing fee. In one case where I was acting for a female employee who had recently had a child and was claiming pregnancy related discrimination and dismissal the employee, she was in the process of taking out a loan to pay the hearing fee. I persuaded her that client that borrowing money to pay the hearing fee when there were some risks was not worth it so we settled the case for the amount offered.

The Commission should be aware that the date the hearing fee is due is not disclosed to the employer by the Tribunal. However, the fee is due approximately one month prior to hearing. If the hearing fee is not paid the claim is struck out.

In one case I dealt with whilst acting for the employee, the employer made an offer 3 days before the hearing fee was due. I managed to extend the deadline the hearing fee was due by a week whilst negotiations continued. Eventually we agree the wording of a without prejudice Settlement Agreement the day the hearing fee was due. The agreement was not valid until the other side signed the agreement and we risked the case being struck out for non payment of the hearing fee.

When asked about the impact of hearing fees I tend to cite one specific example as follows:-

**EXAMPLE CASE**
I was contacted by a female foreign national working for a care organisation. She had raised a written grievance with her employer about unpleasant behaviour from colleagues which included unwanted touching of her breasts by a male colleague on one occasion. The potential client was on national minimum wage working long hours and did not qualify for the fee exemption.

The care organisation is a national provider with numerous care homes under its control. The written grievance had gone unanswered.

The client did not have legal expense cover. As with all potential clients I warned her that to pursue her claim she would have to pay an issue fee of £250 and the £950 trial fee. The client stated that she could not afford to pay the Tribunal fees and went off sick. Eventually the potential client resigned because she felt that nothing would change, she could not afford the Tribunal fees so looked for another job. She may have qualified for the issue fee exemption after she resigned, but she could not afford to be out of work for long, and felt that she could not afford the hearing fee, so did not pursue the matter.

It felt to me as though I was saying that because she could not afford to bring a claim her options were either to put up with the behaviour or resign, she chose the latter rather than pursue a claim. Financially she lost money for alleged sex discrimination.

I accept that she could have gone to the police rather than issue a claim to the Tribunal. However, I suspect that for a foreign national with permission to work in the UK under the terms of her visa, she would have been reluctant to go to the police for all sorts of reasons including the fact she may have felt that to do so would risk losing her job and being asked to return to the Philippines.

Ian Cramer, Solicitor

6 October 2015