Written evidence from The Law Society of Scotland

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Administrative Justice Committee (‘the committee’). The committee is comprised of senior and specialist lawyers (both in-house and private practice).

The committee welcomes the opportunity to consider and respond to the call for written evidence on the Courts and tribunals fees and charges inquiry:-

*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?*

We can only comment on the introduction of employment tribunal fees. Court fees are charged to litigants in the Scottish courts but we have no comment on their English counterpart.

Fees for bringing a claim to the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT) were introduced in July 2013 following an earlier consultation by the Ministry of Justice (MoJ). The MoJ did not consult on the principle of introducing fees but rather brought forward proposals for two potential models of fee regime. The power to charge fees was included in the Tribunals, Courts and Enforcement Act 2007, which attracted minimal debate in Parliament on how it would be applied once the legislation was enacted. In its consultation the MoJ’s success criteria for introducing a fee regime for the ET and EAT were stated to be to:-
(i) Recover a contribution towards the costs from users which will be used to support and fund the system;

(ii) Develop a simple, easy to understand and cost-effective fee structure;

(iii) Maintain access to justice for those on limited means;

(iv) Contribute to improving the effectiveness and efficiency of the system by encouraging users to resolve issues as early as possible.

It is debateable whether any of these success criteria has in fact been fully met, and particularly item (iii), in light of the subsequent impact of fees on access to justice for those involved in disputes with their employers.

The introduction of fees has reduced the number of claims being brought forward across all ET jurisdictions by around 80%. The MoJ’s statistics show that in 2012, the year before fees were introduced, 59,977 applications were made to the ET; in 2014, the year after fees were introduced, the number of applications had dropped to 19,960. The statistics clearly show that that the downward turn in claims occurred in the months immediately following the introduction of fees in July 2013, i.e. June (4,379), July (7,240), August (3,491), September (1,207). The spike in the figure for July 2013 represents people registering their claims before the fees came into operation.

The reasons for such a significant drop in claims are not immediately apparent but we take the view they include:-

- the high levels at which fees have been set – a £160 issue fee and £230 hearing fee for ‘Type A’ claims and a £250 issue fee and £950 hearing fee for ‘Type B’ claims make it financially unrealistic to pursue lower value claims;
- a complex, inflexible and inefficient system of fee remission, the qualifying bar for which is set too low, creates uncertainty for those wishing to bring a claim;
- placing the onus on the employee applicant to pay the issue and hearing fees up front has created a perverse incentive for employers not to engage meaningfully in the conciliation process in the expectation that the fees will act as a deterrent;
the impact of the new requirement for mandatory conciliation by ACAS may have had the effect of filtering out some cases but would not account for the dramatic 80% reduction in claim numbers.

- claimants with unmeritorious claims are no longer pursuing those claims due to the cost involved.
- improved employment prospects have resulted in a reduction in employment tribunal claims.
- the increase in the qualifying period of service for unfair dismissal to two years for those began employment after 6th April 2012.

Cost as a factor preventing claims being pursued

There is statistical evidence that the introduction of fees for employment tribunals presents a significant barrier to access to the employment tribunal system. Research conducted by ACAS (Valuation of ACAS Early Conciliation 2015) suggests that 26% of those whose claims were not formally settled by early conciliation decided against submitting claims to the employment tribunal as tribunal because the fees were off putting.

The impact of fees in low value claims

The presence of only two fee bands, and the setting of the lower of those bands at £390 for the issue and hearing fee, makes it unattractive for those with lower value claims, such as unpaid wages, notice or holiday pay claims to pursue them because the fee will often exceed the value of the claim. This has also to be seen in light of the issue of recovery of fees and awards.

Recovery of fees and awards

It was envisaged that all or part of the tribunal fee paid by the Claimant would be recovered by successful claimants. However, the 2013 Payment of Tribunal Awards study by the Department for Business Innovation & Skills showed that in Scotland only 41% of Claimants received payment of their awards in full, 13% had received payment in part and 46% had
not been paid at all. The combination of substantial fees and the uncertainty as to whether any sums awarded, whether that be compensation or fees, will be recovered, are likely to act as a disincentive to the pursuit of legitimate and meritorious claims.

The impact on discrimination claims

Unlike actions for non-payment of wages, those who allege discrimination in employment have no option but to pursue those claims before the ETs. The outcome of Discrimination claims is very often difficult to predict. Discrimination claims will involve ETs drawing inferences of less favourable treatment, as there is rarely direct evidence of discrimination. Potential claimants therefore face the uncertainty that attaches to this exercise. The addition of substantial costs for pursuing these claims will also mean that many meritorious claims will not be pursued.

The system of remission

The system of remission is, in the view of some practitioners, time consuming and bureaucratic. One way to reduce time spent and costs would be to allow ET staff to access benefits information.

Payment of fees as a disincentive to settle

Employers may delay settling claims until they know if the hearing fee will be paid. One of the objectives of the introduction of fees, namely early settlement, is therefore compromised.

The cost of tribunals in Scotland compared with sheriff court

The Royal Commission on Trade Unions and Employers' Associations 1968 (Report of the Donovan Commission) (Cmnd3623) recommended that Industrial tribunals, the predecessor of the ET, should be “easily accessible, informal, speedy and inexpensive.” The new fees regime means, however, that ETs are one of the most expensive means of resolving disputes, having regard to the fees charged. This can be illustrated by a comparison between the fees for employment tribunals and sheriff courts in Scotland. ETs
and sheriff courts in Scotland have concurrent jurisdictions to consider breach of contract claims and unlawful deductions from wages. A large proportion of these claims will involve relatively small sums of money, in many cases less than £5,000.

A relatively straightforward type A claim before an employment tribunal, such as unlawful deduction from wages will attract an issue fee of £160 and a hearing fee of £230. For those type A claims which can be pursued in the sheriff court, the lodging fee is £18 where the sum sued for is £200 or less, otherwise the fee is £76 for both small claims action, with a value of up to £3,000, and summary cause actions, with a value of up to £5,000. No hearing fee is payable.

**The impact on the behaviour on employers**

The existence of an accessible and inexpensive system for pursuing claims arising from the employment relationship has acted as a strong disincentive for employers to take action that could lead to a finding of unfair dismissal and/or discrimination and to financial awards being made against them. The very significant drop in the number of ET claims raises the possibility that less scrupulous employers may now regard the risk of ETs being so low that they are willing to dismiss employees without good reason or to discriminate against them on the basis they consider they are unlikely to be held to account for their actions. This risks undermining the progress that has been made in promoting good practice in dealing with disciplinary issues and tackling discrimination over the last 40 years.

The introduction of fees was also originally intended to deter frivolous or vexatious cases from being brought forward, despite the tribunal rules already containing adequate provision for such cases to be struck out or for the imposition of money deposits and costs orders.

**The need for Review**

The fees regime has now been in operation for just over two years and the MoJ has recently announced its intention to undertake a review of the introduction of ET fees. It will be important to ensure that this review is undertaken swiftly from the point of view of the users of the system. It is not clear from the terms of reference what the timetable for the
review is, other than that it is expected to be completed ‘later in the year’. It is also not clear who will be responsible for undertaking the review - if this is to be carried out by MoJ officials it will be important for the review also to have a degree of independent input and oversight.

The terms of reference for the review include, among other things, measuring the success of the new arrangements against the criteria mentioned above. With this mind, it will be important, in considering the extent to which access to justice has (or has not) been maintained, for those undertaking the review to look carefully behind the downturn in caseload to establish why certain cases or classes of case are no longer being brought forward.

*How has the court fees regime affected the competitiveness of the legal services market in England and Wales, particularly in an international context?*

We have no comment to make.

*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?*

We have no comment to make.

30 September 2015