Written evidence from the Tribunals Judiciary

Introduction

1.1 So far as tribunals are concerned, the Committee’s terms of reference ask

- how the introduction of employment tribunal fees have affected access to justice
- whether those fees have affected the volume and quality of cases brought
- how the increases in tribunals fees announced in the Ministry of Justice document Cm. 9123 “Court and Tribunal Fees” (August 2015) and the further proposals for introducing or increasing fees included in Cm. 9123, affect access to justice.

1.2 This part of the Board’s response draws on the experience of judiciary serving in the employment tribunals and on the views of presidents of chambers in the First-tier Tribunal and the Upper Tribunal, where fees are proposed by CM. 9123 to be introduced, re-structured or increased. It is not intended to supplant or dilute any individual responses that chamber presidents or other relevant judges may make to the Committee or to the MoJ.

How has the introduction of employment tribunal fees affected access to justice?

2.1 We consider that the introduction of fees has had a damaging effect upon access to justice. The overall reduction in numbers across all employment jurisdictions, following the introduction of fees, is most starkly seen in the areas of unpaid wages, notice pay, redundancy pay etc, where cases are now rare. The clear inference is that a combined fee of £390 represents a considerable investment, compared with what may often be the sum at stake. Unfair dismissal claims attract a combined fee of £1,200, which, again, compares badly with the amount of many awards made in such claims.

2.2 Improvements in the remission process have not served to moderate these adverse impacts upon access to justice. The overall conclusion is that the fees regime and its attendant remission process have acted as a very clear disincentive to bringing a significant number of claims, which could not be categorised as obviously weak. The conclusion is supported by the following. If fees were discouraging only (or mainly) potential claims that would be weak ones, the percentage of successful claims could be expected to rise, following the introduction of fees. In fact, that percentage has declined slightly.

Have those fees affected the volume and quality of the cases brought?
3.1 The overall reduction in new claims, following the introduction of fees, is considered to have been around 70%. Whilst it is accepted that other factors may have had some impact (including changes in employment law and a strengthening in the employment market) and that there was a very slight downward trend in claims prior to the introduction of fees), the judicial consensus is that none of these other factors, alone or in combination, can adequately explain the dramatic fall in claims, which followed immediately upon the introduction of fees.

3.2 The employment cases that are surviving for hearing are primarily the more difficult cases, such as public interest disclosure claims and discrimination claims. In these types, the issues at stake and potential value are such that claimants are likely to be middle or higher income earners able to afford the fees, or those committed to litigation as a matter of principle.

**How might the increases in tribunal fees and the further proposals for introducing or increasing tribunal fees in Cm. 9123 affect access to justice?**

4.1 So far as the First-tier Tribunal is concerned, the consultation contains proposals, which, if implemented, would:

   (a) double the fees currently charged in respect of certain appeals in the Immigration and Asylum Chamber of the First-tier Tribunal;

   (b) revise the system of fees in the Property Chamber of the First-tier Tribunal, so as to require (i) a fee of £100 to start most proceedings; (ii) a further fee of £200 for a hearing in most cases; and (iii) in leasehold enfranchisement proceedings, an initial fee of £400 and a hearing fee of £2,000;

   (c) introduce fees in the General Regulatory Chamber of the First-tier Tribunal in the sum of £100 to issue proceedings and a further £500 if the claimant elects for a hearing; and

   (d) introduce fees in the Tax Chamber of the First-tier Tribunal, according to the case category assigned by that Chamber, as follows:

---

1 The House of Commons Library’s Briefing Paper (7081: 15 September 2015) states that “Following the introduction of fees, the number of single cases averaged around 4,500 per quarter between October 2013 and June 2915, 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.”

2 Esp. the lengthening of the qualifying period for protection from dismissal protection and further capping of compensation for unfair dismissal to one year’s salary.

3 Paragraphs 91 to 111

4 Paragraphs 112 to 123

5 Paragraphs 124 to 127. At present, fees are charged in the GRC only in respect of its gambling jurisdiction. The consultation document proposes that those fees should remain at their current levels.
(i) for paper and basic cases, an issue fee of £50;
(ii) for standard and complex cases, an issue fee of £200; and
(iii) a hearing fee of £200 (basic cases), £500 (standard cases) and £1,000 (complex cases)\(^6\).

4.2 As for the Upper Tribunal:

(a) the fees currently charged in immigration judicial review proceedings in the Immigration and Asylum Chamber are proposed to be raised by 10% in line with the proposals for judicial review in the High Court\(^7\);

(b), likewise, fees currently charged in respect of proceedings in the Lands Chamber are proposed to be raised by 10%\(^8\);

(c) in the Administrative Appeals Chamber, the fees proposed in respect of the General Regulatory Chamber would be payable where that Chamber refers a case for a first-instance decision by the AAC\(^9\);

(d) in the Upper Tribunal Tax and Chancery Chamber, fees are proposed in the sum of £100 for an application for permission to appeal a decision of the First-tier Tribunal Tax and Chancery Chamber; £200 for a permission hearing (where permission has been refused on the papers); and £2,000 for a substantive appeal hearing\(^10\).

4.3 In the light of the experience in the employment tribunals, following the introduction of fees, it is very doubtful whether it is appropriate for the proposals in Cm. 9123 to be founded on the assumption that the introduction and raising of tribunal fees will result in no change in demand for access to the tribunal.\(^11\) In employment, the net income generated by fees, having taken account of remission and the costs of collection, has fallen considerably short of realising the proportion of running costs that the Government set itself. The current proposals likewise risk harming access to justice without delivering the anticipated financial benefit.

4.4 Three general matters of concern arise. First, in assessing any adverse effects on access to justice, it must be borne in mind that Parliament’s decisions to create rights of appeal and other challenge to tribunals have frequently been driven by the desire to create a low-cost alternative to challenge before the courts. This is true not only where the person seeking redress is an individual. The Charity Tribunal (whose functions are now subsumed in the General Regulatory Chamber) was established because the ability of many charities to hold the

---

\(^6\) Paragraphs 128 to 133
\(^7\) Paragraph 108
\(^8\) Paragraphs 137 and 138
\(^9\) Paragraph 127
\(^10\) Paragraph 132
\(^11\) See eg paragraph 134 of Cm. 9123.
Charity Commission to account was severely circumscribed by the costs of bringing proceedings in the High Court.

4.5 Secondly (and relatedly), many tribunal users are persons of modest means, for whom fees of the levels currently proposed are likely to be daunting, but who are unlikely to be assisted by the present system of fee remission. This is borne out by the experience with employment tribunals. Such users are likely to be found in all the Chambers under discussion and include individuals seeking to challenge rent increases and small businesses seeking to challenge tax penalties.

4.6 Thirdly, the imposition of fees in cases involving financial penalties raises its own difficulties. Tax penalties are regarded as criminal sanctions for the purposes of Article 6 (right to a fair trial) of the ECHR, raising questions about the principle of demanding a fee in these cases. There is also plainly an issue concerning the proportionality of charging a fee which represents a sizeable proportion of the amount of the penalty, or which may even exceed that penalty.\(^\text{12}\)

4.7 Cm. 9123 proposes that, in some circumstances, fees should be set according to the category to which the case is assigned by the tribunal on receipt of the notice of appeal etc\(^\text{13}\). As a general matter, there is much to be said for the proposal that the level of fee should take account of the nature of the case. The proposals are, however, inconsistent in this regard, in that no categorisation system is proposed for the General Regulatory Chamber, despite the heterogeneous nature of the jurisdictions covered by that Chamber; and no account is taken of the grading system, which currently operates in the leasehold management jurisdiction of the Property Chamber.

4.8 Although a system of case categorisation offers the potential to ameliorate some of the adverse consequences of the current proposals on access to justice, it is not without its own problems. Amongst these are considered to be the demands placed by such a system on the tribunal’s judiciary and administration; the possibility of collateral challenges; and the point at which fees become payable.

4.9 In conclusion, it is considered that the present proposals in Cm 9123 are based on an assumption regarding the future behaviour of potential tribunal users, which is not supported by the experience in the employment tribunals; and that the proposed levels of fees and the situations in which they are envisaged be charged raise serious concerns regarding access to justice, as dispensed by tribunals.

\(14\) October 2015

\(^{12}\) Eg a fee of £100 for the determination without a hearing of a fixed penalty of £60 under the Household Waste (Fixed Penalty and Penalty Charge) Regulations 2015

\(^{13}\) See paragraphs 128 to 133 (Tax Chamber)