Further written evidence from the Federation of Small Businesses

The Federation of Small Businesses is the UK’s leading business organisation. It exists to protect and promote the interests of the self-employed and all those who run their own business. The FSB is non-party political, and with approximately 200,000 members, it is the largest organisation representing small and medium-sized businesses in the UK.

Small businesses make up 99.3 per cent of all businesses in the UK, contribute 51 per cent of GDP and employ 60 per cent of the private sector workforce. Furthermore, research has found that 84 per cent of new private sector jobs created since the start of 2010 and 2013 were in small and medium-sized businesses.\(^1\) When considering policy interventions therefore, it is important to take into account the critical role played by small businesses in the labour market.

**Background**

Over the past five years, there have been a number of changes that directly or indirectly affect the functioning of Employment Tribunals. In addition to the introduction of fees, this includes Early Conciliation, the extension of the qualifying period for unfair dismissal claims, Settlement Agreements and revisions to the rules and procedures of the Employment Tribunal. The FSB generally welcomes these changes, and believes that they have helped to mitigate key concerns felt by employers.

Despite this, for many small businesses, the fear of an employment relationship deteriorating and culminating in a tribunal is real, and in some cases can be a barrier to employing staff. Tribunals can be costly\(^2\), time-consuming and distressing for both parties. The vast majority of small firms do not have in-house lawyers or dedicated HR functions and the time preparing for and defending a claim is time away from growing the business. The consequence is that it is often far cheaper for small employers to settle a weak or vexatious claim early than to attempt to successfully defend the business at a tribunal hearing.

This concern reflects a broader, widely-established truth: namely, the Employment Tribunal system is no longer recognisable as the swift, straightforward and effective resolution mechanism that it was intended to be. While this partly reflects the volume and complexity of cases brought, the situation is nevertheless far from ideal for employers, workers and the Government, which continues to fund a significant share of the ET’s operational budget. Although Alternative Dispute Resolution has an increasingly important role to play in resolving workplace disputes, the Employment Tribunal also needs to change if it is to be an efficient arbiter of last resort.

**Employment Tribunal Fees**

The FSB supports the rationale behind Employment Tribunal Fees and welcomed their introduction. Previously, an employment tribunal could be seen as a ‘no cost’ option by a disgruntled or former employee in the absence of fees. Under a fee-paying regime, this is no longer the case. Although it is difficult to make firm conclusions based on the available data, the number of speculative claims is likely to have decreased. Furthermore, the introduction of fees should in theory have reduced the perceived risk of taking on staff among small employers.

Despite this, the FSB has always maintained the view that the level at which ET fees are set should be proportionate and should not prevent workers with a genuine grievance from seeking redress, especially if alternative forms of resolution have been unsuccessful. We are not convinced that this is the case with the current fee levels, and believe there is a valid case for fees to be lower.

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1 Thompson S, *Small Firms, Giant Leaps: small businesses and the path to full employment*. London: IPPR
2 FSB research in 2010 found the average cost of preparing for and defending a claim (excluding awards) for a small business was £6,900.
Part of the problem lies with the structure and complexity of the fee remissions system. The FSB supported reform of the remission system and we welcome the introduction of a disposable capital test in addition to a simplified income-based means test. However, despite this many claimants will continue to remain outside the fee-paying system.

Our preference has always been for the vast majority of claimants to be paying fees in full or in part and the most practical way of achieving this is for ET fees to be lower.

In addition, we have argued in favour of a two-tier system where a small ‘starting’ fee would be levied on claimants that would otherwise receive a full waiver, while a higher set of fees would be charged for claims valued by the claimant as being worth over £30,000 (as was previously proposed by Government). This system would function in addition to income and capital tests under a remissions scheme, but would contain an important difference – namely, that any individual wishing to take their employer to a tribunal should be expected to pay something towards their claim, however small the amount.

**Employment Tribunal rules, procedures and decision making**

The FSB participated in Mr Justice Underhill’s review of ET rules and procedures in 2012 and welcomed his recommendations. Introducing presidential guidance, allowing judges to strike out weak claims during an initial sifting phase, simplifying default judgements, reforming the withdrawals system, and merging pre-hearing reviews with case management discussions should all in theory have helped to bring about more effective and consistent case management. The streamlined and significantly shortened rules are also a welcome change, and should make it easier for businesses and employees to understand the tribunal process.

However, it remains to be seen how far the revised procedures and guidance are being utilised by Tribunals in practice, and the FSB believes that more can be done to encourage judges to adopt a more directive approach to case management.

One specific area where this is relevant is costs. We agree with the Law Society that costs can be an important way of instilling responsibility on both parties. However, we know that Tribunal Judges are often reluctant to use their existing powers to levy cost orders, meaning that they are rarely used. The FSB believes that clearer guidance on how judges should interpret provisions concerning cost orders is needed, so that employers that successfully defeat a claim have a better chance of recovering the costs they incurred in demonstrating they acted in accordance with the law. This is important and reflects a point of fairness. Indeed, it could be argued and expected that the tribunal system should function in a way that the successful party incurs minimal costs – and the unsuccessful party contributes towards the other’s costs – yet this is too often not the case.

*10 November 2015*