Written evidence from the Lay Members’ Committee of the Employment Appeal Tribunal

Introduction
1. The Employment Appeal Tribunal is a ‘GB-wide’ superseding Upper Tribunal which considers appeals from employees and employers arising from judgments of employment tribunals sitting in England, Scotland and Wales. Lay Members of the Employment Appeal Tribunal are judicial office-holders in their own right. This submission is from the Lay Members of the EAT who elect a Committee on an annual basis. We therefore welcome the opportunity to submit evidence to this Inquiry of the Justice Select Committee. Our submission focuses on the Committee’s interest in the impact of the introduction of tribunal fees on access to justice and specifically the Employment Appeal Tribunal.

Summary
- The number of appeals received by the EAT has declined significantly since the introduction of fees.
- While there is a system of means-testing to provide fee remission, the latter is potentially complex and even to lodge an appeal for consideration by a judge as part of the EAT’s ‘sift’ process requires the appellant (either an employer or an employee) to pay a fee of £400.
- The number of unrepresented litigants / appellants from both the employer and employee side has increased from 40% in 2009 to 60% in 2014.
- Fees for employment and employment appeal tribunals were justified on the basis that the introduction of fees would deter the lodging of cases that were ‘without merit’.
- A comparison of the outcomes of EAT applications in the six month period prior to the introduction of fees with those in the six month period following the introduction of fees, has confirmed no significant variation i.e. fees have had no impact on outcomes but there has been a steep decline in the number of cases lodged.
- This analysis suggests that the introduction of fees in the EAT has deterred appellants whose cases might have had merit and should have been considered.
- On the basis of the evidence now available, Lay Members of the EAT consider that the introduction of tribunal fees has impacted adversely on access to justice in respect of the Employment Appeal Tribunal.

The role of the Employment Appeal Tribunal
2. Appeals from employment tribunals have to be lodged with the EAT within strict time limits (42 days). For a number of years, all EAT appeals have been considered by a judge at the EAT in a sift process. On the basis of the latter, an appeal is either listed for hearing with a fixed time allocation or rejected. There is also a provision for the judge at this stage to issue an order that an appeal is totally without merit (TWM). This latter prevents an appellant proceeding in any way other than by an application to the Court of Appeal.

3. Accordingly the EAT was and is already operating practice directions which have the potential to sift out cases without merit early in the process. The Employment Appeal

---

1 Northern Ireland has a separate system
Tribunal does not rehear employment tribunal cases but considers appeals based on the application of the law and/or the operation of the ET which has heard a case. Both for individual appellants but also more generally, the Employment Appeal Tribunal judgements are important and sometimes have wide-ranging implications. For example, recent EAT judgements have included immunity of trafficked workers, holiday pay entitlements and disability discrimination and reasonable adjustments. The work of the EAT therefore remains economically and socially important.

The role of Lay Members

4. Prior to the Enterprise and Regulatory Reform Act 2013, the judicial panel of the EAT would comprise of a senior judge and two lay members – one of the latter with experience of the workplace with an employer perspective (employer side) and the other with perspectives derived from representing workers (often referred to as ‘employee’ side). Prior to 2000, Lay Members were nominated by either the CBI or TUC. Since 2000, Nolan principles have been applied and as a result the appointments process has included interviews. The principle of workforce involvement and experience has continued to apply to appointments in order to ensure that EAT panels are informed by this experience.

5. Although the EAT has a GB-wide role due regard has been given to representation from Scotland although EAT Lay members who reside in Scotland also hear cases in London. There is also a requirement that two Lay Members should be Welsh-speaking. EAT hearings take place in either London or Edinburgh but the EAT operates one national pool of Lay Members and seeks to ensure that members are listed in a way that avoids conflicts of interest.

6. The Act reversed the default position of senior judge and two Lay Members and judges now sit alone unless the judge responsible for the sift considers that the experience of Lay Members would be particularly relevant to a case. During their consideration of the 2013 Bill members of the House of Lords raised questions about the equality implications of reducing the role of Lay Members. Although much less frequent as a result of this legislation, the involvement of Lay Members in EAT hearings continues to be highly valued and is frequently referred to in EAT judgements.

The costs of lodging in the EAT

7. EAT fees are significant and from the outset Lay Members of the EAT have been concerned about their impact on potential appellants. As outlined in the evidence submitted to the Committee by the EAT President Mr Justice Langstaff, the fees applied are significant:

‘To start an appeal, appellants (whether employer or employee) must pay £400. That entitles them to have their appeals considered on paper by a judge to see if there are reasonable grounds for proceeding to a full appeal (if there are not, the appeal is rejected then and there, and the respondent is not put to cost, time and trouble in resisting it). This is subject to a right to renew the application to appeal orally before a judge, also covered by the £400 payment. If permission is given to proceed, a further £1200 is payable. It thus costs £1600 to bring an arguable appeal before the EAT for final decision. There is “help with fees” available for those who cannot pay, known as remission.

If the appeal succeeds, the appellant may ask the losing party to repay the fees paid out. An award of such a sum is discretionary, and not inevitable. A decision whether to award it or not

---

In view of changes in practice directions, the impact of the Enterprise and Regulatory Reform Act and the need to ensure that the experience of current Lay Members in hearing cases is not diluted as the number of cases declines, the last round of Lay Members appointments took place in 2010.
can take some time, which is a hidden and additional cost to the system. We understand that if awarded the prospects of recovery are uncertain, since many losing parties do not pay and, if out of work, individuals may not have the means to do so.’

The decline in appeals

8. Mr Justice Langstaff has also outlined the statistics of cases lodged with the EAT to which Lay Members are party. The number of appeals lodged both before and after the introduction of fees in August 2013 appears below:

<table>
<thead>
<tr>
<th>Month</th>
<th>London</th>
<th>Edinburgh</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan</td>
<td>177</td>
<td>23</td>
<td>200</td>
</tr>
<tr>
<td>Feb</td>
<td>157</td>
<td>10</td>
<td>167</td>
</tr>
<tr>
<td>Mar</td>
<td>140</td>
<td>20</td>
<td>160</td>
</tr>
<tr>
<td>Apr</td>
<td>216</td>
<td>12</td>
<td>228</td>
</tr>
<tr>
<td>May</td>
<td>146</td>
<td>24</td>
<td>170</td>
</tr>
<tr>
<td>June</td>
<td>161</td>
<td>14</td>
<td>175</td>
</tr>
<tr>
<td>July</td>
<td>217</td>
<td>18</td>
<td>235</td>
</tr>
</tbody>
</table>

7 month total: 1335 (avg. 191)

<table>
<thead>
<tr>
<th>Month</th>
<th>London</th>
<th>Edinburgh</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aug</td>
<td>101</td>
<td>5</td>
<td>106</td>
</tr>
<tr>
<td>Sep</td>
<td>106</td>
<td>7</td>
<td>113</td>
</tr>
<tr>
<td>Oct</td>
<td>108</td>
<td>11</td>
<td>119</td>
</tr>
<tr>
<td>Nov</td>
<td>92</td>
<td>6</td>
<td>98</td>
</tr>
<tr>
<td>Dec</td>
<td>117</td>
<td>12</td>
<td>129</td>
</tr>
</tbody>
</table>

5 month total: 565 (avg. 113)

9. Some caution has to be exercised about these figures. The increase in the number of appeals lodged in July 2013 may have anticipated the introduction of fees in August. However, the decline in the number of applications received following the introduction of fees is unlikely to be explained on the basis of the downward trend in appeals that was already in evidence.

Rationale for fees: reduction in cases ‘lacking merit’

10. One of the rationales put forward by the then government for the introduction of tribunal fees focused on the need to dissuade appellants whose cases ‘lacked merit’ from proceeding with an application. However, as previously outlined, the EAT already has comprehensive procedures in place to reduce the risk that ‘unmeritorious’ appeals will proceed. This does not mean that all cases heard will be successful but rather that the EAT seeks to hear all cases which in legal terms are ‘arguable’.

11. There may be a number of outcomes of hearings: success in whole or part; remission to the same tribunal or a differently constituted tribunal. Unsuccessful appellants who want to take their case further have to lodge an appeal with the Court of Appeal. Very often the EAT does not give permission and the appellant (employer or employee) will have to argue that their case should be heard at the Court of Appeal in the first instance. Occasionally, the EAT itself will give permission to appeal because a case has a wider significance.

Outcomes of EAT appeals six months prior to and following the introduction of fees

12. Care therefore needs to be taken in applying definitions as to what might constitute a case ‘lacking in merit’. However, an obvious test would be to see a rise in the percentage of successful appeals following the introduction of fees. The EAT has now reviewed the outcome of the appeals received in the 6 months period prior to the introduction of fees and compared these with outcomes of appeals received in the first six months after the
introduction of fees when the percentage of successful appeals might have been expected to increase regardless of the decline in the number of appeals lodged.

13. Of the applications to appeal received in the six months prior to fees (29 Jan – 28 July 2013) 274 appeals were heard as full appeals (after passing through the sift process). Of these 175 were dismissed (63%). Of the 99 (37%) which were allowed, 30 (11% of the total) were allowed without being sent back for further determination by the Tribunal; 69 (26%) were remitted. The comparable figures for appeals received in the six months after the introduction of fees and following ‘the sift’ were: 151 (57%) heard, of which 86 (43%) were dismissed, 20 (13%) were allowed without remission, and 45 (30%) allowed and remitted.

14. Accordingly the number of appeals succeeding in whole or in part as a percentage of applications to appeal which were made was 10.53% of the 940 applications made to the EAT in the 6 months prior to fee introduction, and 10.61% of the applications made after.

15. As the submission from the EAT President Mr Justice Langstaff confirms, ‘the database is sizeable: one would expect to see a real difference if there was one. However, there is no statistically significant difference between these figures.’

16. On the basis of this analysis, it is difficult to see how the argument that tribunal fees would deter cases lacking in merit, can be sustained. On the contrary, when viewed alongside the significant decline in applications received, it is difficult to avoid the conclusion that a significant number of appeals that should have been heard, have not been lodged or heard and that fees have had, and are continuing to have, a deterrent effect that undermines access to justice. We would also remind the Committee that appellants are not only individual claimants but also employers, including small employers, which may have limited resources.

Unrepresented litigants

17. In addition, there has been a steady increase in the number of litigants who are not professionally represented. This stood at 40% in 2009 but had risen to 60% in 2014 and again applies to both employer and employee. The possibility of misunderstanding of the role of the EAT in these circumstances increases, notwithstanding the duty of the EAT to ensure that justice is done.

Conclusion

18. On the evidence collated by the Employment Appeal Tribunal, the Lay Members of the EAT have concluded that it is likely that the introduction of fees has impeded access by both employees and employers to the EAT and further, that there is a strong case for the government to reconsider the application of fees to the tribunal system.

26 November 2015