



**Proposal on Charging Fees in Employment Tribunals and the
Employment Appeal Tribunal**

Consultation questionnaire

We would welcome responses to the following questions set out in the consultation paper. Please return the completed form by email to:

EmploymentFeesConsultation@hmcts.gsi.gov.uk. **Thank you.**

Question 1 – Are these the correct success criteria for developing the fee structure? If not, please explain why.

Comments: Yes. From a user's perspective, the contribution of fees to discouraging weak claims and increasing the incentive to resolve claims earlier, is particularly important.

Question 2 – Do you agree that all types of claims should attract fees? If not, please explain why.

Comments: Broadly yes, save that it may be fairer to apply a minimum claim size threshold, so that very small claims (commonly unpaid wages or similar) do not attract a disproportionate fee. Aside from that, there is no obvious justification for distinguishing certain types of claim and many claims are hybrid anyway.

Question 3 – Do you believe that two charging points proposed under Option 1 are appropriate? If not, please explain why.

Comments: Yes. Charging after the case has concluded, removes the primary advantage to users, being that of an incentive to resolve disputes earlier and more informally. Additional charging stages during the conduct of a case would be unduly complex.

Question 4 – Do you agree that the claims are allocated correctly to the three Levels (see Annex A)? If not, please identify which claims should be allocated differently and explain your reasons.

Comments: Yes, although again many claims are hybrid, meaning that many level 1 claims - such as unpaid wages - will in practice be considered with level 2 or 3 claims and attract the higher fee.

Question 5 – Do you think that charging three levels of fees payable at two stages proposed under Option 1 is a reasonable approach? If not, please explain why.

Comments: Yes. The system needs to be reasonably straightforward, both for the benefit of tribunals and users.

Question 6 – Do you agree that it is right that the unsuccessful party should bear the fees paid by the successful party? If not, please explain why.

Comments: As a general rule, this is the right default approach, subject to two caveats. Firstly, the power not to order reimbursement in any case which is mentioned in the consultation paper, should expressly (but not exclusively) refer to marginal decisions and should also permit the tribunal to apportion fees on a fair basis in such cases. Secondly, the tribunals' present powers to make orders in relation to costs, in limited special circumstances, should be extended to allow consideration of reimbursement of fees in those cases.

Question 7 – Do you agree that it is the claimant who should pay the issue fee and, (under Option 1), the hearing fee in order to be able to initiate each stage of the proceedings? If not, please explain why.

Comments: Yes.

Question 8 – Do you agree that these applications should have separate fees? If not please explain why.

Comments: A counter-claim should properly attract a fee. However, an application to set aside a default judgement does not necessarily infer fault on the Respondent's part and an application for dismissal never does so. In these cases, such applications are a procedural adjunct to the original claim and should not attract a separate fee, which otherwise amounts to a payment for one aspect of a Respondent defending itself.

Question 9 – Do you agree that mediation by the judiciary should attract a separate fee that is paid by the respondent? If not, please explain why.

Comments: No. Mediation should not attract a fee because that would represent an obstacle to the parties using a more informal and economical resolution mechanism. If a fee was charged, it should be borne equally by the parties. A reduced level mediation fee does not, as the consultation paper suggests, still operate as an incentive to mediation, if the Claimant would pay the tribunal hearing fee but the Respondent the mediation fee.

Question 10 – Do you agree that the HM Courts & Tribunals Service remission system should be adopted for employment tribunal fees across Great Britain? If not, please explain why.

Comments: Yes.

Question 11 – Are there any changes to the HM Courts & Tribunals Service remission system that you believe would deliver a fairer outcome in employment tribunals?

Comments: If a Claimant's circumstances changed during the course of a claim - as will be relatively common - the tribunal should have discretion to disapply the remission system in relation to fees previously waived.

Question 12 – Do you agree with the fee proposals for multiple claims under Option 1? If not, please explain why.

Comments: Broadly yes. However, the tribunal should have discretion to fix a fee in especially large claims (the consultation paper refers to claims with up to 10,000 Claimants). Representatives should not have legal responsibility for paying fees, though in practice will commonly do so. Where a single claim is changed to a multiple claim, a partial fee reimbursement to the single Claimant could be considered in the situation where a hearing fee has been paid at the single claim rate, but where no hearing has yet taken place.

Question 13 – Do you agree that the HM Courts & Tribunals Service remission system should be adopted for multiple claims? If not, please explain why.

Comments: The remission system should be adopted. However, it is not equitable, that if a Claimant in a multiple claim qualifies for a remission, the other Claimants should bear the remitted fee share. That conflicts with the approach in single claims, where a remitted fee is borne by the State, and also acts as a deterrent to joining claims together.

Question 14 – Do you agree with our approach to refunding fees? If not, please explain why.

Comments: Yes.

Question 15 – Do you agree with the Option 1 fee proposals? If not, please explain why.

Comments: Yes, subject to setting a minimum threshold claim size, as mentioned at 2 above.

Question 16 – Do you prefer the wider aims of the Option 2 fee structure? Please give reasons for your answer.

Comments: Yes. Option 2 requires Claimants to take an early and realistic view over the potential size of their claims for the first time - something which is notably lacking in many cases at present. This would both facilitate earlier resolution of claims and reduce the fear of uncapped claims - especially discrimination claims - in the majority of cases which would presumably fall below the £30,000 threshold.

Question 17 – Do you think one fee charged at issue is the appropriate approach? Please give reasons for your answer and provide evidence where available.

Comments: Yes. In addition to the answer to question 16 above, it may discourage unworthy claims, but without the burden of finding a hearing fee, which Respondents may use to pressure Claimants to withdraw or settle unrealistically.

Question 18 – Do you think it is appropriate that a threshold should be put in place and that claims above this threshold attract a significantly higher fee? Please give reasons for your answer.

Comments: The threshold of £30,000 should hold no fear for a Claimant with an obviously substantial claim e.g. a highly paid employee with a PIDA or discrimination claim, particularly where most claims (as the report says) are substantially below that threshold in any event.

Question 19 – Do you think it is appropriate that the tribunal should be prevented from awarding an award of £30,000 or more if the claimant does not pay the appropriate fee? Please give your reasons and provide any supporting evidence.

Comments: A difficult point: a Claimant may find he or she is unable to mitigate their loss so a claim which, at inception, appears to be under £30,000, becomes more than the threshold. The answer may be to have an additional fee payable (if appropriate) by the Respondent as the losing party. That would support the principle of reimbursement of the tax payer.

Question 20 – Fewer than 7% of ET awards are for more than £30,000. Do you think £30,000 is an appropriate level at which to set the threshold?

Comments: Yes.

Question 21 – Do you agree that Option 2 would be an effective means of providing business with more certainty and in helping manage the realistic expectations of claimants?

Comments: Possibly in that it brings a degree of forethought and clarity to the claim.

Question 22 – Do you agree with our view that it is generally higher income earners who receive awards over £30,000? Please provide any evidence you have for your views.

Comments: Yes we do agree with your view. Two factors influence that. First is the obvious one about the level of salary. Second is that there are fewer senior vacancies and therefore mitigation may be more difficult.

Question 23 – Do you agree that we should aim to recover through fees a greater contribution to the costs of providing the service from those who choose to make a high value claim (and can afford to pay the fee)? Do you have any views on impacts you think this would have on claimants or respondents? Please provide any supporting evidence for your statement.

Comments: Yes this makes perfectly good sense and, in our view, would have limited impact on either party.

Question 24 – Do you agree with the Option 2 fee proposals? If not, please explain why.

Comments: Yes.

Question 25 – Do you agree with our proposals for multiple claims under Option 2? Please give reasons for your answer

Comments: Broadly yes although the management of the process may be complicated, both from the Tribunal and Claimant perspective.

Question 26 – Do you agree with our proposals for remissions under Option 2? Please give reasons for your answer

Comments: Yes.

Question 27 – Do you agree with our approach to refunding fees under Option 2? If not, please explain why.

Comments: Yes.

Question 28 – What sort of wider information and guidance do you think is needed to help claimants assess the value of their claim and what issues do you think may need to be overcome?

Comments: In claims where the main constituent of compensation is future loss based, Claimants need to understand the Tribunal's approach to mitigation. Illustrations and examples would help provided not overly prescriptive. Any information about scale of damages for injury to feelings, stigma damages etc is also helpful.

Question 29 – Is there an alternative fee charging system which you would prefer? If so, please explain how this would work.

Comments: No.

Question 30 – Do you agree with the simplified fee structure and our fee proposals for the Employment Appeal Tribunal? If not, please explain why and provide any supporting evidence.

Comments: Yes.

Question 31 – What ways of paying a fee are necessary e.g. credit / debit cards, bank transfers, direct debit, account facilities? When providing your answer please consider that each payment method used will have an additional cost that will be borne by users and the taxpayer.

Comments: There is no payment method that we can think of that does not have some costs. Even cash has to be taken to the bank! The cost of each method is broadly comparable, all methods should be available.

Question 32 – What aspects should be taken into account when considering centralisation of some stages of claim processing and fee collection?

Comments: Cost is obviously a factor but centralisation should not be seen as an obstacle to bringing a claim.

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	Andrew Lancaster
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	President
Date	6 March 2012
Company name/organisation (if applicable):	Birmingham Law Society
Address	Cornwall Buildings, 45-51 Newhall Street
	Birmingham
Postcode	B3 3QR
If you would like us to acknowledge receipt of your response, please tick this box	<input checked="" type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Birmingham Law Society, a membership organisation for lawyers.

Equality impact assessment questionnaire

We would welcome responses to the following questions as set out in the equality impact assessment.

Q1 – What do you consider to be the equality impacts of the introduction of fees both under Option 1 and Option 2 (when supported by a remission system) on claimants within the protected groups?

Comments: in general terms the people who find themselves in these groups may also be disadvantaged in terms of finance and affordability of the fees. If these fees are not recoverable the fees could be prohibitive in the people in these groups accessing justice in what are often substantial issues within the workplace. On the positive side the levying of these fees should act as a deterrent in those people in these groups who do not have genuine claims. We are mindful of the remission system and consider that goes some way to mitigating some negative impacts of the protected groups

Q2 – Could you provide any evidence or sources of information that will help us to understand and assess those impacts?

Comments: the statistical evidence which is produced by tribunal in respect of discrimination points to the fact that a large percentage of these claims succeed and that often the claimants are not in work as a consequence of the acts of discrimination and a charge attached to issuing these claims could have the effect as mentioned in suppressing justice in many situations .

Q3 – What do you consider to be the potentially positive or adverse equality impacts on employers under Options 1 and 2?

Comments: I believe that employers would consider that this is a positive effect in that the number of claims would be reduced and therefore the exposure of risk to litigation against the business reduced

Q4 – Do you have any evidence or sources of information that will help us to understand and assess those impacts?

Comments: No

Q5 – Do you have any evidence that you believe shows that the level of fees proposed in either option will have a disproportionate impact on people in any of the protected groups described in the introduction that you think should be considered in the development of the Equality Impact Assessment?

Comments: Not at present

Q6 – In what ways do you consider that the higher rate of fees proposed in Option 2 for those wishing to take forward complaints where there is no limit to their potential award (the Level 4 fee) if successful, will be deterred from accessing justice?

Comments: as with all cases there is no guarantee of success - even if there is potential for an unlimited award this will only become a higher prospect at the later stages in the claim - after disclosure or even on the exchange of statements or following a interlocutory hearing - a fee levied at these later stages may be a better option rather than at the time of issue with a further fee at the hearing stage

Q7 – Are there other options for remission you think we should consider that may mitigate any potential equality impacts on people with protected characteristics while allowing us to keep the levels of fees charged under either option to the level we propose?

Comments: as above consideration may be given to deferring the payment of a fee to a later stage in the process rather than at issue

Q8 – Do you consider our assumption that the potentially adverse effects of the introduction of fees together with the remission system will mitigate any possible adverse equality impacts on the groups covered by the analysis in our equality impact assessment to be correct? If not, please explain your reasons.

Comments: yes

Q9 – Further to Q8 could you provide any information to help us in understanding and assessing the impacts?

Comments: we do not have any tangible further information to assist at this time

Q10 – Could you provide evidence of any potential equality impacts of the fee payment process described in Annex B of the Equality Impact Assessment you think we should consider?

Comments: the remission system is broadly in line with what we might expect to be implemented which will support those individuals on income support in one way or another..

Q11 – Further to Q10 do you have any suggestions on how those potential equality impacts could be mitigated?

Comments: No

Q12 – Where, in addition to any of the questions that have been asked, you feel that we have potentially missed an opportunity to promote equality of opportunity and have a proposal on how we may be able to address this, please let us know so that we may consider it as part of our consultation process.

Comments: None at present

Thank you for participating in this equality impact assessment.