



BIRMINGHAM LAW SOCIETY

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**Response to the Government's Consultation on The
Proposal for Reform: Introducing Fees in the
Employment Tribunal and the Employment Appeal**

March 2024

Response of the Employment Law Committee of the Birmingham Law Society to PROPOSAL FOR REFORM: INTRODUCING FEES IN THE EMPLOYMENT TRIBUNAL AND THE EMPLOYMENT APPEAL TRIBUNAL Consultation

This response has been prepared by the Employment Law Committee of the Birmingham Law Society. The Society is the largest local law society with some 9,000 members from all branches of the legal profession and practising in all aspects of law. The response represents the collective views of the Employment Law Committee whose members include specialists in employment law from all branches of the legal profession

1 Do you agree with the modest level of the proposed claimant issue fee of £55, including where there may be multiple claimants, to ensure a simple fee structure? Please give reasons for your answer.

1.1 We do not agree with either the principle of the introduction of fees in relation to claims or, for that matter, to the amount of the fee in relation to each claim.

1.2 The reasons for this are as follows:-

When fees were introduced previously there was a marked decline in the number of claims. This included a decline in the number of legitimate and well-founded claims with the result that those with legitimate grievances against their employers could not and/or did not seek to pursue those claims;

(a) With 4% of awards being less than £500 that 4% will be paying an "issue fee" in excess of 10% of the amount recovered;

The previous fee structure was overturned, with concerns raised of its discriminatory impact. We see nothing in the current proposal which avoids the Supreme Court decision as to the adverse impact of the less well paid, women and individuals with protected characteristics (as referenced in paragraph 6 of the introduction to the proposal);

Given the projected income between £1.3 million and £1.7 million per annum on a full year basis (from 2025/2026 onwards) it is our submission that the revenue generated is insufficient to justify the adverse effect that fees will have on the pursuit of legitimate claims. We envisage that the cost of managing the fees system (for example, considering and adjudicating remission applications) will surely counterbalance to a greater or lesser extent any projected income;

Although it is possible that the prospect of fees will increase the inclination of claimants to resolve matters by way of conciliation, that is not the case from an employer's perspective. Employers are more likely to wait and see whether a prospective claimant does pursue a matter before engaging - in the experience of the employer side representatives on this committee that was the experience when fees were previously in force.

- (b) We believe that as a general principle, particularly with an employment sector that is so heavily regulated, there should be a tax-payer funded system for parties to be able to resolve employment disputes. We consider there is significant social benefit to such a system and that access to justice, often in claims that are relatively low value, is an important consideration. There is a concern that, ultimately, a system that requires a claimant to pay a fee will end up placing the burden of meeting that fee (whether through awards in successful claims, or the value of settlements achieved) onto employers. It will, we believe, be relevant in the introduction of any new fees regime to make clear whether the Employment and Employment Appeal Tribunal will refund the issue fee to claimants who are successful in their claim/s.

2 Do you agree with the modest level of the proposed EAT appeal fee? Please give reasons for your answer.

2.1 We do not agree with the proposed introduction of fees in relation to EAT appeals.

2.2 The reasons for this are as follows:-

The proportion of case decisions that are appealed is low;

The grounds for appeal are narrow, based upon errors of law or alternatively perversity in the first instance decision. The appeal is therefore to correct a mistake. The correction of a mistake made at a lower level should not be at the

cost of the party adversely affected in a jurisdiction where most claims are capped at 1 year's pay or an upper limit of £105,707;

The potential for the introduction of fees being able to deter unmeritorious claims does not, we believe, have the same potential impact in the EAT compared to the Employment Tribunal. In the committee's experience, the EAT is traditionally well paced at being able to 'weed out' unmeritorious appeals at a relatively early stage.

3 Do you believe that this proposal meets the three principles of affordability, proportionality and simplicity? Please give reasons for your answer.

3.1 We do not believe that the three principles are met in every case.

3.2 The reasons for this are as follows:-

- (a) We do not believe that the fee is proportionate to the issue which is purports to address – there is an adverse impact on certain groups within the labour force, the income generated will be limited and addresses hardly at all the stated shortfall in the operating costs of the ET, EAT and ACAS dispute resolution functions;
- (b) The issue of affordability is referenced above, it adversely impacts on those with low value claims as there is not mechanism which would entitle the individual to recover the issue fee;
- (c) We accept that, a single fee for all cases does meet the principle of simplicity.

The committee's previous experience of fee remission is limited but we understand it is complicated and ineffective. The committee is also concerned that the management costs of running the fees scheme (for example the requirement to consider and respond to fee remission applications) will be costly and this is likely to impact the effectiveness of a scheme of fee payment. It is unclear to the committee whether an impact assessment of these costs has been undertaken and we believe to do so would be a valuable exercise.

4 Do you consider that a higher level of fees could be charged in the ET and/or the EAT? Please give reasons for your answer.

4.1 We do not consider that a higher level of fees should or could be charged in either the ET or the EAT for the reasons previously stated.

4.2 It is clear from the proposal that the issue fee at £55 has been carefully considered so that it falls materially below the issue fee previously found to be discriminatory. In the circumstances, given the judgment of the Supreme Court, it appears to us unlikely that fees at a materially higher level and one which would "recover the full cost of the service provided" is likely to withstand any potential challenge.

The background set out in the proposal document fails to reference claims for unfair dismissal – these are, numerically, the most popular in terms of claims made and are relevant to a greater proportion of the labour force than any other potential claim (save from unlawful deduction from wages). Unfair dismissal claims are capped at the lower of a year's pay and £105,707. The justification for fees, or fees at a level higher than £55 per claim, might be made out if the cap on unfair dismissal claims were removed so that those most likely to claim were in the same position as those who have claims for either discrimination or for whistleblowing unfair dismissal, which is to say that they are uncapped.

The introduction of fees at all is, in our submission, a negative step given the purpose of the employment tribunal. The introduction of fees at the proposed level, with the prospect of fees being increased at a later level (leaving aside the adverse effect that was seen when fees were previously introduced) also represents a "thin end of the wedge" position in which the fees will be increased on some indexed basis from year to year. Although this may recover some greater part of the operating costs of the tribunal system, it may be the case that these are increased at a rate above inflation with the consequent adverse effect on access to justice. If it could be argued that good HR practices by employers help to increase productivity and well-being amongst staff, then it follows that there should be unfettered redress in cases of failure or abuse. The inherent stress and delay in the process is already a material factor in the decision to issue proceedings

Finally, it is an unavoidable truth that the vast majority of those who exercise their right to bring claims in the tribunals are themselves taxpayers and are therefore already contributing to the cost of the system which they seek to use.

In this context the suggestion that "taxpayers meet the bill" means that those using the system have already paid for its operation. There is an element of cross subsidy. Taxpayers in work in effect subsidise those not in work (and who are the claimants, by and large).

5 Are there any other types of proceedings where similar considerations apply (regarding fee exemptions for certain types of proceedings in relation to the national insurance fund payments) and where there may be a case for fee exemption. Please give reasons for your answer.

5.1 We believe that there are such circumstances although they will apply in only limited cases.

5.2 Mindful that our basic position is that fees should not be charged, it would be our suggestion that fees should not be charged in relation to:

Claims without a potential financial value – although it is accepted that there are few circumstances in which freestanding claims for declaratory relief or directions as to employers' future conduct can/or are likely to be made. However, the potential for the encouragement of claims such as for interim relief will need to be carefully considered alongside any such remission; and

- (a) Claims in relation to a failure on the part of an employer to make a statutory redundancy payment – as statutory redundancy pay is due where there is a redundancy (as defined by the Employment Rights Act 1996) the failure by the employer to pay those amounts to a failure to discharge a debt. The employee concerned should not be forced to pay a fee when seeking to recover monies to which they are entitled as a matter of law and which represents a right accrued by reason of their past service to the employer

Any claims arising in an insolvency situation.

6 Are you able to share feedback on the different factors that affect the decision to make at ET claim and if so, to what extent? For instance, these could be a tribunal fee, other associated costs, the probability of success, the likelihood of recovering a financial award, any other non-financial motivation such as any prior expense or court tribunal process etc. Please give reasons for your answer.

6.1 The membership of this committee is drawn from practising employment lawyers. Although the committee represents those who act on behalf of employers and employees the majority of the experience is on the employers' side. The comments therefore are based, for the most part, on perception and anecdote rather than direct experience, although several of the members act for claimants periodically, and some pro bono. Subject to that our view is as follows:-

- (a) The dominant factor in relation to the pursuit of claims is an actual or perceived injustice on the part of a claimant;
- (b) In common with other areas of the law, where an individual's rights have been infringed then they seek to be compensated. Claims in the employment tribunal give rise to claims for compensation for the loss suffered and, in some cases, the injury to feelings (representing a non-financial loss);

The majority of claims will involve an assessment of the prospects of success, particularly where insurers are involved on behalf of a claimant – it is irrelevant how strongly an individual feels about a claim if it stands no prospect of success because their perception of the legal position is incorrect, or their view on the relevant facts is challenged;

In our experience there is little influence on any of the above by reason of the individuals' past experience of court or tribunal processes. The stress imposed on the claimant in pursuit of the claim should not be underestimated;

- (c) There are cases where claimants will initiate proceedings simply to seek to extract a settlement – but that is not the same as pursuit of claims which have no merit;
- (d) In the period when there were fees, as is evidenced by the very material decline in the number of claims filed, the fact that a fee was required did have an adverse impact on the pursuit of claims. As the supreme court concluded it was also discriminatory.

7 Do you agree that we have correctly identified the range and extent of the equalities impacts for the proposed fee introduction set out in this

consultation? Please give reasons and supply evidence of further equality as appropriate.

7.1 We have nothing to add on this point.