

Consultation Response

Introducing Fees in the Employment Tribunals and the Employment Appeal Tribunal

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the Ministry of Justice consultation: *Introducing Fees in the Employment Tribunals and the Employment Appeal Tribunal*.¹ The sub-committee has the following comments to put forward for consideration.

Consultation Questions

Question 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.

We understand that Employment cases are among only a select few types of legal claims for which fees are not currently charged. We also have reviewed the Unison Judgment² and have taken into account the comments from the Supreme Court around fees generally.

Notwithstanding these factors, we are mindful that Employment Law disputes are unique in their nature, given the key principle of this forum being one which is open to individuals to participate in, without the need for legal qualifications or expertise. Although £55 may seem like a nominal amount to businesses and many workers, £55 can still be a significant amount of money for individuals on minimum wage, casual workers and those who are on benefits, in short, some of the most vulnerable in the workforce. With a backdrop of an increased cost of living, then £55 could still be an unacceptable barrier to access to justice. The rationale for reintroducing fees is also not quite well set-out. It is suggested in the consultation that the aim is to reduce the burden on the taxpayer. However, as per the Government's own statistics quoted in the consultation paper, it is anticipated that the reintroduction of fees at £55 would raise an estimated £0.6m and £0.7m in 2024/25 and between £1.3m and £1.7m per annum from 2025/26 onward. As noted in the consultation paper, the costs of running the Employment Tribunal in 2022/2023 was £80m and funding the early conciliation process provided by ACAS was £58m in 2022/2023. The fees mooted therefore do not seem to make any fundamental impact on the funding of the services provided.

¹ <https://www.gov.uk/government/consultations/introducing-fees-in-the-employment-tribunals-and-the-employment-appeal-tribunal>

² R (Unison) v The Lord Chancellor [2017] UKSC 51

In relation to the specific amount, this has not been well-addressed in the consultation paper. The scheme would reduce the bill by the taxpayer by roughly 2%. When taking into account the creation and administration of the scheme, it seems likely that this will outweigh the money the scheme generates. It is not clear on what basis or with what justification the fee has been proposed as £55.

Whilst the Employment Tribunal model is unparalleled and unique in the HMCTS system, it is worth noting that in Simple Procedure (previously called small claims) in the Sherrif Court, the fees are £20 for a claim of £300 or less and £110 for claims over £300, up to a maximum claim value of £5,000.³

Whilst there is an aim of encouraging parties to settle and reducing nuisance claims, which should be welcomed by all Employment Tribunal stakeholders, we note the Supreme Court's comments in 2017 that the previous, higher rates of fees, did not deter unmeritorious claims, nor did they increase settlement of claims, according to the statistics presented to the court at paras. 57 – 59 and 101 of the Judgment. The Consultation also does not address the observations on the potential discriminatory impact of fees put forward by Lady Hale in the 2017 Judgment. The Government seems to have acknowledged this. In the Equality Statement, it specifically identifies that those who are not white British, disabled or older are likely to be adversely impacted due to indirect discrimination relating to their protected characteristic by the introduction of fees. Although objective justification is presented by the Government, if the Scheme in fact makes no discernible saving to the taxpayer as we have outlined above, then it is likely that any pursuit of this aim would not be proportionate and could again become indirect discrimination which cannot be justified. The consultation also suggests that the fee could help alleviate the pressures the Employment Tribunal is currently facing. This is assumed to be on the basis that there is a well-known and recognised backlog of claims, and fees would cut the number of claims being raised. However, it is crucial that access to justice is not impinged upon by a desire to lessen the burden on the Service. Rather, the focus should be on improving administration, technology and increasing the numbers of Judges and administrative staff available. The amount it is suggested that the fees could raise would not cover any of these costs. Fees should not be used as a backdoor way of cutting down the workload of the Employment Tribunal.

If the aim is to encourage parties to settle and reduce nuisance claims, consideration could be given to a more robust sift when claims are submitted, or a model whereby fees are reimbursed where the claim is successful.

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

We refer to our main points set out above. Notwithstanding these, if fees are to be introduced, then we agree that these should be uniform and should be at the same level as any Employment Tribunal fees.

³ <https://www.scotcourts.gov.uk/rules-and-practice/fees/sheriff-court-fees>

Question 3: Do you believe this proposal meets the three principles set out above? Please give reasons for your answer

The level of fee is modest and is likely to be affordable for most claimants. A system of requiring payment of one flat fee has the benefit of simplicity and the level of fee and timing of payment is clear.

As regards proportionality, a fee at the level of £55 or above for a claim involving only a non-monetary award, or a low value financial award (i.e. an award of less than £200), is not proportionate and will likely act as a significant deterrent, presenting issues for access to justice. Consideration could be given to nil fee claims where a non-monetary award sought, or where the level of any financial award is capped.

Additionally, given that it is acknowledged that the fees scheme will make only a minimal contribution towards the cost of providing the Employment Tribunal service, and taking into account the financial and administrative burden involved in implementing and operating the fee (and fee remission) system, which may outweigh the sums recovered, there is an argument that the implementation of the fee scheme is not a proportionate means of achieving the objective of having tribunal users contribute to the cost of the ET service.

The fee remission scheme will be seen to be complex and difficult to understand for many claimants and it is felt that the guidance associated with the Help with Fees process is unclear and may be difficult for unrepresented claimants to understand. Clearer and simpler guidance would be beneficial. We would urge that any Help with Fees guidance and forms be made clear and available on the tribunal website and also when the individual accesses the ET1. If different guidance is available in Scotland, this should be clarified to avoid any misunderstanding. For many claimants, given the short time limits that apply in the presentation of claims in the employment tribunal, any difficulty understanding the Help With Fees provisions will act as a disincentive to the presentation of a claim, particularly for unrepresented claimants.

Question 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

The current level of fee proposed would likely be at the upper end of what might be regarded as affordable for many potential tribunal users, who will often be seeking to present a claim having lost their employment, or in other circumstances where earning ability is compromised.

Increasing the level of fees materially, while placing the burden of paying fees only on the claimant, could reasonably be considered to be unfair. Where an increase to fees is contemplated it would be fairer to require the respondent also to make a payment of fees at the point a response is submitted, or at the point a final hearing is fixed (which may promote earlier settlement of claims).

While the current level of fees payable by the claimant is modest and likely to be affordable in most cases, material increases to the level of fees payable may not meet the objective of being affordable, and could act as an impediment to effective access to justice. Additionally, if higher fees were to be considered, further circumstances for fee exemptions would need to be considered, which risks overcomplicating the system and would undermine the principle of simplicity.

Implementing a system whereby additional fees were payable at different stages of the tribunal procedure would add complexity, and could be used by parties as leverage in settlement negotiations, which may detrimentally and unfairly impact claimants.

Q5. Are there any other types of proceedings where similar considerations apply, and where there may be a case for fee exemptions? Please give reasons for your answer.

We agree that if fees are to be introduced, they should not cover claims relating to the National Insurance Fund.

References to the employment tribunal in respect of failure to provide a section 1 or a section 4 statement, or a pay statement under the Employment Rights Act 1996 (or provide and inaccurate or incomplete statement) do not always attract compensation, in some cases the tribunal can only make a declaration of what ought to have been included in the statement to ensure compliance. In such cases, where no compensation is due, paying a fee seems unfair (although if this claim was brought alongside other claims that did attract compensation the same rationale would not apply). Any other non-monetary claims, if raised in isolation, likewise should not attract a fee.

We considered whether there may also be merit in excluding discrimination complaints from the fee ambit. Given complaints of discrimination are often brought by the most vulnerable and marginalised in society, the introduction of fees will compound the disadvantage they already experience. However, we would anticipate that these concerns would be addressed by an effective fee remission scheme.

We considered whether in cases where a claimant is seeking reinstatement or re-engagement in cases of unfair dismissal (and did not also apply for compensation in the alternative, or otherwise have another claim involving compensation) whether they should also be exempt from paying a fee. However, while there may be some justification for this, this could unintentionally encourage claimants to apply for re-engagement or reinstatement to avoid the fee when they would not otherwise which may not be in the best interests of the parties.

A fee exemption may be appropriate for low value unlawful deductions from wages claims, for example where the amount sought is below £200 and no other claims are brought.

We note the intention is for fees to apply to all claimants and appellants, regardless of the type of claim or the track under which it is recognised (para.32, consultation document). Therefore, although not expressly stated, we anticipate it would apply to:

- Employer's counterclaim in the ET for breach of contract
- Employer's appeals against notices of underpayment of the NMW (section 19c, National Minimum Wage Act 1998)

We consider that a fee in the above two scenarios would be appropriate, based on the wider rationale for fees generally (although administratively in relation to counterclaims, this may be difficult to apply when it is lodged as part of the employer's ET3). It may also level the playing field in that to exclude the above claims would clearly put employers at an advantage.

Q6. Are you able to share your feedback on the different factors that affect the decision to make an 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 motivations such as any prior experience of court or tribunal processes etc. Please give reasons for your answer.

Factors can include:

- Level of anticipated award
- Prospects of success
- Cost of bringing a claim
- Funding from other means (insurance / trade union etc)
- Complexity of the claim
- Reputational issues (assuming the hearing is in public and that any judgement will be made publicly available)
- Justice - the need to feel vindicated and listened to
- Whether the individual has another job, if so they may be inclined to "get on with it" even if they have a valid claim
- Emotional toil / energy of going through a litigious process

Data about the number of ET claims when fees were introduced in 2013 clearly demonstrate that the introduction led to a substantial fall in the number of claims brought to the ET (a drop of 53% in the 12 months after the fee introduction, as per paragraph 6 of the introduction to the consultation). However, we appreciate in those circumstances fees were at a significantly higher level (£390 or £1200 depending on whether a type A or type B claim, compared to the proposed £55).

In terms of the extent to which each of these reasons can influence a potential claimant, much will depend on the individual and claim(s) in question. Clearly financial value of the claim and prospects will generally be a significant driver in many cases. However, some claims (for example, those of a more emotive nature, like discrimination claims) can be driven primarily by the need for justice.

Q7. Do you agree that we have correctly identified the range and extent of the equalities impacts for the proposed fee introductions set out in this consultation? Please give reasons and supply evidence of further equalities impacts as appropriate.

We consider that further assessment of the extent to which the proposals impact women should be made. The equalities impact assessment appears to proceed on the basis that fees will not disproportionately disadvantage women because the percentage of female Claimants (43%) is lower than the percentage of females in the general population (49%). No consideration is given as to why the percentage of women raising employment tribunal claims is lower than the general population, in particular whether this indicates women are more likely to

be deterred from raising a tribunal claim. If that is the case, introduction of tribunal fees, which will act as a further deterrent to raising a claim, may disproportionately disadvantage women.



For further information, please contact:

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