

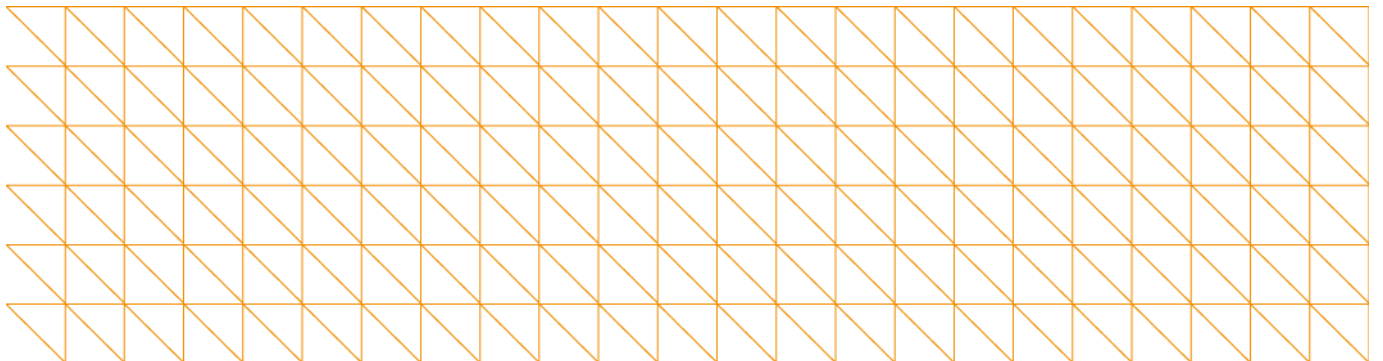


Ministry of
JUSTICE

Charging Fees in Employment Tribunals and the Employment Appeal Tribunal

Response to Consultation CP22/2011

This response is published on 13 July 2012



Charging Fees in Employment Tribunals and the Employment Appeal Tribunal

Response to consultation carried out by Ministry of Justice.

This information is also available on the Ministry of Justice website at www.justice.gov.uk

About this consultation

- To:** This consultation is aimed at all stakeholders with an interest in employment tribunals and employment matters, or who would be affected by the introduction of fee charges for employment claims and appeals to the Employment Appeal Tribunal.
- Duration:** From 14/12/2011 to 06/03/2012
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- How to respond:** This consultation closed on 6 March 2012 and responses can no longer be taken.
- Response paper:** A response to this consultation exercise was published on 13/07/2012 at:
www.justice.gov.uk/about/hmcts/index.htm

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Charging Fees in Employment Tribunals and the Employment Appeal Tribunal Summary of responses

Introduction and contact details

This document is the post-consultation report for the consultation paper, *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal*.

It will cover:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting **Tom Matley** at the address below:

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This report is also available on the Ministry of Justice's website:
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Alternative format versions of this publication can be requested from
EmploymentFeesConsultation@hmcts.gsi.gov.uk

Background

1. Employment tribunals were initially created by the Industrial Training Act 1964 to hear appeals against training levy assessments imposed by industrial training boards. This remains one of their functions today, but the jurisdiction has since expanded to embrace a large number of different types of claim arising from employment situations. In this document, we refer to the person commencing proceedings as the claimant, and the organisation defending the claim (usually the employer or ex-employer) as the respondent.
2. There are, in employment tribunals, separate jurisdictions for England & Wales and Scotland. The Employment Appeal Tribunal generally hears appeals from all the employment tribunals on points of law.
3. The consultation paper *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* was published on 14 December 2011. It sought views on two alternative fee charging structures for the employment tribunals and one proposed structure for the Employment Appeal Tribunal. The consultation did not seek views on the principle of charging fees as the Government announced its intention to introduce fees to bring a claim to the employment tribunals or an appeal to the Employment Appeal Tribunal (EAT) in early 2011¹, together with its reasons for doing so.
4. At present taking a claim to an employment tribunal or appealing to the EAT is free of charge and funded by the taxpayer. An alternative to using the employment tribunals is for parties to use Acas conciliation or other Acas guidance and assistance², in order to resolve their dispute, which is also funded by the taxpayer. The fee proposals are therefore intended to relieve some of the financial burden on the taxpayer by requiring users of the employment tribunals and EAT to make a contribution to the cost of the service that they receive where they can afford to do so. The consultation invited comment on the proposed fee charging structures for introducing fees into these tribunals.
5. The consultation outlined two main options for the fee charging system in employment tribunals.
 - Option 1 proposed a two stage charging system with the first fee stage being due at the issue of a claim and the second fee stage due prior to hearing, with the level of fee payable dependent on the type of claim and stage in the proceedings. The aim of Option 1 was to transfer some of the costs of the tribunal from the taxpayer to the tribunal users.

¹ "Resolving Workplace Disputes" consultation: <http://www.bis.gov.uk/Consultations/resolving-workplace-disputes>

² For example Acas helpline: <http://www.acas.org.uk/index.aspx?articleid=2042>

- Option 2 proposed a single fee at issue, dependent on the type of claim and the value of the award sought by the claimant, so that a higher fee would be payable where the claimant sought an award over £30,000. Under Option 2, the tribunal would be restricted from making an award over £30,000 unless the higher fee was paid. Business and business representative groups raised unlimited awards as an issue which acts as a barrier to business confidence and growth. Therefore, Option 2 had the additional policy aims of providing businesses with greater certainty over their maximum liability of an award and improving claimants' expectations of what they may be awarded if they were to be successful in their claim.
6. In addition, there were a number of proposals which were common to both options, namely:
- That 6 "application specific" fees would be charged for:
 - i. A counter-claim in a breach of contract case.
 - ii. Application to set aside a default judgement.
 - iii. Application for dismissal following settlement or withdrawal.
 - iv. Request for written reasons after the judgement where reasons have been given orally.
 - v. Application for review of the tribunal's judgement or decision.
 - vi. A fee for mediation by the judiciary.
 - The HMCTS fee remission system for civil courts in England and Wales would be applied to the employment tribunals fee structure across the whole of the UK to protect access to justice for those who:
 - i. Cannot afford to pay the full fee or;
 - ii. Can only afford make a contribution to it.
 - Multiple cases would be charged more than single claims, with a multiplier applied dependent on the number of claims in the case.
 - Refund provisions would be restricted to where a fee was taken in error or where it became apparent that a claimant who had paid a fee was eligible for remission at the time at which they paid the fee.
 - A power for the tribunal to order the unsuccessful party to reimburse any fees paid by the successful party.
 - In the EAT a two stage charging system was proposed, similar to Option 1 in employment tribunals, with a fee payable upon requesting permission to appeal and a further fee due prior to the hearing of the

appeal. The same remission, refund and other provisions would apply to the EAT equally, as proposed for the employment tribunals. There were no application specific fees proposed.

7. The consultation period closed on 6 March 2012 and this report summarises the responses received, identifying how the consultation process has influenced the final development of the fees system consulted upon.
8. The Impact Assessment published alongside this the consultation has, where possible, been updated with the most up-to-date financial and workload information. The post-implementation Equality Impact Assessment, updated to take account of evidence provided by stakeholders during the consultation period, has been separately published to accompany this consultation.
9. A summary of respondents can be found at Annex A.

Summary of responses and policy decisions

10. A total of 140 responses were received to the consultation. This included 25 from unions and other organisations representing the views of employees, 29 from legal groups and solicitors, 31 responses from business, 25 on behalf of advisory and equality groups, and 30 from other interested parties and individuals.
11. Claimants and groups representing their interests came out strongly opposed to the principle of charging fees, and as a consequence many responses disagreed with both options presented in the consultation. These respondents thought the fee proposals and the high level of fees proposed would deter claimants from making claims and that it was unfair that claimants were being asked to pay the majority of fees, particularly given the perceived financial inequality of employee versus employer. They also generally viewed fees as discriminatory.
12. Business respondents generally supported both options with a tendency towards Option 2 where they found the idea of a threshold and higher fee attractive. Some were keen that fees acted as a disincentive for claimants to bring weak and vexatious claims. They supported the fact that the claimant would be required to pay the issue and hearing fees, as well as the proposals for limited refunds. They also broadly agreed with the proposals for multiple cases in both options.
13. Little consensus could be found on the key issues across the groups, making it difficult to state a clear preference for either of the options, however respondents overall generally seemed to prefer a two stage fee, believing that it offered a second opportunity to encourage parties to consider settlement.
14. The majority of business responses were in favour of the threshold proposed in Option 2, but less than half of those responses considered that the Option 2 proposals in general would prove to be an effective method for providing more certainty to business over liability with almost two thirds of business respondents rejecting the Option 2 proposal overall. Other groups were almost unanimous in rejecting the Option 2 threshold, and were more strongly opposed to the charging of a single fee at issue.
15. Of the 6 “application specific”, fees, the fee for written reasons attracted the most criticism. All respondent groups (i.e. business, unions, claimants and legal groups) expressed opposition on the grounds that written reasons are a fundamental right of justice, that parties are entitled to know why they have won or lost and should be seen as an existing part of the judicial decision-making process of the employment tribunal.
16. The proposed HMCTS civil courts remission system was criticised by both business and claimant groups. Business thought it was too generous and didn’t take into account savings or recent payments of lump sums to employees.

Claimant groups argued it was too complicated, would not protect as many individuals as suggested and was not generous enough. Research conducted by PricewaterhouseCoopers on behalf of the MoJ³ in 2007 into the civil courts remission system was referenced by some respondents as evidence of how the complex nature of the system had in the past led to flawed decision making by HMCTS staff. The proposals for multiple claims were also criticised for being overly complex.

17. The one proposal to which respondents appeared in mutual agreement across the groups was that the unsuccessful party should reimburse the fee(s) paid by the successful party, although the discretionary nature of the power was questioned by some respondents.
18. Fewer comments were received on the EAT fee proposals. Those who disagreed with fees saw the EAT as playing an important role in determining and clarifying the law for employment tribunals and the fee proposals were seen as deterring worthwhile appeals. However, other respondents agreed with the simplified proposals and thought some consistency with the employment tribunals' structure was preferable.
19. Having carefully considered the full range of the views of respondents, the Government has decided not to pursue Option 2. However, we recognise that many respondents supported the aims of improving the expectations of claimants regarding the level of any potential award, which provides in turn some business certainty. We intend to develop proposals which will improve the communication and advice available to people considering a claim to help address this issue. There is further discussion on these proposals in Part C.
20. In respect of employment tribunals, the Government has decided to introduce the Option 1 fee structure in the latter half of 2013 with some amendments. The amendments are:
 - The merging of levels 2 and 3 fees into one fee level and a change to the issue and hearing fee as a consequence;
 - The re-allocation of a small number of claims to new fee levels;
 - That no separate fee charged for seeking written reasons; and
 - There will be a reduction in the number of bands for multiple claims from 5 to 3.
21. There are some changes to the proposed fee levels and a summary of the proposed fee structure is given on page 61.
22. There are no changes made to the fee structure which was proposed for EAT in the consultation.

³ <http://webarchive.nationalarchives.gov.uk/http://www.justice.gov.uk/publications/2007-court-fee-remission-system.htm>

23. The Government has decided to adopt the proposal to extend the current HMCTS civil courts remission system to protect access to justice in employment tribunals and the Employment Appeal Tribunal for those who cannot afford to pay the fee.
24. Given the concerns raised by respondents to this consultation and more widely, the Government will undertake a review of remissions as part of a wider review required for the introduction of Universal Credit. The review will aim to produce a single remissions system for courts and tribunals which is simpler to use, more cost efficient and better targeted to ensure that those who can afford to pay fees do so, while continuing to provide access to the courts and tribunal system to those who cannot.

Structure and extent of the response to consultation

25. The original consultation in December proposed two alternative fee structures. Under part 1 of the consultation we outlined the Option 1 fee structure and asked 15 questions. In part 2 we outlined the Option 2 fee structure and asked a further 14 questions on this option.
26. Whilst the two proposals were separate, the options shared a number of similar features e.g. the two options shared the same proposals for remissions, refunds and multiple claims. The key differences lay in the wider policy intention of Option 2, the simplified fee structure and the use of the value of the claim to determine the fee levels. This meant that respondents commonly referred to previous answers or did not respond fully to the second set of questions within their responses.
27. Therefore, in order to provide a more holistic response we have adopted a different approach in the response to the consultation responses, whereby questions from each of the options are collated into topics in order to give a more informed picture of the issues raised.
28. Whilst all but one of our questions initially sought a yes / no answer followed by reasons, a significant number of respondents provided “open” answers that it may be perceived to be misleading to log definitively as agreeing or disagreeing with a particular proposal. These are instead noted as an “open comment” answer for the purposes of collating the data. In some cases the total number of views expressed in response to a particular question is greater than the sum of the "agree" and "disagree" tallies. In relation to most responses, approximately two-thirds disagreed with the proposals, with a third agreeing.
29. The sections and questions regarding proposals for: the success criteria for developing the structure, the extent of charging, reimbursement of fees, liability for payment of fee, remissions and refunds apply to both employment tribunals and EAT in equal measure so comments for both are dealt with together.
30. We have considered each response carefully and endeavoured to address as many of the points raised as possible in this response, but it is not possible to respond to all specific points made by individual respondents within the confines of this response.

Responses to specific questions

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Part A – Proposals common to both options

A1. THE SUCCESS CRITERIA FOR DEVELOPING A FEE STRUCTURE

31. The consultation acknowledged that developing a fee structure presented a number of issues, given the need to consider inter-dependencies, when to charge, what to charge for and the likely impact, in the context of tribunals with particular characteristics and ways of working that have become established without fee systems being in place.
32. Recognising this, a set of criteria was developed in order to assist respondents in deciding whether the structure proposed met the criteria. The criteria were:
- Recover a contribution towards the costs from users which will be used to support and fund the system.
 - Develop a simple, easy to understand and cost-effective fee structure.
 - Maintain access to justice for those on limited means.
 - Contribute to improving the effectiveness and efficiency of the system
33. This is set in the context of a fees policy which aims to transfer some of the cost burden from the taxpayer to users of the employment tribunals and the Employment Appeal Tribunal.
34. The consultation sought views on the criteria used to develop the fee structure with one specific question asked. Most respondents did not re-visit the question of the criteria as part of their responses to Option 2. The themes raised in responses to this question such as the impacts of fees, the high level of fees, whether access to justice is maintained and seeking payment from the claimants form the basis of responses to later questions.

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

35. 118 of those who replied to the consultation commented on this question, with approximately a third of respondents agreeing that the success criteria were correct. Other respondents disputed the criteria on the basis that fees should not be charged at all. Of those who disagreed many were business respondents who felt that the policy intention also ought to seek to deter weak and vexatious claims. Other respondents stated that a primary objective ought to be to protect access to justice for employment tribunal users. For example, the Employment Lawyers Association in their response stated:

The government's aim should be to maintain access to justice for all – not just for those on limited means, although it should specifically maintain access to justice for those on limited means. Indeed, any other aim would be inconsistent

with the government's obligations under Article 6 of the European Convention on Human Rights.

36. Many respondents did not disagree that the proposed fee structures would secure a contribution from those who use the service. Doubts were expressed whether the fee structure would result in achieving the amounts assessed in the impact assessment for the following reasons:
- Business respondents argued that the proposed remissions system was too generous and would embrace too many claimants, thus impacting on revenue.
 - Most groups argued that higher level fee levels would deter claims.
 - Complaints from groups representing the views of claimants that the structure sought to secure a contribution from claimants not users generally.
37. Many respondents also agreed that the fee structure should be simple, cost effective and easy to understand but disagreed that this had been achieved with the proposals, particularly in relation to the remissions system and proposals for multiple claims. It was argued, for example, that the system could be simplified if the fee was sought after the claim was concluded. In relation to Option 2 some respondents believed that assessing the value of the claim meant that the fees system was too complicated.
38. All respondents including business respondents agreed access to justice was a key element but there was considerable disagreement as to whether the remissions system adequately achieves this – see section A7 for views of respondents on the HMCTS civil courts remission system.
39. Many respondents agreed that there was a need to improve the efficiency and effectiveness of the employment tribunals system but some disagreed that fees would accomplish this. Most thought that fees would deter claims and whilst business saw this was a positive, by reducing the number of weak and vexatious claims, other respondents argued that there was no evidence of such claims filling the employment tribunals.
40. As the proposed fees were to be paid mainly by the claimant it was also suggested that businesses would become less inclined to settle and wait to see if the claimant could pay the fee leading to longer delays and intransigent behaviour by parties. It was seen as creating an uneven playing field given the likely financial disparity between the claimant and the respondent. In contrast business saw fees as re-balancing a system that heavily favours the rights of employees with some arguing that deterring weak and vexatious claims should be included in the success criteria of the policy.

Our consideration of responses

41. We included the criteria upon which we developed the fee structure to assist respondents in deciding whether we had been successful and it clearly had the

effect of focusing opinion. The Government remains of the view that the aim for the fees structure should be the transfer of some of the cost burden of the employment tribunals from the taxpayer. We do not think it is unreasonable to seek fees from those who can afford to pay.

42. It is not an objective of this policy to deter claims through the introduction of fees, so it would be inappropriate to reflect it in the criteria for developing a fee structure. It is not possible to accurately estimate the impact on the number of claims made to the employment tribunal as a result of the introduction of fees and, importantly, whether any of those claims might be considered “weak” or vexatious”. The terms themselves are inherently subjective for a party to judge – a claim that may appear vexatious to an employer may be considered well founded to the employee.
43. We do not intend that fees should stop claimants from bringing claims they believe to be genuine. We only intend that users who can afford to do so should contribute towards the cost of the employment tribunals. To ensure that those who cannot pay are not financially prevented from making a claim, we have proposed a remissions scheme to ensure that they can afford to bring a claim. Therefore we believe that maintaining access to justice for all is a key element of the fee structure.
44. We believe that fees can form part of the wider Government reforms to improve effectiveness and efficiency of the employment tribunals, which is beneficial to both employers and employees. Fees can encourage parties to think through whether a formal claim needs to be lodged at an employment tribunal, or whether it can be settled informally outside the system (e.g. within the workplace, via mediation or conciliation) without further recourse to the tribunal.
45. Although most fees are being paid by claimants we believe the fee structure provides an incentive to business to consider fully whether to defend the claim. Business will be conscious of the financial implications of losing the case as well as the wider powers of the employment tribunals to impose financial penalties on businesses who act unreasonably.
46. We also think this approach complements the Government’s aim to ensure that the employment tribunals are used as the option of last resort to resolve employment disputes. The Government will continue to promote alternative dispute resolution procedures which can result in maintaining if not improving the working relationship. For example the Department for Business, Innovation and Skills is working with employers to promote the use of mediation early in the dispute process through a regional mediation network pilot and encouraging the sharing of best practice from large companies in the retail sector with their own in-house mediation schemes⁴.

⁴ <http://news.bis.gov.uk/Press-Releases/Regional-Mediation-Pilot-Schemes-up-and-running-67b90.aspx>

A2. THE EXTENT OF CHARGING

47. The consultation proposed that all claim types and appeals made to the employment tribunals would be charged a fee. Our reasoning was that with appropriate safeguards to protect access to justice this was fair because:
- The cost of the service is borne across all users;
 - It encourages all users to make informed decisions when deciding whether to make a legal claim or use an alternative dispute process to resolve their dispute; and
 - It reflects the long-standing approach taken in the courts system.
48. We sought the views of respondents on the approach not to exempt any type of claim from fees. There was only one question asked in respect of the extent of fee charging as the same proposal was made under both Options 1 and 2.

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

49. We received 124 comments in answer to this question, with around 25% agreeing that all types of claims should attract a fee. Business groups came out almost exclusively in support of charging for all claim types whereas the large majority of advisory, claimant, legal and other respondents were against charging for all claim types. In support of charging for all claim types, the Institute of Directors said:

... the cost of the service should be borne across all users, that all users will make informed decisions about whether to go to an Employment Tribunal, and because it reflects the long-standing approach in the civil courts.

50. The types of claims that respondents suggested ought to be exempt from fees can be broken down broadly into the following main groups:
- i) Low or zero value money claims such as National Minimum Wage claims, claims where no financial remedy is sought, and holiday or notice pay claims. This was on the basis that these are low value claims, often made by the most vulnerable in society, who are entitled to minimum statutory requirements. It was argued that such was the level of fees there would be little merit in bringing a low value claim. In the case of the National Minimum Wage, a reduction in the numbers of claims made was perceived as encouraging employers to pay employees below the legal requirements. On this point, Employment Judges in Scotland responded:

Employment Judges in Scotland consider that there is a significant risk that if a claim is for a small amount of money then a claimant will be discouraged from pursuing that claim, even although they are legally entitled to the sums due. For example, say an individual is entitled to one

week's wages in respect of holiday pay and the individual is paid just above the threshold which would allow them to qualify for remission. That person may decide that they will not pursue the sum due. This could have the consequence of encouraging a less than fair employer to routinely deprive employees of small sums of money to which they are entitled on the basis that the risk of them pursuing a claim will be small.

- ii) Respondents thought that there was no reason for claimants to have to pay to bring proceedings against an insolvent employer given Government policy to cushion employees from the effects of insolvency by underwriting such claims through the Insolvency Service. The only recourse a person may have to recover the sum due from an insolvent employer is to initiate employment tribunals proceedings and unless the Insolvency Service refunded the fee, claimants will have incurred a fee which with minimal prospect of recovering the award and may gain little or nothing from the proceedings. This is demonstrated by the following comment from the Money Advice Group:

Where an employer has ceased trading, but not been made insolvent, and it owes wages, redundancy pay etc. employees HAVE to raise an ET claim or the Redundancy Payments Office will not pay them out of the National Insurance Fund.

- iii) Respondents felt no fees should apply when appealing against decisions of a Government body such as the Health and Safety Executive, Department for Business, Innovation and Skills, or by employers against levy assessments of an Industrial Training Board. It was argued that these represent a small number of appeals per annum (circa 500) and respondents said that given the small number of these claims, this would not impact on the effectiveness of the overall fee structure. Neither could it be seen as promoting or encouraging these types of claim in lieu of others because there was no alternative claim that could be brought.

- iv) Respondents argued that discrimination claims should not pay a fee. The Equality and Human Rights Commission stated:

The Commission believes that requiring payment of a fee to bring a discrimination claim may breach the principle of effectiveness as it will make it difficult for individuals to enforce their EU law rights. We do not think that the measures set out at paragraph 3.5 of the EIA will "ensure that no one is denied access to justice through the introduction of a fee." Nor do we think that those measures are likely to be proportionate and thus justify what would otherwise amount to indirect discrimination.

Others argued against it either on the basis of the importance to society or on legal grounds namely:

- Requiring payment of a fee to bring a discrimination claim may breach the principle of effectiveness as it will make it difficult for individuals to enforce their EU law rights;
- The aim of the Equality Act is to enable progress towards equality in the workplace and the introduction of fees would interfere with that aim because of its deterrent effect;
- The pay gap between certain groups remains significant, and particularly disadvantages women, people with disabilities, and some ethnic minority groups; and
- The proposal, despite the measures which address the access to justice issue arising from the introduction of fees, may breach the UK's obligations under Articles 6 and 14 of the ECHR.

vi) A few respondents argued for exemption for whistle-blowing claims on the grounds that the key policy aim of the whistle-blowing legislation is to protect those who witness wrongdoing, malpractice or a safety danger in their workplace so they can raise their concerns at the earliest opportunity. Without this reassurance of protection from reprisals, whistleblowers may not feel encouraged to come forward, which could reduce the aims of this legislation.

v) Other claims that were proposed for exemption included protective awards, TUPE claims, interim relief, and Trade Union led matters. It was argued that the nature of these claims is such that more than one set of fees would be payable to enforce the order (as the initial application protects the position and can be followed by a substantive hearing), and on the basis that it relates to legitimate trade union activity.

Our consideration of responses

51. We looked again at all the claim types considered for exemption. At this stage we remain of the view that no claims or appeals made to the employment tribunals should be exempt from fees. Our general reasons are:

- It is not the aim of the policy to deter claims through the introduction of fees; it is our aim that those who can afford to pay should make a contribution towards the cost;
- It is right that irrespective of the type of claim or appeal all those who make a claim and all those that defend a claim consider carefully the implications and fees can help to encourage parties to think through the actions they take and explore all options for resolving the dispute;
- The approach places claims on the same footing as claimants in the civil courts where there are no exemptions (e.g. injunctions, divorce, money claims etc);

- Low monetary claims such as the National Minimum Wage claims attract the lowest level of fee;
 - The remissions system will protect access to justice for those who are in receipt of certain benefits such as income-based job seekers allowance, income support, income-related employment and support allowance, together with those who have low incomes;
52. In relation to claims where the employer is insolvent we note that the Redundancy Payments Service and in some circumstances the Insolvency Service pay out the statutory entitlements without the need for an employment tribunal claim where the employee is eligible. This is reflected in the low level of appeals made annually against such decisions⁵. Given that there is full engagement with individuals before reaching a decision we think that a fee is reasonable if an appeal is made. We will explore further what considerations might be necessary within the fee structure for claimants facing redundancy but facing a risk that solvent employers leave no assets.
53. In relation to discrimination we do not accept that charging a fee is unlawful under EU legislation. We think that our revised approach will not lead to direct or indirect discrimination⁶ and that access to justice is protected via the remissions system we will apply across the fee structure.
54. In relation to the possibility of fees deterring individual claimants with the suggestion that this will have wider societal impacts of fewer discrimination, whistle-blowing and National Minimum Wages claims, we do not accept that it is only the threat of the employment tribunal that forces business to abide by their legal obligations. The Government supports a wide range of guidance, advice provision and help-lines which help business to observe their legal responsibilities and helps employees to understand their rights⁷. There is also independent research that highlights the potential wide-ranging benefits for employers from fostering a diverse workforce⁸.
55. Claims under the Public Interest Disclosure Act 1998 (PIDA), provide protection for those who are dismissed or otherwise suffer detriment as a result of making a disclosure in the public interest. This is often referred to as whistle-blowing. A claim under PIDA would arise after such a disclosure has been made, and where an employer has acted in a manner that the employee considers to be unfair and as a result of their disclosure. We are not aware of any evidence to indicate that fees will deter such disclosures from being made.

⁵ Around 330 of these appeals were accepted in 2009/10, and 310 in 2010/11

⁶ For discussion on the equality impacts of the proposals see our equality impact assessment.

⁷ For example the Acas Helpline where employers and employees can get advice on employment problems; Equalities and Human Rights Commission publications for small and larger business and Government Equalities Office information

⁸ For example see CIPD report – Managing Diversity which shows that diversity can help stimulate creative interaction, motivate employees and improve business performance www.cipd.co.uk/NR/rdonlyres/D4D2D911-FC8A-4FD2-A814-B80A55A60B87/0/mandivlink0405.pdf

However we will keep under review the impact on PIDA claims, particularly in respect of lower paid health and social care workers.

56. We also note that across all claim types there are a range of different outcomes and not all claims succeed, as evidenced by the employment tribunals' annual statistics⁹. Some are settled, some withdrawn and others are dismissed by the tribunal. We believe it is reasonable that irrespective of the claim type, claimants who make an allegation in a claim and either fail to pursue it or where the employer is judged to have acted lawfully, should bear the costs, where they can afford to do so.
57. In relation to trade union activities we think it is appropriate that fees should be charged if they choose to pay fees on behalf of their membership. Like other claimants they must prove their claim before the tribunal and like other parties, they can seek reimbursement of their fees if they are successful. They also have the opportunity to enter into Acas conciliation.
58. In the next stage of our implementation work we will review in detail all claim types and how and when fees are charged. There will be published guidance to ensure that claimants and respondents know when fees are paid, how they are paid and how much is payable. We will also provide clear guidance on the remissions system which will support the fee structure.

A3. THE BASIS FOR FEE LEVELS AND COSTS

59. The original proposals outlined the HM Treasury requirements that fees should be based on the cost of the case and so far as possible fees should be set at levels that reflects the full cost but no more. We outlined that our policy intention was to set fees initially below full cost recovery under both Option 1 and 2 (with the exception of the highest fee under Option 2).
60. Our case modelling identified that the claim type and the stage in the proceedings were the two factors most likely to affect the level of cost incurred by the tribunal. As fees are based on cost these two elements are the key factors of determining the fee levels. We consider the views of respondents on the proposal to set a fee based upon the value of the claim in the discussion of Option 2 issues (see Part C of this document).

i) The stage in the proceedings

61. Options 1 and 2 took different approaches to the number of fee charging points. Option 1 proposed that fees were split across the process and charged at issue and before hearing, reflecting that only 20% of claims reached this second stage. Option 2 provided lower fees overall by charging only a fee at issue. As these were effectively alternatives we consider respondents views to the following questions namely:

⁹ www.justice.gov.uk/statistics/tribunals/employment-tribunal-and-eat-statistics-gb

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

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.

62. Both the employment tribunals fee structure options required the payment of a fee at the point of making or issuing a claim or appeal. Under Option 1 our proposal was that there would also be a fee payable before hearing.
63. 117 respondents replied to question 3 and 112 to question 17. Overall there was a slightly less opposition against 2 charging points although the totals for both questions show disagreement with the proposals. The majority of business respondents preferred two charging points, believing that it offered a second opportunity to encourage parties to consider settlement. They believed that a single charging point risked driving the claim to hearing because the claimant will not be willing to settle once the fee at issue was paid. A number of legal respondents believed that the hearing fee must only be charged once witness statements have been exchanged in order to ensure that both sides can assess the weight of the evidence and that it is only at that stage that detailed discussions on settlement can take place. Some business respondents who agree with the threshold proposed under Option 2 saw the ideal as a two stage approach with a threshold on the basis that it would deter the most claims.
64. In their response, Acas said that fees should support the need to incentivise settlement:

Of the two Options proposed, Acas believes that the two stage approach suggested in Option 1 will allow more opportunity for resolution through Conciliation. The period following lodging of the initial fee will allow time for reflection, consideration of the merits of the case and the opportunity to consider other options including use of the Acas Arbitration Alternative before the second payment is due.

65. Acas also said that conciliators' experience is that parties are more willing to settle at certain points in the duration of a case; the first in the early weeks of a case being registered and the other close to the proposed hearing date.
66. However, union and advisory groups generally believed that because only the claimant pays both the issue and hearing fee, it only incentivises claimants to consider settlement. They believed that respondents would use the hearing fee to wait to see if it is paid, thereby reducing the likelihood of settlement. They also cite the high level of the hearing fee as a factor that would deter claimants and many argued that the respondent should pay half or the entire hearing fee. In the context of opposing fees generally they suggest that a single fee is less complex and fairer because of the lower overall fees. However, one trade union saw little justification for a single fee given that 80% of claims did not reach a hearing.

Our consideration of responses

67. The Government believes that on balance the two charging point system is the more appropriate structure because it provides a second opportunity for parties to settle, with only those that reach the hearing stage paying the second fee. Overall we believe this is fee structure which better represents where the cost of the service lies (namely at the end of the process) and ensures that those who consume considerably more resources contribute more.
68. It is still the Government's intention to require the hearing fee to be paid around 4-6 weeks prior to the hearing. We believe that offers the best balance for allowing sufficient time for parties to engage in successful settlement negotiations whilst reducing the likelihood that unnecessary resource is consumed by the employment tribunals in terms of court, judicial and member time due to cancelled hearings. However, we acknowledge the point made regarding the timing of when witness statements are exchanged, and will take that into consideration when a final decision is made on this issue. We will also consider when a hearing fee for level 1 claims should be payable and if this should be at a different point to level 2 claims.

ii) Allocation of claims to fee levels

69. The second factor that had an impact on cost (and therefore fee level) was the type of claim. Both Options adopted the same approach and proposed 3 levels of fees dependent on the type of claim. The three fee levels were based upon the track system used in employment tribunals which are:
- Short (allocated to level 1 fee band)
 - Standard (allocated to level 2 fee band)
 - Open (allocated to level 3 fee band)
70. The costs associated with each track are different due to complexity and amount of judicial and staff resources required to process and determine the claim. Typically level 1 claims require very little or no case management work and are listed for a hearing lasting 1 hour. It is anticipated that level 1 claims are likely to contain low value claims and that such claim types may become subject to the proposed Rapid Resolution Scheme¹⁰ in due course.
71. We proposed that 28 claim types including unfair dismissal should be allocated to Level 2. These take longer to determine, are more complex and generally require greater case management. There were 8 claim types allocated to Level 3 consisting of discrimination, whistle-blowing and equal pay claims. They typically take longer to progress as they tend to have the most complex legal issues to resolve.

¹⁰ Details of the Rapid Resolution Scheme can be found at page 10 of BIS response to their "Resolving Workplace Disputes" consultation here: <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-1365-resolving-workplace-disputes-government-response>

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

72. 35 respondents agreed that we had allocated the claim types correctly with 71 disagreeing. Some respondents believed that the principle of differentiating the fee levels was unfair and that those who cost the tribunal more should not be charged more. Those who took this view generally supported a single low fee spread across users.

73. In answering this and other questions, comment was made by claimant, and equality and advisory groups in relation to the proposed fee levels which were considered to be:

- Disproportionate to the amounts claimed;
- Excessive in comparison to the civil courts;
- Driving claims to the civil courts; and
- Discriminatory (as higher fees are proposed for discrimination claims).

74. Business responses generally were content with the proposed fee levels although more expressed a view that the levels are possibly too high than suggest that they are not high enough. Their main point of concern was to ensure that fees are set high enough so as to deter weak and vexatious claims. Legal and judicial respondents tended to think that the fee levels were too high, particularly when compared with fees for commencing similar proceedings in the civil courts.

75. Equality groups raised concerns that discrimination claimants were being asked to pay the highest fee under level 3. Other responses echoed this and also raised the issue in relation to Equal Pay. These respondents also felt that some discrimination claims were not always complex whereas in contrast some unfair dismissal cases could be very complicated. However a small number of business respondents felt that the differential between the fees at levels 2 and 3 fees was insufficient.

76. A small number of respondents suggested that some types of claims had been allocated incorrectly and proposed re-allocation. These included claims for written pay statements, written reasons for dismissal, levy appeals, interim relief TUPE claims.

Our consideration of responses

77. After consideration of the responses, the Government has reduced the proposed 3 levels of fees down to 2 levels, primarily due to respondents concerns that discrimination and equal pay cases were being unfairly charged the highest fee at level 3 when their cases were not necessarily as complex as

some cases in level 2. The cost model developed in the Impact Assessment¹¹ shows that the average costs for levels 2 and 3 cases are in a similar range. Moreover, as the cost model is based on a representative cost of a typical case of its type, some level 2 cases can be as complex and as costly as a level 3.

78. Consequently the Government has decided to combine the claim types proposed in levels 2 and 3 into one fee level, which also has the advantage of simplifying the fee structure for users. The revised level 2 fee therefore now reflects the overall average costs for all claims that were previously included in both level 2 and level 3.

79. The indicative fee levels proposed in the consultation were initially set to achieve around a third of the cost of running the tribunals. Mindful of respondents' concerns about high fees, we have sought to reduce the fee levels where possible. We undertook a further iteration of the cost model and established that the issue fee under level 1 was not fully reflecting interlocutory work. We have corrected this which led to a small reduction in the overall fee payable if the claim went to hearing, though an increase in the issue fee.

80. Following these changes the Government proposes the following fees namely:

Fee Type	Issue Fee	Hearing Fee	Total (if hearing fee paid)
Level 1 claims	£160	£230	£390
Level 2 claims	£250	£950	£1200

81. In light of the above changes, and respondents' proposals for re-allocation we looked again at the allocation of all claim types. We have allocated claims that generally take little or no pre-hearing work, and usually require approximately one hour to resolve at hearing, in the Level 1 fee type. We have allocated all other claims, that typically take longer to case manage, and where hearings are much longer, into the level 2 fee type. The draft list of allocations can be found in Annex C.

82. We will work through further the implications that arise for the payment of fees because of an amendment to the claim type between issue and hearing as part of our implementation work.

83. We do not think that the civil courts fee structure is a reasonable comparator to show that employment tribunal fees are too high. Firstly, the civil courts charge fees at up to five points during the process, meaning that lower fees are paid more often. Secondly in the civil courts higher fees are payable for higher value claims, whereas employment tribunals have no basis upon which to compare.

¹¹ Further detail of the cost model can be found in the Impact Assessment published alongside this response.

Thirdly, parties also pay for every type of applications they seek (e.g. witness summons) which is a variable amount and adds to the cost. Finally, parties open themselves to different cost regimes in the civil courts whereas the liability to pay the costs of the other party in employment tribunals is more limited.

84. We also do not consider that there is a significant risk of cases being transferred to the civil courts in England and Wales or the Sherriff court in Scotland because:
- Most jurisdictional complaints that can be dealt with in the courts will be associated with complaints that can't be transferred. For example, equal pay claims can be dealt with in both the employment tribunals and the courts, but will often be associated with a discrimination claim which can only be dealt with at the Tribunal;
 - By issuing in the courts, claimants will open themselves up to wider liability in terms of costs if they were to lose the claim; and
 - The differing cost structure in the civil courts where, for example, interlocutory fees are chargeable, means that depending on the value of the claim, fees will not necessarily be lower than in the employment tribunals.

A4. Power to order reimbursement of fees

85. We proposed that the employment tribunal is empowered to make an order that fees paid by the successful party will be reimbursed by the unsuccessful party. This is on the basis that it ensures that the party who ultimately causes the employment tribunal to be used bears the cost. We made no proposal as to whether there should be a presumption that an order would be made and said that the power would ensure that the employment tribunal has discretion not to make an order in appropriate circumstances. We also proposed that it was a matter for parties to take the payment of any fees into account during settlement negotiations as the employment tribunals do not intervene in the arrangements reached in such agreements. Comments for both Options are dealt with under question 6.

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.

86. Around 75% of all respondents were in favour of a discretionary provision allowing the employment tribunals to order unsuccessful parties to pay the successful party any costs that they had accrued by way of employment tribunals fees.

87. Of those that disagreed, the key arguments were:

- The claimant should not be required to pay any of the Respondent fees as they are on a different footing and will likely have paid issue and hearing fees of their own
- Remitted claimants should not be required to pay any respondent fees
- Seems likely to cause a wholly disproportionate concern to both parties, with the question of who ought to be responsible for fees creating a brand new area of settlement negotiations.
- There is a relatively much greater risk for claimants than respondents creating further inequality of arms.
- It will lead to inequality between claimants as those with full remission of fees will be under less pressure than those on low incomes who do not qualify for remission.
- This is an unnecessary complication. Given that the introduction of fees is proposed in a stated climate of encouraging conflict resolution, it will only enhance the adversarial nature of the system, meting out retribution to losers.

88. Also raised by some respondents was the issue of enforcement of awards, of which large amounts currently go unpaid, and adding a fee onto the amount due could exacerbate the problem.

Our consideration of responses

89. We do not believe that this provision adds unnecessary complication into the process. We believe it is right that the party who ultimately causes the employment tribunals to be used should bear the cost. However, we recognise that there may be circumstances in which it is not appropriate for such an award to be made and that the employment tribunal judge is best placed to make a determination, so the provision will not be an automatic one.
90. It is intended that the employment tribunals will have the power to make such an award at any point at which they make a decision on an application that attracts a fee. We will consider whether to provide for the tribunal to make provision for an order at interlocutory stages for example when an application for a review or to set aside default judgement is made. We do not accept that only having a power for reimbursement creates a much greater risk for claimants than respondents. It will be for an employment judge to decide whether it is appropriate to require a claimant to reimburse any fee(s) paid by the respondent, and the claimant will have the opportunity to argue why they ought not to. We will work closely with the judiciary to develop guidance for judges ensuring a consistency of approach.
91. We do not accept that the power to order reimbursement will create a disproportionate area of concern in settlement negotiations. Settlement negotiations already discuss liability and financial considerations and this will be another matter for parties to take into account. It will be up to the parties to

engage early enough to allow settlement prior to the hearing fee being paid, and should the claim to reach hearing then any fee(s) paid would become a consideration at that point anyway.

92. We also do not believe that there is any inequality arising from the proposals. Remissions are available to protect access to justice.
93. We had made no proposal that where claimants had not paid a fee because they were remitted that the unsuccessful respondent should reimburse HMCTS. However, a number of respondents suggested that where the claimant was entitled to a remission and was subsequently successful that the unsuccessful respondent should pay the fees that would have been paid to HMCTS. We will undertake further analysis to see if this approach would be viable and cost effective.
94. On the enforcement of awards, we expect all parties to abide by the decision of the tribunal and pay awards and fees as ordered. A Fast-track enforcement system is in place to enable the enforcement of tribunal awards where parties do not pay. However, it is important that the claimant understands that the tribunal itself cannot enforce the payment of any award.

A5. Liability for payment of fee

95. One of the main principles of the proposals was that the party that sought the benefit of the application or order is the party that is responsible for the payment of any associated fee. As such, the consultation proposed that both issue and any hearing fees were to be paid for by the claimant. Comments were invited under question 7.

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.

96. Less than a third of respondents who answered this question agreed that the claimant ought to be responsible for the fees. Of the remaining two thirds many disagreed generally because they were against claimants paying any fees in principle. Claimant groups, trade unions and individual respondents were almost unanimous in the view that these fees should not be paid by claimants, two thirds of legal groups disagreed, whilst business groups were exclusively in favour of claimants paying issue and hearing fees. Unison Scotland responded:

UNISON Scotland is unable to identify any rationale for making the claimant alone meet the fees when settlement is in the hands of the respondent in the first instance and when, in some cases, justice will dictate that both parties rightly wish the claim to be determined by the Tribunal

97. Other comments from those who were not in favour included:

- This proposal will create a significant disincentive for employers to agree to settle a case either during Acas Pre-Claim Conciliation stage or after the claim has been filed. Employers are likely to wait out the process in the hope and expectation that high hearing fees will deter workers from proceeding with their claim.
- A significant number of respondents argued that the hearing fee should be shared between claimant and respondent.
- In addition to splitting the hearing fee, some respondents argued that the employer ought to pay a fee to defend the claim, as per current practice in Scottish civil courts.
- Access to justice will be limited by issue fees and in particular it will be low and moderately paid workers who are still in employment and above the remission level who will think twice about discrimination claims.
- Requiring a fee up front will impinge on access to justice, particularly in cases where it is difficult to prove eligibility for remission. The issue fee will deter potential claimants from using the Tribunal with the result being a greater number of businesses not abiding to their obligations under employment law.
- Consultation responses also highlighted the possibility of “strategic behaviour”, such as respondents refusing to negotiate on settlements until the claimant has paid the hearing fee.

98. One advisory group agreed that the claimant ought to be responsible for these fees, but that respondents should pay the equivalent if launching a counter claim.

Our consideration of responses

99. We believe that seeking a fee from the party who seeks the benefit of an order offers a clear rationale for deciding which party should initially pay the fees, and for that reason we will not seek issue or hearing fee payments from respondents. We accept that there are other alternatives such as that adopted by the civil courts in Scotland. However, we believe that as it is the party who commences the proceedings who must prove their claim and will get the benefit of the order, this approach is preferable. Moreover, sharing the hearing fee between the claimant and the respondent would add additional complications and cost into the system which would result in higher fees.
100. One of the principles on which the Government is seeking to build the fee collection process is that of paying for the service before it is received. The Government believes that principle, which is in line with how the civil courts operate, is the correct one and to design a process where fees were paid at the end of the proceedings would build in significantly higher collection and enforcement costs which would likely lead to higher fees required than are proposed in this document.

101. We cannot say if “strategic behaviour”, such as employers waiting to see if claimants will pay the hearing fee before engaging in settlement negotiations, will take place. However, there are systems in place which are likely to reduce the chance of this occurring. For example, by waiting until after a hearing fee has been paid before engaging in settlement negotiations the respondent increases their own potential financial liability as the employment tribunals will have the power to order them to pay the fees of the claimant if they were to be successful at hearing. Additionally, if it is clear to the employment judge that unnecessary delaying tactics have resulted in increased costs existing case management powers exist which can carry financial penalties by way of wasted costs.
102. We believe that the introduction of fees with the measures we are proposing, and, in particular, the remission scheme will mean that claimants will not be prevented from bringing cases to the tribunal. Legal prohibitions will remain and claims will continue to be brought where a claimant considers their rights have been breached. Claim types such as discrimination will continue to be challenged in the tribunal. There is a wide range of guidance, advice and help-lines available for both employees and employers. This helps business to observe their legal duties, for example by setting up an equality policy and action plan, as well as helping employees to understand their rights¹². There is also independent research that highlights the potential wide-ranging benefits for employers from fostering a diverse workforce¹³.
103. In regards to concerns raised regarding access to justice, we believe that the proposed use of the HMCTS remissions system adequately protects those who cannot afford to pay the fee, supporting our proposals regarding where responsibilities for payment of issue and hearing fees should lie. Therefore the Government maintains its proposal from the original consultation that the claimant will be responsible for payment of these fees.

A6. Six separate application fees

104. The consultation proposed the two principles that:
- the person who seeks the order pays the fee; and
 - all parts of the employment tribunals process will be subject to fee charging (i.e. the cost of the service will be accounted for in one of the fees and no part of the cost of providing the service will be exempt).

¹² For example the Acas Helpline where employers and employees can get advice on employment problems; Equalities and Human Rights Commission publications for small and larger business and Government Equalities Office information

¹³ For example see CIPD report – Managing Diversity which shows that diversity can help stimulate creative interaction, motivate employees and improve business performance
www.cipd.co.uk/NR/rdonlyres/D4D2D911-FC8A-4FD2-A814-B80A55A60B87/0/mandivlink0405.pdf

105. On this basis and in addition to the issue and hearing fees we proposed the following fees:

Type of fee	Who will usually pay
Counter-claim	Respondent
Mediation by the judiciary	Respondent
Set aside default judgment	Respondent
Dismissal of case after settlement or withdrawal	Respondent
Request for written reasons	Party who applies
Review application	Party who applies

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

106. We asked respondents to comment on whether they agreed with the proposals for these additional fees and have considered each one separately below.

Request for written reasons

107. 40 of the 71 respondents who disagreed with the proposals for the additional 6 fees oppose charging for providing written reasons when the judgment and reasons had been given orally at the conclusion of the hearing. All respondent groups (i.e. business, unions, claimants and legal groups) expressed opposition. The main issue was that reasons for a decision are a fundamental right of justice, that parties are entitled to know why they have won or lost and should be seen as an existing part of the judicial decision-making process of the tribunal.

Our consideration of responses

108. The Government does not intend to pursue a separate fee for the provision of written reasons when they have been issued orally at the conclusion of the hearing. We agree that parties are entitled to be told why they have won or lost. We accept the argument that the giving of reasons flows from the hearing and should be part of the cost of that fee. It also has the advantage of simplifying the fee structure.

Application for Dismissal following withdrawal/settlement

109. The consultation proposed a fee for applications to dismiss a case after it had been settled through Acas or withdrawn by the claimant. Such applications occur because parties (in the main respondents) do not consider that withdrawal or settlement is a final determination

110. Whilst this fee attracted fewer comments, most came from business who felt that either it was an administrative process that cost little, that should be shared with the claimant or that it was the claimants fault and that it was beneficial to all parties to ensure finality was brought to the proceedings.

Our consideration of responses

111. It takes administrative and judicial resource to complete the work needed to have a case formally dismissed. As our policy is to charge for all processes, the cost of this application would need to be borne in other fees if this fee is removed.
112. The fundamental review of fees (led by Mr Justice Underhill)¹⁴ is considering a rule change in to ensure that when a withdrawal is accepted by the employment tribunals an automatic notice of disposal will be issued, meaning that a further dismissal notice/order will not be required. We will also need to further explore ensuring there is finality following settlement also, but it may be possible to ask the claimant to withdraw the claim following settlement which would make charging for a dismissal application redundant.
113. We maintain the proposal that these applications will attract a fee, but will reassess the proposal following the reporting of Mr Justice Underhill's fundamental review of rules.

Application for Review Application and Application for setting aside of a Default Judgement

114. In the consultation we proposed a fee for an application for a review of a decision (payable by the party who made the application) and a fee for making an application to set aside default judgement (payable by the respondent).
115. Respondents opposed these fees when they were made as a result of an administrative error by the (e.g. serving the wrong address) or where the employment tribunal needed to correct its own error. In those circumstances it was argued by respondents that it would be unfair for a party to pay for the application, but equally unfair for the opposing party to have a fee award made against them when they were also not at fault. Trade unions and other groups were generally in favour of a fee payable by the respondent to set aside a default judgement.

Our consideration of responses

116. We propose to retain both these fees. An application for review can be made on the grounds of administrative error as well as other grounds such as new evidence coming to light or on the basis of the interests of justice. A tribunal or employment judge may also, on their own initiative, review a decision on the same grounds on which the parties themselves may seek a review, which

¹⁴ Terms of reference available here: www.bis.gov.uk/assets/biscore/employment-matters/docs/f/11-1379-fundamental-review-employment-tribunal-rules-terms

would not attract a fee. In other cases the application for the employment tribunal to review its decision removes the need for the party to appeal to the EAT, which is more expensive.

117. We understand that the criteria for an application for review maybe changed as a result of the fundamental review of rules, so we will keep this under review. However, at this stage of the rules development the proposals seem compatible with our suggested approach.

Counter-claim

118. From the additional fees proposals, the fee proposed for counter-claims was most commonly agreed with and not argued against with any weight. The majority of business respondents seemed to recognise that to charge for a claim but not a counter-claim would be unfair.

Our consideration of responses

119. We therefore propose that the fee of counter-claim remains. We will consider whether, if the breach of contract claim made by the employee is withdrawn, and the counter-claim proceeds to a hearing whether it is appropriate to seek a hearing fee from the employer.

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.

120. In employment tribunals mediation by the judiciary is available in some limited discrimination and unfair dismissal claims. The proposal that the fee for mediation by the judiciary was paid by the respondent was the exception to the principle that the party who seeks the order pays the fee. We proposed this on the basis that in employment disputes the cost of mediation, if provided externally, is normally borne by the respondent.
121. 34 respondents agreed with the proposal to charge for judicial mediation with 61 disagreeing. Over 75% of business responses disagreed with charging for judicial mediation. Those in support were mainly judicial or groups representing views of claimants, some of those in support advocated a lower fee than proposed. Ten respondents argued that the fee should be shared equally between the claimant and respondent so as to encourage joint participation.
122. Those who disagree argued that:
- The fee was too high;
 - It would discourage respondent participation if the fee was entirely borne by the respondent;
 - It would act as a general deterrent to the use of mediation;

- At the time we consulted mediation by the judiciary was still in its infancy as a pilot and beginning to charge for it before its success had been reviewed was premature; and
- It did not take into account the savings that it generates from claims that would otherwise require a hearing to resolve.

123. Employment tribunal judiciary were strongly opposed to a fee for mediation. They argued that mediation ensures that the employment tribunals system does all it can to encourage the resolution of disputes, reduces the costs of running the system and improves or at least maintains the employment relationship. It is also in line with the Government's commitment to encourage resolution of disputes without the need for judicial determination. Their view was that a fee for mediation forces parties to go to hearing and should it be charged, mediation will no longer take place.

124. In contrast the Council of Employment Tribunal Members' Associations agreed with the proposals and highlighted that there are others in the system (e.g. Employment Tribunal Lay Members) who are trained mediators who would be able to provide such an optional service at less cost.

Our consideration of responses

125. Given the continued availability of the taxpayer funded Acas conciliation service, we do not accept that the Government's commitment towards alternative dispute resolution is weakened by charging for mediation undertaken by the judiciary. In addition, given the limited number of claims that can access mediation, we believe that on balance it is fair to charge a separate fee.

126. Providing mediation by the judiciary is an additional cost borne by HMCTS that is ultimately met by the taxpayer. In terms of requiring a fee, mediation is normally attracts a cost and is generally met by employers.

127. In terms of the fee level we proposed a fee of £750 for mediation that usually lasts a day. We note that in comparison, whilst Acas conciliation is free, their mediation service is charged at a rate of circa £1000 for the first day followed by £620 for subsequent days. Mediation is also offered by commercial firms where we understand that similar rates apply. Parties can decide themselves who bears the cost or whether it is split, although again we understand that in employment cases, it is usually borne by the employer. In light of this, we do think that whilst it departs from our usual principle of seeking a fee from the party who pays the order, that seeking a fee from the respondent is reasonable and the better approach than splitting the fee between the parties.

128. We do not believe that the Government should offer a further free mediation service given the funding of free Acas conciliation and the availability of commercial mediation. Whilst we acknowledge concerns about the level of the fee originally proposed, given the comparable fees charged for other mediation services we do not propose to significantly alter the fee. However, we will initially reduce the fee by 20% to £600 to encourage use and will monitor the

impact on the number of mediations undertaken to see if this should be changed in the future.

A7. Remissions

129. The consultation proposed that the HMCTS civil court remissions policy is adopted in employment tribunals and made available for those individuals who cannot afford to pay part or all of any fee. To be eligible an individual claimant must provide proof that he is either in receipt of certain permitted state benefits or that his household income is below a certain threshold. In line with the approach in the civil courts approach, proof of eligibility must be provided on every occasion a remission is sought. There are three elements to the HMCTS remissions system which is outlined in Annex B.
130. Several questions under both Options 1 and 2 dealt with remission issues. However, remission proposals underpinning both options is essentially the same so the responses given to the following three questions are taken together.

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.

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?

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

131. Just over a quarter of all respondents who answered question 10 considered that the HMCTS remission system was suitable for implementation in employment tribunals. 86 respondents replied to question 26. Just over 20% of respondents agreed with the proposals for remissions under Option 2. Two thirds of business respondents agreed, but other groups were united in their disagreement
132. From business respondents, concerns were raised by British Chamber of Commerce and the Federation of Small Businesses that claimants may have access to cash through savings or redundancy/settlement payments that the proposed remission system would not take into account. The Institute of Directors noted that the time when someone might be expected to be accessing the Tribunal might be exactly the time when then were in receipt of such a benefit (even if for a short time), and that high proportions of full or partial remissions would ultimately undermine the objectives of the proposals, leaving employers “continuing to fear the recourse of a tribunal.”
133. Manufacturers Group EEF said that that the County Court is a very different environment from the Employment Tribunal and assuming parity in some way

that means the remission system fits both could be flawed thinking. The employment tribunal, they argue, does not have the strong case management powers of the County Court allowing measures to punish unreasonable behaviour before the court, and as a result the proportion of failed cases before employment tribunal is high. Fees, they say, can perform a similar role in employment tribunals to weed out the many thousands of cases that end up struck out or dismissed, but only if the remissions system functions properly.

134. EEF recommend that the system should offer only partial remission at best and require all claimants to pay something to issue a claim. A small flat fee for all claimants would spread the burden, and by the nature of the issues before employment tribunals the claimant is highly likely to have been in employment until recently and should have access to residual funds to meet it. Remission 3 in particular was considered difficult to justify. Restricting remission to those on benefits or earning below a fixed amount, as is proposed in remission 1 and 2, is simple to administer and is sufficient to protect vulnerable groups. They propose we take our lead from the legal aid system, with a structure of contributions and a lower disposable income threshold.
135. On the other hand, claimant groups argued that the complexity of the current system in the civil courts had led in the past to incorrect decisions being made on remission applications, that there were a number of benefits that ought to be included but weren't and that the system should look at an individual's income, not household incomes.
136. Another major concern of respondents was the introduction of Universal Credit, and the impact that would have on the remissions system. The Citizens Advice Bureau ("CAB") said:

... with the exception of pension credit, all of the means-tested, 'passport' benefits specified in Remission 1 are to be abolished for new benefit claims in late 2013, and replaced with Universal Credit. And, as the population in receipt of Universal Credit will be far larger than that in receipt of the 'passport' benefits, the two are not analogous. In short, Remission 1 will simply not exist in its current form by the time any ET fees regime comes into force. The consultation paper is surprisingly silent on this issue.

137. Other concerns raised included:

- Research conducted by PricewaterhouseCoopers on behalf of the MoJ into the civil courts remission system was pointed to by some respondents as evidence of how the complex nature of the system had in the past contributed to flawed decision making by HMCTS staff.
- Proposals have the potential to become complicated, laborious and expensive, thus negating the premise of saving the public purse.

- When proceedings are commenced in employment tribunals, less than 3 months has passed and the claimant's financial position will be unstable. A decision may not yet have been taken regarding eligibility to a particular benefit.
- Claimants must not be disadvantaged due to time limits in producing evidence to prove eligibility for remission.
- The remissions scheme does not take into account higher living costs for people with disabilities and the impact that may have on their ability to pay fees.

138. Some respondents also suggested other types of benefits which ought to be included in remission 1. These included maternity pay, contributory based Job Seekers Allowance and other contributory based benefits. Respondents also drew attention to the fact that some claimants having recently left employment may *qualify* for such benefits but have their access to them suspended for a period of time. It was suggested that those who were otherwise eligible for a benefit falling within the remit of remission 1 ought also to be eligible for full remission under remission 1.

Our consideration of responses

139. Having considered responses the Government maintains the view at this stage that the HMCTS remission system is suitable in employment tribunals to protect access to justice for those who cannot afford to pay the fee.
140. The PriceWaterhouseCoopers report referred to by respondents was published in 2007 since when all staff processing remissions have received comprehensive training, benefitting from improved guidance and the development of a national Standard Operating Procedure. Further, changes were made to the remissions form so we believe that this criticism has been addressed.
141. We do not propose to alter the time-limits for making claims in employment tribunals which currently apply. However, we propose, so as not to disadvantage any group, to separate out consideration of the fees from whether a claim has been made "in time". In other words, the imposition of fees will not affect the current position except that an application will have to be accompanied by either a fee or an application for remission. If time is taken to resolve the remission application, so long as the claim form was received in time, the claim will be considered as having been received within prescribed time limits. If the claimant's benefit status is not fully resolved by the deadline for filing a claim, remission 2 and 3 offer assessments based on past income or monthly disposable income under which remission can be applied for.
142. Likewise for other types of benefits not falling under the remission scheme, the Government would expect those individuals to apply under remission 2 or 3 if full or partial remission is sought.

143. The civil courts remissions system discounts any income from disability benefits (such as severe disablement allowance, disability living allowance and carer's allowance) when assessing income for the purposes of remissions 2 and 3¹⁵. Therefore we believe that the increased financial burdens arising from disability are taken into account and the impacts will not be greater.
144. We believe there are advantages to maintaining a consistent remissions scheme consistent with that used in the civil courts. Advantages arise for users who will only need to understand and undergo a single remissions test whether they are dealing with the civil and family courts or the employment tribunal. This is particularly so given that some disputes can be determined by either the county court or in an employment tribunal. Any differences could lead to suggestions that access to justice was compromised for court or tribunal users. In addition, there are administrative advantages. Court and tribunal staff only need to be trained on one remissions approach and changes to the remission scheme only need to be considered and made once. A simple system also means lower fees.
145. The remission proposals from the consultation are, therefore, maintained at this stage. However, given the concerns raised by respondents to this consultation and more widely, MoJ will undertake a review of remissions as part of a wider review required for the introduction of Universal Credit.
146. The current HMCTS remissions system is based upon the applicant's ability to pay the fee and not the level of fees or the type of application, claim or appeal. The review will aim to produce a single remissions system for courts and tribunals which is simpler to use, more cost efficient and better targeted to ensure that those who can afford to pay fees do so, while continuing to provide access to the courts and tribunal system to those who cannot.
147. A public consultation will be published in the latter part of 2012 and respondents will be able to provide further responses regarding their concerns as part of the consultation process.

A8. Multiple claims

148. For multiple claims the consultation proposed that as every person within a multiple claim ultimately gains the same benefit as an individual bringing a single claim, it is appropriate that all claimants in multiple claims should pay a reasonable contribution to meeting the cost of providing the service.
149. Whilst multiple claims provide operational efficiencies (e.g. it is cheaper to deal with 20 cases as a part of a multiple claim than to deal with each as a single claim) our case modelling suggests that they cost more than a single claim. We

¹⁵ Excluded benefits for the purposes of calculating income under remissions 2 and 3 are outlined at page 7 of the EX160 "Court Fees – Do I Have To Pay Them?" leaflet, found here: <http://hmctscourtfinder.justice.gov.uk/courtfinder/forms/ex160a-eng.pdf>

therefore proposed to charge higher fees for multiples claims than for singles based upon the numbers of claimants within the multiple claim namely that:

- 2 and 4 individuals pay a fee of 2 x the fee for single claims;
- 5 and 10 individuals pay a fee of 3 x the fee for single claims;
- 11 and 50 individuals pay a fee of 4 x the fee for single claims;
- 51 and 200 individuals pay a fee of 5 x the fee for single claims; and
- 201 or more individuals pay a fee of 6 x the fee for single claims.

150. We proposed the use of the HMCTS remissions being available for those in multiples.

151. Proposals for multiple bandings cut across both Options 1 and 2 with a final decision affecting both. As such, responses to the following questions are dealt with under this heading.

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

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

152. Of the 90 people who responded to question 12, around two thirds disagreed with the proposal or some aspect of it. A similar proportion disagreed with the Option 2 proposals (question 25). The approach was commonly criticised as too complicated and that the proposals didn't acknowledge that each individual received different awards. Practical issues were raised such as who would pay when claimants were represented by more than one representative or not at all. In addition respondents thought that:

- Unions/representatives should not be expected to pay the fee;
- The banding was not fairly distributed;
- The failure of one person to pay must not prevent others from proceeding;
- A flat rate fee across claimants including those in multiples would be more appropriate.
- The proposals fail to recognise the fluid nature of multiples with the total number of cases contained within a multiple at any one time possibly being different from another.
- On occasions where a claim leaving or joining a multiple results in the case falling into a different payment bracket, respondents ask if a top-up or refund might be expected in those circumstances.

- Charging fees for multiples at a later stage than issue (even potentially at or after hearing) would ensure that the correct level of fee could be levied.
- Consultation document is wrong that all claimants within a multiple might expect to receive the same benefit from it. Awards can vary within multiple.
- Unfair that some members of a multiple might have their fees increased by a minority with claims at a different level. Fees should reflect the level of the claim of each individual.

153. There was very little by way of comment on how the proposal might be improved or made easier to understand, but one of the key points coming across strongly was that the fluidity of numbers might make it very difficult to charge the correct fee at certain points. One option suggested by a number of respondents would be to charge the fee at the end of the process when the final settled number of claims in the multiple is known.

Our consideration of responses

154. We think it is reasonable for those in a multiple claim to contribute to the cost where they can afford to do so. Our rationale for charging everyone in a multiple claim was that they ultimately received the same benefit as a single claim. This was intended to express the idea that all claims will benefit equally from the resolution of the claim, although we recognise that the value of any award may differ from claim to claim within the multiple claim itself.

155. As our cost modelling shows that it is the type of claim, the stage in the proceedings and the number of claimants that impact on cost, we believe it is reasonable that all those within a multiple are asked to contribute to the cost, where they can afford to do so.

156. We accept that there are some practical issues to be resolved with multiple claims but believe they are not as complicated as some respondents suggested. Class actions are brought in the courts and fees are paid in such cases. The Government does not believe the responses received demonstrated a compelling case that the proposed fee structure will be any more complicated than equivalent actions in the civil court.

157. Concerns were raised in responses over whether the lack of payment from one person in the multiple claim would result in the strikeout of the entire case. To clarify, it is not proposed that the tribunal will strike out claimants in a multiple claim who have paid or shown eligibility for remission, only those who do not. We will establish clear guidance that reminds claimants that it is ultimately their responsibility for payment, not their representatives, and if they fail to do so the consequences that can result.

158. Reimbursement of multiple fees to successful parties will make up a part of the guidance on reimbursement that will be produced ahead of implementation to ensure a coherent and consistent approach in that area.

159. There is no theoretical limit on the number of claimants in a multiple claim, which means that in the largest multiple claimant claims the amount payable individually would be very small, should it to be divided equally by all those within the claim. We believe that in order to account for this we would have to make the fee structure much more complicated.
160. Our modelling shows that the more claimants in a multiple claim the more judicial and administrative resource is consumed so we do not accept the argument for charging a single fee. However, we accept that the comments made by respondents and that the simple approach is the best at the start of fee charging. In order to reduce the issues that could arise through a change in the numbers within a multiple claim during the life of a case, we propose to simplify the fees payable, namely that multiple claims between:
- 2 and 10 individuals pay a fee of 2 x the fee for single claims;
 - 11 and 200 individuals pay a fee of 4 x the fee for single claims; and
 - 201 or more individuals pay a fee of 6 x the fee for single claims.
161. We think this approach is reasonable given that the median number of claimants in a multiple claim is 4¹⁶ which means that the first band at 2 x the single fee will capture around 85% of multiple claims made. We will monitor the fees system following implementation and review whether this approach requires changes at a later stage.
162. As part of our detailed implementation work we will model the different ways that multiple cases in the employment tribunals are created, issued, and determined. Clear mechanisms and guidance will be in place to cater for fluctuations in the size of multiple claims or a change in the type of claims sought to ensure the appropriate fee is requested and paid for both at issue and hearing.

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

163. A remissions system broadly in line with that in the civil courts was proposed as being available to individual claimants who participate in a multiple claim. Where the details of the claimants are submitted in the one claim form and no claimants in the multiple claim were entitled to a remission, the full fee is payable. Where a sub-group of claimants in a multiple claim are entitled to a remission, then the remaining claimants in the group would be required to pay the total relevant issue fee. The same principle is adopted when payment of the hearing fee is due i.e., where a sub-group of claimants is not entitled to a remission, responsibility for payment of the hearing fee would rest with that

¹⁶ The impact assessment states "It has not been possible from the available data to identify the exact number of 2009/10 cases that consisted specifically of 2, 3 or 4 claims, though it appears likely that the median number of claims per case was around 4".

group. No individual claimant in a multiple is required to pay more than the comparable single fee.

164. Just over half of the total respondents to the consultation answered this question. The majority of the substantive comments made are reflected in question 12 above, but key amongst concerns was the complicated nature of both the remissions system and the multiple proposals, and together compounded the complication. However, respondents were content with the proposal that no one would be expected to pay a fee higher than the equivalent single fee.

Our consideration of responses

165. We think that the proposal to adopt the HMCTS remissions system for multiple claims is appropriate. We will maintain the proposal to ensure that no-one will be asked to pay more than the single fee.

A9. Refund proposals

166. The consultation proposed a simplification of the current HMCTS approach given plans to review the approach to refunds in the civil courts. Therefore we proposed that no refunds would be given if the hearing fee is paid and subsequently the case does not require a hearing. Our justification was:

- There is no evidence to suggest that offering refunds encourages settlement;
- It is a waste of resources to collect a fee and then return it;
- It would be costly to implement refunds into the fee system;
- Refunds would not tackle the culture of waiting until near to or the day of the hearing to settle or withdraw the case;

167. This approach was common to both Option 1 and 2 but the issue arose mostly in relation to Option 1 as Option 2 did not propose a hearing fee.

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

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

168. One issue raised was that the hearing fee is based upon the cost of the hearing and if parties do not use the hearing arguably they are paying for a service they did not receive. However, our position is that the fee secures the opportunity to have a hearing. To mitigate this we proposed to make the hearing fee payable 4-6 weeks before the hearing providing ample time for parties to reach a settlement and during the development of operational

processes to support the fee structure we will explore whether it is possible to set payment of the hearing fee after exchange of witness statements. If settlement takes place before the hearing fee is due and the Tribunal is formally notified of that settlement then no hearing fee would be required to be paid.

169. There was little comment on our proposals not to refund the issue fee, except in limited circumstances. There was some support for the approach of no refunds for hearing fees with 35 agreeing with the proposals under Option 1. The majority of these came from business groups. One comment made was that no refunds was a useful aid to settling claims and that it was unfair to place burden on taxpayer if settlement was reached.
170. 69 respondents disagreed with Option 1 refund proposals and felt that it was unfair not to have the hearing fee refunded when the case was settled. Moreover the lack of refunds would deter settlement in two ways either by the respondent waiting to see if the claimant paid the hearing fee, or by the claimant refusing to settle because they wanted the hearing they had paid for. The Law Centres Federation supported the Law Society's comment that:

If a fee is non-refundable, a party may take the view that they have made the investment and, therefore, may as well proceed. This is counter to the objective of encouraging settlement where possible ... The limits on refunds of hearing fees also run counter to the objective of encouraging settlement. Settlement should always be encouraged, at any stage, as it will always result in some saving of time and often costs.

171. Other comments were:

- Refunds should be made when the tribunal has made an error (e.g. accidentally taking 2 fees);
- Refunds should be made when a claimant downgrades their claim; and
- It is often not appropriate to settle until after disclosure, if there are no refunds then a fee must be charged nearer to the hearing and after witness statements have been exchanged.

172. We received 87 replies to question 27. Around a third agreed with refund proposals under Option 2, with businesses expressly coming out in agreement with the proposals, and a small proportion of equality groups also supporting.

173. Those who disagreed with the refund proposals for Option 2 did so for the same reasons as those disagreeing with the Option 1 refund proposals. The only additional factor raised by respondents was that in Option 1, there is at least a split of the fee between issue and hearing, meaning that if settlement occurred prior to hearing fee being due there would be no requirement to pay it. In Option 2, the two fees are rolled up together in a single fee at issue, with

no prospect of recovering the hearing element upon settlement. As the Government has settled on a two stage fee, that argument is now redundant.

Our consideration of responses

174. Some of the concern raised by respondents is mitigated by the adoption of two fees at issue and hearing instead of one at issue alone. We realise that offering no refunds after the payment of a hearing fee might lead to more cases requiring a full hearing. However, we have balanced this against the incentive to settle for both the claimant and respondent that we believe arises from the prospect of paying the fee rather than the prospect of getting a refund. We will monitor the impacts of this once fees are introduced.
175. We agree that if there is an administrative error and two fees are taken, one would be refunded. We believe that by seeking the hearing fee near to the hearing date, as far as possible after disclosure and the exchange of witness statements, this will offer ample opportunity for parties to settle and is a reasonable approach.
176. The limited refund policy proposed in the consultation is therefore maintained.

B. Responses related to Option 1

177. Two questions specific to Option 1 were asked:

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.

178. There were 111 replies to question 5. Overall around a third of respondents agreed that this was a reasonable approach, with almost 75% of business respondents agreeing with this proposal. All other groups disagreed.

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

179. 126 replies were received to this question. Around 20% of respondents supported the Option 1 proposals. Of the 80% who disagreed, a large percentage of them did so on the basis that they objected to the principle of fees and for reasons explained in the questions above. Some positive comments were received, however, including the following from RBS Plc Mentor Services:

Of the two options presented, Option 1 has the benefit of aligning charges more closely with the likely costs of processing claims, which will appear transparent and fair to Tribunal users

Option 1 will also discourage claimants from adding groundless and vexatious discrimination claims to what are essentially unfair dismissal claims, without making it appear punitively expensive to pursue genuine discrimination claims.

180. Other supportive comments included:

- The separate hearing fee should encourage discussions of settlement before large costs have been incurred and focus both claimants' and respondents' minds on the costs involved in pursuing the case.
- Option 1 is the simpler option and the simpler option suits all users of the employment tribunals.
- The two stage fee carries additional benefits and is generally preferred to a single fee.

Our consideration of responses

181. In reaching the conclusion to adopt Option 1 we have considered closely all the comments from respondents and as a result have made amendments to the policy as noted earlier.

Part C – Responses related to Option 2

182. Option 2 offered an alternative fee proposal. Both Options had the primary objective of transferring some of the financial burden from the taxpayer to the user. The additional policy aims of Option 2 were to:
- provide business with greater certainty over their maximum liability of award by asking claimants to specify if their claim is above or below a threshold amount; and
 - encourage claimants to make a more informed judgement about the value of their claim and hence narrow the gap between an individual's expectation of what they can 'win' and their actual entitlement, leading to a more satisfactory outcome for claimants and respondents.
183. It was proposed that these aims were to be achieved through requiring claimants to pay a higher fee if they sought an award over a specified threshold (proposed at £30,000 in the consultation). This would have required the claimant at the outset of making a claim to identify whether to seek an award above or below this threshold. If the claimant chose to pay the lower fee then the tribunal would be prevented from awarding above the threshold amount, regardless of whether they considered that the claimant was entitled to a higher amount.
184. This approach acted as an effective cap on the amount awarded where the claimant chose to pay the lower fee. This would enable business to know that their maximum liability is £29,999 where an award was made against them.
185. Option 2 proposed a single fee at issue with four fee levels. The first three levels were based on the type of claim made but where the claimant seeks an award above a particular threshold, proposed in the consultation at £30,000 or more, then the Level 4 fee would be payable, irrespective of the type of claim made. It was further proposed that if the level 4 fee had not been paid then the Tribunal would be restricted to making an award up to the level of the threshold and not over it.
186. The following questions related to those aspects that only applied to the Option 2 fee structure.

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

187. Around 20% of 123 replies to this question were in agreement. A small majority of business respondents agreed with the additional aims and a significant minority of legal respondents agreed, but claimant, Trade Union and equality groups were exclusively against the wider aims, mainly due to the means by which the Government intended to achieve them. For example, TUC said:

The TUC does not dispute the objectives. However, we do not believe that the proposed threshold contained in Option

2 represents an effective or proportionate means of achieving these aims.

Option 2 also seeks to transfer an increased proportion of the costs from the taxpayer on to individuals who are seeking to challenge long standing discrimination in the workplace and whose claims amount to £30,000 or more. We are concerned that this sends a signal that the prevention of discrimination is not considered to be a priority for this government.

188. Other comments by those who did not support the aims were:

- The advantage of giving business more certainty over the maximum liability of an award can be overcome by ensuring that this information is provided on the Form ET1. The proposals in Option 1 are sufficient to ensure that claimants think carefully about the merits of their claim at two distinct stages of the process.
- The consultation paper notes that fewer than 7% of all tribunal claims result in awards in excess of £30,000. Thus the proposed threshold is likely to have a relatively small impact towards providing greater certainty for business over potential liabilities and expectations in some cases over the potential value of claims.
- There are better ways of addressing unrealistic expectations, in particular using advice services and advisers who can assist claimants to realistically calculate the value of their claim. In this respect the GMB believes that the Government should reverse the funding cuts for legal assistance for employment rights that impact on providers such as Citizen's Advice Bureau, Law Centres etc.
- It risks either claimants artificially inflating their claims so as not to limit the possible compensation once a proper assessment can be carried out, or artificially deflating their claims to avoid higher fees but then be unable to get a just and equitable level of compensation if their case is successful.
- It would be very difficult to assess the value of the claim at the outset as a number of factors determining the level of the award are out of the control of the claimant e.g. when the hearing takes place, when the claimant will find further work etc

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?

189. In terms of whether the Option 2 proposals generally would meet the stated aims of improving business certainty and claimant expectations, a majority of all groups (including business groups) say it will not. It ought to be noted, however, that respondents were considering the Option 2 proposal as a whole

and not merely the threshold aspect. Although a small majority of business respondents were in favour of the threshold, common criticisms from respondents were:

- Claims can already be quantified by respondents with a reasonable degree of accuracy;
- The threshold could falsely inflate claimants' expectations if opting to pay the level 4 fee where the actual value of their claim falls beneath the threshold;
- It is impossible for the claimant to know the value of the claim at the outset;
- The threshold will do nothing to educate claimants as to the value of the claim which must come from other guidance or advice;
- Most awards are below £30,000 so most will not be affected;
- The high levels of eligibility for remission 3 means that claimants may gamble on the higher amount in any event;
- That the threshold was in breach of EU legislation that prevented a cap on discrimination awards; and
- The threshold as proposed would capture only a small number of total claimants.

190. In their response to this question, Thompsons Solicitors said:

We would rather expect the contrary. Despite the inherent valuation problems which would be faced by claimants in particular, a fee structure like this could provide a lock-step approach. It will be exceedingly difficult to dissuade a claimant who has paid an inflated fee on the basis of a high valuation that their claim is actually worth much less. The fee will solidify that valuation in their minds. As it is paid, there is no further incentive to avoid a hearing. A claimant, who is prepared to, will easily press their claims to a full Tribunal.

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.

Question 19 – Do you think it is appropriate that the tribunal should be prevented from making 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.

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

191. The majority of respondents across all groups did not believe that a higher fee should be charged for higher value claims (although a majority of business respondents did). CAB Scotland stated:

Option 2 places an arbitrary threshold on claims over which the claimant must pay a significant fee. Claimants who are owed greater amounts of money by employers must therefore pay a higher, and potentially unaffordable, fee in order to access justice and the funds they are entitled to. Option 2 also places no incentive on either party to seek an early resolution. Both options risk limiting access to justice for those with limited means and may therefore encourage poor or illegal employer behaviour.

192. The main reasons were:

- It is a punitive fee punishing those seeking what they are due;
- The higher fee means Government is trying to engineer claimants' choices and make them claim less;
- It will drive those claimants who lodge a claim for over £30,000 into entrenched positions by refusing to settle for an award below the threshold;
- It is not just the wealthy who will be affected, but low paid claimants can receive over £30,000 because awards are not only based on income;
- There is no incentive for those with fee remission to claim below the threshold amount;
- Claimants do not choose to have a higher award, they either have one in fact and law or they do not;
- There appears to be no correlation between the fee and the cost of administering the claim; and
- A significant number of respondents questioned the legality of the threshold in relation to the UK's obligations under EU law.

193. The majority of business respondents agreed that a higher fee should be charged for higher value claims. They also agreed with the threshold but for reasons other than those proposed in the consultation; principally they support the threshold because they believe higher fees would deter greater numbers of claims. This may help to explain the disparity between the majority of businesses supporting the threshold but only a minority believing that it will help contribute to creating greater certainty for business or improve

194. All groups considered the proposed threshold of £30,000 to be arbitrary and likely to offer limited certainty or clarity to organisations in terms of their liability beyond the fact that the value of a claim sought may be worth more or less than £30,000. A small number of business groups advocated a lower threshold (such as £26,000 based on the national average wage) or more than one threshold to ensure a larger proportion of claimants were subject to the higher fee, and to better reflect the median award level. Other groups also criticised the threshold as irrational, and unions suggest a level that matches the current maximum award in unfair dismissal claims (£72,300) or the maximum amount in breach of contract claims (£25,000).

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.

195. Around a third of 97 replies to this question agreed that it is generally higher income earners who receive awards over £30,000. The Council of Tribunal Members' Association agreed that it was usually high earners but with a caveat:

Equal pay claims are a major exception as back pay can be claimed for up to 6 years, so increasing awards for women who are, as they often, are, on relatively low pay.

196. Respondents also highlighted that awards for injury to feelings are completely unrelated to income levels and often may result in an award being considerably higher than any standard loss of earnings award.

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.

197. Around 20% of replies to this question indicated support for that the proposal that those who sought a higher award should make a greater contribution to the costs of the Tribunal. Of that 20% more than half were from organisations representing business or employer interests.
198. Many respondents objected to the use of language in the question that there is somehow a *choice* over the value or worth of a claim. It was strongly argued by multiple respondents that there is no choice in the amount that a claimant seeks or is awarded, it is the amount which they are legally due.
199. The Age and Employment Rights Network commented:

Giving everyone a right to bring a claim without differential fees based on income, etc, is the best way to ensure equity and justice all around. The system should not expect applicants to pay the tribunal system "a cut of their winnings". Having a system that is fair and equitable at nil or the same low cost gives everyone a stake in society, protects against arbitrary unfairness and discourages bad treatment of all kinds of workers in all kinds of situations.

200. Other comments included:

- The consultation paper does not present any evidence of claimants making claims of inordinately high value.
- Higher awards are often associated with discrimination claims. To charge a higher fee for higher awards risks being discriminatory in itself
- The value of a claim and ability to pay the attendant fee are not directly related (particularly in discrimination claims), contrary to the assumption underlying this particular proposal.
- We note that the 2010-2011 tribunal statistics show that roughly 10% of claimants in discrimination cases were awarded above £30,000, and that 31% of claimants, who successfully claimed age discrimination, were awarded above that figure. Not all "high" awards are due to high earnings. Claims may be brought by low earners unable to work again owing to life-changing acts of discrimination.

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

201. In total, respondents were almost 90% against the Option 2 proposals. No respondent group supported it. Two thirds of business respondents disagreed with the proposals and support amongst the other groups was significantly lower.

202. However, amongst the support for Option 2 the Local Government Association commented:

75% of authorities who responded prefer Option 2, the main reason being that a higher fee payable at the issue of commencement of a claim may be more likely to deter those from weaker claims from commencing their claim in the first place. One authority indicated that of the 32 claims it received last year, 11 were withdrawn, and it considers that the Option 2 fee structure would reduce the number of claims being issued, that are subsequently withdrawn.

Authorities also indicate that Option 2 would in their view be simpler to administrate, and that the level 4 fee payable where £30,000 or more is payable will provide more

certainty and encourage greater openness about the awards that a respondent faces.

203. A majority of respondents disagreed with both the threshold aspect and the proposals for a single charging point at issue. Those issues are covered in detail at questions 18-20 and question 17, respectively.

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?

204. Respondents were generally sceptical whether Government provided information and guidance could aid claimants in adequately valuing their claim. It was widely noted that when the claim is at its formative stage valuations are particularly hard to establish. Suggestions for what would be required to help claimants do so were:

- Guidance on the Acas website and sent out when a claim is issued.
- Standard advice pack issued from both Acas and Tribunal explaining statutory formulas for unfair dismissal awards along with mean/median figures of awards.
- Case studies and examples of previous claims.
- A telephone helpline providing advice.
- Specialist employment advice to be made available.
- Signposts to information/advice/guidance to help in online and written literature.
- Provision of information in hard copy at DWP, law offices, CAB, local Government offices.
- MoJ actively countering wider press claims.
- Legal aid ought to be available for advice and representation.
- Flow charts explaining how value of claims is considered.
- Quality, free, independent advice should be made available for claimants supported by legal aid and funded advice centres
- Template schedule of loss to be included within ET1.
- Wider publication of precedents from range of cases
- Online ready reckoner.
- Proper access to expert legal advice

- Transparent, jargon-free advice on where to go to obtain legal advice, the types of claim that can be made including remedies in those claim types.
- Explanation of: claimant's responsibility how: to mitigate loss, how future loss is calculated by the tribunal, that calculations for loss of earnings are based on net pay.
- Establishment of a specialist free advice service.
- No substitute for proper legal advice, flowcharts, questionnaires and booklets may help with basics but not assessing litigation risk, and are vulnerable to developments in law such as revised compo limits. Bare minimum for properly funded advice service would be:
 - i. For each claim type, what remedies are available
 - ii. For each remedy, how it is calculated
 - iii. For each calculation, average outcomes and explanation of variations which apply

205. A small number of respondents raised the concern that increased spend on advice, guidance and other services may begin to extinguish the benefits expected to be generated by fees in the first place.

Our consideration of responses for the Option 2 proposals

206. The Government believes that the policy aims of improving certainty for business, and expectations of claimants, are legitimate and worthwhile intentions. However, we are mindful that the Option 2 proposals were rejected across all respondent groups with less than 20% of respondents believing that Option 2 would prove to be an effective means of matching these policy aims.
207. Currently, there is little evidence to substantiate that higher income earners generally receive higher value awards made by employment tribunals. We also recognise the concerns raised regarding accurately placing a value on an award at the outset of a claim, and that further work needs to be undertaken to improve the quality of information that will help claimants to properly value their claims.
208. Consequently we will not pursue the Option 2 proposals via the fee structure for employment tribunals. However, in order to pursue the aims of improving certainty for business, and claimants' expectations, the Government will look at other options suggested by respondents such as improving the communication and advice available during an employment dispute.

Part D – Alternative models for employment tribunals

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

209. The majority of respondents believe that fees and the proposed fee levels will deter meritorious claims with the consequence of more unresolved disputes. Most alternative proposed solutions were aimed at reducing the current fee levels and as well as reducing the burden on claimants.
210. Several respondents advocated adopting a different approach where all claimants irrespective of whether they made a single claim or were within a multiple were charged a fee. This would spread the cost over a wider group and have the effect of lowering the fee levels payable on a per-person basis. The CAB also suggested that an additional 'at fault' fee could be charged on employers that are unsuccessful in defending a claim at hearing, which they suggest could also lower the fees payable by claimants. CAB say that fee levels of either £50 or £75 per claimant could raise similar revenue to current proposals when combined with a fee paid by the respondent if they were unsuccessful at hearing. This would be a fee in the region of £300 - £600 and paid to the employment tribunal. Alternatively the Scottish judiciary recommended that the hearing fee be based upon an estimated hearing length.
211. There is no limit on the number of claimants that can be within a multiple claim. Moreover, while the number of singles is relatively stable at around 60,000 per annum the number of claimants in multiples is much harder to predict and shows significant annual fluctuations. For example, during the last three years the number of claimants in multiples has varied from 90,000 to 160,000 individuals.
212. This fluctuation in claimant count, together with the unknown effects of fees on demand for the larger multiple claims (some of which current have over 10,000 claimants within them, and may have to pay total fees in excess of £1m), would mean it will be virtually impossible to set fees with any certainty to ensure that income targets are met. This means that in any given year we (MoJ) could significantly under or over recover on total fee income because a few large multiple claims did (or did not) happen to be issued. Under recovery of fee income requires offsetting cost reductions to be found from other areas of the courts and tribunals system and places added pressure on Ministry of Justice spending review commitments.
213. The response from the Scottish judiciary also advocated a flat issue fee as follows:

All claimants, irrespective of the nature of the claim and whether the claim is lodged as a single or part of a multiple should pay a small issue fee (for example, £50)

Both/All parties pay a hearing fee. That fee should be determined not by the nature of the case or the amount which is claimed but by the length of the hearing which is

fixed as currently happens in Scotland in both the Sheriff Court and the Court of Session. If the hearing is only fixed for 1 hour then a very small sum would be payable by each party at a pre-determined point prior to the hearing date. A hearing fixed for half a day would attract a slightly larger fee, one day would cost more and so on. If the case did not finish in the time allocated and a further hearing was required an additional fee would be required from all parties. When the case was determined the unsuccessful party would, in normal circumstances, be ordered to reimburse any fees paid by the successful party. If a party did not pay the required hearing fee then their claim or response, as the case may be, could (in appropriate circumstances) be struck out.

214. The Institute of Directors, on the other, hand favoured a hybrid approach:

There are good elements to both options presented in the consultation document, so we favour a combination of the two – fees for different stages of the process and different types of claim, plus higher fees for claims over a certain level (the consultation document proposes £30,000). The first element (Option 1) could be introduced earlier by secondary legislation, while the second (Option 2) could be introduced once legislative power has been obtained.

Our consideration of responses

215. We do not favour charging a flat fee per claimant as it would remove a central principle of the fee proposals which is to charge proportionately according to the typical resources required to resolve different types of claims. Multiple claims cost HMCTS more to administer than single claims but the cost per claimant is actually lower as the numbers of parties in each multiple increase. This is why we have decided to introduce the fee 'banding' approach. In addition, in respect of the small number of multiple claims received each year that involve very large numbers of claimants (e.g. 5000+), charging per claimant would create difficulties in ensuring that customers do not pay more than the typical costs involved in resolving their dispute.

216. A further anomaly that could arise is that although the median number of claimants per multiple claim is 4, there are examples of claims that consist of over 10,000 individuals, leading to vast amounts paid per claim. For example if 100 people were to pay a fee of £200 the total would be £20,000, or 10,000 claimants at £200 each would result in a total bill of £2m to the individuals or organisation bringing the claim, a sum which is significantly higher than the cost of the employment tribunals to determine the claims.

217. We are not persuaded by the arguments in favour of 'at fault' fee payable after the event. We believe that a system where payment (or remission granted) is made in advance of HMCTS incurring the cost is the best method of ensuring that fees are paid promptly, with the minimum amount of administrative effort whilst ensuring that the taxpayers' financial burden is reduced. Seeking a payment after the event also removes any benefit that fees can have in encouraging parties to resolve disputes at an early stage and to think more carefully about the alternative options to making a formal claim.

Part E – Employment Appeal Tribunal (EAT)

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.

218. The consultation proposed broadly the same fee structure for EAT as Option 1 in employment tribunals, namely a fee to be charged at issue to cover issue and interlocutory work and a further fee in advance of the hearing. The issue fee cost also covers the initial sift, undertaken by a registrar.
219. As the resource used by an appeal in the EAT does not vary depending on the type of appeal made and there is no cost difference between an appeal made by a single appellant and one made by multiple appellants, the proposed fee structure was simpler and restricted to the following 2 fees namely:

Fee	Payable by	Amount
Issue fee	Appellant	£400
Hearing fee	Appellant	£1200

220. The indicative fee levels proposed in the consultation would have secured around 55-60% of the cost of running the EAT in 2010/11. The justification for seeking a higher cost recovery rate than in employment tribunals is because the appellate nature of the EAT which means that the issues had already been considered. All other elements to the proposals were the same as employment tribunals e.g. same limited refunds and use of the HMCTS remissions system.
221. Whilst about 70% of respondents disagreed with the proposals to charge for the EAT, it did not provoke the same level of comment as charging in employment tribunals did. The main points were that the fees seem very high, and that it is contrary to natural justice to have to pay one tribunal to correct the decision of another. Other comments included:
- The figures used are based upon current running costs whereas no adjustment appears to have been made for the reduction in lay members.
 - If the error is an error in judicial decision making, no fee should be paid;
 - Fees in EAT are a further barrier to justice which could allow errors of law to pass unchallenged;
 - It is for the good of society that questions of doubt over employment tribunal decisions are determined by an upper court so fundamentally wrong that should be charged for;
 - The role/responsibility of the EAT is to establish case law which improves the effectiveness and efficiency of the system;

- The assumption that all EAT appeals are of same complexity and require similar resource to determine is incorrect; and
- One fee only should be charged and if the appeal passes the initial sift no further fee should be charged because sift should remove all unmeritorious appeals.

Our consideration of responses

222. We do not accept that it is a barrier to justice to charge fees in appellate tribunals. We believe that there are clear public policy reasons to not place the full burden on taxpayers to fully subsidise a user who has already had the benefit of a previous judicial decision. We believe our fee and remission proposals will mean that appeals will still be made to the EAT and access to justice will be protected. We do not accept that an error in judicial decision making should mean no fee is paid. The reason for the EAT is to determine points of law and in doing so provide guidance for users as well as the employment tribunals' judiciary. We believe it is reasonable to charge a fee for EAT hearings where in order to finally determine the claim, this is required.
223. We are confident that our cost model shows that EAT cases generally take the same amount of time to deal with and that there are no other factors (such as type of claim) that suggests we should be considering a more complicated fee structure. The cost model takes into account the wider changes proposed in employment tribunals and Employment Appeal Tribunal including an estimate of the reduction in the use of lay members. However, we will be reviewing the costings for EAT and employment tribunals on an annual basis.
224. Respondents raised a number of detailed practical issues, such as the type of interlocutory hearings covered by the issue fee, whether fees will be payable when the EAT decides to remit to the employment tribunals, and at what stage the hearing fee will be paid. During implementation we will work through these issues, and ensure that clear guidance is available but our aim will be to keep the principles as simple as possible at commencement. Once implemented we will use the review to assess whether changes are required.

Part F – Practical arrangements

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.

225. All forms of payment were advocated by respondents including:

- Cash
- Cheque
- Credit/debit card
- Account facilities for Trade Unions and regular legal representatives
- Payments at bank and post office
- Online payments
- Bank transfers
- Direct debit

226. Some respondents stated that whatever methods of payment are implemented must be cost effective so as not to undermine revenue generated by this policy.

Our consideration of responses

227. Development for fee payment/collection arrangements will begin shortly after publication of this response. Accessibility for people with protected characteristics such as the disabled and elderly along with cost is a key concern, and we will look to engage with stakeholders in particular with equality groups to ensure that the payment process options and guidance on use are accessible.

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

228. The consultation stated that MoJ would consider whether, alongside the centralisation of payments processes, it would be sensible to provide for any claims that are not submitted on-line to be similarly centralised in their initial stages (e.g. issue and service of the claim form ET1). The following comments were received:

- Centralisation is supported if it reduces costs.
- Centralisation could have a detrimental effect on quality, transparency, agility and accountability on ET services.

- Interlocutory requests must remain in the hands of local offices.
- Submission by fax ought to be available, even if to a centralised point.
- Local lodgement is important, especially if paying by case or seeking a remission approval. Centralisation may restrict that.
- Reference to problems in civil claims required to be lodged at Salford Business Centre.
- Could result in organisations having a central place to identify potential respondent clients to sell their services.
- Separation of fee payment from processing of claim could lead to confusion and delays.
- Could create time delays.
- Centralised office should deal with posted claims and online claims/payment.
- Could pose difficulties for those without bank accounts.
- Current arrangements should suffice.
- Appropriate to consider centralisation of accounting/collection and processing of claims.
- Any decision should be delayed until after Tribunals have been devolved.
- Centralisation would be helpful in allowing an even allocation of workload across regions.
- Must not lead to delays in accepting claims and notifying parties.
- The closer that the fee payment is to the point of use, the better it is for the claimant. It is a misconception that all claimants will have access to modern payment methods. Older population may not have access to internet or credit cards, lower income groups prefer to deal in cash only.
- All methods of submitting must be maintained to take account of poorest users.
- Centralisation unlikely to save costs due to increase expense in moving files and losing papers etc.

Our consideration of responses

229. The Government is grateful for consideration given by respondents to the practical and operational impacts. We will be taking these views into account

as further work is undertaken to assess the impacts and costs and benefits of making the required changes to current business processes to facilitate fee collection and assessment of fee remission applications. We will work to ensure there is sufficient and timely communication to all service users before any changes are introduced.

Conclusion and next steps

1. The responses we have received have been fully considered and led to the policy changes outlined in this document. The changes are:
 - Merging of levels 2 and 3 fee levels;
 - No separate fee charged for seeking written reasons;
 - Re-allocation of a small number of claims to new fee levels; and
 - A reduction in the number of bands for multiple claims from 5 to 3.
2. There are some changes to the proposed fee levels and a summary of the proposed fee structure is below. Fee levels are initially set at a rate less than full cost.
3. We will seek to implement the amended fee structure in the summer of 2013. We will undertake further work with HMCTS staff as well as the employment tribunals and EAT judiciary to develop the new procedures and guidance for staff and users. As part of our implementation work we hope groups and organisations who regularly use the employment tribunals, such as members of the National User Groups in England & Wales, and Scotland as well as the equalities groups who have already engaged with us, will help us to consider what guidance and other practical ways we can make the fee and remission scheme accessible to those who may use the tribunal.
4. Our plan is to publish the wider MoJ consultation on remissions in Autumn 2012. All those who gave a response to this consultation will be notified of the consultation. If anyone is interested in receiving this further consultation please use the details provided in this response to let us know.
5. The Government is committed to reviewing the fee structure once implemented to assess its impacts in order to consider if changes are needed. The review will seek to:
 - Ensure that those who use the employment tribunals system, and can afford to pay, do pay a fee as a contribution to the cost of administering their claim/appeal;
 - Ensure that the remissions system provides that those who can afford to pay a fee do so;
 - Ensure that the fee charging process is simple to understand and to administer;
 - Examine impacts on equality groups; and
 - Verify the amount of fee income raised against the models presented in the Impact Assessment and quantify any operational savings.

The final fee structure proposal - Employment tribunals single claims

Fee Type	Level 1 claims	Level 2 claims
Issue fee	£160	£250
Hearing fee	£230	£950

Multiple claims – level 1

Level 1 claims are generally for sums due on termination of employment e.g. unpaid wages, payment in lieu of notice, redundancy payments

	Number of claimants in multiple claim		
	2-10 (2 x the single fee)	11-200 (4 x the single fee)	over 200 (6 x the single fee)
Issue fee	£320	£640	£960
Hearing fee	£460	£920	£1380
Total	£780	£1560	£2340

Multiple claims – level 2 claim fee levels

Level 2 claims include those relating to unfair dismissal, discrimination complaints, equal pay claims and claims arising under the Public Information Disclosure Act

	Number of claimants in multiple claim		
	2-10 (2 x the single fee)	11-200 (4 x the single fee)	over 200 (6 x the single fee)
Issue fee	£500	£1000	£1500
Hearing fee	£1900	£3800	£5700
Total	£2400	£4800	£7200

Other fees

	Review Default Judgment	Application to dismiss following settlement	Mediation by the judiciary	Counter-claim	Application for review
Level 1	£100	£60	-	£160	£100
Level 2	£100	£60	£600	-	£350

Employment Appeal Tribunal – proposed fee levels

	Appeal fee	Hearing fee	Total
EAT fee	£400	£1200	£1600

Consultation Co-ordinator contact details

If you have any comments about the way this consultation was conducted you should contact Sheila Morson on 020 3334 4498, or email her at : sheila.morson@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

**Ministry of Justice
Consultation Co-ordinator
Better Regulation Unit
Analytical Services
7th Floor, 7:02
102 Petty France
London SW1H 9AJ**

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Annex A – List of respondents

Advice Services Alliance

Advisory, Conciliation and Arbitration Service (Acas)

Age UK

ARAG Legal Services

Association of Colleges

Association of Employment Tribunal Members, London

Association of Recruitment Companies

Association of Teachers and Lecturers

Birmingham Law Society

Brighton & Hove Unwaged Advice & Rights Centre

British Chamber of Commerce

British Retail Consortium

CAB

CAB Fife

CAB Scotland

Care First Management Services Limited

Chartered Institute of Journalists

Chartered Institute of Personnel and Development

Confederation of British Industry

Council of Employment Judges

Council of Tribunal Members' Associations

Croner, part of Wolters Kluwer UK Ltd

Cumbria Law Centre

DAWN (Dignity At Work Now)

Discrimination Law Association
Edwina Hart MP - Welsh Government
EEF - the manufacturers' organisation
ELA
Electrical Contractors' Association (ECA)
Employment Judges in Scotland
Employment Law Bar Association
Engineering Construction Industry Training Board
Equality and Human Rights Commission (EHRC)
Equality Diversity Forum
Equity
Ethnic Minority Law Centre
Eversheds Solicitors
Federation of Small Businesses
Food and Drink Federation
Garden Court Chambers
Glasgow City Council
GMB
Hillingdon Borough Council
HRXexchange
Incorporated Association of Musicians
Institute of Directors
Institute of Employment Rights
John Stamford Associates
Kalayaans
Kent Law Clinic

Lambeth Law Centre

Law Centre Federation

Law Society

Law Society Scotland

Liverpool Law Society

Local Government Association

Low Pay Commission

Lyons Davidson Solicitors

Martin Searle Solicitors

Maternity Action

Matthew Rowe (Lay Member)

Mind

Morrisons/USDAW

NASUWT

NAT (National AIDS Trust)

National Union of Rail, Maritime and Transport Workers

Nationwide

Nautilus

Newspaper Society

North West Employment Law

Northumbria Law School

NUJ

NUT

Pattison Brewer Sols

Pay and Employment Rights Service

Police Federation of England and Wales

President of Employment Tribunals (England and Wales)

Prospect

Public and Commercial Services Union (PCS)

Public Concern at Work

Queen Mary's College, University of London

RBS Plc Mentor Services

Royal College of Nursing

Scottish Legal Advisory Group (SCOLAG)

Scottish TUC

Simpson & Marwick

Simpson Millar LLP

The Administrative Justice and Tribunals Council

The Age and Employment Network

The Automobile Association

The Construction Industry Training Board

The University of Sheffield

Theodore Huckle QC - Welsh Government

Thompsons Sols

Transport for London

Transport Salaried Staffs' Association

Travers Smith Sols

TUC

Tunbridge Wells Citizens Advice Bureau

UK's Race Equality Network

Union of Construction, Allied Trades and Technicians (UCATT)

Union of Shop Distributive and Allied Workers

UNISON Scotland

Unite

University and College Union

University of Central Lancashire

University of Strathclyde Law Clinic

University of Ulster

Working Families

Yorkshire and Humberside Employment Rights Network

Zurich Insurance plc

Nb. There were a further 29 submissions from individuals who responded in a private capacity.

Annex B – HMCTS Civil Courts Remission System

HM Courts and Tribunals Service provides a fee remission system for users of the English and Welsh civil courts. A system of fee waivers is available to those who would have difficulty paying a court fee and meet the appropriate criteria. An individual may be eligible for a full remission (where no fee is payable) or a part remission (where a contribution towards the fee is required). Anyone who seeks a remission from paying a fee, either in full or in part, must apply to do so at the time of making the application or at any time when a fee is due and provide documentary proof of their financial eligibility. There are three types of remissions as follows:

Remission 1 – provides a full remission (i.e. no fee is payable) if the applicant is in receipt of one of the following stated benefits:

- Income Support
- Income-based Jobseeker’s Allowance
- Pension Credit guarantee credit
- Income-related Employment and Support Allowance
- Working Tax Credit but not also receiving Child Tax Credit

Remission 2 - provides a full remission (i.e. no fee is payable) if the applicant’s annual gross income and that of their partner (if they are a couple) is calculated to be not more than the amounts shown in the table below:

Gross annual income with:	Single	Couple
No children	£13,000	£18,000
1 child	£15,930	£20,930
2 children	£18,860	£23,860
If the party paying the fee has more than 2 children then the relevant amount of gross annual income is the amount specified in the table for 2 children plus the sum of £2,930 for each additional child		

Remission 3 - provides a full or part remission (i.e. either no fee or a contribution towards the fee is payable) based on an income¹⁷ and expenditure means test to calculate their (and, if applicable, their partner’s) monthly disposable income:

¹⁷ A number of benefits are excluded from the calculation of income in remissions 2 and 3. These include Carer’s Allowance, Disability Living Allowance, Exceptionally Severe Disablement Allowance and Severe Disablement Allowance. The complete list can be found at page 7 of the EX160 “Court Fees – Do I Have To Pay Them?” leaflet, found here: <http://hmctscourtfinder.justice.gov.uk/courtfinder/forms/ex160a-eng.pdf>

- No fee payable if monthly disposable income is £50 or less;
- If monthly disposable income is more than £50 but does not exceed £210, an amount equal to one-quarter of every £10 of the party's monthly disposable monthly income is payable, up to a maximum of £50;
- If monthly disposable income is more than £250, an amount equal to £50 plus one-half of every £10 over £200 of the party's monthly disposable income is payable.

There are also 3 fixed allowances permitted as part of the means test for this criterion:

Partner	£159 ¹⁸ a month
Dependant Children	£244* a month per child
General Living Expenses	£315* a month

For example, where a person's monthly disposable income is calculated between £50 and £59.99, they will contribute £12.50 on each occasion that a fee is required to be paid; where the disposable income is calculated between £340 and £349.99, the contribution will be £120. To assist users, a table setting out the contributions payable has been created and is provided in Annex C.

The table below shows the contributions currently payable in the HMCTS model.

Disposable Monthly Income	Contribution	Disposable Monthly Income	Contribution	Disposable Monthly Income	Contribution
£	£	£	£	£	£
50 – 59*	12.50	340 – 349	120.00	630 – 639	265.00
60 – 69	15.00	350 – 359	125.00	640 – 649	270.00
70 – 79	17.50	360 – 369	130.00	650 – 659	275.00
80 – 89	20.00	370 – 379	135.00	660 – 669	280.00
90 – 99	22.50	380 – 389	140.00	670 – 679	285.00
100 – 109	25.00	390 – 399	145.00	680 – 689	290.00
110 – 119	27.50	400 – 409	150.00	690 – 699	295.00
120 – 129	30.00	410 – 419	155.00	700 – 709	300.00
130 – 139	32.50	420 – 429	160.00	710 – 719	305.00
140 – 149	35.00	430 – 439	165.00	720 – 729	310.00
150 – 159	37.50	440 – 449	170.00	730 – 739	315.00
160 – 169	40.00	450 – 459	175.00	740 – 749	320.00
170 – 179	42.50	460 – 469	180.00	750 – 759	325.00

¹⁸ The amounts contained in this table for an individual (and couple) are based on the 'Monthly Disposable Income' bands which are used by the Legal Services Commission to calculate how much someone would pay towards their case when assessing Legal Aid.

Disposable Monthly Income	Contribution	Disposable Monthly Income	Contribution	Disposable Monthly Income	Contribution
180 – 189	45.00	470 – 479	185.00	760 – 769	330.00
190 – 199	47.50	480 – 489	190.00	770 – 779	335.00
200 – 209	50.00	490 – 499	195.00	780 – 789	340.00
210 – 219	55.00	500 – 509	200.00	790 – 799	345.00
220 – 229	60.00	510 – 519	205.00	800 – 809	350.00
230 – 239	65.00	520 – 529	210.00	810 – 819	355.00
240 – 249	70.00	530 – 539	215.00	820 – 829	360.00
250 – 259	75.00	540 – 549	220.00	830 – 839	365.00
260 – 269	80.00	550 – 559	225.00	840 – 849	370.00
270 – 279	85.00	560 – 569	230.00	850 – 859	375.00
280 – 289	90.00	570 – 579	235.00	860 – 869	380.00
290 – 299	95.00	580 – 589	240.00	870 – 879	385.00
300 – 309	100.00	590 – 599	245.00	880 – 889	390.00
310 – 319	105.00	600 – 609	250.00	890 – 899	395.00
320 – 329	110.00	610 – 619	255.00	900 – 909	400.00
330 – 339	115.00	620 – 629	260.00	910 – 919**	405.00

*each range ends with .99p

**the contribution will increase by £5 for every additional £10 over £919

A remissions policy broadly in line with that in the civil courts would also be made available to individual claimants who participate in a multiple claim. This would mean that where the details of the claimants were submitted in the one claim form and no claimants in the multiple claim were entitled to a remission, the full fee would be payable. Where a sub-group of claimants in a multiple claim is entitled to a remission, then the remaining claimants in the group would be required to pay the total relevant issue fee. The same principle will apply when payment of the hearing fee is due – i.e. where a sub-group of claimants is not entitled to a remission, responsibility for payment of the hearing fee would rest with that group.

Annex C – Draft schedule of fee levels to which ET claims are allocated

Descriptor	Originating Legislation	Level	Fees	
			Issue fee	Hearing fee
Suffer a detriment and/or dismissal resulting from a failure to allow an employee to be accompanied or to accompany a fellow employee at a disciplinary/grievance hearing	EReIA 1999 s.10–12	Level 2	£250	£950
Application for a declaration that the inclusion of discriminatory terms/rules within certain agreements or rules causes the aforesaid to be invalid	E A 2010 s.145 and 146(1)	Level 1	£160	£230
Application by an employee, their representative or trade union for a protective award as a result of an employer's failure to consult over a redundancy situation	TULR(C)A 1992 s.188–189	Level 2	£250	£950
Breach of Contract	Breach of contract and s.3 ETA 1996 & SI 1994/1623 and (in Scotland) SI 1994/1624	Level 1	£160	£230
Failure of the employer to consult with an employee representative or trade union about a proposed contracting out of a pension scheme	Reg 4 of OPS(CO)R 1996	Level 1	£160	£230
Application or complaint by the EHRC in respect of discriminatory advertisements or instructions or pressure to discriminate (including preliminary action before a claim to the county court)	E A 2010 s.13–14, 19, 26–27 and 120	Level 1	£160	£230
Suffered a detriment, discrimination, including indirect discrimination, harassment or victimisation or discrimination based on association or perception on grounds of age	E A 2010 s.13–14, 19, 26–27 and 120	Level 2	£250	£950
Suffered a detriment, discrimination including indirect discrimination, and discrimination based on association or perception, harassment or victimisation and/or dismissal on grounds of disability or failure of employer to make reasonable adjustments	E A 2010 s.13–15, 19 – 21, 26–27, 120 and Schedule 8	Level 2	£250	£950
Suffered a detriment and/or dismissal resulting from requiring time off for other (non-work but not Health and Safety) duties, study, training or seeking work	ERA 1996 s.46–48, 102–103, 105, 108 and 111	Level 2	£250	£950

Descriptor	Originating Legislation	Level	Fees	
			Issue fee	Hearing fee
Suffered a detriment, discrimination including indirect discrimination, discrimination based on association or perception, harassment or victimisation on grounds of religion or belief	E A 2010 s.13–14, 19, 26–27 and 120	Level 2	£250	£950
Suffered a detriment, discrimination including indirect discrimination, discrimination based on association or perception, harassment or victimisation on grounds of sexual orientation	E A 2010 s.13–14, 19, 26–27 and 120	Level 2	£250	£950
Application by the Secretary of State for Business, Innovation & Skills to prohibit a person from running an Employment Agency	Employment Agencies Act 1973 s3A and 3C	Level 1	£160	£230
Failure to provide equal pay for equal value work	E A 2010 s.64, 120, 127 and 128	Level 2	£250	£950
Failure of the employer to consult with an employee rep. or trade union about a proposed transfer	TUPE 2006 Reg 13–15	Level 2	£250	£950
Suffer a detriment and/or dismissal for claiming under the flexible working regulations or be subject to a breach of procedure	ERA 1996 s.47E, 80F–80G 94 and 104C FWR 2002	Level 2	£250	£950
Application by an employee that an employer has failed to pay a protected award as ordered by a tribunal	TULR(C)A 1992 s.190 and 192	Level 1	£160	£230
Failure to pay remuneration whilst suspended from work for health and safety reasons whilst pregnant or on mat. leave	ERA 1996 s.67–68D and 70	Level 1	£160	£230
Failure to provide a written statement of terms and conditions and any subsequent changes to those terms	ERA 1996 s.1, 4, 8 and 11	Level 1	£160	£230
Suffered less favourable treatment and/or dismissal as a fixed term employee, than a full time employee or, on becoming permanent, failed to receive a written statement of confirmation from employer	FTE 2002 Regs 3, 6 to 9	Level 2	£250	£950
Failure to allow time off for trade union activities or duties, for ante-natal care or for public duties	TULR(C)A 1992 s.168–170; ERA 1996 s.50, 55 and 56	Level 1	£160	£230
Failure to provide a guarantee payment	ERA 1996 s.28–34	Level 1	£160	£230
Failure to pay remuneration whilst suspended for medical reasons	ERA 1996 s.64 and 70	Level 1	£160	£230

Descriptor	Originating Legislation	Level	Fees	
			Issue fee	Hearing fee
Failure to allow time off to seek work during a redundancy situation	ERA 1996 s.52	Level 1	£160	£230
Failure of an employer to comply with an award by a tribunal following a finding that the employer had previously failed to consult about a proposed transfer of an undertaking	TULR(C)A 1992 s.188, 188A, 190 and 192	Level 1	£160	£230
Failure to allow or to pay for time off for care of dependants, union learning representatives duties, pension scheme trustee duties, employee representatives duties, young person studying/training and European Works Council duties	ERA 1996 s 57A to 63C TICER 1999 Reg 25, 26, 27	Level 2	£250	£950
Failure to provide a written pay statement or an adequate pay statement	ERA 1996 s.8, 9 and 11	Level 2	£250	£950
Failure to provide a written statement of reasons for dismissal or the contents of the statement are disputed	ERA 1996 s.92 and 93	Level 2	£250	£950
Appeal against an enforcement, improvement or prohibition notice imposed by the HSE or Environmental Health Inspector, or by the Environment Agency	REACH Regs 2008, reg 21 or HSWA 1974 s.24(2) or COMAH 1999 s.18	Level 1	£160	£230
Failure to pay for or allow time off to carry out Safety Rep duties or undertake training	Health & Safety at Work etc Act 1974 s.48 and 80 SRSC 1977 Reg. 4, 11; HSCE 1996 Reg. 7, Sch. 1	Level 1	£160	£230
Suffer a detriment, dismissal or redundancy for health and safety reasons	ERA 1996 s.44, 48, 94, 100, 105 and 111	Level 2	£250	£950
Application for interim relief	ERA 1996 s.128 or TULR(C)A 1992 s161–167	Level 2	£250	£950
Failure by the SOS to make an insolvency payment in lieu of wages and/or redundancy	ERA 1996 s182 and 188	Level 1	£160	£230
Appeal against the levy assessment of an Industrial Training Board	Relevant Industrial Training Levy Order – either Construction or Engineering Construction Board	Level 1	£160	£230

Descriptor	Originating Legislation	Level	Fees	
			Issue fee	Hearing fee
Suffer a detriment and/or dismissal on grounds of pregnancy, child birth or maternity	ERA 1996 s.47C, 48, 94, 99 and 111 MPL 1999 Regs 19–20 PAL Regs 2002 regs 28–29	Level 2	£250	£950
Appeal against an enforcement or penalty notice issued by HMRC	NMWA 1998 s.19C	Level 1	£160	£230
Suffer a detriment and/or dismissal related to failure to pay the minimum wage or allow access to records	ERA 1996 s.94, 104A, 105, and 111 NMWA 1998 s.10, 11 and 23	Level 2	£250	£950
Appeal against an unlawful act on a notice issued by the EHRC	EA 2006 s.21	Level 1	£160	£230
Failure of the employer to comply with a certificate of exemption or to deduct funds from employees pay in order to contribute to a trade union political fund	TULR(C)A 1992 s.86 and 87	Level 2	£250	£950
Failure of the employer to prevent unauthorised or excessive deductions in the form of union subscriptions	TULR(C)A 1992 s.68 and 68A	Level 1	£160	£230
Failure of the Secretary of State to pay unpaid contributions to a pensions scheme following an application for payment to be made	Pensions Schemes Act 1993 s.124 and 126	Level 1	£160	£230
Suffered a detriment and/or dismissal due to exercising rights under the Public Interest Disclosure Act	ERA 1996 s.47B, 48, 94, 103A, 105, and 111	Level 2	£250	£950
Suffer a detriment and/or dismissal due to requesting or taking paternity or adoption leave or time off to assist a dependant	ERA 1996 s.47C, 48, 57A and 80 MPL 1999 Regs 19 PAL Regs 2002 Reg. 28	Level 2	£250	£950
Suffer less favourable treatment and/or dismissal as a result of being a part time employee by comparison to a full time employee	PTW 2000 Regs. 5, 7, 8 ERA 1996 s.105	Level 2	£250	£950
Failure to pay a redundancy payment	ERA 1996 s.135, 163 and 177	Level 1	£160	£230
Failure of the SOS to pay a redundancy payment following an application to the NI fund	ERA 1996 s.166 and 170	Level 1	£160	£230

Descriptor	Originating Legislation	Level	Fees	
			Issue fee	Hearing fee
Suffered a detriment, discrimination including indirect discrimination, discrimination based on association or perception, harassment or victimisation on grounds of race or ethnic origin	E A 2010 s.13–14, 19, 26–27 and 120	Level 2	£250	£950
Suffer a detriment and/or dismissal for refusing to work on a Sunday	ERA 1996 s.45, 48, 94 101, 105 and 111	Level 2	£250	£950
Suffered a detriment, discrimination including indirect discrimination, discrimination based on association or perception, harassment or victimisation on grounds of sex, marriage and civil partnership or gender reassignment	E A 2010 s.13–14, 16, 18, 19, 26–27 and 120	Level 2	£250	£950
Suffered less favourable treatment and/or dismissal as a temp. employee than a full time employee	FTE Regs 2002	Level 2	£250	£950
Suffer discrimination in obtaining employment due to membership or non-membership of a trade union; or refused employment or suffered a detriment for reasons related to a blacklist.	TULR(C)A 1992 s.137 and 139 ERA 1999 s.104F ERA 1999 (Blacklist) Regs 2010 (SI 2010/493)	Level 2	£250	£950
Suffer a detriment and/or dismissal relating to being, not being or proposing to become a trade union member	TULR(C)A 1992 s.145A–145C, 146–147 and 152–160 ERA 1996 Part X	Level 2	£250	£950
(a) Failure of the employer to consult or report about training in relation to a bargaining unit (b) Suffered a detriment on grounds related to recognition of a trade union for collective bargaining	TULR(C)A 1992 s.70A –70A and Schedule A1 paras 156–157	Level 2	£250	£950
Suffer discrimination in obtaining the services of an employment agency due to membership or non-membership of a trade union	TULR(C)A 1992 s.138 and 139	Level 2	£250	£950
Suffered a detriment and/or dismissal due to exercising rights under the Tax Credits Act	ERA 1996 s.47D, 48, 104B, 105, 108–109 and 111	Level 2	£250	£950
Unfair dismissal after exercising or claiming a statutory right	ERA 1996 s.104, 105, 108–109 and 111	Level 2	£250	£950

Descriptor	Originating Legislation	Level	Fees	
			Issue fee	Hearing fee
Unfair dismissal on grounds of capability, conduct or some other general reason including the result of a transfer of an undertaking	ERA 1996 s.98 and 111	Level 2	£250	£950
Unfair dismissal in connection to a lock out, strike or other industrial action	TULR(C)A 1992 s.237–239 ERA 1996 s.94	Level 2	£250	£950
Failure of employer to pay or unauthorised deductions have been made	ERA 1996 s.13 and 23	Level 1	£160	£230
Appeal by a person who has been served with an improvement or prohibition notice under the Working Time Regulations 1998	WTR 1998 Schedule 3, para 6RT(WT) Regs 2005 Schedule 2, para 6	Level 1	£160	£230
Failure to limit weekly or night working time, or to ensure rest breaks	WTR 1998 Regs 4, 6, 10, 12–17 and 30 ERA 1996 Ss 45A, 48, 101A, 105, 108–109 and 111	Level 2	£250	£950
Complaint by a worker that employer has failed to allow them to take or to pay them for statutory annual leave entitlement	WTR 1998 Regs 13, 14 or 16 and 30	Level 1	£160	£230
Appeal by a person who has been served with an improvement notice under the Road Transport (Working Time) Regulations 2005.	RT(WT) Regs 2005 Schedule 2, para 6	Level 1	£160	£230
(a) Suffer a detriment and/or dismissal related to a request for time to train or study. (b) Failure of an employer to follow the correct procedures or reject a request based on incorrect facts.	ERA 1996 s.47A, 47F, 63A to 63I	Level 2	£250	£950

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