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Submitted to Introducing Fees in the Employment Tribunals and the Employment Appeal Tribunal
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Questions

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

No

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No, we do not agree with the proposal to introduce a £55 issue fee for claimants.

The reason we do not agree is because the reasons put forward in the "Open Consultation Introducing fees in the Employment Tribunals and the Employment Appeal Tribunal (the Consultation Proposal)" as to why the Ministry of Justice (MoJ) says fees should be charged in the ET and the EAT do not justify the harm that is certain to be caused by this measure.

Public Benefit of Enforcement of Employment Rights:
That harm includes the detrimental impact on the public benefit of all employees and workers being undeterred from enforcing their rights. As the Supreme Court said at paragraph 102 of in in their judgment in R (Unison) v The Lord Chancellor [2017] UKSWC 51 (the Unison Judgment),
"There is a further matter, which was not relied on as a separate ground of challenge, but should not be overlooked. That is the failure, in setting the fees, to consider the public benefits flowing from the enforcement of rights which Parliament had conferred."
The MoJ's Consultation Proposal fails again to give any consideration to the public benefits from the enforcement of employment rights.
On the contrary, the MoJ's approach in the Consultation Proposal is very narrow and completely ignores the risk that an additional deterrent to claimants enforcing their rights undermines the whole framework of employment protection for employees and workers who do not bring claims. The ET claims that are brought are the vital key stone holding up the bridge of confidence that employees and employers have in the framework of employment protections enacted by Parliament.
As the Supreme Court said in the Unison Judgment,
"But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations." (paragraph 71)
"When Parliament passes laws creating employment rights, for example, it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights are given effect." (paragraph 72)
And
"Equally, although it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail. It is thus the claims which are brought before an ET which enable legislation to have the deterrent and other effects which Parliament intended, provide authoritative guidance as to its meaning and application, and underpin alternative methods of dispute resolution." (also paragraph 72)

Vulnerable Potential Claimants:
This is especially important in influencing employment relations where the employee is in a particularly weak economic position and those in non-unionised workplaces and 'vulnerable workers' (using the definition of a 'vulnerable worker' in Success at Work: Protecting Vulnerable Workers, Supporting Good Employers: A Policy Statement for this Parliament' (DTI 2006, at [25]) as someone working in an environment where the risk of being denied employment rights is high and who does not have the capacity or means to protect themselves from that abuse).
This is in contrast to the very narrow definition of 'vulnerable' used by the MoJ in paragraph 2.5 of the accompanying Equality Statement which only takes into account financial vulnerability.

MoJ's Justification:
In the 'Rationale behind tribunal fees' section of the Consultation Proposal the MoJ purports to justify this known and certain risk to employment protection for sections of the workforce by advancing 3 reasons. When read carefully these 3 reasons overlap and are actually just two reasons namely:
1. that fees are charged in other courts and tribunals so to charge fees in ETs would be consistent that and would place ET users 'on the same footing'.
2. to charge fees would both reduce cost to the taxpayer and, at the same time, generate resources to reinvest into the service.

MoJ Reasons 1 and 2 - Consistency with other courts and tribunals:
Employment Tribunals (under different names) have been running successfully without fees and without being 'consistent' with other courts and tribunals since 1964, save for a brief period between 2013 and 2017 when the then Government imposed fees that it now accepts severely undermined access to justice, causing a substantial fall in the number of claims brought to the ET ("case volumes fell by 53% in the 12 months after the fee change" -see paragraph 6 of the Consultation Proposal) and which were found to be unlawful by the Supreme Court in the Unison Judgment.
During the very many years when no fees were charged for ET claims this was not 'consistent' with other courts and there is no reason why ETs should be consistent with other courts, which differ in many respects, including operating under a different costs regime.
As is recorded in the Unison Judgment (at paragraphs 7 and 8), ETs were established to provide, "an easily accessible, speedy, informal and inexpensive procedure" for the settlement of employment disputes and are intended to provide a forum for the enforcement of employment rights by employees and workers, including the low paid and designed to deal with issues that are often of modest financial value, or of no financial value at all but are nonetheless of social importance and that this has been reflected in the fact that, unlike claims in the ordinary courts, claims could be presented without a fee and that the absence of fees was one of 3 elements which had made ETs successful.
The MoJ has lost sight of the unique importance of Employment Tribunals, and the need of especially the low paid to have as easy and unhindered access to justice as possible given their weak position in their employment relationship with the employer.
As was recognised by the Supreme Court in the Unison Judgment (at paragraphs 66 to 89), tribunals are not merely a public service providing value to the 'users', but also to ensure that rights and obligations legislated for by Parliament are adhered to in wider society. Employers comply with their legal obligations because they know that if they do not do so they are likely to face legal proceedings in an Employment Tribunal. Where they are confident that an employee of theirs will not have the necessary resources, of which lack of funds is only one relevant factor, unscrupulous employers are more likely to ignore their legal obligations entirely, and even some better employers may only partially comply. The whole system of employment protection for all employees and workers depends on the few who bring claims, including those employed by employers who may be less likely to fully comply with the law.
The system of universal employment protection depends on all employers being mindful of the very real possibility that their own employees and workers will in practice bring claims to enforce their rights if necessary.
The Supreme Court summarises the legal position at paragraph 89 of the Unison Judgment:
"To anticipate that discussion, however, it is clear that the ability of litigants to pay a fee is not determinative of its proportionality under the Convention [European Convention on Human Rights and Fundamental Freedoms}. That conclusion supports the view, already arrived at by the common law, that even an interference with access to the courts which is not insurmountable will be unlawful unless it can be justified as reasonably necessary to meet a legitimate objective." (our emphasis)

MoJ Reason 3 - Reduce cost to the taxpayer and generate resources to reinvest into the service:
This reason to charge fees is inherently contradictory. If the MoJ is genuine in its stated intention to use the fees charged to reinvest into the service, there would be no saving to the taxpayer. If properly spent there could be an improved service for claimants and respondents in ET claims.
In fact, on the previous occasion when the MoJ imposed fees for ET claims, the fees generated were not reinvested in the ET service. On the contrary, when the number of claims were drastically reduced due to the deterrent of fees, the MoJ used this opportunity to substantially cut the resources allocated to the ET service and did not restore those resources when the fees were removed and the number of claims rose again. This caused great pressure on the diminished ET resources resulting in unacceptably long delays between the issuing of claims and the final hearing which disincentivised employers from settling claims, or from considering there would be any imminent repercussions from non-compliance with their legal obligations.
In any event on the MoJ's own assessment (at paragraphs 17 and 60 of the Consultation Proposal) fees are only expected to provide an income of £0.6m-£0.7m in the first year and £1.3m – 1.7m per annum thereafter. This is against a stated (in paragraph 9 of the Consultation Proposal) direct running cost of the ET and EAT of around £80m in 2022/23. This is before deduction of the admitted additional costs for HMCTS due to amendments to IT systems, guidance for staff and public guidance (see paragraph 67 of the Consultation Proposal). The accompanying Impact Assessment gives a figure of £0.5m in transitional costs during the first year but makes no allowance for ongoing administrative costs including the costs of running the proposed remission scheme.
In short, any cost saving is insignificant compared with the harm done to very many individual claimants and potential claimants and the consequential adverse impact on society of discouraging those who most need to be able to enforce their rights at work. This is necessary to hold employers to account. Without the realistic prospects of enforcement some employers will feel able to take advantage of more vulnerable workers to overlook their legal obligations.

Further Reasons Why the MoJ's Reasons for Charging Fees for ET Claims do not Justify the Harm Caused by Charging Fees:
Balance of Power in the Employment Relationship

In the Consultation Proposal the MoJ states (at paragraph 24) that they face the challenge of "ensuring the claimant fee is at such a level that it does not materially change the economic balance between the parties". This is to ignore the fact that employment protection legislation, to be enforced by ETs, was first introduced, and later extended, precisely because Parliament recognised that there was an imbalance between the power of the employer and that of the employee which the law as it was then, enforceable in the courts only, was grossly inadequate to redress. It was not to maintain the status quo.
To charge any fee to ET claimants (or to require claimants to go through the extra burden of applying for fee remission) necessarily pushes the balance of power even further in favour of the employer.
A fee of £55 will be disproportionate in a substantial number of potential claims and any fee, even with the facility to apply for remission, places an additional barrier to many employees and workers seeking to enforce their rights.

The Deterrent Effect of Fees/Fee Remission Procedure:
For some employees and workers, it is hard enough to bring a claim, even without fees. This is especially the case for the low paid and those in a weaker position for a wide variety of reasons including:
• fear of repercussions where they are continuing employees,
• being time poor where they need to work several jobs to make ends meet,
• lacking the resources to access advice,
• English not being their first language
• finding the process difficult due to a disability or temporary illness,
• lack of aptitude in form filling
Add to this the deterrent of either having to pay a fee, which there is very little certainly of recovering even if successful, which may on current time scales be in very many months or years' time. (Notably, unlike on the last occasion when fees were charged, the Consultation Proposal does not make any provision for repayment of the fee by the employer, or the Government, in a successful claim.)
Even those who may be eligible for fee remission would be required to undertake an additional administrative process involving the completion of a further form and the provision of detailed financial and other information to apply for remission and all at the same time as having to complete their ET1 and draft grounds of claim within much tighter time frames than apply in the courts. Added to this is the uncertainty of whether fee remission will be granted. All this is a very real deterrent to potential claimants, especially those on low pay. It is these employees and workers who are in an especially weak position compared with their employers and who need the protection of employment rights the most. It is the employers of these workers who most need to feel that there is a realistic prospect of their employees bringing a claim against them if they do not fully comply with their legal obligations towards their employees. Otherwise Parliament's intended redress through employment protection is meaningless to those workers and their employers.
As the Supreme Court said in the Unison Judgment (at paragraph 92):
"the ability to obtain a fair settlement is itself dependent on the possibility that, in the absence of such a settlement, a claim will be presented to the ET".
This is the case with the imposition of any fee regardless of whether or not by some measure it can be shown to be 'affordable'.
In the Unison Judgment the Supreme Court said (at paragraph 93) that the question of whether a fees proposal effectively prevents access to justice must be decided according to the likely impact of the fees on behaviour in the real world. The Supreme Court goes on to say fees must therefore be affordable not in a theoretical sense, but in the sense that they can reasonably be afforded. Although the MoJ recites this (at paragraph 48 of the Consultation Proposal) the MoJ's only answer is the remission scheme and the Lord Chancellor's Exceptional Power (about which very little information is given). This is to completely overlook the position of those who, being less well-off, face much harder decisions on which of many pressing demands for expenditure to prioritise.

Proportionality – Low Value Claims:
The MoJ's only answer on the issue of proportionality of the fee to the remedy being sought is at paragraph 57 of the Consultation Proposal. Even on the figures relied on by the MoJ in this paragraph, in 2013 of those successful in receiving a monetary settlement, 5% of claims settled for £200 or less and 2% of claims settled for £100 or less. This is still a large number of claimants, but what is more important, they are likely to be just the claimants who need the ability to enforce their rights the most.

Other Costs:
Further the MoJ says nothing in answer to the point that the proposed fee is disproportionate where a non-financial remedy is being sought. These may be claims of great importance to the employee or worker in their continuing relationship with their employer, such as the provision of particulars of employment or a recommendation by the ET for the employer to take specific steps to remedy discrimination.
At paragraph 58 of the Consultation Proposal the MoJ seeks to rely on personal costs of £50 for communication costs and £60 for travel costs in bringing an ET claim being of a similar value to the proposed fees to show the proposed fees as proportionate to the remedy. In fact such costs need to be added to the proposed £55 fee to assess whether the additional fee, when added to the other costs of bringing an ET claim, makes it disproportionate in relation to the remedy.

Effect of Fees on Potential Claimants:
It is already known from what actually happened the last time fees were imposed for ET claims that having to pay a fee substantially reduced the number of claims brought. There is no evidence or reason to believe that the reimposition of a somewhat lower fee would not also drastically reduce the number of claims brought and potential claimants left without a remedy. This would harm not only to the individuals left without redress but would also produce the adverse effect on society of reducing the likelihood that unlawful employment practices will be upheld and respected for all employees and workers.

2 Do you agree with the modest level of the proposed EAT appeal fee?

No

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No, we do not agree with the proposal to introduce a £55 issue fee for appellants.
All the reasons set out above in answer to question one apply, albeit to a lesser extent as fees in the EAT would only apply to claims already underway and the number of appeals and potential appeals is far smaller than is the case with ET claims.
As ET decisions do not set legal precedent, EAT judgments are essential to develop the law and provide invaluable and authoritative guidance to employees and employers on the application of the law in a wide variety of ever-expanding circumstances. It is in the interests of both employers and employees to have the benefit of as many EAT decisions as possible to clarify the way the law is likely to apply in particular cases. This gives more certainty to the parties and a surer basis on which to reach a settlement at an early stage, thereby reducing the need to litigate. The EAT sift procedure ensures that only appeals that are on a point of law are allowed to proceed.
The MoJ propose (at paragraph 36 of the Consultation Proposal) that the fee is payable upon lodging an appeal in the EAT. If the reasons already given for not imposing fees at all in the EAT are not accepted, we contend that any fee should only be payable after the appeal has passed the sift stage, that is only for appeals that it has been decided will proceed. This ensures that appellants do not have their appeal rejected at the outset for non-payment of a fee and that the fee is only applicable to appeals that will actually result in the expenditure of resources of an appeal hearing.

3 Do you believe this proposal meets the three principles set out in the consultation document?

No

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No, we do not agree that this proposal meets the principles of affordability, proportionality and simplicity.
We rely on the reasons we gave in our response to question 1 above and, in summary:

Affordability:
For the reasons set out in response to question 1 above, what is important is not whether or not a majority of potential claimants could pay the fee, either out of savings or by foregoing other expenditure, but whether or not those claimants who are in most need of employment protection are able to pay the fee in practice.
Much of the Unison Judgment is devoted to the need to consider affordability realistically as a whole.
At paragraph 91 of the Unison Judgment the Supreme Court says, "In order for the fees to be lawful, they have to be set at a level that everyone can afford, taking into account the availability of full or partial remission". (our emphasis)
The Supreme Court also says (at paragraph 93)
"The question whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Fees must therefore be affordable not in a theoretical sense, but in the sense that they can reasonably be afforded. Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable."
The principle MoJ says it aims to ensure i.e. that, "the cost of the fee can broadly be met by users" is not the right test which has already been outlined by the Supreme Court, as above. The MoJ has not shown that everyone could reasonably afford the fee without having to sacrifice the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living.

Proportionality:
The MoJ has confined its consideration of proportionality to whether or not that the value of the fee generally does not exceed the value of the remedy being sought.
The MoJ should instead be considering whether or not the harm caused by the imposition of fees is disproportionate to the stated objectives. We say it is disproportionate. Please refer to our response to question 1.

Proportionality to the Value of the Claim:
Even on the narrow issue of a comparison of the proposed fee with the value of claims, the point is not whether or not "generally" the fee exceeds the value of the remedy being sought. In many cases the outcome of bringing a claim is that, whether by way of ET determination, declaration or recommendation, or by terms of settlement reached during ET proceedings, it delivers non-financial benefits.
One example is the enforcement of the fundamental right to an up to date and complete statement of particulars of employment setting out the contractual terms of employment required to be provided by statute. It is very often employers of low paid workers who have failed to comply with their obligation to provide a statement of particulars.
Another important example is in discrimination claims where an ET can make a recommendation requiring the employer to do something specific within a certain time to remove or reduce the bad effects which the claim has shown to exist on the individual, such as making reasonable adjustments. An ET may also make a recommendation that the employer reduce the bad effects which the claim has shown to exist on the wider workforce such as: introducing an equal opportunities policy, ensuring its harassment policy is more effectively implemented, re-training staff and/or publicising the selection criteria used for transfer or promotion of staff.
There are also many claims for unlawful deduction of wages and breach of contract which are for a sum that is not very much more than the proposed fee but which are a significant loss for the worker and which go to the heart of the employment relationship. For these basic contractual rights to be universally upheld employees and workers need to have unhindered access to the enforcement of these rights.

Non-Payment of Awards by Employers:
A further reason claimants may not lodge a claim if they need to pay a fee is that, even where a claimant manages to obtain judgment for a larger sum the employer fails to pay the award in around half of cases. For more on this see the Department for Business Innovation & Skills Payment of Tribunal Awards 2013 Study which says:
"As was the case in 2008, there is an even chance that individuals who receive a monetary award at an employment tribunal will not receive payment of their award without the use of enforcement. This is perhaps a particular concern in light of the forthcoming changes to the Employment Tribunal process where individuals will need to pay an "issue fee" to file a case with the Employment Tribunal and a further "hearing fee" if the claim proceeds to a hearing".

Simplicity:
The introduction of a fee makes it more complicated for a claimant to submit an ET claim, especially for those who would need to apply for remission. It also adds a layer of complication to the administrative burden on the Tribunal Service
As we said in our response to question 1, the costs of the fee must be added to other likely costs of bringing a claim such as travel and communication costs.

4 Do you consider that a higher level of fees could be charged in the ET and/or the EAT?

No

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No, for the reasons given in response to the earlier questions we do not consider fees should be charged at all.

5 Are there any other types of proceedings where similar considerations apply, and where there may be a case for fee exemptions?

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Yes, although, for the reasons given above in response to the earlier questions, we do not agree that fees should be charged at all. If fees are introduced we consider that it is essential that the following types of claim are exempt:

• references to an ET for determination of Particulars of Employment under section 11 Employment Rights Act 1996. As explained above, these often have no monetary value and are more often commenced by employee in lower paid roles;
• complaints to an ET that the employer has made an unlawful deduction of wages under section 13 Employment Rights Act 1996
• breach of contract claims in the ET

6 Are you able to share your feedback on the different factors that affect the decision to make an ET claim, and if so, to what extent? For instance, these could be a tribunal fee, other associated costs, the probability of success, the likelihood of recovering a financial award, any other non-financial motivations such as any prior experience of court or tribunal processes etc

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As was found in empirical research carried out by the Universities of Bristol and Strathclyde in conjunction with participants recruited through Citizens Advice Bureaux, embarking on an employment dispute, "demands an enormous amount of time, effort and emotional resilience from people who are often already deeply affected by the problems at work that led to legal disputes. Pursuing a claim can become a full-time occupation - lives are put on hold while claimants prepare, which puts considerable pressure on their personal lives"

And

"families are frequently the fall-back for financial as well as emotional support."
And that many claimants seeking new employment are worried about how they would attend the hearing and the difficulty of taking time off to go to the hearing and what their new employer might say about it as well as their own reputation as, potentially, being considered a 'troublemaker' for bringing the claim in the first place.
https://www.bristol.ac.uk/policybristol/policy-briefings/employment-tribunal/

As we said in our response to question 1 above, factors that deter potential claimants from enforcing their rights include:
• fear of repercussions where they are continuing employees,
• being time poor where they need to work several jobs to make ends meet,
• lacking the resources to access advice,
• English not being their first language
• finding the process difficult due to a disability or temporary illness,
• lack of aptitude in form filling

Additional factors are:
• time limit issues, including lack of knowledge and advice about how to calculate the time limit for lodging a claim, taking into account ACAS early conciliation and about the possibility of applying for a 'just and equitable' extension of time in discrimination claims
• the time it is likely for a claim to reach a final hearing
• a lack of confidence that any final award will be paid by the employer
• a lack of the support of a trade union or the ability to pay for legal advice
• threats of costs by employer

These are all factors that have a greater or lesser deterrent effect in addition to cost or the administrative burden of making an application for fee remission. We are not clear what the intention of the MoJ is in asking this question in a consultation about ET fees. The fact that there are other factors which may deter a potential claimant from bringing a claim does not justify adding the further deterrent of tribunal fees, especially at the early stage of submitting a claim which, in itself, often leads to reasonable settlement with minimal administrative work by the tribunals as the employer takes note of the risk to them.

For the reasons set out in our response to the earlier questions we do not agree that ET (and EAT) fees should be charged at all. To require claimants to pay a fee at the same time that they submit their claim would be to impose a double hurdle for claimants. If fees are to be introduced, they should not be payable until after a case management hearing, when it is more certain that the claim will proceed, which is also before the final hearing, which will be the main cost to the ET service of the claim.

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

No

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No, we do not agree that the MoJ has correctly identified the range and extent of the equalities impacts for the proposed fee introductions.

In the accompanying Equality Statement MoJ accepts (at paragraphs 6.3 and 6.6) that the introduction of an ET fee is likely to disproportionately adversely affect those with a protected characteristic of race, sex, disability and age. The MoJ bases this conclusion on the fact that the proportion of individuals

with one or more of those protected characteristics is higher in the claimant population than in the workforce in general. In other words, those with a protected characteristic relevant to the infringement of their rights are more likely to need to enforce their employment rights and more vulnerable to exploitation at work than other employees and workers.
The MoJ nevertheless say (at paragraph 6.6 of the Equality Statement) that these potentially adverse disproportionate impacts on those with protected characteristics (who have particular need of ETs) of the introduction of ET and EAT fees is not likely to result in anyone suffering a particular disadvantage in relation to the introduction of those fees. This startling conclusion is based entirely on, “the policy rationale and considerations that form the basis for the proposal to introduce modest fees in the ET and EAT”, namely that the proposed fee is “generally affordable“ and that only a small percentage of claimants are seeking a low value or non-monetary award. That rationale is merely a repeat of the very narrow considerations of affordability and proportionality in the Consultation Proposal, the flaws of which that we have already identified in our response to earlier questions.
The MoJ then (at paragraph 6.6) purports to use the very same rationale to attempt to justify the indirect discrimination that might arise in a particular case, which the MoJ says, without any supporting evidence relating to potential claimants, is “unlikely”.
In particular, the MoJ have failed to consider or seek any evidence about whether or not those with any of these protected characteristics are more likely to be low paid and/or vulnerable employees or workers or more likely to find completing an application for remission difficult or daunting for any type of claim.
Indeed, at paragraph 5.1 of the Equality Statement the MoJ frankly admits that it lacks data on which it could confidently assess affordability of ET and EAT fees at any level.

The MoJ’s narrow approach has failed to take any account of the obvious point that those with a protected characteristic, whether or not related to their potential claim, may be even more vulnerable and in even greater need of free and unhindered access to ETs with the minimum of administrative obstacles.

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