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Submitted to Review of the introduction of fees in the Employment Tribunals
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About you

1 What is your name?

Name:
Nick Clark and Eva Herman

2 What is your email address?

Email:
e.herman@mdx.ac.uk

3 What is your organisation?

Organisation:
Middlesex University Business School

Questionnaire

1 Do you have any specific proposals for further reforms to the Help with Fees scheme that would help to raise awareness of remissions, or make it simpler to use? Please provide details.

Please type your response in the text box.:

We feel that fees ration access to justice to those most able to risk not recovering the fee. This therefore prevents those who need such access the most getting what is rightfully theirs.

2 Do you agree that raising the lower gross monthly income threshold is the fairest way to widen access to help under Help with Fees scheme and to alleviate the impact of fees on Employment Tribunals claims? Please give reasons.

Please type your response in the text box.:

Even if the income threshold access under the Help with Fees scheme is increased it will probably have little impact on ET proceedings, as our evidence suggests that fees have affected the behaviour of both workers and employers.
Unpaid Britain has analysed judgements from Employment Tribunal cases submitted under the 'Wages Act' jurisdiction at London tribunal offices in 2012 and 2014 and established the respondents' information from Companies House. Our sample consisted of 735 claims registered at three London ET offices and Watford (where claims from North London are heard). We selected every tenth judgement of a case including a 'Wages Act' claim from 2012 and every fifth from 2014 (due to the substantial drop in number of claims that were registered after the introduction of fees).
Comparing the samples we found that, in addition to the sharp fall in the numbers of claims presented and cases heard, the distribution of outcomes differed between the two. There was a drop in the proportion of default judgements from 16% of all judgements in 2012 to 7% in 2014, and a sharp rise in proportion of claims that were dismissed upon withdrawal from 19% in 2012 to 30% in 2014. In terms of the change in outcomes of cases heard, a count reveals that for every unsuccessful claim apparently discouraged by fees, a potentially successful one was also discouraged.
Key informants (employment Law professionals) interviewed by Unpaid Britain had informed us that since the introduction of fees there has been a trend towards employers waiting until the hearing fee has been paid before settling (resulting in the claim being withdrawn and consequently dismissed). This would explain the sudden increase in proportion of claims that were dismissed upon withdrawal. If an employer does not settle at Acas, and where the claim has merit, it seems they will wait to see how serious the worker is about pursuing their claim before settling.
Comparing respondents' status at Companies House suggested that claims that were withdrawn because settled and those dismissed upon withdrawal were from the same population, with the vast majority of companies still being recorded as active (75% still active where claim was settled and 85% still active where claim was dismissed upon withdrawal) . In this they differed from respondents in default judgements (28% of respondents still active) and those in cases where the claimant succeeded (41% of respondents still active).
The sharp reduction in default judgements and a like for like reduction in successful and failed claims suggests that workers are less likely to pursue a claim if they suspect they may not get their money – even if their claim succeeds. This is supported by a higher proportion of companies in successful claims from 2014 than from 2012 being shown as active (even after adjusting to account for the 2012-2104 time lag). This would be expected if, as we are suggesting, workers choose not to pursue claims against companies who are likely to be wound up rather than pay any ET awards.
These findings indicate that fees ration the access to justice and prevent those who need it the most getting what is rightfully theirs. This suggests that the 66% of claims that did not go to ET after not managing to reach a settlement at Acas conciliation represents a problem of access rather than a recognition that the case has not merits. In effect, the consequence of charging is that some abusive employers have been handed a "get out of jail free" card, as workers have to make conservative assessments not only of their chances of success at ET, but also their chances of being paid if they do succeed.
More needs to be done to ensure that these people can access justice; hence we feel that fees are not just discouraging claims with little merit but are preventing claims which have merit, the hearing of which would assist in the identification of habitual offenders.

3 Do you agree with the proposal to raise the gross monthly income threshold for a fee remission from £1,085 to £1,250? Please give reasons.

Please type your response in the text box.:

Raising the threshold is of course welcome, but in order to avoid the limiting effects set out above, it would need to be raised to at least the national median wage. It would be simpler, and more equitable to lift the fee altogether.

4 Are there any other types of proceedings, in addition to those specified in paragraph 357, which are also connected to applications for payments made from the National Insurance Fund, where similar considerations apply, and where there may be a case for exempting them from fees? Please give reasons.

Please type your response in the text box.:

The 2013 BIS report on the payment of Tribunal Awards found that 44% of wages claims that won at ET never received their award. The most common reason for this given by claimants was that the company was no longer active, some stated that where this was the case the company had started trading again, sometimes under a different name (BIS 2013). In our investigation we found that where claims were successful only 40.7% of companies were still active and where the claim was not defended (Default Judgement) only 27.9% of the companies were still active. A further investigation reveals that that only 31% of companies that were insolvent before the final ET judgement was sent to all parties. Hence 77% of parties would not come under the insolvency stipulation but would still never receive the money that they are awarded. Therefore we feel that the introduction of fees has placed a double burden on these workers, not only do they not get their wages but they have to pay a fee that they will most likely never retrieve.
There is a need to extend fee exemptions further not just for cases that are specified in paragraph 355/357. The likelihood of employers paying the award must be taken into account. This is specifically pertinent when we see the proportion of successful claims where the respondent has ceased trading.

5 Do you agree with our assessment of the impacts of our proposed reforms to the fee remissions scheme on people with protected characteristics? Are there other factors we should take into account, or other groups likely to be affected by these proposals? Please give reasons.

Please type your response in the text box.:

Our research has not focused specifically on claimants with protected characteristics, or claims relating to those characteristics, so we are not able to comment meaningfully on this.