THE COUNCIL OF EMPLOYMENT JUDGES

Submission on the Review of the Introduction of Employment Tribunal Fees

Introduction

1. The Council of Employment Judges' membership[1] consists of the great majority of salaried and fee paid Employment Judges (EJs) in England, Wales, Scotland and Northern Ireland.[2]

2. This submission is presented after consultation with the Council's membership directly and through regional representatives. It is intended to assist the Ministry of Justice in gathering evidence about how successfully the original objectives of Tribunal fees have been met. Those objectives have been described by the MOJ as follows:

   (a) *financial*: *to transfer a proportion of the costs from the taxpayer to those who use the Tribunal where they can afford to do so;*

   (b) *behavioural*: *to encourage parties to seek alternative ways of resolving their disputes*

   (c) *justice*: *to maintain access to justice*

3. The Council recognises that the question whether a fee should be paid to initiate or defend Tribunal proceedings is one of policy. Accordingly, this submission focuses on the effects of the policy to charge fees that EJs have noticed on the pattern and volume of claims since the introduction of fees and not the principle of charging fees.

4. The Council suggests that EJs are in the best position to describe the nature of the claims which are now most often heard in Employment Tribunals rather than simply their type. Furthermore, many fee-paid EJs are solicitors or barristers practising in the field of employment law who can bring their experience of private practice to bear.

What the Judges say

5. Judges were asked the following questions:

   (a) Have you noticed any difference generally in the claims which you hear?

[1] The Council currently has 401 members (including a few recently retired judges). There are approximately 162 salaried and 239 fee-paid Employment Judges (including Regional Employment Judges) in the United Kingdom in total.

[2] There is presently no fees regime in Northern Ireland.

(b) *Do you hear the same range of 'money claims'* [explained below] *as you did prior to the introduction of fees?*

(c) *Have you noticed an increase in the number of claims which succeed before you?*

(d) *Have you noticed any change in the number of appeals against your decisions?*

(e) *Has the mix of respondents changed (broadly speaking the mix is: public sector, large employers & small employers)?*

(f) *Have you noticed a marked change in claims brought under particular jurisdictions? If so, what ones and why do you think this might be?*

(g) *Have you noticed any change in the number of claims settling?*

(h) *Are you aware of apparently arguable cases being dismissed administratively because of the claimant's failure to pay a fee?*

(i) *Have you noticed any changes in the range of representatives appearing before you?*

6. All bar one of the judges who responded to the survey reported that they now hear far fewer 'money claims', that is individual claims for unlawful deduction from wages, unpaid holiday pay, breach of contract as to notice or for redundancy payments. There are some large multiple claims of this type, often brought by employee groups or unions, but that is not what is being talked about here. Many judges reported that they now hear no money claims at all. Prior to the introduction of fees money claims were often brought by low paid workers in sectors such as care, security, hospitality or cleaning and the sums at stake were small in litigation terms but significant to the individual involved. There are few defences to such claims and they often succeeded. Furthermore, the existence of an effective remedy for workers was a control on the behaviour of unscrupulous employers across these and similar sectors. EJs cannot say whether these claims have now simply moved to other parts of the courts system, for example small claims in the County Court (although the Council does not believe this to be the case). If County Court statistics show that these claims have not been absorbed there, then it calls into question how access to justice in respect of these types of claim is being maintained for lower paid workers.

7. Judges have also noticed a substantial decline in 'simple' unfair dismissal claims (that is a claim of unfair dismissal not linked with some other jurisdiction such as discrimination or whistle-blowing). Such claims as remain tend to be from middle to high income earners or

those with legal expenses insurance. This may also call into question whether fees affect access to justice for lower paid workers.

8. Salaried judges reported an increase as a proportion of their workload in the number of multi-day, multi-jurisdiction cases they hear. That is not to say that there are more of these cases numerically rather it reflects a decline in the use of the fee-paid judiciary.

9. Long discrimination and/or whistle-blowing claims have been heard in Tribunals for many years but judges have noticed more of these claims being linked with dismissal. This may reflect the reduction in the compensation available for claims of unfair dismissal and the increase in the qualifying service needed which do not apply to discrimination or whistle-blowing claims rather than fees *per se* but it is notable that it costs no more to allege, say, discrimination when bringing a claim which might otherwise have been one of unfair dismissal only. Legal principles established in the appellate courts make it very difficult for judges to dispose of discrimination or whistle-blowing allegations without a full consideration of their merits and in the judges' view this helps explain the increase in longer cases.

10. No judge reported an increase proportionately in the number of successful claims before them since the introduction of fees. Given the overall reduction in the number of claims, this suggests that litigants who would have succeeded have been deterred by fees and that fees have not 'weeded out' unmeritorious claims. Indeed, a number of judges described a proportionate increase in the number of unmeritorious claims coming to a hearing because determined but misguided claimants remain undeterred by fees.

11. Salaried judges generally deal with the longer, more complex claims, and most reported that there appear to be fewer such claims against small or medium-size private employers; typically the respondents are now most likely to be a public sector or large private employer. One salaried judge reported being told by a solicitor representing a large public sector employer that judicial mediation (for which a respondent must pay a fee and Treasury approval is required for mediation and settlement) was not now possible because Treasury approval is only granted for the settlement of non-contractual claims in exceptional circumstances. This does not suggest that fees have encouraged public sector employers to seek alternative means of resolving their disputes.

12. Overall judges have not noticed a change in the proportion of appeals against their decisions since the introduction of fees or significant changes in the types of representatives appearing in the Employment Tribunal. Their experience of the level of settlements at a hearing before and after the introduction of fees differed.

13. Some judges were aware of instances when apparently arguable claims had been dismissed administratively because of the non-payment of a fee but generally judges have little to do with the administration of fees (dismissal of a claim for non-payment of a fee is not a judicial act) and most were unable to comment on this.

14. The undoubted decline in claims has led to a substantial reduction in sittings for fee-paid judges. This may impact on recruitment to salaried posts in years to come and is already de-skilling fee-paid judges due to the lack of sitting opportunities for them. At the same time, and as explained above, the remaining claims are proportionately longer and more complex so the workload of salaried judges has not decreased and has, arguably, increased. Salaried judges no longer find their diet of long, complex cases punctuated by short or simple ones.

15. A number of fee-paid judges who are also employment law practitioners reported the difficulties litigants faced in applying for remission of fees, which they described as a complex and bureaucratic process. One fee-paid judge described spending 2 hours with a client simply completing the paperwork for remission of an issue fee: he had to repeat the process for the hearing fee. He added that about half the clients he advises who have a good claim (that is, with prospects of success of 51% or better) do not proceed with it because of fees.

16. Similarly, fee-paid judges reported that some employers delayed negotiating on claims which, because of litigation risk, they formerly would have settled in order to see whether the employee would pay the hearing fee. One fee-paid judge said that his firm was advising employer-clients that they are at much less risk of Tribunal claims for unpaid wages, notice pay or holiday pay if they refuse to pay or simply ignore post-employment claims of this type. These were once common claims in the Employment Tribunal.

17. It appears that many litigants are unaware that they need to reapply for remission of the hearing fee or that they may seek remission of the hearing fee even though they have paid the issue fee. On occasions a claim has been dismissed administratively for non-payment of the hearing fee and the Claimant, not realising that they can seek reconsideration of this, has issued a further claim (with remission!) but by then their second claim is out of time. For many jurisdictions (for example, unfair dismissal) an EJ will have little choice but to dismiss the late second claim and they may be wholly unaware of the earlier in-time claim which has been dismissed administratively.

18. A further anomaly and potential injustice identified by judges related to those cases where an employee is obliged to bring a claim against a potentially insolvent employer to obtain a payment from the Redundancy Payments Service or National Insurance Fund. In these circumstances there is no real prospect of the claimant recovering the issue and hearing fees from the respondent; £1,200 where unfair

dismissal is claimed. This could be addressed, of course, if fees were added as sums recoverable from these bodies.

19. Regional Employment Judges have reported an increase in complaints about judicial conduct since the introduction of fees which they and the Council strongly suspect is linked to the cost of an appeal to the EAT. One REJ reported a complainant saying in terms that they were complaining about the judge because they could not afford to appeal. Another talked of complaints along the lines of *"I have paid for justice and not received it – because I lost or because I was not permitted to take as long as I wanted to present my case"*. Whilst such complaints (without more) are inevitably rejected, they nevertheless absorb a significant amount of administrative and judicial time.

What the statistics show

20. To what extent is EJs' experience 'on the ground' borne out by the statistics? This submission has reviewed four sources: the Ministry of Justice Statistics Bulletin published on 11 June 2015; its accompanying Disposals Table (Excel Table 2.3); the ACAS Early Conciliation Update published on 7 July 2015; and the Equal Opportunities Review Compensation Awards Surveys (the latest published on 20 June 2015). Members of the Council are not statisticians and would welcome the opportunity to discuss these sources with the relevant experts. Nevertheless, the Council says that a summary review of these sources, particularly Table 2.3, reveals clear evidence supporting the judges' reported experiences.

21. The Council's submission focuses on single claims rather than multiples as the historically high volumes of equal pay/holiday pay/redundancy pay multiple complaints do not appear to pose the same degree of access to justice issues as single claims. Individuals typically club together to pay issue and hearing fees for multiples with considerable savings compared to a single claim (the lack of recovery of these fees where employers are insolvent <u>is</u> an issue mentioned elsewhere in this submission).

22. The number of single claims issued in the Employment Tribunal nationally fluctuated between 60,000 and 70,000 per annum between 2001 and 2010 but the trend was then downwards, rapidly accelerated by the introduction of fees. In 2014-2015 the number of single claims presented was some 16,500, a quarter or less of the volume compared with previous years.

23. In 2014/2015 45% of applicants who presented single claims to the Tribunal applied for remission of the issue fee. A fifth of these applications were successful which means that in 90% of single claims the claimant paid the full issue fee (either £160 (Type A) or £250 (Type B)). 8% received remission from the issue fee (full or partial) and 2% appear not to have proceeded any further with their claim because of

the issue fee or the refusal of remission. It should be emphasised that these figures relate to claimants who presented claims and takes no account of those deterred by fees from doing so at all.

24. In 2014/2015 13,425 hearing fees were requested (it is not clear how many were for single claims). Around 3000 claimants presented applications for remission of the hearing fee and 43% were granted either full of partial remission. In 94% of single claim cases the claimant paid the full hearing fee and in 5% remission was granted (in the largest part full remission). It appears from the statistics therefore (although the Council understands that these are described as "experimental") that multiple claim applicants are proportionately more successful at obtaining remission than single claimants. This may be because more typically they have access to advice and support.

25. The low proportion of successful applications for remission of fees supports the EJs view that claimants are now more often middle and high-income earners.

26. ACAS early conciliation statistics suggest that the current number of workplace disputes is greater than the historical levels of Tribunal claims. In 2014-2015, ACAS reported approximately 20,000 notifications per quarter and an annual total in excess of 80,000. In the first three months, 15% resulted in a COT 3 settlement, 63% or so did not progress (but there was no settlement), and 22% progressed to the Tribunal; this is consistent with the 16,500 or so single complaints presented to the Tribunal. The access to justice concern is, of course, in respect of the 63% who did not resolve their dispute.

27. ACAS has also undertaken a qualitative survey over three months conducting approximately 1300 claimant side interviews and approximately the same number of respondent side interviews. The average settlement for those participating in the survey was reported at approximately £1300 which is about the cost of a Type B issue and hearing fee (total £1200). The single most reported reason for not submitting a claim (absent settlement) was Tribunal fees: this was cited by more than a quarter of relevant interviewees who decided not to issue a claim.

28. As to types of claim, it is clear that ordinary unfair dismissal complaints are considerably reduced notwithstanding that the statistics by jurisdiction do not differentiate between multiple and single claims. In January 2013 there were 3,805 unfair dismissal complaints; in January 2015 the figure was 1,069 (it had dipped as low as 830 in May 2014). This is consistent with the picture reported by EJs on the ground. Furthermore, the average number of jurisdictions raised in a claim is two, so it is very likely that those unfair dismissal complaints which remain are being presented with another claim such as discrimination or whistle-blowing.

29. The inclusion of multiples in the Table 2.3 statistics distorts the picture in relation to money claims and the precise position is difficult to discern; this is particularly so given recent case law and legislative developments[3]. Nevertheless, one can extrapolate on the basis of the breach of contract jurisdiction which had not seen the spikes caused by multiple holiday pay claims. The Tribunal received about 2500 breach of contract claims each month before fees; since the introduction of fees this has reduced to 600 to 700 claims per month. Once again, this supports the Judges' reports that single money claims are significantly reduced.

30. Discrimination claims have been similarly affected (that is reducing in number by between 60% and 80% when compared with historical volumes), particularly race, sex and pregnancy discrimination. Age and sexual orientation complaints appear to have been disproportionately affected.

31. There has been a marked increase in the proportion of complaints of race, disability discrimination and unfair dismissal issued which are disposed of at a hearing rather than by settlement or withdrawal: an increase of between a third and a fifth on historical levels.[4] The number of sex discrimination claims disposed of at a hearing have not changed as markedly, nevertheless the changes in the race, disability and unfair dismissal jurisdictions may indicate a greater willingness on the part of a litigant to progress to a hearing once he or she has invested in a fee. There does not appear to be a similar marked change in the proportions of single money claims progressing to a hearing (albeit the number of such claims is drastically reduced).

32. Apart from disability discrimination claims where there appears to have been an increase in the success rate since the introduction of fees, success rates for complaints disposed at a hearing appear to be broadly constant. It remains the case that more unfair dismissal complaints and far more discrimination complaints fail at a hearing than succeed whereas far more money claims succeed at a hearing than fail. The success rate of claims, with its marked difference between jurisdictions, does not support a conclusion that unmeritorious complaints are being deterred by fees (or resolved at early conciliation for that matter).

33. In 2014 Employment Tribunals made 355 awards of compensation for successful discrimination complaints, exactly the same number as in 2013. At first glance this may suggest a higher success rate for claimants after the introduction of fees given the lower number of

[3] The well publicised new statutory limitation period on holiday pay claims has led to a surge in multiples in 2014/2015 and many of these identify the same complaint as both unlawful deduction from wages and a Working Time complaint.

[4] Race, around 18% in 12/13, increased to around 25% in 14/15; disability in 12/13 12%, increased to 18% in 14/15; unfair dismissal around 18% in 12/13, increased to around 23% in 14/15.

claims received in this period but a closer analysis shows that this is not so. There are two factors affecting the level of awards in 2014. Firstly, the litigation process and delays in the system mean that longer cases presented in 2012 and 2013 (when there was a pre-fees spike in claims) were still being heard in 2014. Discrimination claims fall typically into the longer case category. Secondly, the number of awards in 2014 has been affected by the marked increase in success rates in disability discrimination cases.

34. The total amount of discrimination compensation awarded by Tribunals in 2014 was £7.5 million, a 77% increase on 2013 and an increase against the levels in previous years. For the first time in five years the median award for discrimination has risen from £7000 to £10,630 (this does not include Tribunal fees, which were awarded only in a minority of cases). The average award for injury to feelings has also increased substantially (now £8162). The statistics show that the lowest injury to feelings awards are no longer in the majority, and the mid and high level awards (by Vento banding) are the most frequent. Apart from awards for injury to feelings, the level of compensation reflects loss of earnings and, in the public sector and some parts of the private sector, a loss of pension benefits. Accordingly, the Council maintains that the increase in awards reflects to a large extent a shift in the demographic of claimants from low paid workers toward middle and high-income workers.

Summary

35. There can be no doubt that there has been a decline in cases presented to Employment Tribunals but the EJs' experience that there has been a particularly marked decline in the types of cases that had previously been brought by those in lower income brackets (those who might be termed 'ordinary working people'), that is, claims for unpaid wages, notice pay, holiday pay and simple claims of unfair dismissal, is borne out by the statistics. The Council considers that there is clear evidence that fees are deterring meritorious but lower value claims, whether they be money claims, unfair dismissal or discrimination complaints where compensation for injury to feelings and lost earnings may be relatively low. High fees deter such complaints, act as a barrier to justice and, in the context of discrimination, undermine the aims of the Equality Act 2010.

36. Fees have had no impact on weeding out weak claims: if they had done so the number of claims succeeding in front of EJs would have increased significantly. EJs' experience is that misguided but determined litigants remain undeterred by fees. Furthermore, the Council maintains that the claims which are the least costly to the public purse are the short, single money and unfair dismissal complaints; long multi-day cases are the most costly but the hearing fee is the same whether it is a one day unfair dismissal claim or a twenty day discrimination or whistle-blowing claim. It is the latter types

of case that predominate since fees, meritorious or otherwise. This calls into question whether the aim of transferring a proportion of the cost of Tribunals to users has been met whereas fees have created a clear barrier to justice for those that need it most (notwithstanding the existence of a remission system).

37. The fee remission process is complex, time consuming and acts as a deterrent in its own right unrelated to the merits of the claim. Many litigants do not know that remission is considered separately in respect of the issue and hearing fees.

38. In circumstances where an employee has little choice but to proceed against an insolvent employer there is a real injustice as there is no realistic prospect of recovering the fees.

39. The Council submits that qualitative research like the five yearly SETA report (Survey of Employment Tribunal Applications) undertaken by BIS would provide the best evidence of the access to justice problems identified in the ACAS survey and in this submission.

40. Turning then to the three objectives identified by the Ministry of Justice, financial, behavioural and justice, the Council says as follows:

    (a) *Financial: The Ministry knows how much it has and will spend on the capital and running costs of the fees and remissions systems and whether fees cover this and more. What the Council can say is that the cases that remain for disposal at a hearing are proportionately more likely to be the complex multi-day hearings which are the most costly. The large majority of the cheaper to administer money claims have either been exported to the County Court or are simply not being heard at all.*

    (b) *Behavioural: Fees have changed litigants' behaviour but it is not the EJs' experience that they have encouraged parties to seek alternate ways of resolving their disputes; on the contrary, claimants are more likely to be deterred from claiming and respondents more likely to make no or lower offers of settlement. The Council believes that the statistical evidence shows this too.*

    (c) *Justice: The Council does not believe access to justice has been maintained for all.*

24 July 2015

Jennie Wade,
Employment Judge

George Foxwell,
Employment Judge

On behalf of the Council of Employment Judges