CONTRIBUTION FROM JUDGE BRIAN DOYLE TO THE REVIEW OF EMPLOYMENT TRIBUNAL FEES

(via email)

Dear Bill,

Review of the introduction of Employment Tribunal Fees

1. I write on behalf of myself and the Regional Employment Judges to make a contribution to the internal review of the introduction of Employment Tribunal fees. Observing constitutional principle and practice, we shall not comment upon matters of policy, save where it directly affects the operation of the Tribunals or aspects of the administration of justice within our particular area of judicial responsibility or expertise. We shall limit ourselves to commenting on the practical operation or technical aspects of the policy, reflecting the judiciary's interest in the effective administration of justice and our jointly held responsibility for the operation of the Tribunals.

2. We do not intend to embark here upon a detailed analysis of the statistical and financial data. No doubt your team will be considering what conclusions can be drawn from that data. We have seen in draft the submission of the Council of Employment Judges (CEJ). We are content to adopt its analysis of the data. We also consider that the data speaks for itself.

3. You may also be aware of the rigorous (if irreverent) series of analytical articles written by Richard Dunstan (under the account name "Wonkypolicywonk") for the Hard Labour blog (http://hardlabourblog.com/). He seeks to show the correlation between the imposition of fees and the unprecedented fall in the Tribunal's caseload. You will also be aware of the research being carried out by Professor Morag McDermont and Professor Nicole Busby of the Universities of Bristol and Strathclyde.

4. We start from the proposition that the introduction of fees has not been successful in achieving the original objectives of transferring a proportion of the costs from the taxpayer to those who use the Tribunal where they can afford to do so; encouraging parties to seek alternative ways of resolving their disputes; and maintaining access to justice.

5. The net income generated by fees, having taken account of remission and the costs of collection, falls considerably short of realising the proportion of the running costs of the Employment Tribunal system that the Government set itself. This is so even when account has been taken of any reduction in judicial, staff and overhead costs that may have accrued as result of the very sharp decline in cases following the introduction of fees. Fees and remission processes have

also added to the time which it takes for a claim to progress to disposal. There has also been some satellite litigation created by the process.

6. There is little evidence that fees may have served to encourage parties to seek alternative ways of resolving their disputes. That evidence is just as likely to have been the result of the introduction of Acas early conciliation as it is of the levying of issue and hearing fees. See Acas Research Paper 04/15, Evaluation of Acas Early Conciliation 2015. We are concerned that as many as six out of ten potential claimants who entered early conciliation neither settled their potential claim via Acas nor subsequently presented a claim to the Tribunal. Acas has found some evidence that this group may be being dissuaded from pursuing a claim by the prospect of fees.

7. Moreover, the imposition of a fee charged to the respondent has not served to improve the take-up of judicial mediation conducted by the Employment Tribunal itself, despite the fact that what remains in the hearing lists are the higher value, more complex, multi-day cases that would otherwise be ripe for judicially-assisted alternative dispute resolution. I can provide you with the judicial mediation statistics kept since 2009, if you wish.

8. Most significantly of all, we consider that the introduction of fees has had a damaging effect upon access to justice. Although there has been a very large reduction in new claims across all jurisdictions – perhaps as much as 70 per cent – the cases that have been most obviously affected are the short track and standard track cases. Employment Judges now see very few short track cases (claims for unpaid wages, notice pay, redundancy pay, etc), the obvious inference being that a combined fee of £390 represents a considerable investment in proportion to what might be a relatively modest sum at stake, particularly given that the respondent might be insolvent and that the rate of enforcement of Employment Tribunal awards remains disappointing. The standard track cases (typically unfair dismissal claims) attract a combined fee of £1,200 – which does not compare well with the mean and median awards made in successful unfair dismissal complaints. We conclude that the fees and remission scheme act as a very clear disincentive to bringing what might otherwise be claims that are not obviously weak or unmeritorious.

9. We confirm the evidence provided to you by CEJ to the effect that what is now surviving for hearing – primarily by the salaried Employment Judges – are the more difficult standard track cases (for example, public interest disclosure claims) and the challenging open track cases (for example, discrimination claims). The issues at stake and the potential value of these cases are such that claimants are likely to be middle or higher income earners able to afford the fees and/or committed to litigation rather than resolution as a matter of principle. There may also be a small number of claimants who pursue this type of claim misguidedly or without the benefit of advice, or who would seek to litigate their claims regardless of the level of any fee or risk of costs imposed upon them for doing so. Again, we agree with the analysis of CEJ in its submissions on this point.

10. While there have been improvements in the remission process, and further improvements are planned, remission has not served to moderate any adverse impact upon access to justice. No

doubt, in part, this is due to a lack of knowledge of remission on the part of would be claimants. It is equally likely that the remission requirements are fixed at too low a level to be effective in the quite different environment of Employment Tribunal litigation compared with litigation in the Civil Court. The limitation period in the Employment Tribunal is typically three months compared with three years or six years in the Civil Court. Where employment has been terminated the claimant may have received termination payments (accrued wages, accrued holiday pay, notice pay and redundancy pay) that will count against their income or savings.

11. We note that the review will consider other factors that might have influenced trends in the number of Employment Tribunal cases. We offer some short observations on those trends.

12. The quarterly and annual statistics do reveal a very slight and gentle downward trend in ET cases prior to the introduction of fees. It is not possible for us to say whether there has been a continuation of this trend following the introduction of fees. There is also likely to have been some unmeasured impact of the improvement in the economy on the number of people having their employment terminated. Changes to employment law may also have to be accounted for, not least the lengthening of the qualifying period for unfair dismissal protection and the further capping of unfair dismissal compensation to one year's salary. We do not consider that any of these factors can fully or adequately explain the quite dramatic fall in claims that followed immediately upon the introduction of fees and before the introduction of early conciliation, and which has continued. Nor do they sufficiently explain why, in general terms – despite some modest recovery in claims (due to particular multiples and the development of holiday pay litigation) – the caseload has not begun to return to its pre-fees levels.

13. We do not consider that there has been a reduction in weak or unmeritorious claims. Had that been the case we would have expected the percentage of successful claims to have risen, whereas in fact it has declined slightly. In any event, the definition of what is a weak or unmeritorious case is notoriously elusive. In only a very small percentage of claims is it possible to identify an obviously weak or unmeritorious claim until there has been some rudimentary case management, a preliminary hearing or the determination of conflicting evidence. We agree with the observations made by CEJ in this regard in its submissions.

14. CEJ has commented upon the impact that the introduction of fees has had upon claims from people who would not otherwise have been able to get anything from a former employer due to insolvency or another similar reason. We do not wish to add to those comments, with which we agree. As for other changes in users' behaviour which has resulted in a fall in volumes of claims, we have not discerned any displacement of claims (where that is jurisdictionally possible) into the Civil Court, despite speculation to the contrary by some commentators. HMCTS does not appear to be able to verify any such displacement.

15. We wish now to focus upon recommendations for any changes to the structure and level of fees for proceedings in the Employment Tribunals, including recommendations for streamlining

procedures to reduce costs. While we would prefer to rewind the clock to before the introduction of fees, we recognise that fees are a matter of policy and thus a matter for Ministers and Parliament.

16. We would recommend a reclassification and a recalibration of the issue and hearing fees. To do so would prompt a modest recovery in the volume of claims being presented to the Employment Tribunal, thus contributing to the objective of recovering part of the costs of the ET system, while maintaining access to justice. Yet fees would continue to act as a proportionate disincentive to claimants from regarding the Employment Tribunal as a first resort and would continue to encourage early conciliation and other alternative dispute resolution. We would also recommend that respondents should be required to contribute to the costs of the ET system, as we explain below.

17. The reclassification of the fees system would require replacing Type A and Type B claims with the more logical division of claims into short track, standard track and open track cases. The three track classification more logically reflects the cost of processing claims than the two type classification (the effect of which is most keenly felt in respect of unfair dismissal cases). The three track system has been used by the Tribunal for over 10 years to manage its caseload.

18. Short track cases (unpaid wages, etc) are typically brought to a hearing within 10 weeks. That hearing is usually a short hearing of one or two hours duration. Short track cases require very little administrative or judicial intervention and normally do not require any (or any sophisticated) case management. Standard track cases (unfair dismissal, etc) are characteristically brought to a hearing within 20 weeks. That hearing is typically a one or two days hearing. Standard track cases require relatively more administrative or judicial intervention than short track cases, but usually they require only standard case management orders. With open track cases (discrimination, etc) we aspire to bring them to a case management hearing within 8 weeks and to list them for a preliminary hearing as soon as possible and for a final hearing within 30 weeks. They are mostly multi-day hearings of 3+ days duration. They do require greater administrative and judicial intervention and more sophisticated case management.

19. If a three track fees system were to be accepted, then attention could focus upon how fees might be calibrated between the three tracks. The level at which fees are set is entirely a matter for officials to recommend for decision by Ministers. We hesitate to suggest what the fee levels might be. For illustration purposes only, we might suggest issue fees of £50 (short track), £100 (standard track) and £200 (open track), and hearing fees of £75 (short track), £150 (standard track) and £300 (open track). Our intention is simply to establish a differential between the three tracks and a step effect from issue to hearing to encourage settlement. What actual figures are ascribed to each track and to issue or hearing fees is a matter of policy and not for us.

20. A recalibrated fees system could be modified further by providing a discount (say, 10%) for presentation online, for dealing with correspondence electronically and for payment online. A further discount (say, 50%) could be offered for dealing with “hearings” online or on the papers (that

is, without a hearing in person), where it is appropriate to do so. This would require some adjustment to the rules of procedure.

21. An alternative approach to the hearing fee might be to consider a *per diem* fee. The basic hearing fee might cover a standard hearing length (say, one day for short track, up to three days for standard track and up to five days for open track). The payment of a *per diem* fee would then be payable for days beyond the standard allocation. It would encourage the parties to take a realistic view of hearing length and it would supply additional discipline for time management of the hearing so that cases were less likely to be adjourned part-heard. It would also reflect the additional cost to the Tribunal incurred in longer cases.

22. Further charging points could be incorporated in the scheme to encourage efficiencies. For example, where standard case management orders had been issued, or where a case management hearing has been held, a fee might be chargeable for applications made thereafter or further preliminary hearings or case management. The intention would be that the Tribunal provides an appropriate level of management of the case as part of the initial fees and the parties are then encouraged to prepare for the final hearing without further intervention from the Tribunal. However, provision would need to be made to ensure that a party who makes an application, but is not the cause of having to do so, is not penalised by having to pay a fee. One option might be to defer payment of a fee until the judge determining the application decides which party is responsible for the fee and any costs associated with the application.

23. We would also recommend that respondents become liable to pay response fees and hearing fees, as is the model in civil litigation in Scotland. The argument is that if a claim has not been settled or withdrawn as a result of Acas early conciliation – in which both parties participated or had the opportunity to participate – then both parties have an interest or stake in the Tribunal resolving or determining the dispute between them. Both parties are incurring the costs of the Tribunal system and both parties should contribute towards it. Whatever fee a claimant must pay for the issue of a claim, the respondent should pay the same fee for presenting a response. To participate in a final hearing the respondent should also pay an identical hearing fee to that paid by the claimant. This would aid cost recovery, but would also promote settlement. The fee for an employer's contract claim (presently £160) would be brought in line with whatever fee would be payable for a short track claim.

24. As now, there would be other miscellaneous fees. Consideration should be given to whether the £600 fee payable by the respondent is a disincentive to judicial mediation and whether a lowered fee or shared fee would be attractive, especially if it were set at level below the fee for a final hearing. We would also recommend that a nominal fee (say, £50) be payable by a party requesting written reasons following an oral judgment.

25. Consideration should be given to the remission scheme. While keeping the structure of the scheme a common one across tribunals and courts, the threshold for remission in an ET claim might

be raised to reflect the shorter limitation period and the greater likelihood of termination payments having been made. Alternatively, such termination payments might be discounted as income or capital. The remission scheme already provides some administrative discretion for exceptional circumstances, but this might be better treated as part of the scheme itself rather than as an exception to it. We would also suggest that once remission has been granted at issue stage it should not be necessary to re-apply for remission at hearing stage or at any other fee-charging point. A party not entitled to remission at an earlier stage could apply for remission at a later stage if circumstances have changed.

26. Finally, might some thought be given to how fees are recovered or repaid? Requiring a successful claimant or respondent to recover any fees as an award of costs seems unnecessarily complicated. It adds uncertainty and often requires a further hearing on costs. The fee might be treated as automatically repayable as part of any award. Consideration might also be given to circumstances in which a fee might be reimbursed by HMCTS or credit given for it (for example, where an issue fee has been paid, but the claim is rejected at the vetting stage; or where a hearing fee has been paid, but there is a timely withdrawal or settlement before hearing). Reimbursement on a sliding scale (as in the County Court) measured by the time remaining to a hearing would encourage early withdrawal or settlement and discourage late withdrawal or settlement. At present the fee is not recoverable where a claimant brings a claim against an insolvent employer for unpaid wages, etc and then has to seek payment from the Insolvency Fund. The fee should be recoverable as part of the statutory debt payable under the insolvency provisions.

I shall be very pleased to speak to you again about the review once you have digested our submission.

Best wishes.

Brian

Judge Brian Doyle | President | Employment Tribunals (England & Wales)