

Mr Bill Dowse
Employment Tribunal Fees Review Team
Ministry of Justice
102 Petty France
London
SW1H 9AJ

30 September 2015

Dear Mr Dowse

Review of the introduction of Employment Tribunal Fees

We welcome the Ministry of Justice's (MoJ) review of the introduction of Employment Tribunal (ET) fees. It is important that the government investigates and ascertains the reasons behind the huge reduction in the number of people taking disputes to the ET.

The Law Society's (the Society) view is that fees have harmed access to justice and that since July 2013 many people have not been able to enforce their employment rights. Our members have told us that claimants with strong cases see the fee as a significant deterrent to pursuing a complaint. We have heard of examples where respondents have refused to consider engaging in early conciliation or settling the matter before it reaches the tribunal because they wanted to "call the claimant's bluff¹" on whether the employee would pay the fee.

Discouraging employees from pursuing valid claims does not just harm the individual, it also puts many well run businesses at a competitive disadvantage compared to the minority who adopt a "less careful" attitude to employment law.

As you are aware, the most recent MoJ statistics show that there has been a decrease in claims to the tribunal by over 67%. In some areas there has been an even more dramatic drop in claims. For example, claims have fallen by 87% in sexual discrimination cases and by 70% for equal pay claims². We hope that the review will be able to explain how much of this fall is a consequence of broader economic factors, the introduction of Acas early conciliation, and the introduction of ET fees.

ET fees have harmed access to justice

The Society believes that ET fees have harmed access to justice in four ways.

¹ Evidence sent to the Law Society by an employment solicitor - September 2015.

² <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2015>

The ET fee is high compared to earnings

"I volunteer at a legal advice clinic and have come across a lot of reluctance among low to middle income claimants to bring employment tribunal claims as a result of the issue and hearing fees. These fees are impacting access to justice for ordinary people."³

A survey of employment cases brought to Citizens Advice Bureau (CAB) (2014) found that four in five potential cases assessed as having a better than 50% chance of success are not pursued in the ET.⁴

The ET fee is prohibitively high for most people. The average monthly take home salary is £1,792.27 per month⁵. Further research by the CAB found that just under half of people with an employment issue would have to save for six months to afford fees of £1,200⁶. This puts claimants at a disadvantage as for most cases you have to bring your claim within three months from the date of dismissal, or for discrimination claims when the first complaint was made.

Acas report that among those who could not reach an agreement through the early conciliation process and then decided not to pursue a claim, the most frequently cited reason was ET fees - 26%⁷. Only 20% did not pursue the claim because the issue had been resolved.

The ET fee is high compared to awards

The levels of compensation awarded in most tribunal cases are modest compared to the fee. For example,

- disability discrimination: the average award is £7,536, with 18% of those awarded compensation receiving less than £3,000 and 29% less than £5,000.
- race discrimination: the average award is £4,831 with 28% of those awarded compensation receiving less than £3,000 and 46% less than £5,000.
- sex discrimination: the average award is £5,900, with 22% of those awarded compensation receiving less than £3,000 and 39% less than £5,000⁸.

According to the Funding Code published by the Legal Aid Agency a reasonable person would not litigate a claim with 50-60% prospects of success unless the likely damages were at least four times the likely cost of pursuing the case. Four times the fee for a discrimination based case is £4,800. When the other costs involved in making a claim are factored in many of those who have a valid discrimination claim will have to make a financial commitment that is above the Legal Aid Agency's threshold.

Even for those who win there is a high chance that the fee will not be reimbursed

"We have advised claimants not to pursue strong cases because there is a high chance that their fee won't be refunded, even if they are successful."⁹

Members have advised claimants not to pursue valid cases because there is a high chance that the claimant will not have their fee reimbursed. This is because many ET awards go unpaid. A study by

³ Response to Law Society survey on further court fee increases - August 2015.

⁴ <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/employment-tribunal-costs-putting-people-off-valid-claims/>

⁵ . (Office of National Statistics, Annual Survey of Hours and Earnings, 2013 Provisional Results)

⁶ <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/four-in-five-deterred-by-employment-tribunal-fees/>

⁷ <http://www.acas.org.uk/media/pdf/5/4/Evaluation-of-Acas-Early-Conciliation-2015.pdf> - pg 97

⁸ Employment and EAT Tribunals Quarterly Statistics (March 2014).

⁹ Response to Law Society survey on further court fee increases - August 2015.

the department of Business Innovation and Skills (2013)¹⁰ found that only 49% of ET awards were paid in full, with a further 16% paid in part, and 35% of those awarded compensation receiving no money at all.

The remission system is not helping as many people as it should

"I am particularly concerned with Employment Tribunal fees. I recently represented a client who was dismissed for gross misconduct and was expected to pay the £250 issue fee plus £950 hearing fee despite having no job and only receiving £71 a week Jobseeker's Allowance. No remission fee was available. How are people expected to access justice on that basis?"¹¹

Members report that the ET fees are providing a psychological barrier which stops many from pursuing a complaint. Since the introduction of fees members report a big decline in the numbers of people who seek initial advice on their claim. Many people are not aware that they can have fees remitted.

In our members' experience the remission system is confusing, uses complicated language, and is hard to navigate. CAB research found that only three in ten potential claimants were aware of the existence of financial support for those on low incomes. CAB also found that half of claimants who thought they were not eligible actually were¹².

When ET fees were first proposed the MoJ estimated that between 11 - 13% of claimants would benefit from full remission and 53% of claimants would benefit from a variable discount on fee rates up to £950¹³. Statistics show that only 21% of claimants have benefited from any remission¹⁴. This gives a strong indication that the remission system is not working well.

No evidence that ET fees have encouraged parties to seek alternative ways of resolving disputes

The data published by Acas on early conciliation found that 70% of claimants who entered into early conciliation did not reach a formal settlement¹⁵. A private settlement was reached in only 7% of these cases¹⁶. In only 6% of cases where a formal settlement was not reached did the employer offer a settlement, which the claimant refused. 85% of the time further alternative dispute resolution (ADR) methods were not attempted. It would be useful if Acas were to conduct follow up interviews with those who did not reach a formal settlement to discover why they did not proceed to the ET and why the take-up of further ADR methods is so low.

Evidence exists to show that fees put people off pursuing ADR in the tribunal. Judicial mediation in the ET was successfully piloted in 2006 and went nationwide in 2009. During 2012 judicial mediation was used 576 times, with a success rate of 70%. The number of judicial mediations increased until 2013, when a £600 fee was attached to the process. Our members report that the introduction of the fee has dramatically decreased take-up¹⁷ of this ADR option.

¹⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf

¹¹ Response to Law Society survey on further court fee increases - August 2015.

¹² <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/four-in-five-deterred-by-employment-tribunal-fees/>

¹³ <https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/results/et-fees-response-eia.pdf>

¹⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/459787/tribunals-and-gender-recognition-bulletin.pdf - pg5.

¹⁵ <http://www.acas.org.uk/media/pdf/5/4/Evaluation-of-Acas-Early-Conciliation-2015.pdf> - pg 65.

¹⁶ <http://www.acas.org.uk/media/pdf/5/4/Evaluation-of-Acas-Early-Conciliation-2015.pdf> - pg 72

¹⁷ <http://www.parklaneplowden.co.uk/uploads/documents/CAS%20march%202015%20Employment%20newsletter.pdf>

A broader review of the employment tribunal is needed

It is the Law Society's view that ET fees have failed to maintain access to justice and failed to encourage parties to seek alternative ways of resolving their dispute. We believe that if the government is to achieve the original objectives for introducing ET fees the current fee system must be reconsidered, as is the case in Scotland.

The introduction of ET fees has acted as a catalyst for a wider debate about whether the tribunal is working in the best way possible. The MoJ could use this debate to look more broadly at how the ET can best offer access to justice. The Society has been exploring how the ET system could be improved for the benefit of employers, employees and the administration of justice. The attached discussion document suggests that the structure of the ET should be reformed so that cases are dealt with at a level proportionate to their complexity.

We look forward to discovering the review's conclusions, and what proposals, if any, emerge.

Yours sincerely,



Laurence Anstis
Chair, Employment Law Committee
Law Society