FROM: MR JUSTICE LANGSTAFF,
PRESIDENT OF THE EMPLOYMENT APPEAL TRIBUNAL
Fleetbank House, 2-6 Salisbury Square, London EC4Y 8AE

Bill Dowse
Strategy and Specialist Policy: Court and Tribunal Fees
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2nd. Nov 2015

Dear Mr. Dowse,

Review of Tribunal Fees

1. It is important to the judiciary at the Employment Appeal Tribunal (*please forgive me for mentioning, for the sake of accuracy – it is "Appeal Tribunal", in the singular, not "Appeals" as the draftsman of the TOR has recorded it*) that the review of fees not only considers the position of Employment Tribunals, but also that of the appellate body, where the cost of bringing an appeal to a full hearing is £1600 per appeal.

2. Your TOR include gathering evidence including, where available, data and research, including outcomes. I doubt that you have any evidence to show you how the proportion of appeals received at the EAT which have succeeded since fees were introduced compares to the proportion of those received beforehand which were successful.

3. We keep our own statistics as to the number of applications to appeal which are received. In the year in which fees were introduced (at the end of July 2013) the applications to appeal received month by month were:

January: (London)	177	(Edinburgh)	23	(Total) 200
Feb	157		10	167
Mar	140		20	160
Apr	216		12	228
May	146		24	170
June	161		14	175
July	217		18	235
	FEES INTRODUCED			
Aug	101		5	106
Sep	106		7	113
Oct	108		11	119
Nov	92		6	98

4. The figures for 2014 and 2015 are set out below. We suspect, though have no empirical evidence to substantiate, that the rise in receipts in July 2013 was in part due to appellants seeking to ensure their appeals were entered before fees became payable. This behavioural effect cannot have lasted long, however, since any appeal has to be brought within 42 days of the decision being appealed – a time limit the approach to which is unforgiving at the EAT, and is relaxed only in exceptional circumstances.

5. There was no obvious similar drop following the introduction in the spring of 2014 of early conciliation – though the effect of this might take a little longer to work through the system, because an appeal is likely to be delayed by the additional time it takes for the process to be completed. This might suggest the conclusion that the introduction of early conciliation has had only a sli0-ght, if any, impact on the behaviour of litigants.

6. Current caseload is approximately half of that which it was before the introduction of fees. There is some anecdotal evidence that the cases which come to appeal are more complex than they were, and it is reported to me by the President of Employment Tribunals that now approximately 5% of decided cases are appealed, whereas before the introduction of fees it was around 4%. This may suggest that appeals in those cases "hold up" where the litigants are more determined to fight rather than agree a conclusion to their dispute. A further factor may be at play: to bring a claim before a Tribunal may put a party to expense, because in the case of unsuccessful claimants, they will have to pay a fee in order to start, and in the case of unsuccessful employers they may be ordered to reimburse claimants for the fees they incurred to bring the claim, in addition to any financial compensation they may be ordered to provide. This provides some added incentive to both parties to appeal.

7. You may not fully be aware of the effects that our processes have on the success of appeals, and in discouraging "pointless" appeals. Appeals may be brought only on a point of law. Unmeritorious cases raising no, or no sufficient point of law, are filtered out by the processes used at the EAT (and always have been in recent years). Thus, every case is subjected to scrutiny on paper by a judge to see if it shows good grounds for appealing (called "the sift"). If the judge considers it does not, the judge writes a short note of that, and brief reasons. The would-be appellant has a right to renew the refused application orally before a judge, who will usually be a judge other than the one who determined the paper application. However, the right to renew an application has been restricted by a change in the EAT rules which was introduced two years ago, which permits a judge who considers a case is totally without merit to certify that that is so. The effect of this is to deny the appellant a further right to approach the EAT – he, she or it may then only complain to the Court of Appeal where similar processes are in place, including the ability to prevent oral renewal applications by certifying that a case is "TWM".

8. It follows that unmeritorious cases are filtered out by the system at the start. This happens without the successful party being required to take any step. A Respondent is only obliged to give a response, and incur expense, when permission to appeal is granted following the sift.

9. It should follow, logically, that only appeals with a properly arguable point ever get to a hearing at which the Respondent has to appear. The payment of fees to appeal logically should have no impact on whether hopeless cases are pursued, to the cost of the meritorious party: the system ensures they are not.

10. There is empirical evidence to support this, which you will not have from the "MB Stats" produced by HMCTS in respect of Employment Tribunal and EAT cases, since we at the EAT keep the data and they do not collect it. These are figures from which can be calculated the percentage of appeals heard and determined before the introduction of fees, where the appeal was allowed in whole or part, compared to the percentage of such successful appeals after the introduction of fees.

11. Of the applications to appeal, received in the 6 months prior to fees (29 Jan – 28 July 2013), **274** appeals were heard as full appeals, after passing through the sift process. **175 of these were dismissed** (63%). Of the 99 (37%) which were allowed, **30 (11% of the total) were allowed without being sent back for further determination** by the Tribunal; **69 (26%) were remitted.**

12. The corresponding figures for appeals received in the 6 following months were **151** received, of which **86 were dismissed**, **20 allowed without remission, and 45 allowed and remitted**: respectively 57%, 43%, 13%, and 30%.

13. Please note these figures are in respect of ***applications received*** in the two periods – in other words, this does not represent any cases heard after the introduction of fees which were "in the pipeline" for hearing at the time fees were introduced.

14. If a broader view is taken – that of the percentage of cases in which an application to appeal was made in which the appeal was successful[1] - the number of appeals succeeding in whole or in part as a percentage of applications to appeal which were made was 10.53% of the 940 applications made to the EAT in the 6 months prior to fee introduction, and 10.61% of applications made after.

[1] This is all those cases which came into the office, and therefore includes those cases sifted out as having no good reason for appealing (the test under rule which is to be applied on the sift) or as being made too late, after the time for appealing had expired.

Our Conclusions

15. On the basis that success on appeal is the best measure of whether there was a "good" appeal, our conclusion from these statistics is that the introduction of fees has made no discernible difference to the number of good compared to the number of bad appeals. It must also follow that, to the extent that fees have discouraged applicants from appealing, their introduction has prevented a significant number of worthwhile appeals being brought. Though I appreciate that you are in part deciding what the causes of the drop in the number of applications have been, whatever is responsible has meant that one third (roughly) of appeals which would have been successful immediately before the introduction of fees never now get heard in court.

16. It will not surprise you to know that our view is that the cause of the drop in workload so far as the EAT is concerned has been the introduction of fees, both for hearings before us and before the Employment Tribunals from whom appeals to us normally come, and not some other cause: I have attempted however in this paper to provide you with information as to figures and outcomes which to us appears revealing, which provides an objective basis for any conclusion you may reach on your review, and which you might like to consider, as well as information about the processes which weed out unmeritorious appeals before they ever get to the courtroom for final hearing.

17. I should be happy to supply any further information, or further figures which we can extract in-house, should you need it. Please contact my clerk, Mary Sampson, on 0207 273 1022, or at Mary.Sampson@hmcts.gsi.gov.uk.

Mr Justice Langstaff,
President, Employment Appeal Tribunal
2nd. November 2015

Appendix

Receipts:

Feb - Jul 2013	1135
Aug 2013 – Jan 2014	679
Feb – Jul 2014	690
Aug 2014 – Jan 2015	601
Feb – Jul 2015	500

Please note that so far as appeals were concerned, the number of applications to appeal had increased in each of the 5 years prior to the introduction of fees, to the extent that the EAT was under serious pressure of work.