EMPLOYMENT TRIBUNALS (SCOTLAND)

Contribution from Employment Judges in Scotland to the MOJ Review of the Introduction of Employment Tribunal Fees

Introduction

1. The decision to introduce fee charging in the Employment Tribunals (ET) was a policy based one. We will therefore, in line with constitutional practice, make no comment on the principle of fee charging and instead focus on the impact of the introduction of fees (that being the stated remit of the review) from a judicial perspective. Our central concerns are the administration of justice and the maintenance of access to justice.

2. More specifically, we will largely restrict our observations to the extent to which the original objectives of fee charging have, in our view, been met. These are described in the review terms of reference as:-

    a. Financial: transfer a proportion of the cost from the tax payer 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: maintain access to justice.

3. We are aware of the terms of the submission made by the Council of Employment Judges (CEJ) to the review and do not seek to demur from it. Indeed, we proceed on the basis that certain matters which we might otherwise have raised have already being dealt with by CEJ and there is little point in reiterating the position here.

4. To the extent that we may suggest that the original objectives have not been met, we will venture to make some suggestions about what might be done to enhance the prospects of the objectives being met in the future, with particular reference to possible changes to the structure and level of fees in accordance with paragraph 4 of the terms of reference of the review.

Achievement of Original Objectives

a. Financial

5. MOJ has available to it all the income and expenditure information which will allow it to assess whether the financial objective it set has been met. That having been said, the decline in the number of claims

[1]The Ministry of Justice, *Charging fees in Employment Tribunals and Employment Appeal Tribunal-Consultation Paper CP22/2011* (December 2011); Ministry of Justice, *Charging Fees in Employment Tribunals and Employment Appeal Tribunal-response to consultation paper CP22/2011* (July 2012); *Impact Assessment* (30 May 2012); *Equality Impact Assessment* (13 July 2012).

presented has been much more significant than the government estimated that it would be prior to the introduction of fees.[1]

6. It was variously stated that there was an intention to recover approximately 33% of the costs of the ET system with it being estimated that £10 million pounds would be recovered in the first year. (That, as the review team will no doubt be aware, is actually considerably less than 33% of actual costs.) Information produced by HMCTS suggests that between 30 July 2013 and 29 July 2014 £7,287,833 was received in fees. Aside from staffing and other overhead costs associated with fees, additional costs have also been incurred as a result of some associated litigation (e.g. judicial costs incurred in connection with reinstatement provisions in rule 40(5) of ET Rules of Procedure).

7. If the objective is indeed to recover 33% of running costs then the financial information available to date appears to suggest that this has not been met.

b. Behavioural

8. By way of background, we can understand the tendency to assert that when the economy is growing, rather than in recession, there will be a decline in the number of claims made to the ET (irrespective of the position with fee charging). While that may be broadly true the statistical picture over the years[1] show that the ET caseload is affected by a wide variety of factors[2]. In the past, even when the economy was growing, employment tribunals received many more claims than they do now, post fees. While a growing economy (that being what it is suggested currently exists) can result in a reduction in dismissal cases it will normally either have no impact on other types of cases which make up a considerable proportion of the work of the tribunal or it can lead to an increase in certain types of claim (for example, claims connected with discrimination in recruitment, disputes about pay including equal pay, promotion related cases and the like).

9. Had it been the case that the introduction of fees encouraged parties to seek alternative ways of resolving disputes then one would have expected to see a significant rise in the use of pre claim conciliation which Acas operated both prior to and after the introduction of ET fees, and before the introduction of Early Conciliation (E.C.). One would also expect to see a marked rise in settlement rates. However, we are not aware of any significant increase in the use of that alternative method of resolving disputes after the introduction of fees nor any noticeable change in outcomes when the process was used prior to the introduction of EC. Acas will no doubt be able to provide further information on this matter. We note the submissions of CEJ in connection with feedback from practitioners (including fee paid

[1] See the table on page 14 of the House of Commons Briefing Paper (No. 07081, 12 January 2015)

[2] For example, over the last year ET(Scotland) has received more than 21,000 claims relating to holiday pay (mostly received as multiple claim cases with fees tending to be paid by trade unions). These claims all raise the same/similar central issues. A superficial assessment of claim numbers would suggest that claims are holding up relatively well but that would not be borne out when one removes these particular claims from the overall total received.

Employment Judges) in connection with the negative impact of fees on settlement of cases in some circumstances which accord with experience in Scotland as relayed through members of the ET National User Group (Scotland)).

10. It would be reasonable to expect, following the introduction of EC (a free service, the initial contact stage normally being mandatory) that if fees were encouraging parties to resolve their disputes by other means there would be a significant rise in the percentage of claims settled through EC compared to the number of cases which used to be settled by Acas before the introduction of fees. In July 2015 Acas reported that of EC notifications received by them in the period from April to December 2014 (the outcome for these cases largely being known by July 2015) 15% had resulted in an Acas brokered settlement agreement (COT3), 22% progressed to an ET claim and 63% did not progress to tribunal even although the case had not been settled by Acas. We venture to suggest that if the imposition of fees had resulted in a much greater willingness to settle cases one might have expected a significantly larger percentage of settlements through E.C. In Acas Research Paper 4/15 "Evaluation of Early Conciliation" the most frequently cited reason for not submitting a claim to the ET, where a case was not settled, was that ET fees were off-putting.

11. So far as judicial mediation is concerned, we have had several instances of parties agreeing to try to resolve the case by mediation (offered in our most complex cases likely to last three days or more at hearing and therefore to be resource intensive) but the respondent then deciding not to proceed down this alternative dispute resolution route because a fee of £600 must be paid.

12. Anecdotal evidence from ET system users suggests that one of the reasons why fees may not have been effective as might have been hoped in encouraging parties to seek alternative ways of resolving disputes is because the fees are imbalanced as between claimant and respondent (see suggestions below for improvements to the system). The fee system, it is suggested by some users, may be encouraging respondents to delay settlement (work requiring to be done on the case within the ET system in the meantime) or not to settle at all.

13. To the extent that it is suggested that the introduction of fees was, at least in part, to discourage weak and/or vexatious claims[3] one could reasonably expect that if this objective had been achieved then the proportion of claims that are successful at hearing would have risen but in fact, according to MOJ statistics, it appears to have fallen since fees were introduced. It is the view of some Employment Judges that the **relative proportion** of cases proceeding to hearing in which it might be said that the claimant is misguided in pursuing the matter appears to have risen. (The fact the claimant is misguided often only becomes apparent at the merits hearing once the evidence emerges.) While this is speculation, the impression gained is that those claimants (who, it

[3] See for example, the Resolving Workplace Disputes consultation document (January 2011) in which it was suggested that the introduction of a fee charging mechanism could "disincentivise unreasonable behaviour, such as pursuing weak or vexatious claims."

should be stressed, are still few in number overall) who fall into this category are not dissuaded from pursuing their claims by the imposition of fees. This is in line with the submissions made by CEJ on this topic.

14. Representatives and parties will be in a much better position than we are to comment on the extent to which the behavioural objective has been met but the information which has emerged about the outcomes following EC does not appear to support any suggestion that there has been a sea-change in the behaviour of parties in terms of their willingness to "resolve" disputes by other means. Rather it points in the direction of a significant number of disputes remaining unresolved following EC with all that may mean for ongoing workplace harmony and denial of justice.

Justice

15. We are aware of, but make no comment upon, the views expressed by a wide range of practitioners and organisations to the effect that ET fees have had a detrimental impact on access to justice.[4] We are also aware of the findings of the report jointly produced by the Department for Business, Innovation and Skills (BIS) and the Equality and Human Rights Commission (ECHR) 'Pregnancy and Maternity Related Discrimination and Disadvantage' (published 24 July 2015) which suggest that there is still a high level of pregnancy and maternity related workplace discrimination in Great Britain.[5] In Scotland, prior to the introduction of fees, a high proportion of the sex discrimination claims presented to the ET related to pregnancy/maternity discrimination. Sex discrimination claims have declined by over 80% in Scotland since the introduction of fees but such evidence as there is (for example the BIS/EHRC report) suggests that sex discrimination (of the type that previously made up a significant proportion of Scottish sex discrimination claims) is still occurring on a regular basis[6].

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[4] See, for example, policy briefing 6/2014 from the University of Bristol which is headed 'Employment Tribunal Fees Deny Workers Access to Justice' and which summarises research conducted by Professor Nicole Busby and Professor Morag McDermont)See also the report of the Law Society of Scotland 'Employment Tribunal Fees – Report – July 2014' which states that 'with the reduction in the number of claims brought at employment tribunals, we conclude that this presents a serious challenge to access to justice. Claims that would have been successful are simply not being brought as a result of this change. We believe that urgent review is required'. Also note press release from Law Society of England and Wales issued on 29 July 2015 suggesting ET fees have "undermined access to justice".

[5] For example, if the results of the survey are scaled up to the workforce as a whole they suggest around 54,000 women a year are dismissed (including constructive dismissal) for pregnancy/maternity related reasons.

[6] Several advisers working with women who consider they have been subjected to pregnancy or maternity related discrimination have indicated to the ET President (user group and other similar interactions) that the requirement to pay fees is the "last straw" for such women who are already concerned about issues such as the possible impact on their unborn child of stress caused by engaging in litigation when pregnant, the impending decrease in their income connected to going on maternity leave, the costs incurred in connection with having a new baby (pram, cot etc) and the like. The knowledge that fees of £1200 may require to be paid is described by these advisers as the factor which tips potential litigants into making a decision that they should not proceed with their case even although it may be a strong one. We proceed on the basis that the review team will be in a position to explore this matter further during the investigations it undertakes.

16. The most straightforward cases dealt with in the ET are those commonly referred to as "money claims". These include claims for unpaid wages, holiday pay, notice pay (breach of contract) and redundancy payments. Normally such cases are the least expensive to deal with in terms of judicial and administrative time. A high proportion of the claims of this type which we used to receive were brought by low paid workers. Quite often the sum due, while significant to the claimant, is relatively low and, in fact, is less that the amount which would now have to be paid in fees. Data available to the review team will show that there has been a very steep decline in such claims following the introduction of fees. It is not difficult to understand that some potential claimants may make what it is hard to see as other than a rational decision to the effect that it does not make economic sense to pursue the sum due to them when they are being asked to pay more in fees than the sum due with no guarantee that they will receive reimbursement of the fees.[7] Such individuals would, of course, already be taking the risk that they will not receive any compensation for loss awarded by the tribunal[8]. The research conducted by BIS into enforcement of ET awards attracted a great deal of interest and publicity. The knowledge that there is a significant risk that claimants will end up also out of pocket for trying to enforce their rights, it has been suggested by various organisations at National User Group meetings, tips the decision in favour of not making a claim at all (with all that means for the effective functioning of the employment market – employers who fail to pay sums due are less likely to be challenged than before fees were introduced).

17. Several representatives have informed the President, through the National User Group, that where "money claims" that would previously have been brought to the ET are capable of being pled as breach of contract, they are in some instances, following advice on the matter, now being pursued in the Sheriff Court in Scotland because the associated fees are very much lower. It has not been possible to verify this information due to the way claim related data is gathered in the civil courts. The magnitude of any shift is unclear but the underlying point is that there are some representatives who are advising that it is no longer sensible to pursue access to justice in the forum set up to deal with employment related claims because the fees are, relative to the civil courts, much higher. This possible shift of work into the civil courts may be greater in Scotland than in England and Wales given that we understand the relevant civil court fees in Scotland are lower than those in England and Wales.

18. Prior to the introduction of fees a significant number of "money claims" would be made against insolvent employers on the basis that the sum found to be due would then be paid by the National Insurance Fund/Redundancy Payments Office. However, since the employer is insolvent there is no realistic prospect of the claimant recovering the fees they have paid to pursue the claim from the employer and there is

[7] That decisions of this type are being made very frequently has been suggested to the President at National User Group meetings by several participants including Citizens Advice (Scotland).

[8] There is a significant risk of non payment of any award made by the tribunal – see the research conducted on behalf of the Department for Business, Innovation and Skills (BIS/13/1270, published 29 October 2013)

no other mechanism for reimbursement of them. The review team may wish to give consideration to whether this is one of the reasons why there has been a significant reduction in insolvency related claims.

19. So far as "standard track" claims are concerned (mainly unfair dismissal), similar issues arise to those identified for "money claims" (perhaps a little less acutely) in connection with the level of fees which require to be paid compared to the average award (particularly now the government has imposed a statutory cap on compensation). The high level of non payment of awards is also relevant here.

20. The fee system as currently structured appears to have a particularly harsh impact in certain types of cases. For example, in protective award cases, the first stage involves the Employment Tribunal (in a claim usually brought by a trade union or employee representative of another type, but sometimes in the absence of either, brought by individual employees), making an award which is stated to apply to a particular class of employees. No specific award is made to individuals. If the employer then fails to comply with the protective award judgment, employees can then make a further claim to the Tribunal in which they seek to enforce the protective award judgment. A fee will already have been paid in respect of the first application for the protective award. It may have been paid by a union but it could have been paid by individual employees. It seems to be particularly unfair, given the fault would appear to lie with the employer who has failed to pay the award, that individual employees are made to pay a further fee when they require to bring a claim to the Employment Tribunal to enforce the protective award. The same holds good in connection with failure to consult in connection with a transfer under the Transfer of Undertakings (Protection of Employment) Regulations.

Justice -The fee remission scheme

21. It is suggested by MOJ that the measure which has been put in place to ensure that access to justice is maintained is the fee remission scheme and that only those who can afford to pay should bear a proportion of the running costs of the system. The issue arises as to whether account has properly been taken of the fact that a very high proportion of ET claimants will recently have lost their job, and therefore be facing a period of financial uncertainty, just at the time when they are being asked to pay fees. While they may have capital which disqualifies them from remission, they are faced with the stark choice of paying what may be a significant sum in fees (if a hearing is required) just at the time when their finances are likely to be at their most precarious. This difficulty is exacerbated by the fact that sums paid on termination of employment, designed at least in part to assist in reducing their current financial difficulties, are taken into account in the remission scheme (see below).

22. The review team will have access to information which shows that applications for remission made and granted are significantly below the numbers predicted by MOJ prior to the introduction of fees. User feed back (delivered via the National User Group (Scotland) and other user interactions) is to the effect that the remission system is overly

complex, burdensome in terms of documentary requirements, inflexible, too time consuming for users and representatives alike and that it has a disproportionate impact on employment tribunal claimants when compared to pursuers (claimants) in the civil courts. The length of time between payment of the issue and hearing fees can be short (and is increasingly so) and yet claimants who are granted remission of the issue fee are required to apply again in respect of the hearing fee. Aside from the issue of whether this is sensible from an administrative point of view, it is also a requirement that appears to cause considerable confusion and delay.

23. The decision to change the fee remission scheme to take account of disposable capital is policy based and we make no comment on the principle. However, in practice the scheme in place, in our view, particularly disadvantages ET claimants compared to litigants in the civil courts, and undermines the premise that only parties who can afford to pay are required to do so, for the following reasons:
    a. The fee charging scheme in Employment Tribunals involves claimants paying an issue fee and a hearing fee. In Type B claims (the majority of claims) the issue fee is £250 and the hearing fee is £950, making a total of £1200. As each of these fees is treated as a separate fee they are classified, in terms of the remission scheme, as a fee of "up to £1000". The disposable capital threshold (beyond which remission is unavailable) is £3000. However, if these fees were combined they would be a fee over £1000, in terms of the scheme, and the disposable capital threshold would be £8000. In many cases there is a relatively short period of time between the payment of the issue fee and the hearing fee (the period is becoming ever shorter as a result of the decline in case load which means that tribunals are able to hear cases more quickly than used to be the case). Since the fees are not treated as combined this means that an individual who has disposable capital of say £3001 is required to pay a fee of £1200 (more than a third of disposable capital). Given the short period of time between the payment of the issue fee and the hearing fee the issue arises of whether it would be appropriate for these two fees to be combined when making the disposable capital assessment.
    b. The capital limits do not take into account that those who are involved in employment disputes may be more likely than the vast majority of litigants in other fora, to have an artificially inflated capital balance for a short period of time just at the point in time when the assessment requires to be made. The rules of the remission scheme mean that redundancy payments are treated as capital. Redundancy payments are designed to provide individuals with a financial cushion to cover a period of unemployment (to that extent, they could more properly be considered to be a form of income replacement). Furthermore, there are many employment claims where a redundancy payment has been paid but there is an issue about whether there was, in fact, a genuine redundancy. Should an unfair dismissal claim be pursued successfully then any such redundancy payment that has been made will fall to be offset against the unfair dismissal basic award which will thus be reduced to zero.

In effect, the payment made by the employer could on this view be more properly characterised as a payment towards the sum due in respect of compensation for unfair dismissal.
The inclusion of redundancy payments and the definition of capital also appears, on the face of it, to discriminate against older workers. The size of a redundancy payment will increase dependant upon length of service which will be age related. Thus, the inclusion of redundancy payments within the capital assessment disproportionately disadvantages those involved in Employment Tribunal proceedings and older workers.

c. Similarly, the remission scheme also operates on the basis that any other payment made on termination of employment (for example pay in lieu of notice or accrued holiday pay) is to be treated as capital. However, payments of this type reflect the income which would have been received had the individual worked their notice period or, as the case may be, the income the individual would have received had they remained in employment but been on holiday.

d. The vast majority of Employment Tribunal claims require to be brought within 3 months of the act giving rise to the claim. This is a much shorter limitation period than would apply in most types of claims made to the civil courts. Many ET claimants will have received a payment on termination of employment (redundancy pay/notice pay/holiday pay etc) which is designed as a form of income replacement to tide them over a period of unemployment but since this is treated as capital, and the assessment needs to be made very quickly after the termination of employment has occurred, these individuals will be undergoing the assessment when they have an artificially inflated capital sum which they have only had a very limited time to use for the purpose for which it was intended (income replacement). Litigants in the civil courts, in receipt of such sums, would normally have much more time to legitimately use such payments for their true purpose prior to requiring to make their claim, thereby reducing their capital to a lower level by the time they are subject to the capital assessment requirement.

24. Given the dramatic reduction in the number of claims across all jurisdictions, the information emerging from system users, and the difficulties identified above in connection with the remission scheme (which was designed to maintain access to justice) it is the position of the Employment Judges in Scotland that the objective of maintaining access to justice (including ensuring that only those who can afford to contribute to the cost of running the system are required to do so) has not been met. Put another way, Employment Judges in Scotland consider the fee system has acted to significantly reduce access to justice.

Suggestions for possible changes to the fee structure and the level of fees

23. What follows is based upon the premise that the policy of charging fees in the ET will not now be reversed by the UK government and that UK government policy will continue to require that some of the cost of

running the ET system is met by parties. We also proceed on the basis that it is accepted that the system should be as simple as possible and, insofar as possible, that access to justice should be maintained.

24. ETs currently group claims into three types – short (essentially "money claims" as defined above), standard (principally unfair dismissal) and open (largely discrimination including equal pay) track. While not without exceptions, as a broad rule of thumb, short track cases require least resources (in terms of administrative and judicial time) to be expended, while open track tend to be the most complex cases, taking up the greatest resource. This could be used as the basis for a revised fee system if the underlying principle remains that fees charged are to reflect work likely to be occasioned by the case. That having been said, there is no escaping the fact that charging the highest fees for discrimination cases can be viewed, arguably, as contrary to the public interest in having such alleged behaviour challenged and exposed.

25. The fixing of the appropriate level of fee is a matter for government. However, we proceed on the basis that, at least in part, the dramatic reduction in claims is due to the fact that the fees are too high when one takes into account

    a. the personal circumstances of many claimants (by the very nature of the claims made to the ET many will have lost their job and be facing financial uncertainty);
    b. the sum likely to be awarded (in short and standard track cases in particular relatively low in many cases);
    c. the risks arising from the fact that there is no guarantee that fees will be reimbursed to a successful party (and in insolvency cases, no realistic prospect of recovery at all);
    d. the level of risk that a successful party will not recover any financial award at all due to the level of non payment of awards;
    e. the provisions in the remission scheme which mean that ET claimants are disproportionately impacted by the capital test and the fact that the issue and hearing fees are assessed separately even although in many cases the hearing fee requires to be paid a short time after the issue fee.

26. The current system creates an incentive for claims to be presented together (in the form of what are commonly known as "multiples") as lower fees per head are levied the larger the group of claims in question. (In other words, there is a "discount for bulk".)We understand the benefits of that but we also understand from administrative staff that the multiple fee group provisions, which remain in place for charging hearing fees irrespective of what happens to groups of claims after presentation (e.g. splitting into smaller groups, new claims added to the group), cause considerable administrative work and confusion because staff have to keep track of the multiple groups in which the claims were first presented. Putting it another way, the current system means if you enter the ET system as a single claimant, and pay the single claim issue fee, you remain a single claimant forever after, for fee charging purposes even though your claim may be linked (perhaps even on the day it is received) with others which already are in the form of a multiple. Similarly, if you enter the

ET system as a multiple of say 10 and pay the appropriate issue fee for that size of group you will remain a multiple of 10 for fee charging purposes even if, as a matter of fact, the group of 10 cases is linked to a group of 1000 which are already in the ET system. Particular problems in this regard are currently being experienced in Scotland due to the large number of holiday pay claims being received in various formats which are then often linked together into larger groupings. What happens at the moment hardly seems fair given the premise of the scheme is that individuals should pay fees throughout which are commensurate with work done on their particular case. While there are undoubtedly pros and cons to the suggestion, consideration could be given to retaining the "discount" on presentation of a multiple (so maintaining the incentive on presentation) but for the second fee (the hearing fee) to be the same for each claim *which actually requires to be heard* irrespective of whether it is being dealt with at hearing as part of a multiple or a single claim. However, if the foregoing was implemented, it would be important to ensure that the lead case provisions (ET Rules of Procedure, rule 36) remain in place. This would mean that if there is a group of claims, one or more of which become lead case(s), with the other cases being sisted (stayed in England and Wales) then the hearing fee would only require to be paid for the lead case(s). This would provide a mechanism to avoid very large hearing fees requiring to be paid when there are large numbers of claims in the group and would also encourage use of the lead case provisions, thus further streamlining hearing process.

27. While there are again pros and cons, consideration could be given to basing the hearing fee payable at first instance on the track of the case, taking account of the average number of days which a case on that track normally takes. Thus, the hearing fee for a short track case would be calculated on the basis that (say) one day is the normal expectation. A normal standard track hearing fee would give (say) two days of hearing and an open track hearing fee would give up to (say) four days of hearing. (These estimates are used for the purpose of example only.) If the case needs more time allocated (either before it has commenced or later) then an additional hearing fee per day could be charged. This would more accurately reflect time expended on the hearing and would act as an incentive to parties to be as expeditious as possible when conducting a hearing. The desired effect though would only be achieved if both (all) parties are required to pay a share of the hearing fee (see para 28 below).

28. In Scotland, both (all) parties to a case in the civil courts are required to pay fees. The rationale for this is that it is not appropriate to impose a burden on one party but not another since it will not be clear who is in the "wrong" until the dispute has been judicially determined. Once that has happened the loser can be required to pay fees expended by the winner. We consider this system to be greatly preferable to that in place, particularly now that EC is available free of charge in all (but exceptional) cases. That means that potential respondents and potential claimants are given the chance to avoid "using the ET system". Consider, on a hypothetical basis, the case of a potential claimant who is willing to settle the claim, through EC and seeks only a moderate sum faced with a potential respondent who refuses

completely to engage in EC, leading to the potential claimant making an ET claim. Who, in that scenario, has actually caused the ET system to be used? We consider the case for introducing a response fee and a hearing fee split between both (all) parties is now even stronger than it was prior to the introduction of EC. A hearing fee (which is based on a fee related to the length of hearing required – see para 27) split between both (all) parties would also encourage expedition on the part of all involved. In addition, the fact that respondents would have to pay the hearing fee might well act as an incentive in terms of encouraging respondents to engage in settlement discussions. The fact that both (all) parties were paying a hearing fee would mean that the hearing fee could be lower than that which is currently charged as recoupment of costs would be spread between more parties.

29. So far as other fees are concerned, we consider that if the judicial mediation fee of £600 remains there should be provisions in place to provide at least a partial refund in the event that settlement is achieved. This could encourage respondents (who are responsible for paying this fee) towards settlement. Currently claimants already have the incentive of avoiding the hearing fee if the case settles through mediation. Such a refund would also reflect the fact that the ET system costs will be reduced due to the fact that the hearing does not need to take place. (Mediations are undertaken in more complex cases which tend to require lengthy hearings if judicial determination is required.)

30. For the avoidance of doubt we wish to make it clear that we are completely against the idea of charging fees for interlocutory (case management) applications/work. In other words, we think the system should remain as it is in this regard. The introduction of such fees would discourage parties from applying for tribunal orders, which in turn would run the (high) risk that a case would not be properly prepared by the time it was due to be heard. Furthermore, the information recovered through the case management process often leads parties to develop a more realistic assessment of the strengths and weaknesses of their respective cases with settlement resulting thereafter. In addition, charging fees for case management orders would slow the progress of a case down (fee charging has already had an impact on the speed at which some cases progress through the system) and add even greater complexity to the fee charging system.

31. The level at which fees are set should not act to dissuade potential claimants from presenting their claims. The fees should encourage claimants to bring employment related claims in the Employment Tribunal rather than forum shop for lower fees in the civil court. We consider the foregoing proposals at paras 26, 27 and 28 could result in it being possible to charge significantly lower fees while still recouping the necessary contribution to the running costs of the system. Furthermore, we would speculate that if fees are lowered this will lead to an increase in the number of claims being made, with a concomitant increase in fees received overall. We do not consider it appropriate for us to suggest the specific fees that should be charged but we do say that access to justice concerns are such that they should be much lower than they are now.

32. The remission scheme should remain in place. However, the calculation of a claimant's capital resources should not include payments made upon the termination of employment (statutory and contractual redundancy payments, pay in lieu of notice, accrued holiday pay and other termination payments) for the reasons set out at para 23. Furthermore, given the short period of time between payment of the issue fee and the hearing fee these fees should be added together for the purpose of calculating the capital limit beyond which remission is not available. If the time between payment of these fees is less than say 4 months then a party should not be required to make a second application for remission if remission was granted for the issue fee. However, the option of applying for remission of the hearing fee would require to remain open in circumstances where an application for remission of the issue fee had not been granted.

33. Changes should be made to the fees scheme to remove instances of the type of "double charging" identified in para 20.

34. So far as recovery of fees is concerned, the ET Rules of Procedure should say that the unsuccessful party will be required to reimburse fees paid by the successful party unless an Employment Judge decides that it would not be in the interests of justice for that to occur. In insolvency cases, there should be a mechanism in place so that if the Secretary of State is required to make a payment of sums due, any fees paid are also reimbursed by the state.

SHONA SIMON
PRESIDENT

6th August 2015