

Evidence to the Justice Committee in response to their inquiry into court and tribunal fees

Discrimination Law Association

Introduction

1. The Discrimination Law Association (“DLA”), a registered charity, is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information, and the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law-makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.
2. The DLA is a national association with a wide and diverse membership. The membership currently consists of some 300 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective. As well as lawyers, it includes academics, trade-unionists, human resources professionals and others with an interest in discrimination issues.

Employment Tribunal Fees

3. The Discrimination Law Association is profoundly concerned that the introduction of employment tribunal fees has been disastrous for individuals’ ability to access justice or enforce their rights.
4. The situation is not a complex one. Following the introduction of employment tribunal fees, the number of claims plummeted; individual claims dropped 67% following fees. If, as some have suggested, this was the result of weak claims being kept out of the system, there would be a change in the outcomes of tribunal hearings. Fewer weak cases would mean a higher proportion of strong cases, leading to a higher proportion of cases succeeding in tribunal. This has not happened. Outcomes in tribunal, judged both by the tribunal statistics and the anecdotal experience of our members, have remained the same. There are simply far fewer cases being brought. Employees with strong claims are being kept out of the tribunal.
5. The difficulty in accessing the tribunal to enforce employment rights means that the practical value of these rights has been substantially reduced. This includes the rights with which the DLA is most immediately concerned — the equality rights found primarily in the Equality Act 2010. It is worth noting, however, that the impact of the reduced access to other employment rights has fallen disproportionately on women and those from traditionally disadvantaged groups.
6. Many of our members who deal with front line advice report that they are often approached by individuals with strong potential claims, but once they are aware of the fee, choose not to continue. Most potential employment tribunal claims are about dismissal. This inevitably means that most of the individuals concerned are facing significant economic difficulty. They have lost their job and most face a period of uncertainty. Most do not feel they can run the substantial

risk of paying now to enter a tribunal process which will, at best, result in a judgment in their favour many months later. This is particularly problematic since, even if a claimant is successful at tribunal, the award may not be paid. Ministry of Justice research in 2013 found that only 49% of awards were paid in full and that 35% of successful claimants received no money at all. That research matches the experience of our members.

7. Although there is the possibility of remission of the fee, there are two fundamental problems with that system. First, the limits are set too low. There is no remission at all if a household has savings of £3,000. It is unrealistic to expect someone with this comparatively low level of savings, to expend nearly half of them on tribunal fees, especially when they have just lost their main source of income. Many clients with modest savings tell our members that they need to conserve their savings carefully following dismissal. Similarly, the boundaries for full and partial remission are set too low. A household income of £1,085 a month does not indicate an ability to afford even a reduced fee.
8. The fees are also wholly disproportionate to the likely rewards at tribunal. One third of race discrimination awards are below £4,000. One third of disability discrimination claims are below £5,000. 23% of sex discrimination claims are below £5,000. The very high awards that create newspaper headlines are exceptionally rare. For most claimants, the fee represents a substantial proportion of the amount they can expect to recover at the tribunal. This, inevitably, has a significant discouraging affect — especially given how often awards go unpaid.
9. The household approach to remission has a particularly adverse impact on women. They are more likely to have a working partner whose income takes them out of the scope of remission, without having the savings to pay for the fee themselves. This means that they must, in effect, gain the permission of their partner to bring a claim.
10. In addition to the low thresholds for remission, there is considerable confusion about the availability of remission and many potential claimants find it difficult to navigate. Those without legal advice (which, since the removal of the legal help scheme for employment and the reductions in advice funding, is very many of them) do not understand what they are entitled to or how to navigate the application process.
11. The DLA is particularly concerned about the impact of the sharp reduction in claims and the difficulties that fees create for employees has on the wider employment and equality environment. The vast majority of employees do not litigate in the tribunal. They rely on their employer obeying the law. Many employers are conscientious. They wish to follow the law and many would treat their employees well regardless of what the law says. However, there are also bad employers, who will only behave reasonably if it is practical for employees to force them to do so. Even good employers are often subject to pressures that make it hard for them to prioritise or take action on equality issues. The fact that employers know it is now significantly more difficult for employees to enforce their rights, makes it much less likely that those rights will be respected. It is easy for bad employers to think 'We know they can't do anything. There is no need for us to follow the law'.
12. This is not only bad for employees, it is also bad for good employers, who may suffer a short-term competitive disadvantage compared with a bad employer. In the long-term a good employer may reap the benefits of good practice, in the form of a talented, diverse and motivated workforce. But this may be of little consolation in the short-run, if they are undercut by a bad employer who ignores, for example, the need to arrange maternity leave or make reasonable adjustments to those with a disability.
13. The introduction of a fee for judicial mediation in the employment has also been damaging. Judicial mediation, without cost to the parties, had previously been an effective form of ADR within the employment tribunals. It was particularly useful in the context of discrimination claims, which often involve long hearings. In our experience, the introduction of a fee has almost entirely eliminated it as a practical option. Judicial mediation was not only of significant

assistance to parties, it also represented a significant cost saving to the tribunal, by taking long, expensive cases out of the system when settlement was agreed. It is therefore hard to see the policy rationale for imposing the fee, particularly when preliminary hearings do not attract a fee.

Court Fees

14. The civil courts do not provide statistical data on the number of discrimination claims. This, combined with the fact that far fewer civil discrimination claims are brought make it much harder to assess the impact of changes to the fees.
15. The increase in fees, however, will almost certainly reduce the number of claims being brought, in the same way that it has done in the employment tribunals. As with the ET cases we would anticipate that any increase in fees will negatively affect people from protected groups who are more likely to be in the lower income groups.
16. The lack of evidence is something that should be addressed by the Ministry of Justice. Fuller court statistics would be of great benefit both to the government and others in formulating policy and assessing the impact of changes. The minimal statistics available in relation to the courts, especially when compared to that available in the tribunal system, are unsatisfactory and should be improved.

Court Charge

17. A mandatory charge, with no discretion to take account of the circumstances of a case or individual is profoundly unjust. It is also discriminatory, because the most serious consequences will be to those who are either forced to try to pay a charge when they are unable to do so, or are pressured by the existence of the charge to plead guilty when they would not otherwise do so. The people affected most seriously will inevitably be the poor, disadvantaged and vulnerable.
18. The fees are set at an unsustainable level, which cannot be afforded by many who come before the criminal courts. But the most serious problem is the lack of any discretion for judges and magistrates to take sensible decisions in relation to individual circumstances. Imposing charges of up to £1,200 on those who self evidently cannot afford them is a waste of public money, as well as being morally repugnant.