Discrimination Law Association

The DLA's response to the MOJ's proposal to reintroduce ET fees consultation 25th March 2024

The Discrimination Law Association is a registered charity, a membership organisation established to promote community relations by the advancement of education in the field of antidiscrimination law and practice. It is a national association with a wide and diverse membership. The membership currently consists of some 250 members (individuals and organisations). 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, but not exclusively, persons concerned with discrimination law from a complainant perspective.

We strongly oppose the proposal to re-introduce claimant issue fees for the following reasons:

As set out above, we propose a £55 issue fee for claimants, including having the same issue fee where there are multiple claimants.

Question 1: Do you agree with the modest level of the proposed claimant issue fee of £55, including where there may be multiple claimants, to ensure a simple fee structure? Please give reasons for your answer.

1. **Impact on access to justice**

   From July 2013 until July 2017, hearing and issue fees were implemented in the employment tribunal, with the amount depending on whether the claim was regarded as simple or complex. In the 12 months following implementation, the number of claims brought fell by 53% - a serious failure in ensuring claimants had access to justice. After the Supreme Court in *UNISON* ruled that the fee regime was unlawful and abolished fees, the number of cases brought thereafter increased sharply from 18,000 in August and September 2017 to 33,000 in 2022-23.

   The Supreme Court held that the fees interfered with a claimant's access to justice and were indirectly discriminatory against women and other individuals to whom a protected characteristic applied as they were more likely to bring more complex claims which attracted the higher fees.

   Although the £55 issue fee now proposed is less than that previously implemented, and the previous two-tier fee structure and hearing fees have been removed, the ability of claimants to afford issue fees has not changed, particularly in the light of our cost-of-living crisis.

   We therefore maintain that imposing an issue fee, of any amount, would severely affect a claimant's right to access to justice, in particular the viability of low value and declaration claims (as held in the *UNISON* judgment), and would deter claimants from pursuing claims.

As set out in further detail below, we do not consider the government's aims will truly be achieved, rendering the imposition of fees disproportionate. A more proportionate method by which this aim could be achieved is to impose fees on respondents following an unsuccessful defence. Not only do respondents have greater financial means compared to claimants but this would achieve the social aim of encouraging the implementation of lawful employment practices.

2. Financial viability

From our extensive claimant experience, those who issue claims in the employment tribunal often do so as a last resort and, as described in the Ministerial Foreword to the consultation, are 'going through difficult and unsettling times in their lives'. They are either no longer in employment, or their employment relationship is in a precarious position.

Together with obtaining redress for whatever employment wrong they have endured, a claimant's finances are naturally of utmost concern. Imposing a fee on claimants who are in such a position, particularly low earners and/or those who may not easily be able to obtain alternative employment, is a deterrent to justice, regressive and likely to reduce the likelihood of genuine claims obtaining a remedy.

Although a fee remission scheme will be put in place, it is unclear whether Help with Fees (HwF) will be any less complicated and bureaucratic than the predecessor scheme that was operating prior to the *UNISON* judgment. This is particularly concerning for disabled claimants and those who are litigants in person as it might deter them from seeking a fee remission.

Further, the suggestion that claimants who do not qualify for HwF but whose circumstances are such that they cannot realistically afford to pay the fee could potentially seek a remission under the Lord Chancellor's Exceptional Powers provides a lack of certainty and increased complexity.

With most employment tribunal limitation periods being 3 months, it is unlikely that claimants would receive confirmation of their eligibility for a fee remission before having to issue a claim, resulting in claimants having to pre-emptively pay upfront and later challenge the remission.

3. ACAS

The Government's alleged policy aim of transferring some of the cost of the employment tribunal system from taxpayers to claimants, to incentivise parties to settle their disputes early through ACAS without the need for issuing a claim in the employment tribunal, is disproportionate when comparing the estimated 20%

reduction in cases that will be brought against the estimated taxpayer saving of 2% from 2025/26.

It is also our practical experience that since the implementation of the ACAS Early Conciliation process, respondents are unlikely to engage in settlement discussions prior to the issuing of a claim. This is evidenced by the fact that in 2022/23, 37% of Early Conciliation cases resulted in a positive outcome, increasing to 77% of employment tribunal claims being positively resolved. Were the fees to be introduced, 77% of claimants would have incurred an issue fee before a settlement is reached.

Should issue fees be introduced, we consider this would only tend to increase the likelihood of respondents tactically holding out on settlement discussions until claimants have put their money where their mouth is. This would result in an imbalance in power during ACAS negotiations in favour of respondents, contrary to the Government's aims.

If the Government's aim is to encourage the settlement of claims outside of the employment tribunal via the ACAS Early Conciliation process, they should revisit why Early Conciliation is not currently achieving this aim.

4. Disproportionate cost v saving

The suggested issue fee of £55 is arbitrary. Whilst we appreciate that it is hoped that the re-introduction of fees will enable the employment tribunal and the employment appeal tribunal to generate income to update infrastructure, based on the Government's figures (paragraphs 9-11 of the consultation), only around 6% of employment tribunal running costs will be recovered by the fees (although likely to be less if the fees act as a deterrent) – notwithstanding the increase in the employment tribunal's administration costs in processing fees and responding to queries.

This is evidenced by the Analysis and Evidence summary in the Impact Assessment which confirms that the introduction of fees will be a loss-making scheme and over a 10-year period will cost more to administer than it will generate in fees.

5. Encourages illegal employment practices

Imposing claimant issue fees is likely to encourage employers to think that unfair and discriminatory employment practices will go unchallenged as fewer claimants will be willing to pay an issue fee to pursue their claim. This would have a severe detrimental effect on employment practices and reduce public trust in the tribunal justice system.

6. **Likely to result in further fee increases**

A further policy objective in the Impact Assessment is to bring the employment tribunal in line with the other courts and tribunals which charge issue fees. However, while fees apply in the civil courts, these have increased 620% since having been implemented and have been heavily criticised for making justice increasingly unaffordable to most. It is noted that in the latter part of 2023, there was a Consultation to raise fees in other Courts by around 10% in some cases, having been raised by over 17% in 2021 (source: Ministry of Justice announces plans to raise up to £42m extra a year by increasing some court fees by 10% | Law Gazette). The DLA therefore has no doubt that the imposition of a £55 issue fee in the employment tribunal would be the start of a slippery slope towards the vast and unaffordable fees paid in the civil courts.

7. **Distinction with the Civil Courts**

A key distinction between the employment tribunals and the civil courts is that the latter is a cost-bearing jurisdiction, with the losers paying the winners' costs, enabling successful claimants to claim back any fees incurred. This is to be contrasted with the employment tribunal where each party bears their own costs incurred, win or lose.

8. **Group claims**

Our members' experience is that the employment tribunal is unfortunately not adequately equipped to dealing with group claims, particularly in respect of which claimants can be submitted on the same claim form. In light of respondents often threatening breaches of Rule 9, claimants are likely to err on the side of caution and issue multiple claims resulting in increased issue fees.

We propose introducing a £55 fee payable by the appellant upon bringing an appeal against a decision of the ET, where several ET decisions are being appealed, a £55 fee is payable for each of those decisions.

Question 2: Do you agree with the modest level of the proposed EAT appeal fee? Please give reasons for your answer.

The DLA does not agree with this proposal for the same reasons as those set out in response to question 1 above.

The DLA is of the opinion that should fees be imposed (whether in the employment tribunal or employment appeal tribunal), to avoid them acting as a barrier to access to justice, they should be borne by the respondent, perhaps if they lost the claim and at a higher amount than currently proposed.

This will ensure there is not a barrier to access to justice on behalf of the claimants, will negate scenarios in which there is an imbalance of power which is taken advantage of by the employer and will encourage the use of ACAS Early Conciliation as a meaningful settlement tool, rather than claims proceeding straight to the Tribunal.

The three principles underpinning this proposal are affordability, proportionality and simplicity. These ensure that the cost of the fee can broadly be met by users; that the value of the fee generally does not exceed the value of the remedy being sought; and that there is clarity around what fees are payable and when.

Question 3: Do you believe this proposal meets the three principles set out above? Please give reasons for your answer.

The DLA does not think that the three principles will be met and does not think that the lessons from the Supreme Court have been learned.

Affordability

While the fees are proposed to be set at a *"modest"* level, they are not affordable for many. The Lord Chancellor's Exceptional Power to remit fees and HwF are not sufficient to overcome the affordability challenge for many prospective claimants. The analysis is incomplete and flawed. There is a cost-of-living crisis. The absolute fee is not as relevant as affordability. Opportunity cost must be considered as many individuals (prospective claimants) face difficult choices on a daily basis. While it is not a choice between to heat or to eat, it is of a similar nature in that there will be an opportunity cost. What is paid in terms of a fee cannot be used for some other purpose. This will, or at least has a significant likelihood to, prevent access to justice for many. The fact that around 17% of claimants may have had their fee paid by a third party is not relevant. To the extent that it may be of some relevance, around 83% of prospective claimants will be liable for the fee if it is implemented.

The time limit to bring claims brings additional pressure in that claimants will have a very short time to pay the fee.

There is the potential for multiple fees. It is not certain how many appeals against Judgements, Orders etc., may be required during the course of litigation.

The median personal costs associated with bringing a claim are noted. These costs are unavoidable. Rather than supporting the principle of proportionality, they count against the principle of affordability.

Proportionality

For non-monetary claims, the proposed fee will be infinitely higher in monetary terms than the financial remedy. However, there is likely to be a direct benefit to the individual and wider societal benefits of having non-monetary claims determined by the Employment Tribunal.

It is important to note that not all users of the system will be charged a fee. It is only claimants (one half of users) that will be charged a fee. This is structurally unfair.

We do not think that users of the system are being treated fairly and equally.

The statistics set out assume that the same or similar level of remedies will be achieved by claimants either following determination of a claim or via settlement. However, this assumption is incorrect. Firstly, claimants may be deterred from bringing a claim in the first place. Secondly, respondents may take advantage of the structural unfairness, and for those low-value settlements (5% of £200 or less and 2% of £100 or less) to not make settlement offers at all or to reduce the offer by a percentage or absolute amount. That said, a respondent could reduce an offer it would otherwise make by £55 knowing that the claimant, if they proceed further, would be charged a fee to bring the claim, putting the claimant at a further inconvenience and cost could become part of respondents' calculations and tactics.

As stated above, the median personal costs associated with bringing a claim are noted. These costs are unavoidable. Rather than supporting the principle of proportionality, they count against the principle of affordability.

Considering proportionality from the perspective of cost versus benefit, it is noted that the Impact Assessment provides that there will be transition costs of £0.5m. The transition costs have not been broken down. However, these could be an underestimate. The cost of the consultation is unlikely to have been included in this estimate. There are likely to be greater direct and indirect costs. Training will not be one-off. Systems may require amendment. Enquiries will increase that will result in greater costs and a burden for the administration. This is an indirect opportunity cost.

We note from the impact assessment that *"45. There may be familiarisation and awareness costs incurred by individuals and legal service providers who use tribunal services where the fees are being changed. These costs have not been monetised but are expected to be minor."*

We do not agree with this statement. An attempt should be made to monetise the direct financial costs even if the opportunity costs cannot be directly quantified. It is not clear that the "*additional costs for HMCTS due to amendments to IT systems, guidance for staff and public guidance*" have been monetised [paragraph 67].

There may also be ongoing burdens for the administration with an indirect opportunity cost. There will also be an indirect opportunity cost for advisers of claimants. This presents a barrier to access to justice for claimants. The advice sector, and particularly the third sector, is overburdened. With the removal of legal aid in England and Wales, and restrictions on the available of legal aid in Scotland (the specific type of advice and assistance is advice by way of representation AA/ABWOR) advisers in the third sector will need more time with each individual client. Making it impossible to be able to provide advice to the same number of clients.

Taking the published figures for income generation as a proportion of costs of the administration, the recovery is around 2% [1.7/80x100 = 2.125% and 1.3/80x100 = 1.625%].

Over the period of ten years, the "best" estimates of costs are £13.1m and benefits of £12.6m. There will therefore be an economic loss over the 10-year period. Strictly on a financial basis, the cost of policy option 1 is greater than the benefits. As it does not make sense on a financial basis, policy option 1 should not be implemented as it does not achieve best value for the taxpayer.

The financial loss is not likely to be a full financial loss because some of the costs have not been monetised.

By adding the non-financial costs including opportunity costs, it is clear that policy option 1 should not be pursued.

Simplicity

We acknowledge that in principle a flat fee structure is relatively simple. However, the proposed fee structure is not as simple as it could be. The potential for multiple fees of £55 in respect of appeals complicates the relative simplicity.

Being relatively simple does not mean that the proposed fee of £55, placing the burden on the claimants, is fair. It is not clear what other options were considered. There are many different potential models.

When charging fees, we seek to recover the full cost of the service provided, where possible. Recognising that the level of fees proposed in this consultation are modest and only seek minimal contribution from users, we would welcome views on the potential to introduce higher levels of ET and EAT fees. This would help increase cost recovery,

strengthen our ability to better support an efficient and effective ET service and further reduce the financial burden on taxpayers.

Question 4: Do you consider that a higher level of fees could be charged in the ET and/or the EAT? Please give reasons for your answer.

Given that the burden is placed on claimants, there would be structural inequality. The £55 fee proposed is arbitrary. There are real concerns in relation to access to justice based on the proposed fee. For a greater fee to be charged to claimants would result in further unfairness and a barrier to access to justice. It is important to remember the societal benefits of Tribunals (and Courts).

As the choice is between policy option 0 and policy option 1, policy option 0 should be chosen. There should be no change at this time.

Question 5. Are there any other types of proceedings where similar considerations apply, and where there may be a case for fee exemptions?

No. The DLA considers that this answer merits an important qualification and is opposed to fees being implemented that are structurally unfair and place a further barrier on access to justice. Accordingly, it would be incongruous to answer yes. However, as a separate and distinct issue, there are many types of proceedings where similar considerations apply and warrant a case for fee exemptions. However, making a positive case for fee exemptions would equate with our primary and fundamental objection to the introduction of fees being implemented as proposed.

There are also practical considerations. Any exemptions will complicate matters. There could be confusion and there will be greater bureaucracy. It would be even less likely to achieve the stated aim of simplicity. It could also be an unintended barrier. An individual with lived experience of the practical difficulties of fee remission described being faced with "roadblocks" and that *"Dealing with fee exceptions brings yet another challenge and difficulty in very stressful time already."* They provided greater detail of the practical difficulties they faced with fee remission. From our collective experience, the DLA recognises that it is an experience which could be shared by many prospective claimants.

6. Are you able to share your feedback on the different factors that affect the decision to make an ET claim, and if so, to what extent? For instance, these could be a tribunal fee, other associated costs, the probability of success, the likelihood of recovering a financial award, any other non-financial motivations such as any prior experience of court or tribunal processes etc.

Yes.

In our collective experience, claimants consider, and are advised about, many factors including but not limited to the factors set out above. The DLA is concerned that many claimants may choose to not seek to enforce their legal rights if there is a fee or greater bureaucracy involved in an application process.

Fighting with the Wind: Claimants' Experiences and Perceptions of the Employment Tribunal, Nicole Busby and Morag McDermont, is an article that reports on research conducted by the Universities of Bristol and Strathclyde which explored the perceptions and experiences of claimants to the Employment Tribunal (ET). It was noted on page 4 that: *"Although the advent of fees certainly exacerbated the difficulties faced by claimants, they were by no means the sole cause of those difficulties and many of the cases we tracked pre-dated their introduction."*

Quoting from pages 25 to 26: *"Although most of the tracked cases pre-dated the introduction of ET fees, we did investigate their impact on claimants' experiences in two ways: through a sub-sample of 14 individuals who considered pursuing ET claims after the introduction of fees and by conducting research with CAB advisers in Scotland using an online survey and focus groups. Most of the claimants in the study lived in low-income households making them eligible for a full or partial waiver through the Fee Remission Scheme. However, proving eligibility brought its own challenges due to the lengthy and complex paperwork and detailed documentary evidence required. The name 'Remission' which was unfamiliar to many users caused difficulty and misunderstanding.*

Even among our relatively small sample, it was clear that fees had a deterrent effect on workers' ability to pursue claims as, having recently lost their jobs, few are able to pay to take a case to the ET. This is particularly so if their previous work was low-paid and there is a high likelihood that their future employment will also be. As one adviser explained, the relatively low value of claims among this group meant that a simple financial calculation often ruled out seeking justice…"

A tipping point can be reached at any stage. The idiom: *"the straw that broke the camel's back"* is an effective way of expressing the concern that what has little weight as a single item, can have significant adverse consequences.

7. Do you agree that we have correctly identified the range and extent of the equalities impacts for the proposed fee introductions set out in this consultation?

No. In general, the introduction of a fee has been considered on a financial and binary basis. This does not identify the range and extent of the impacts. There is a lack of proper and

adequate consideration in relation to all impacts, including the barriers to access to justice identified in response to questions above.

Referring to the numbering in the Equality Statement document we noted that 5.9 suggests that men may be disproportionately adversely impacted, and that the potential mitigating factor is that men earn more than women. However, the DLA's view is that women who on average earn less than men, have greater primary child-caring responsibilities, and may be more likely to work part-time, will be disproportionately adversely affected. This is an example of a lack of proper and adequate consideration.

During July 2013 - July 2017, hearing and issue fees were implemented in the employment tribunal, with the amount depending on whether the claim was regarded as simple or complex. In the 12 months following implementation, the number of claims brought fell by 53% - a serious failure in ensuring claimants had access to justice. After the Supreme Court in *UNISON* ruled that the fee regime was unlawful and abolished fees, the number of cases brought thereafter increased sharply from 18,000 in August and September 2017 to 33,000 in 2022-23.

The Supreme Court held that the fees interfered with a claimant's access to justice and were indirectly discriminatory against women and other individuals to whom a protected characteristic applied as they were more likely to bring more complex claims which attracted the higher fees.

Although the £55 issue fee now proposed is considerably less than that previously implemented, and the previous two-tier fee structure and hearing fees have been removed, the ability of claimants to afford issue fees has not changed, particularly considering our cost-of-living crisis.

The DLA therefore maintain that imposing an issue fee, of any amount, would severely affect a claimant's right to access to justice, in particular the viability of low-value and declaration claims (as held in the *UNISON* judgment), and would deter claimants from pursuing claims.

As set out in further detail above, the DLA does not consider the government's aims will truly be achieved, rendering the imposition of fees disproportionate. One more proportionate method by which this aim could be achieved, is to impose fees on respondents, following an unsuccessful defence. Not only do respondents have greater financial means compared to claimants but this would achieve the social aim of encouraging the implementation of lawful employment practices.