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Review of the introduction of fees in the Employment Tribunals

Response from the Employment Lawyers Association

14 March 2017

ELA Response to Review of the introduction of fees in the Employment Tribunals

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law. We include those who represent both Claimants and Respondents/Defendants in the courts and Employment Tribunals. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal and practical standpoint. Our Legislative & Policy Committee is made up of both barristers and solicitors who meet regularly to consider and respond to proposed new legislation.

A working party was set up to prepare this response to the Review, co-chaired by Paul McFarlane of Weightmans LLP and Michael Reed of the Free Representation Unit. A full list of the members of the working party is appended to this response.

Overview

ELA remains concerned about the impact of the Employment Tribunal fees regime (and in particular the form and levels at which it has been introduced) on access to justice. The review of the introduction of fees in the Employment Tribunals ('the Review') reached a different conclusion, with which we respectfully disagree. In this response ELA will focus primarily on the government's proposals for change contained in the Review, rather than seeking to reopen the Review itself. However, we feel it is important to make some observations on the Review's conclusions:

First, the Review concludes that, where potential claimants have access to the necessary funds to pay the fee, but choose not to, there is no access to justice issue. We disagree. There are a number of ways in which fees can harm access to justice. Making a claim impossible may be the most serious, but it is certainly not the only one. Discouraging claims by making it too uncomfortable or making it uneconomical to pursue a claim can create equally serious access to justice issues. To expand on this a little, saying that a claimant foregoing non-essential items is not an access to justice issue is far too simplistic and in many cases just wrong. There are clearly cases where the sacrifice being asked for might be reasonable but there are many where it is demanding too much of an individual to forego, e.g. renewal of a TV licence or cancelling the after school club that her child might attend, simply so they can obtain redress from something their employer has wrongfully deprived of them.

A right that cannot be enforced is of little value. Further, a right that can only be enforced if a claimant is willing to act against their economic best interest is not much better (e.g. paying a fee of £1,200 to recover £600). It is clear, from ELA's collective experience as well as the substantial drop in claims since fees were introduced, that many claimants are in this position.

For a large number of potential employment tribunal cases, fees represent a substantial proportion of the claim's value (and in some cases, particular those relating to unpaid wages, may exceed it). Claimants also face the fact that the fee — subject to remission — is certain, while even the most meritorious claim represents only a probability of an award in the future. This problem is only compounded by the high number of tribunal judgments that go unpaid (the MoJ's 2013 research found that only 53% of claimants received their award in full).

All of these factors tend to place potential claimants in a position where, while they might be able to afford to bring a claim, it is prohibitively risky or expensive to do so. Of course, this does not apply to all potential

claimants — some will qualify for remission and some will have claims of a sufficiently high value that they outweigh the fee or may have sufficient savings to be able to pay the fee without it hurting them significantly. Nonetheless it applies to many (actually most) and particularly those with relatively small claims. These are most likely to be those on a modest wage, because that is sufficient to take them outside the scope of remission, without resulting in them having the substantial savings or large potential damages for loss of earnings that would make bringing a claim economically sensible.

Where a right can only be enforced by individuals willing to take a level of risk which his not sensible, its value is substantially reduced. The increase in the gross monthly income limit for remission will ameliorate those issues for the small number of potential claimants it affects, but does little else to address the underlying problem.

Second, the Review relies heavily on statistics drawn from ACAS Early Conciliation to suggest that potential claimants are finding alternatives to litigation. ELA does not accept that this conclusion is warranted from the available statistics. The fact that entering ACAS Early Conciliation (although not participating in it) has been made mandatory, means that it is wrong to suggest that potential claimants are necessarily choosing it as an alternative to the tribunal. Further, the Review does not recognise that many of those entering Early Conciliation may not be potential claimants at all. Since Early Conciliation is available without having to first bring a claim or pay a fee, employees with workplace disputes will frequently use the process as a supplement to workplace dispute resolution, without necessarily wishing to then pursue an Employment Tribunal claim.

The statistics also do not take account of those potential claimants that have decided not to enter Early Conciliation at all. This may be because they are aware that they have to pay a fee to bring an employment tribunal claim and therefore have decided not to engage in Early Conciliation. All of these factors make assessing the potential impact of ACAS Early Conciliation difficult. One thing is clear. Fees were introduced in July 2013. The dramatic reduction in the number of tribunal claims immediately followed the introduction of fees. Early Conciliation was not introduced until April 2014 and had almost no impact on the statistics. It is therefore clear that the dramatic reduction in the number of claims cannot have been the result of Early Conciliation.

It is disappointing that the Review did not, with respect, properly engage with the arguments presented by ELA and other organisations about whether Employment Tribunal fees should continue, and if so, in what form. These are matters on which there were a wide range of views. A great deal of evidence and argument was presented to the Review, which does not appear to have received significant consideration. Similarly, it is disappointing that the review does not substantively engage with the conclusions and recommendations of the House of Commons Justice Committee in relation to Employment Tribunal Fees, contained in their June 2016 report.

Question 1: Do you have any specific proposals for reforms to the Help with Fees scheme that would help to raise awareness of remissions, or make it simpler to use? Please provide details.

Although ‘Help with Fees’ is a significant improvement in wording over fee remission, it may have caused its own problems. ‘Help’ implies that what is on offer is assistance with the fee, i.e. a reduction, rather than full remission.

This wrong impression is reinforced by much of the government’s guidance. The government online guidance on bringing a claim uses phrases such as, ‘You may be able to get help paying the fee if you’re getting certain benefits or on a low income.’ This gives the impression that assistance is limited to a reduction in the fee, rather than a complete remission. In fact, full remission is the most common form of assistance.

Similarly the gov.uk page on ‘Get help paying court and tribunal fees’ says that, ‘You might be able to get money off your court or tribunal fees…’. Again, this gives the misleading impression that what is available is a discount on the fee. To learn that the fee will be reduced to zero, a potential claimant would have to complete the twenty stage online questionnaire. The guidance is particularly misleading since the income

limits on that page are, in fact, those for full remission rather than a reduction.

ELA suggests the guidance is rewritten so that it is easily apparent on first reading that a total remission of fees is possible and is likely to happen if the potential claimant meets the basic criteria. More detailed information and the questionnaire can then follow.

Question 2: Do you agree that raising the lower gross monthly income threshold is the fairest way to widen access to help under Help with Fees scheme and to alleviate the impact of fees on ET claims? Please give reasons.

As an apolitical organisation ELA does not feel that it is appropriate for us to comment on what approach to widening access to Help with Fees would be fairest. There are potentially many different approaches to a fees system. All have advantages and disadvantages and would create winners and losers. Deciding between these competing options is a policy decision which inevitably involves political considerations.

We agree that lowering the gross monthly income threshold will help widen access to help under the Help with Fees Scheme. It will not, however, address two significant areas of concern.

First, it is unlikely to have a significant impact on the number of potential claimants who would be able to afford the fee, but are very understandably and rationally discouraged by the need to pay it. The Review argues that these individuals do not represent a problem in relation to access to justice, because they could bring a claim but are choosing not to do so. As discussed above, ELA disagrees. Fees that routinely make it uneconomical to enforce rights are as capable as harming access to justice as charging fees that people cannot afford in a narrow sense.

Second, many people will not reach the gross monthly income threshold test, because they are excluded from Help with Fees by the capital test. This can create very similar access to justice issues to those discussed above. A potential claimant who has just lost their job may well very rationally hesitate before expending capital on bringing a tribunal claim however justified they are in their sense of grievance against their former employer. The capital test is more likely to affect:

- older potential claimants, who are more likely to have built up savings;
- couples, since it is based on a household's capital.

The test also does not take account of liquidity problems; a potential claimant may be above the capital threshold, but unable to access funds within the short deadlines for commencing employment tribunal claims. A change to the gross monthly income threshold will not address these issues.

Question 3: Do you agree with the proposal to raise the gross monthly income threshold for a fee remission from £1,085 to £1,250? Please give reasons.

This increase is in line with the National Living Wage in recent years from £6.31 in 2013 to £7.50 which will apply from April 2017. This would ensure that those who remain on the National Living Wage are not excluded from assistance with fees. This is a small, but welcome, increase given the problems discussed above and the massive reduction in claims. More people who would otherwise be prevented from bringing a claim will now be exempt from paying fees and others will contribute less towards the fees.

As noted in the Review, however, the impact will be small — affecting only 3% of potential claimants.

It should also be highlighted that the change is insufficient to alter significantly the problems discussed at question 2. Many potential claimants will still be left in a position where it is uneconomic or illogical to make

the sacrifices required to enforce their rights, which does raise access to justice issues.

Question 4: Are there any other types of proceedings, in addition to those specified in paragraph 355, which are also connected to applications for payments made from the National Insurance Fund, where similar considerations apply, and where there may be a case for exempting them from fees? Please give reasons.

The Government has concluded that it is not appropriate to charge a fee for three types of proceedings in the ET which relate to payments from the National Insurance Fund (NIF). The types of claim are

(1) References to the ET related to a redundancy payment from the NIF, under section 170 of the Employment Rights Act 1996 (ERA),

(2) Complaints that the Secretary of State has failed to make any, or insufficient payment out of the NIF, under section 188 of the ERA, and

(3) Complaints under section 128 of the Pensions Act 1993. The consultation document states that the exemptions will apply from the date of publication. The legal basis for the change is unclear as ELA understands that the Fees Order 2013 remains unchanged, but we note that the guidance document T435 *Employment tribunal fees for individuals* states that there is "no fee for claims solely relating to payment from the National Insurance Fund. If however your claim includes additional complaints a fee is payable".[1] On the Government website there is a note which states "until further notice claims relating solely to payment from the National Insurance Fund must be submitted by post".[2]

The Government's rationale for concluding that such claims should not attract a fee are twofold:

(a) Conciliation is rarely a realistic option in these types of cases; and

(b) They often involve employers who are insolvent and are therefore unlikely to be able to satisfy an order for the fee to be reimbursed.

ELA notes that it is common for employees to bring separate claims both against the insolvent employer and against the NIF relating to the same matter. This may happen sequentially, for example, where the employee begins by claiming against the employer, but then has to make a second claim after the employer becomes insolvent and enforcement against them becomes impractical. Or it may happen concurrently, where the employee seeks to have the moratorium on claims against an insolvent employer lifted as well as bringing a claim against the NIF after their claim to the fund had been denied. In both circumstances, the claim against the insolvent employer will attract a fee in the usual way, while a claim relating solely to payment from the NIF (against the Secretary of State) will be exempt.

In practical terms, the two criteria referred to above (relating to the availability of conciliation and the inability of the insolvent employer to satisfy any order) will apply to both categories of claim (claims made direct against an insolvent employer and claims against the Secretary of State).

In ELA's experience, insolvent employers (or administrators on their behalf) will not generally elect to engage in voluntary Early Conciliation. With the exception of those claims which amount to preferential debts, Employment Tribunal awards will rank as unsecured debts, so employees will often recover only a small percentage of their award or nothing at all. Further, a costs order in respect of the fee would not be a preferential debt and could not be recovered from the NIF/Redundancy Payments Office. The combination of these factors means that claimants will very often be left out of pocket, even if they succeed on all points,

[1] https://formfinder.hmctsformfinder.justice.gov.uk/t435-eng.pdf

[2] https://www.employmenttribunals.service.gov.uk/apply/guide/#fees_and_payment

with no effective mechanism for recovering their fee.

In ELA's view, this does have an impact on access to justice.

ELA does not have information about the relative cost to the Employment Tribunal system of different types of claim, but it may be reasonable to assume that claims against insolvent employers (or their administrators) in respect of which the insolvent employer may submit little or no evidence or actively defend the claim, would result in shorter, less complex hearings and with a reduced likelihood of interim applications (and therefore less costly and less burdensome to the Tribunal system). If that is correct, in ELA's view, requiring a claimant to pay a full hearing fee in the same order as a claimant pursuing a defended claim could be viewed as inequitable.

ELA is asked to identify types of proceedings which are also connected to applications for payments made from the NIF in respect of which there may be a case for exempting fees. In ELA's view, all claims for sums from an insolvent employer that may also be made against the NIF or which will support or supplement a claim against the NIF (even if not limited by the maximum thresholds for such payments), should be exempted from payment of a fee, provided that the employee can confirm that they have made a relevant claim to the NIF and that the Respondent is in fact insolvent.

Therefore, the claims that ELA suggests should be exempted from fees, provided they are against an insolvent employer and relate to sums which are (at least in part) the subject of an active application to the NIF, will include claims in respect of:

- unlawful deduction from wages / arrears of pay (including holiday pay);
- protective award in respect of collective redundancy consultation;
- notice pay;
- unfair dismissal; and
- statutory redundancy pay.

Question 5- Do you agree with our assessment of the impacts of our proposed reforms to the fee remissions scheme on people with protected characteristics? Are there other factors we should take into account, or other groups likely to be affected by these proposals? Please give reasons.

ELA agrees with the conclusions set out in the Equality Statement. The proposed changes will make it slightly easier for all groups of people to obtain fee remission, but will, comparatively, assist young, single people more than older people in couples. This is because young, single people are more likely to meet the gross income requirements and older people in couples are more likely to be caught be the cap on disposable capital.

ELA does not believe that the changes, in themselves, raise other significant equality issues.

ELA Working Party

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