Introducing fees in the Employment Tribunals and the Employment Appeal Tribunal

Response from the Employment Lawyers Association

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INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent claimants and respondents/defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.

2. A Working Party, co-chaired by Caspar Glyn KC and Kiran Daurka was set up by the Legislative and Policy Committee of ELA to respond to the Ministry of Justice's consultation to re-introduce fees in the Employment Tribunal and Employment Appeal Tribunal . Members of the Working Party are listed at the end of this paper.

3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

EXECUTIVE SUMMARY

4. It is not part of the ELA's role to comment on the policy considerations of reducing the cost to taxpayers, incentivising settlement and generating resources for ACAS which the government asserts are affordable, proportionate and simple. However, it is the role of the ELA in this consultation first to assess the likely lawfulness of the proposals and second, to test whether the proposals will meet the Government's policy objectives and are rationally justified by them.

5. Those in Government, those drafting the fees proposal and those in the ELA responding to this consultation can all afford £55 to issue a claim. In fact, that level of fee, that would always, on the proposal, only fall on the claimant, offers no incentive to the relatively well-off to settle their claims. £55 will only be an 'incentive' to those suffering in-work or recently in-work poverty, whereupon it becomes a deterrent.

6. As the Government admits, this fee scheme will cost more to administer and implement, than it will raise. Therefore the goals of reducing the cost to the taxpayer and generating resources for the justice system cannot rationally be achieved by this proposal and any reliance on them would be irrational. It is not just the financial cost that Employment Tribunals would suffer but also the diversion of hard pressed administrative staff away from progressing and listing and driving down the backlog of Tribunal claims. In our view, the two most likely outcome of the proposals are extra costs and additional burdens on Employment Tribunal staff which would divert them from core tasks.

7. The proposal:

    7.1. is for an irrecoverable fee which is levied only on those who present claims to the tribunal without the possibility of shifting that burden, for instance, on to employers whose unlawful conduct may be the sole cause for the need for the claim;
    7.2. the simple one level fee provides no incentive to settle to the well-off, but instead has a disproportionate, unaffordable and deterrent impact on those claiming who are in 'in-work poverty' or have recently been made unemployed such that they need to submit to a relatively complex Help with Fees (HwF) system;
    7.3. is likely to result in unjustifiable detriment on those who share particular protected characteristics who make up a disproportionate number of those who suffer 'in-work poverty';
    7.4. provides no exemption for low value or non-monetary claims; and
    7.5. does not, on the Government's own Impact Assessment, meet the policy goals of relieving cost to the taxpayer or generating resources for ACAS.

8. Accordingly, on the evidence presented in the consultation documents, the policy is not rationally justified by Government's stated policy goals. ELA considers that the proposal could be found to be unlawful because the Government will have, in setting fees under s.42(1) of the Tribunal, Courts and Enforcement Act 2007, considered irrelevant factors such as the economic justifications (yet the fee scheme will cost more to run than it will raise), failed to consider the relevant factors such as the impact on equalities and those who suffer from in-work poverty and then set fees with the unlawful effect of deterring claims. As such, an inference could therefore be drawn that the aim is to deter claims and impede access to justice.

9. The general position of working party members was one of reticence about the proposal to re-introduce fees. The working party was cognisant that fees are applied more generally within the court system and this was considered alongside the deterrent effect of fees on low-income claimants, the reduction of checks and balances on

employers' conduct, and the consequence of fewer appellate decisions on complex and important legal issues.

Q1. 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.

10. No. We disagree with the proposed fees because:

    10.1. The proposals do not distribute the burden to Tribunal users, only irrationally targeting some Tribunal users;
    10.2. The proposals will not incentivise most Tribunal users to settle their claims;
    10.3. The proposals will disproportionately deter and impede access to justice for other claimants; and
    10.4. The proposals will have an unjustifiable effect on equalities;
    10.5. The proposals with increase, not lessen, the burden of the Tribunal system on taxpayers;
    10.6. The proposals will be loss making and therefore create no resources for investment.

The Approach to the Consultation and Defined Terms

11. We consider the proposals in the Employment Tribunal under the following headings:

    11.1. The Constitutional right of access to the Courts (see paragraph 13 - below);
    11.2. Incentivise Settlement (see paragraphs 14 - 18 below);
    11.3. Deterrent Effect (see paragraphs 19 – 51, 64 - 65 below);
    11.4. Fee Remission systems (see paragraphs 52 - 63 below);
    11.5. Impact on Equalities (see paragraphs 66 - 73 below);
    11.6. Enforcement of Awards (see paragraph 51 below); and
    11.7. Economic Justification (see paragraphs 74-81).

12. In addressing the consultation, we use the following terms:

EAT	Employment Appeal Tribunal
ET	ET
LiP	Litigant in person is a person who represents themselves and has no assistance from a professional lawyer or trade union official.
IC	Instructing claimant – a claimant who can afford to instruct solicitors.

IWP A reference to claimants who are 'In-work poverty'. 15% of all working-age adults are in poverty falling within the category of 'In-work poverty'. Of the 15%, 20% of part-time and 10% of full-time workers are in work poverty[1].

The Constitutional right of access to courts

13. The starting point is Lord Reed's statement of the law that "the constitutional right of access to the courts is inherent in the rule of law" from *R (on the application of UNISON) v The Lord Chancellor* ('UNISON')[2].

Incentivise Settlement

14. The ELA does not consider that there is good or sufficient evidence to suggest that the fees will incentivise settlement, and our response is set out under the following headings:

    14.1. No incentive for settlement;
    14.2. Disincentivise early settlement;
    14.3. Likely increase of the rate of weak or vexatious claims; and
    14.4. Third party payments.

No Incentive for settlement

15. For the cohort of claimants who can afford representation and are relatively well-off the fee of £55 will not act as an incentive to settle a claim. Their legal fees are likely to be considerably more than this sum and, as the consultation says and we accept, for this cohort, the charge is relatively modest. Accordingly, there is no evidence that it would encourage settlement.

Disincentivise Settlement

16. ELA's experience of the old regime was that fees often disincentivised early settlement of claims because employers would wait to see whether the employee would pay the tribunal issue fee before embarking on settlement negotiations.[3] A respondent is more likely to "wait and see" if a claimant was willing to incur the fee and issue proceedings.

[1] UK Poverty – The essential guide to understanding poverty in the UK – Joseph Rowntree Foundation. The group in poverty have an equivalised after housing cost (AHC) household income of less than 60% of median AHC income
[2] [2017] UKSC 51, Para 66 and 67
[3] See also UNISON, at [59]

Previously this saw a decline in the respondent's willingness to participate in Early Conciliation under the previous fees scheme.

Likely increase of the rate of weak or vexatious claims

17. There is no basis for believing that the proposed fee will have the effect of deterring weak or vexatious claims or encouraging settlement. Indeed, the evidence of the 2017 review of the Fees Order regime, cited in the UNISON[4] judgment and accepted by the Lord Chancellor, points to the opposite conclusion. Following the Fees Order, the success rate and settlement rate of ET claims decreased, suggesting that more weak and vexatious claims were brought relative to the (greatly decreased) total number of claims.[5] Further, as noted in the written evidence of the Council of Employment Judges to the Select Committee, "misguided but determined litigants remained undeterred by fees".[6] We have set out in the Appendix our suggestions for the more effective management of weak or vexatious claims.

Third party payments

18. The impact assessment refers to the fee being paid for by a third party. Members of a trade union may see their fee (if a claim is considered to be meritorious) covered by the union itself, however this raises external difficulties with how the unions are funded and whether they are able absorb the additional cost of this. A presumption that the union will automatically absorb the fee could be ill-advised. Those with insurance backing may have their fees covered, although in many cases claims need to be issued before cover is confirmed which may cause difficulties for the claimant.

Deterrent Effect

19. We consider the deterrent impact of the proposals under the following headings:

    19.1. The admitted deterrent effect
    19.2. The 'deterrent' objectives of the 2013 Fees Order
    19.3. The deterrent effects of the 2024 proposal
    19.4. Deterrent intent of the proposals
    19.5. Low Value Claims
    19.6. ETs are not comparable to the Common Law Courts
        19.6.1. Cost shifting by default in the Civil Courts
        19.6.2. Inequality of the claimant in the employment relationship

[4] "*57. A secondary objective of the introduction of fees was to deter the bringing of unmeritorious claims. The Review Report analysed the outcomes of single claims which had been presented after fees were introduced, and compared them with the outcome of cases during the three quarters preceding the introduction of fees. The results show that the proportion of successful claims has been consistently lower since fees were introduced, while the proportion of unsuccessful claims has been consistently higher. The tribunal statistics, which record the figures for all claims, show the same trend. The Lord Chancellor accepts that there is no basis for concluding that only stronger cases are being litigated".*

[5] MoJ, *Review of the introduction of fees in the ETs: Consultation on proposals for reform* (Cm 9373, 2017)

[6] D. Pyper, F. McGuinness, J. Brown, *Employment tribunal fees* (Briefing paper CPB 6073, 2011), 45

19.6.3. The failure to consider cost shifting
19.6.4. The shared burden of costs depending on success
19.6.5. Most claimants are employees or workers
19.6.6. The fees burden falls almost entirely on individuals
19.6.7. Disparity with the Common Law Courts
19.6.8. Time limits
19.7. Failure to consider that a respondent should contribute to fees
19.8. Enforcement of Awards
19.9. Fee Remission Systems
19.9.1. Simple fees but complex remission
19.9.2. The evidence of past fee remission failures
19.9.3. The evidence of the past rare use of the discretionary power
19.9.4. The Help with Fees (HwF) Process
19.9.5. The temporary effect of dismissals on capital
19.9.6. HwF must be based on current circumstances
19.9.7. HwF Practical Difficulties
19.9.8. The title 'Help with Fees' could mislead a claimant
19.9.9. Lack of clarity on HwF process

The admitted deterrent effect

20. The Government accepts that its 'modest and affordable' fees scheme could likely lead to a 20% drop in claims to the ET[7]. However the consultation does not suggest that the fees would have any perceptible impact in deterring weak or vexatious claims, beyond suggesting that modest fees might help encourage parties to consider early conciliation as a means of resolving their dispute before taking their case to the ET. The proposal does not address deterrence in the consultation.

21. As set out above, the working party agrees with the characterisation of the proposed £55 fee, by the Ministry of Justice ("MoJ") is "generally affordable". It is, indeed, significantly lower than the fees of between £160 and £1,600 introduced by the 2013 Fees Order, and that any claims for a deterrent effect would be commensurately weaker and likely to be focusses on a narrower cohort.

22. However, the lack of regard by the consultation to the issue of deterrence, and simply noting the incentive to settle, is surprising, in light of the previous experience of the Fees Order regime.

The 'deterrent' objectives of the 2013 Fees Order

23. A secondary objective of the previous Fees Order was the deterrence of weak or vexatious claims to ET, flowing from a general perception, invoked by the Coalition

[7] Para 60 Consultation

Government of the time, that the lack of fees and general irrecoverability of costs incentivised employees to pursue weak or vexatious ET claims to the detriment of employers.[8] A further stated aim of the introduction of the Fees Order was to incentivise the early settlement of employment disputes.

24. Research carried out by the Universities of Bristol and Strathclyde between 2012 and 2014 suggests that there was little empirical foundation for that initial perception, although there clearly are difficulties of definition and qualitative assessment.[9] Whether that perception was true and remains true of the ET system at present is a discussion beyond the scope of this consultation response, in which a range of opinion exists within ELA's membership.

The deterrent effects of the current proposal

25. The 2024 Proposal sets out that while the MoJ's intention is not to impact demand through the introduction of fees, it could lead to a 20% reduction in volume of cases. The MoJ posits that an impact on demand is unlikely, given that the £55 fee is broadly in line with the costs associated with bringing a claim, such as travel and communication costs. The reasoning here is obscure, given that these costs will presumably continue to be incurred by employees bringing ET claims.

Deterrent intent of the proposals

26. Costs do not generally shift in the ET or EAT. However, where a cost is imposed on a party by the process by the Government, it is unclear why claimants should not only be tasked with funding the ET system in order to exercise their right to access justice, but they are also required, as expressed in this consultation, to fund the ACAS early conciliation service, which seeks to conciliate services between all users. The failure of the proposal to allow for cost shifting of the fee on the success of a claim as would be the case in other jurisdictions supports an inference that the reason for the fee is to deter the issue of claims. This is because the justification of the fee is that Tribunal users should contribute towards the fee. However, an unsuccessful respondent will have caused the use of the system and be required to pay nothing towards the use of the system caused by their unlawful conduct.

27. The cost on only the claimant using the system would appear, therefore, to set out a deterrent effect. There seems to be no justification that a claimant who has to resort to

[8] *R(UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869, [57]-[59], [101] ("***UNISON***"). See also the Ministerial Foreword to MoJ, *Charging Fees in ETs and the Employment Appeal Tribunal* (CP22/2011, 2011), 5.

[9] N. Busby & M. McDermont "Access to justice in employment disputes: private disputes or public concerns" In E.Palmer, T.Cornford, Y. Marique, & A. Guinchard (Eds.), *Access to justice: beyond the policies and politics of austerity* (Hart Publishing, 2016), 175-196

the tribunal as a result of their employers' unlawful conduct, however condign, should always have to contribute to the use of the tribunal.

28. We set out at Appendix 1 to this paper the proper, appropriate and lawful method to manage weak and or vexatious claims. There are existing mechanisms available to the tribunal service that are designed to deter and dispose of claims of a vexatious nature which could also be better utilised or strengthened by the tribunal service.

Low Value Claims

29. The previous fees were set at a level which was disproportionate in relation to low-value claims. Despite the new proposal, proportionality remains a concern. The fee, when placed beside low-value claims or non-monetary awards such as declaratory relief, may still dissuade deserving claimants as it would be impractical to pursue a claim. This was identified previously by the Scottish employment judges in the 2012 consultation who considered there to be :

… a significant risk that if a claim is for a small amount of money, then a claimant will be discouraged from pursuing that claim, even although they are legally entitled to the sums due. For example, say an individual is entitled to one week's wages in respect of holiday pay and the individual is paid just above the threshold which would allow them to qualify for remission. That person may decide that they will not pursue the sum due. This could have the consequence of encouraging a less than fair employer to routinely deprive employees of small sums of money to which they are entitled on the basis that the risk of them pursuing a claim will be small.[10]

30. If low value claims or claims only for declarations are not exempted then per Lord Reed at paragraph 96 of *UNISON* the level of fees will likely be unlawful:

… it is not only where fees are unaffordable that they can prevent access to justice. They can equally have that effect if they render it futile or irrational to bring a claim. As explained earlier, many claims which can be brought in ETs do not seek any financial award: for example, claims to enforce the right to regular work breaks or to written particulars of employment.

ETs are not comparable to the Common Law Courts

31. The ET, according to the Law Commission's 2020 report, is different from the civil courts by design. Among its key characteristics as identified by the Law Commission are that it is generally a no-costs jurisdiction, proceedings are usually less formal than in the civil courts and there is a right to lay representation.

32. A comparison has been suggested in the proposal between the ET and the small claims track in the County Court. The small-claims track is the usual track for less

[10] See paragraph 50 of the MoJ's Response to Charging Fees in Employment Tribunals and the Employment Appeal Tribunal, 13 July 2012

complicated claims with a value of up to £10,000, for issues such as breach of contract or very low-value personal injury claims. It is also meant to be an informal decision-making forum, with relatively flexible procedural rules, lay representation and, as a default, both sides will bear their own legal costs. Court fees, ranging from £35 to £455, depending on a claim's value, are charged to issue a claim. Should the matter proceed to a hearing, a further fee of £27 to £346 will be charged.

Cost shifting by default in the Civil Courts

33. There are, however, material differences between the two jurisdictions. First, should a claimant succeed on the small-claims track, the defendant will be ordered to reimburse sums spent on court fees, as well as expenses for travel and loss of earnings. There is therefore a prospect of recovering at least some of the costs outlaid. No such mechanism has been proposed here.

Inequality of the claimant in the employment relationship

34. Secondly, the dynamics between the parties are different. As articulated in *Autoclenz Ltd v Belcher and others* [2011] UKSC 41, employment contracts must be interpreted differently from commercial contracts, as there are unequal bargaining powers between workers and employees. In *Unison*, at paragraph 92, the Supreme Court also noted that "the use which people make of ETs is governed more by circumstances than by choice. Every individual who is in employment may require to have resort to an ET, usually unexpectedly" Taking into account the expectation that a citizen will ordinarily be expected to work, there is arguably a more important regulatory significance to the work of the ET than the cases heard on the small-claims track.

The failure to consider cost shifting

35. Cost Shifting appears not to have been considered by the Ministry of Justice in its current proposal to re-introduce fees.

The shared burden of costs depending on success

36. The fees system in operation in the High Court and County Court does not impose the burden of payment of a fee solely upon the claimant who commences legal proceedings. Where a money claim is being brought in the High Court or County Court, the defendant who makes a Counterclaim is also liable to pay a fee. This was also an element of the 2013 fees structure there was provision for payment of fees both by respondents and claimants. However, the current proposals mean that a claimant will always have to bear the cost of fees and there is no mechanism for that burden to be shifted save through the Tribunal costs provisions which only apply to a tiny minority of cases.

Most claimants are employees or workers

37. Unlike the common law courts most claimants are employees whereas in the common law courts there is no such homogeneity in respect of one class of person being a claimant. There are very few circumstances where an ET claim is initiated by an Employer. Apart from cases where there is a dispute between the Transferor and Transferee over any responsibilities under TUPE there are very few circumstances where an Employer is likely to have to commence a claim in an ET.

38. The most likely situation where an employer will have to pay a fee is where they are a respondent to an employee's claim and the employer wishes to make an employer's contract claim. Since 1994 there has been in place the ET Extension of Jurisdiction (England and Wales) Order. This Order sets out a requirement for an Employer's contract claim up to £25,000, as well as an Employee contract claims up to £25,000, to be dealt with in the ET under the relevant statutory instrument SI 1994 No. 1623. Indeed the Tribunal Rules contain detailed provisions at Rules 23-25 for handling Employer Contract Claims.[11]

39. Surprisingly Employer's Counterclaims have not been mentioned anywhere in the Government's proposal for the reintroduction of ET fees. This is despite the fact the 2013 fee structure in the ET included provision for payment of a fee by the respondent for an Employer's Contract Claim. The failure to mention payment of fees by respondents in the present Government proposal or discuss these at all is an omission in the Government's proposals that seeks only to place burdens, realistically, on employees and workers.

The fees burden falls almost entirely on individuals

40. Any system that introduces a fee structure that only charges a fee on those commencing a claim has a disproportionate impact upon those who, through either denial of their employment rights or loss of employment, are least equipped to pay a fee to seek a remedy for that injustice. The impact of fees is totally different in the ET because in contrast to the County Court, it is only individual claimants who have had their potential income threatened or removed.

41. Indeed, the High Court and County Court fee structure has a far better balance of claimants using the system. Both employers and employees are commencing proceedings and accessing the court service to recover monetary sums that are being claimed. Thus claimants are both individuals and also businesses. For money claims the size of the fee is determined by the monetary amount claimed.

[11] SI number 1237 of 2013 as Amended.

Disparity with the Common Law Courts

42. The minimum fee payable for a money claim in the County Court is £35.00 for a money claim of £300.00. Once a claim is for in excess of £10,000 it is 5% of the claim (£500.00).

43. Furthermore, if the current proposal for a flat rate £55 fee in the ET takes effect, it will cost a claimant £20 more to claim £300 in unpaid wages in the ET than in the County Court with no prospect of the fee being recovered, even if the claim is successful.

Time limits

44. The comparison with the civil courts is further inapposite because a claimant in a civil court has in most, but all claims, three or six years to make a claim. However, the Tribunal has strict, mostly 3 month, time limits with extensions of up to six weeks for early conciliation. The ETs present to the IWP cohort as complex, legalistic, and a procedural minefield from the moment a claimant starts to even consider taking a claim. The litigant in person faces hurdles which simply do not present themselves to those who can afford to instruct a solicitor, the educated, the IT-literate, the resourceful, the time-rich and the healthy.

45. It does not appear that consideration has been paid towards the fact that a claimant paying a fee electronically will be able to do so far more quickly than a claimant, perhaps speaking English as a second language and with limited literacy in their second language has to navigate a HwF form all within the same timetable as the claimant paying the fee. Such claimants should, rationally, have more time in which to issue their proceedings as they have more to do.

Failure to consider that a respondent should contribute to fees

46. One suggestion is that the respondent, when they are sent the Response Pack, should be informed that they have a fee to pay if they wish to dispute the claimant's Claim. That fee can then be incorporated in the Response Form and paid by the respondent without the critical time limit for the commencement of the Claim being infringed.

47. In the unlikely event that the respondent fails to defend the proceedings, under the Tribunal rules the claimant may apply for a Default Judgment under Rule 21 of the Tribunal Rules of Procedure. If the respondent has a default decision entered by the Tribunal, the amount of fee that the respondent ought to have paid when filing the Response can be added to the amount of the Judgment. In this way, the Tribunal can receive a fee for each Tribunal claim that is brought whether or not the respondent submits a Response.

48. In many cases the ET have to issue what is called a Recoupment Notice if an employee has received welfare benefits that need to be taken into account when the Tribunal are awarding compensation. Where such a Recoupment Notice process is used, then a Notice is sent out by the Tribunal stipulating the amount that must be paid, not to the successful claimant, but by the respondent to the DWP.

49. In the case of a Default Judgment, the Recoupment Notice issued by the Tribunal can be varied to provide for the unpaid fee that should have been paid by the respondent be paid to the Tribunal Service.

50. Should claims settle between the issue by the claimant and the filing of the Response with the Tribunal, whether via ACAS or through some other means, the Notice of Claim issued to the respondent can make clear the Recoupment Notice system must still be used. Thus the respondent must still pay the Tribunal whatever fee should have been paid by the respondent if the respondent had filed a Response in the Tribunal. Such practice should effectively be relatively rare, because it is more common for Claims to settle after, rather than before the respondent has filed their Response and paid the fee.

Enforcement of awards

51. Enforcement of awards in the ETs continues to remain a problem that has not been tackled under this Consultation. As mentioned in *UNISON* judgment in paragraph 36 the lack of enforcement of awards may render the pursuit of compensation a futile one:

    36 In the last study carried out by the Department of Business, Innovation and Skills, shortly before the introduction of fees, found that only 53% of claimants who were successful before the ET were paid even part of the award prior to taking enforcement action ("Payment of Tribunal Awards", 2013). Even after enforcement action, only 49% of claimants were paid in full, with a further 16% being paid in part, and 35% receiving no money at all. This was noted to be of particular concern in the light of the forthcoming introduction of fees.

Fee Remission Systems

<u>Simple fees but complex remission</u>

52. If a claimant can afford to pay, then a flat £55 fee is simple. However, HwF is not simple. By definition it is only the IWP cohort who will need to use the HwF system – it is they who will be bound to suffer the disproportionate impact of fees as well-off claimants simply pay by a debit card online. It is an additional hurdle which is potentially insurmountable for this cohort. Beyond understanding and navigating Early Conciliation and completing the ET1 form, claimants would be expected to also submit either a fee or a fee exemption form. This intricate process demands financial evidence, adding layers of complexity to an already intricate ordeal. The process of submitting fees or requesting an exemption becomes yet another bureaucratic barrier.

The Evidence of past fee remission failures

53. The last Help with Fees scheme for ET fees did not have the success that the government hoped that it would have. The numbers of claimants receiving remission was found to be far lower than the Government had anticipated, and its impact was reviewed in the UNISON judgment as follows:

43. The impact assessment published in May 2012 estimated that at least 24% of the pre-fees population of claimants would receive full remission, and that a further 53% would receive partial remission on fees up to £950. In the event, the Review Report found that the proportion of the post-fees population of claimants receiving full or partial remission was initially very low, but had increased by 2016 to about 29%. The proportion of claimants receiving remission is therefore far lower than had been anticipated. The actual number is even lower, compared with what had been anticipated, given the difference between the number of claimants before and after the introduction of fees.

The evidence of the past rare use of the discretionary power

54. Further the use of the Lord Chancellor's discretionary power was also found to have had very limited effect in paragraph 44 of the *UNISON* judgment:

44. So far as concerns the Lord Chancellor's discretionary power to remit fees in exceptional circumstances, in practice this power to remit has rarely been exercised. It was exercised 31 times during the period between 1 July 2015 and 30 June 2016: a period during which 86,130 individual claims were presented. It was exercised 20 times during the period between 14 July and 22 December 2016.

The Help with Fees Process

55. It is the IWP cohort who will be applying for HwF. This cohort will have more persons with lower literacy levels, lower rates of speaking English as a first language. The HwF form is 8 pages long and requires detailed information[12]. For many, they will simply be deterred by needing to complete this form alongside and in addition to the ET1.

The temporary effect of dismissals on capital

56. No remission is available if the claimant is treated as having £4,250 or more in disposable capital (which in most cases will include their partner's disposable capital). Some claimants might have temporarily inflated capital balances due to the circumstances in which their employment terminated. For example, it is reasonably common practice for employers to make payments to employees in lieu of their notice period on termination of employment.

[12] https://assets.publishing.service.gov.uk/media/65cc8b5f39a8a7000f60d502/EX160_1123.pdf

57. By way of example, an employee with an entitlement to one month's notice might receive a final payslip which included their normal pay up to the termination date plus a month's pay in lieu of their notice period. Clearly, this would have the effect of inflating their disposable capital for a finite period, despite the very real prospect that they could remain out of employment, and thereby without employment income, for a substantial period thereafter. In these circumstances, it would be perverse to deny the claimant the right to fee remission.

HwF must be based on current circumstances

58. Likewise, the assessment of total monthly income should be based on current financial circumstances not skewed by income prior to dismissal, and the information about remission of fees and evidential documentation required should reflect this. For example, if a claimant is currently unemployed (for example due to their employment having recently been terminated) the wages element of their total monthly income should be nil and should not affected by pre-termination wages. This is a proportionate approach taking into account the reality that the claimant is reasonably likely to enter a period of financial hardship.

HwF Practical Difficulties

59. Claimants who are able to identify their eligibility for full or partial remission might not have the documents readily available to evidence their means. For example, in circumstances where employers fail to provide payslips for whatever reason or payslips have not been retained by the employee, claimants would be hampered in their ability to produce relevant evidence. This is particularly high risk for claimants with a disability. One member of the working party has first-hand experience of the High Court refusing Remission of Fees to a claimant who was unemployed and in a wheelchair being required to pay a Court fee for their Trial. But for the persistence of the claimant's solicitor in forcing Court staff to deal properly with the Remission of Fees Claim, that claimant could have been prevented from obtaining justice. That claimant eventually succeeded in his claims in the High Court because the time limit for his commencing his proceeding was not 3 months as in the ET but 3 years. Remission of fees must be properly adapted to the ET and measures implemented to ensure such claimants are not unfairly denied the opportunity to claim due to failings in the fee remission process.

The title 'Help with Fees' could mislead a claimant

60. We consider that the title "Help with Fees" risks giving prospective claimants a misleading impression that only some limited discount to fees is available. In our view, the title does not make it clear enough to claimants that they could be eligible for a full fee remission.

Lack of clarity on HwF process

61. It remains unclear what would happen if a claimant presented a claim without paying the fee but it is accompanied by an application for fee remission and also if the application is invalid or incomplete. In particular, claimants should not be prejudiced by the passing of time limits after a claim has been presented by issues regarding their entitlement to fee remission. By this we mean that if a claimant presents a claim with an application for fee remission which is invalid, they should be permitted a period of time to appeal the assessment of their application and/or rectify any error before the claim is dismissed.

62. In our view, the appropriate sequence would be as follows:

    62.1. claims presented with neither the required fee nor a duly supported and valid application for remission should nevertheless be treated as received by the Tribunal on the date of actual receipt, and recorded as such, so that the running of time will not affect the Tribunal's jurisdiction to hear the claim if the fee issue is subsequently resolved (by payment or grant of remission);
    62.2. Respondents should be notified of claims treated as received on this basis (because otherwise they might be unaware of the claim until after the expiry of the limitation period and might then proceed to destroy relevant documentation to comply with GDPR requirements) and should be sent a copy of the claim form at that stage so that they are aware of the nature of the claims made; but they should be informed that no response will be required unless and until there are so notified;
    62.3. claimants should be required by the Tribunal administration to pay the fee, or provide whatever documentation to support an application for remission may be specified, within 14 days of being sent notification to that effect, or 14 days in advance of a final hearing. The letter informing them of these requirements should make it clear that the claim may be struck out if there has not been compliance with the 14-day period; and
    62.4. once a claimant has complied with the requirement to pay a fee, or has been granted remission, the hearing should proceed in the usual way.

63. The current online system could not cope with a HwF process. Further, it is not clear how long each application would take to determine.

Hypothetical claimant to evidence deterrent effect

64. The ELA suggests that any fee may act as a deterrent for LiP and those experiencing IWP. Claims within the ET need to be brought promptly and may arise at a time where other key essentials must be prioritised. Again, raising the question as to "whether the sacrifice of ordinary and reasonable expenditure can properly be the price of access to one's rights".

65. Take the hypothetical case of Aleisha, who is a lone parent and an employee doing a 48-hour week in the hospitality sector. She is not a member of a union. She embodies the challenges experienced by those seeking justice. She's now been dismissed because of absence. She faces the dual burden of navigating the labyrinthine tribunal process while contending with stress-related health issues. Her priority is to find new work even though she considers her dismissal to be unfair and her wages/final pay calculation to be incorrect. The barriers for her are as follows:

    65.1. She does not know her rights.
    65.2. There are no employment advisers locally offering free legal support.
    65.3. She finds out she must contact ACAS.
    65.4. She does this and starts Early Conciliation.
    65.5. She is asked to think about settlement.
    65.6. She has no-one to ask.
    65.7. She is told about the fees and the time limits for taking a claim.
    65.8. She cannot afford the fees as she has to pay for childcare and is also looking for work.
    65.9. The time limit is also problematic because she must produce additional financial information (and if not a lone parent then also from her partner) and requires further time to complete the 8-page form and potentially produce additional evidence.
    65.10. She is told she can claim an exemption but would have to prove her financial status with bank statements and P45/P60.
    65.11. She is overwhelmed by the procedural requirements and she drops her claim.

    The above is an illustration of the real and present barriers to access justice posed by this proposal to reintroduce the payment of fees into an ET system where limitation periods are extremely short.

Impact on equalities

Fundamental Right

66. The right not to be subjected to discrimination is a fundamental right protected in primary legislation and it is a principle that should be beyond the influence of financial barriers. The working party has considered the potential repercussions on equality following the introduction of fees. The starting point is that an additional fee/means-test regime predicated on an individual's savings and earnings presents unjustifiable detriments to the following groups:

    66.1. Ethnic minority communities;
    66.2. Women;
    66.3. Pregnant workers; and
    66.4. Those with disabilities.

    Finally, we illustrate this with a hypothetical example.

Disproportionate Impacts

Ethnic Minority Communities

67. First, the equality statement says that "individuals from a black, Asian or ethnic minority background….. are likely to be over-represented in ET claims and will be disproportionately adversely affected by the introduction of any fee." Poverty rates are very high in some minority ethnic groups. Between 2019/22-21/22 51% Pakistani, 53% Bangladeshi[13] households lived in poverty. Further those in households headed by someone from an Asian background other than Indian, Pakistani, Bangladeshi or Chinese, or by someone from Black African backgrounds, were twice as likely as those in white households to be in poverty in the UK (39% and 42% respectively versus 19%), while people in households headed by someone from Black Caribbean backgrounds were 50% more likely to experience poverty than those in white households (28% versus 19%). These groups are therefore more likely to be constituents of the 'In-work poverty' cohort. Whilst the Government relies on justification by its HwF scheme and or the exceptional power we address these matters under deterrence and also on our comments directly on the schemes.

Women

68. Most lone parent families are headed by women and lone parent families have the highest poverty rate of any family type[14].

Pregnant women

69. ET fees will be particularly restrictive for pregnant women who want to uphold their right to paid time off for antenatal appointments. The financial compensation where an employer refuses to pay for ante natal leave or refuses to allow an employee to attend ante natal leave, is likely to be less than £55 in a lot of cases. Where the fee is greater than the financial award, many pregnant workers could be put off from bringing claims. Charging fees for employment tribunal claims puts the justice system out of reach for women at a time when they are most in need of protection. The Women's Budget Group reported in July 2023 that 'a decade on from major changes to legal aid, women have been disproportionately affected, leaving them without essential support to fight discrimination[15]'. Further, pregnant women and those on maternity will suffer a drop in their income as a result of the taking of maternity leave.

[13] UK Poverty – The essential guide to understanding poverty in the UK – Joseph Rowntree Foundation pp.11, 45.
[14] Ibid, p.37
[15] Gender Gaps in Access to Civil Legal Justice, Thursday 13th July 2023
https://wbg.org.uk/analysis/reports/gender-gaps-in-access-to-civil-legal-justice/

Those with disabilities

70. We note that in 2021/22, 31% of disabled people were in poverty[16]. This was even higher (38%) for people with a long-term, limiting mental health condition. Higher poverty rates for disabled people are partly due to the additional costs associated with disability and ill health and partly due to the barriers to work they face. The impacts are likely to be disproportionate for this cohort of employees.

71. Persons with disabilities, particularly those with mental health issues are likely to find the process of apply to a Tribunal and then complying with HwF more difficult and therefore it would be anticipated that the impact would be disproportionate to this cohort.

Hypothetical claimant

72. A hypothetical claimant for which the fees would have no or little impact based on equalities would be a white individual, with no disabilities, aged 44 or under, with an individual income of over £29,500 with no children, or with a joint income of over £50,000 or above with 2 children.

73. Mo, a migrant worker, employed in a care home, faces language barriers and heightened vulnerability due to his employment status. He is not a member of a trade union and is completely unaware of his rights. English is his second language. He cannot afford legal representation. He would face all the same challenges as Aleisha mentioned above but with the added worry of potentially losing his sponsorship and trying to navigate the now even more complex ET procedures with limited English.

The economic justification for the proposed fee scheme

74. Two of the three rationales for the fee proposals are economic. Namely, so that Tribunal users contribute to the cost of the operation of ETs and so that funds can be reinvested to fund the system and contribute towards ACAS. The economic justifications for the proposed scheme fail to consider the following:

    74.1. The proposed fee scheme will cost more to implement and run than it will raise;
    74.2. The benefit to taxpayers of the Tribunal System;
    74.3. The cost to business of failing to enforce employment rights consistently; and
    74.4. Further hearings will be caused by the scheme creating further cost and delay;
    74.5. Diversion of scarce administrative resources to implement and run the scheme;

[16] UK Poverty – The essential guide to understanding poverty in the UK – Joseph Rowntree Foundation p.11

The proposed fee scheme will cost more to implement and run than it will raise

75. We note that the capital and resource costs of implementing the previous Fees Order regime were around £6.0 million. While the collection costs were estimated to be between £0.3 and £0.4 million in 2013-14, that was against the backdrop of a significantly reduced number of ET claims.

76. However, the fees in this proposal will be loss making. In fact the Impact Assessment sets out that they will have initial costs of £500,000 before implementation followed by costs of between £10.6 and £13.1 million over a ten year period. Whereas the benefits to the tribunal system will be work between some £10.1 and 12.6 million. As the costs exceed the benefits to the Tribunal system it is clear that neither of the economic considerations can therefore rationally support the proposal. The proposed scheme is uneconomic. It would cost more than it raises and could not provide any excess income for investment into the system. It would do the opposite and drain the Tribunal system of already scarce resources. Accordingly, the proposal has no Net Present Value to the Government or to the Tribunal System but an estimated Net Present Cost of £500,000.

Failure to consider the benefit to taxpayers of the Tribunal system

77. A scheme mainly to reduce the cost to the taxpayer raises questions as to whether the lessons from *UNISON* have been fully understood by Government. As the Supreme Court held, "access to the courts is not, therefore, of value only to the particular individuals involved". Lord Reed pointed out that the importance of the rule of law was not always understood, and that[17]:

    "It is epitomised in the assumption that the consumption of ET and EAT services without full cost recovery results in a loss to society, since "ET and EAT use does not lead to gains to society that exceed the sum of the gains to consumers and producers of these services".

78. Lord Reed went on to explain that decided cases are relied on to determine if a case is meritorious and worth pursuing:

    "every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless".

[17] Ibid -paragraph 66

The cost to business of failing to enforce employment rights consistently

79. Parliament passes laws so that they are enforced. Employers who avoid or evade their obligations under the law do so, in the most part, so that they can reduce their costs. This allows a cohort of evading / avoiding employers to operate their business at a lower cost than those who carry-on their business lawfully and, for instance meet their obligations to pay workers holiday pay and or the national minimum wage. As the principal mechanism of enforcing employment rights in Great Britain falls on individuals to bring their cases, there is a benefit to business if the employer who underpays or avoids their rights is held to account by its employees.

80. Further, no assessment has been made of the impact of additional hearings that would be caused wholly by the fee scheme. For example, if a claim is not accompanied by the correct fee or a remission claim, where presented close to the expiry of the relevant time limit, this will give rise to preliminary hearings to consider whether time should be extended.

Diversion of scarce administrative resource to implement and run the scheme

81. It is accepted by all users that the ET service is understaffed and has significant issues handling the existing workload. Additional resource would have to be diverted to handle the complexities of processing fees and the HwF system. The ET backlog stood at 438,000 cases at the end of September 2023.[18] In London South ET, for example, short and standard track claims (i.e. claims for unpaid wages/holiday pay and unfair dismissal) are being listed up to a year in the future. The proposal will simply divert resource from an overstretched system. [19]

Q2. DO YOU AGREE WITH THE MODEST LEVEL OF THE PROPOSED EAT APPEAL FEE? PLEASE GIVE REASONS FOR YOUR ANSWER.

82. No. We adopt the matters set out above. We set out in this section the particular factors which are also particularly relevant in the EAT. We consider that the proposals fail to consider the position of the EAT, and of the wide and general importance of EAT cases, under the following headings:

    82.1. Fail to consider the distinct position of the EAT;
        82.1.1. The heightened formalities and technicalities involved in the EAT;
        82.1.2. For many appellants, employment tribunal fees will in fact amount to £110;
        82.1.3. The relatively compressed timeframe for submitting an appeal;
    82.2. Cases to the EAT have wide and general importance;

[18] Ministry of Justice, *Tribunal Statistics Quarterly: July to September 2023* (Tribunal Statistics Quarterly: July to September 2023 - GOV.UK (www.gov.uk)

[19] Examples of listing delays present in system: Preliminary Hearing London South ET Thursday 14 March 2024 10-day listing for 2026, Bristol ET PH 7 August 2023 7-day listing January 2025, Manchester ET PH 30 October 2023 5 day listing May 2025.

82.2.1. The increased importance of appeals to the EAT post BREXIT;
82.2.2. The increased importance of low value cases in clarifying post BREXIT law.

Failure to consider the distinct position of the EAT

83. As observed in the Government's response to the consultation on Charging Fees in ETs and the EAT 13 July 2012 (**the 2012 response**), the topic of fees in the EAT tends to attract less attention than fees in the ET (paragraph 221). In our experience, that is also borne out in the academic literature on the previous fee scheme. It was evidently an assumption underlying both the Government's consultation on the previous fees scheme, and the litigation which sought to challenge the previous fee scheme, that the impact of fees in the ET was representative of their impact in the EAT (for instance, A. Adams and J. Prassl, "Vexatious Claims: Challenging the Case for ET Fees' (2017) 80 *Modern Law Review* 412-442 at footnote 11).

84. However, as the Government will know, there are important differences between the functions of the ET and EAT, and members of this working party have very considerable experience of conducting cases for both employees/workers and employers in the EAT. Yet, notwithstanding the Government's aim for "simplicity" in its proposed fees regime, there appears to be little articulation or appreciation of those differences in the Government's current proposal or the current impact assessment, save for references to how claims/appeals are processed, and their respective limitation periods (for instance, paragraphs 37 and 54 respectively of the current consultation.

85. Accordingly, we are concerned that the Government appears not to have given separate and bespoke consideration to the rationale and justification for the introduction of fees in the EAT, informed by the unique remit and responsibilities of the EAT. In our view, this needs to be done and a failure to do so risks a repeat of past mistakes. We hope that our discussion below will go some way to explaining why.

86. The first important distinction between the EAT and ET concerns access to justice. We would ask the Government to reconsider and assess how issues of access to justice may play out in the specific context of the EAT given the following factors.

The heightened formalities and technicalities involved in the EAT

87. Individuals face growing barriers when engaging with the ET systems generally, such as the costs of legal representation, low levels of compensation, feelings of intimidation at the prospect of self-representing and increased legalism (see for instance: (i) N. Busby and M. McDermont, "Fighting with the wind: claimants' experiences and perceptions of the employment tribunal' (2020) 49(2) *Industrial Law Journal* 159-198; (ii) , S. Corby and P Latreille, "Employment tribunals and the civil courts: isomorphism exemplified' (2012) 41(4) *Industrial Law Journal* 387-406; and (iii) Unison's arguments

in *R (on the application of Unison) (No. 2) v The Lord Chancellor v Equality and Human Rights Commission* [2014] EWHC 4198 (Admin), at paragraph 47).

88. Yet such barriers are arguably even more pronounced in the EAT which, in our view, is an altogether more formal and less inviting forum, especially for LiPs. Far from the fact-finding and lay members they encountered at first instance (though we note that recent changes will mean that lay members are now just as unlikely to feature in the ET as the EAT), parties in the EAT often find themselves before a senior judge having to make submissions on technical points of law. In our experience, that alone is enough to deter some individuals from appealing. If fees were added on top, of any amount, we have serious concerns that this will only compound the perceived inaccessibility of the EAT.

For many appellants, employment tribunal fees will in fact amount to £110

89. The Government's calculations regarding "affordability" overlook the extent to which submitting an appeal is likely to represent the *second time* that an individual will have had to pay £55. In 2022/2023, appeals by those who were also claimants at first instance made up 80% of those dealt with at a preliminary hearing; and 73% of those disposed of at full hearing (Tribunal Statistic Quarterly: April to June 2023, ET and EAT 2022 to 2023, tabs E12 – E13: https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2023 – statistics to which the Government refers at footnote 15 of the current impact assessment). Thus, in the vast majority of cases, an individual will have, in fact, paid £110 by the time they submit their appeal.

90. In our view, the prospect of having to pay £55 for a second time, especially if the appeal is the result of perceived failings in the first instance decision, will invariably mean that a number of meritorious appeals are not pursued. It also follows that the Government's discussions and calculations regarding: (i) disposable capital; (ii) remedies (especially low value and non-monetary awards); and (iii) personal costs, at paragraphs 51, 57 and 58 respectively of the current consultation, are inaccurate insofar as appeals are concerned.

The relatively compressed timeframe for submitting an appeal

91. The Government is right to consider the length of time it may take a party to acquire the requisite £55 to issue or appeal. However, we have concerns that the Government has not fully appreciated quite how stark the difference is between the ET and EAT. In contrast to the 3 or 6 month limitation period (plus the early conciliation period) applicable to claims in the ET, the 42 days available to a prospective appellant means they have between one third and one half of the length of time to acquire the £55 fee that a prospective claimant typically would. We hope that the Government will fully factor this discrepancy into its decision-making.

Cases to the EAT have wide and general importance

92. The second important distinction concerns what might be termed the broader societal benefits of employment tribunal litigation. Regarding the EAT specifically, these arise from its unique powers and responsibilities in relation to the maintenance and development of labour law and the ETs. They can be summarised broadly as: (i) to clarify the law and to set precedent; (ii) to maintain public confidence in the ETs by overturning injustices and correcting first instance errors of law; and (iii) to maintain standards and consistency by issuing guidance to ETs and employers.

93. The 2012 consultation and the 2012 impact assessments demonstrated a worrying lack of appreciation for these broader societal benefits, both in relation to the EAT and generally. Further, though concerns were raised by respondents to the 2012 consultation that fees may adversely affect the EAT's ability to perform certain of the aforementioned functions, the Government, in our view, did not properly engage with such concerns (paragraphs 221 – 224 of the 2012 Response). These benefits were well summarised by Lord Reed in UNISON as follows:

"70. Every day in the courts and tribunals of this country , the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless…..

"71 But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand , that they will be able to enforce their rights if they have to do so, and , on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable."

94. Regrettably, it seems that the Government appears again to have overlooked how employment litigation, both in the ET and EAT, can benefit wider society. The Government's description of "proportionality" at paragraph 55 of the current consultation is a case in point, in that it frames the issue of fees solely from the perspective of those who *use* the ETs as opposed to those who stand to *benefit despite not using* it. We also note that such considerations are absent from the current impact assessment. We are therefore concerned that the Government's approach will again fail fully to understand the impact of fees in the ETs unless proper regard is paid to these broader societal benefits. By way of example, one of the members of our

working party was involved last year in a case in the EAT- *Higgs v Farmor's School* [20]- where the EAT gave important guidance as to the factors that are likely to be relevant when assessing whether, and to what extent, an employer can properly object to the manifestation of a protected belief by an employee. This followed earlier decisions of the EAT which gave equally valuable guidance as to the range of beliefs that are protected under the Equality Act (*Nicholson v Grainger*[21]*, Forstater v CGD*[22]). Given the importance of this issue to so many in the workplace, this is invaluable guidance to both employers and employees which is likely to assist in an understanding of their respective rights and equally likely to enable any disputes that arise to be settled in the workplace rather than in the tribunals. This in turn would result in fewer of this type of claim having to be administered by the ETs.

95. That is particularly the case with the EAT, given the unique and extensive ways in which its work, for the reasons above, is often relevant to issues that go beyond the interests of the parties before it. Given the inherent public benefit of such work, our view is that it is wrong in principle that a party should have to pay any fee when lodging an appeal; even more so where that appeal turns out to be well-founded because of an error of law at first instance.

96. Further, for every party deterred from appealing because of the new £55 fee, there will be a corresponding loss of opportunity for the EAT to discharge its unique functions in relation to labour law and the ETs. That in itself is cause for concern. But we would also argue that present circumstances demand, if anything, the *removal* of potential deterrents and barriers to appeal, as opposed to the creation of new ones (in the form of fees or otherwise) particularly at a time when so many are struggling, through no fault of their own, with the costs of living.

The increased importance of the EAT post Brexit

97. UK employment law is currently in a state of profound flux. Following the introduction of the Retailed EU Law (Revocation and Reform) Act 2023 (REULA), many areas of UK employment law are now considerably less certain than they once were, including judges' interpretative powers. Further, several pieces of new legislation have recently been enacted on such issues as family-friendly rights, anti-discrimination and working time. Accordingly, there is, at present, an unusually high volume of employment law-related issues that remain untested, creating risks and uncertainty for employers of every size and sector. The EAT will play an indispensable role in settling this new law and, in our view, any measures that could upset or interfere with this process should be viewed with extreme caution.

[20] [2023] IRLR 708; [2023] ICR 1072
[21] [2010] 2 All ER 253; [2010] IRLR 4
[22] [2021] IRLR 706; [2021] All ER (D) 62

98. In addition, both the number of appeals submitted, and those disposed of at final hearing, have been in steady decline in recent years. Appeals to the EAT have yet to return to the levels which they were at prior to the previous fees scheme, with those submitted in 2022/2023 comprising just 62% of those submitted in 2012/2013 (Tribunal Statistic Quarterly: April to June 2023 etc. at tab E11). Further, the number of appeals disposed of at final hearing, as a percentage of total appeals submitted, appears to be in freefall, with 18% so disposed in 2019/2020; 12% in 2020/2021; 10% in 2021/2022; and 7% in 2022/2023 (*ibid*.). Thus, the clear and concerning trend is that the EAT is being afforded ever-diminishing opportunities to discharge its vital functions.

The increased importance of low value cases in clarifying post BREXIT law

99. It is also important to recognise how the EAT's caseload is likely to be affected by the imposition of fees in both the ET and EAT *at the same time*. This can distort the types of claims and legal issues that make it through for determination by the EAT, which, in turn, can hamper the EAT's ability to clarify important areas of law and to issue guidance. It would be most unfortunate, for instance, if the nature of those claims and issues were skewed because only those with the appropriate resources were able to take advantage of the EAT.

100. By way of example, an area of particular concern are the new rules around holiday pay. Many practitioners remain unclear as to how they will work in practice and look forward to EAT authority which clarifies this issue. Yet claims for holiday pay are typically among the lower value claims that can be pursued. They are therefore among those most likely to be deterred from being issued, on the basis that fees of £55 render it irrational and/or futile to do so. As a result, there is then a diminished pool of holiday pay claims that have been determined at first instance from which potential appeals can be made. Of that diminished pool, a further proportion may then be then deterred from being appealed by the £55 payable at *that* stage. Thus, the remoteness of EAT authority in this area of law (and others) can be compounded by the dual operation of fees at both first instance and on appeal. Such claims may be individually small, but collectively important to both employers and employees.

Conclusion

101. We conclude with two general observations:

    101.1. While we do not recommend increasing the proposed level of fees, we have serious doubts that £55 payable on appeal would make any meaningful contribution towards the running costs of the ETs. Over the last five years, there was an average of 1,322 appeals per year (Tribunal Statistic Quarterly: April to June 2023 etc. at tab E11). A fee of £55 per appeal would therefore bring in, on average, less than £73,000 per year. And that is without factoring

in: (i) the new administrative costs that will likely be incurred in processing the payment of fees; and (ii) the likely reduction in the number of appeals submitted following their introduction. Put simply, we question whether charging appellants £55 is really worth it, especially given the risks discussed above of doing so.

101.2. A prospective appellant is not obliged to engage with ACAS, prior to appealing or otherwise. Accordingly, to the extent the level of fees has been designed to ensure that parties to an appeal pay their fair share for ACAS' services (as would seem to the case at paragraph 17 of the current consultation), that is not the case. This also means that prospective appellants, especially LiPs, are not afforded the same opportunity as prospective claimants to have the options open to them in relation to an appeal explained to them by an impartial third party free of charge. Given that, our view is that natural justice requires that any fee should in any event only be payable once an appeal is considered to have been properly constituted and passed the sifting process.

Q3. DO YOU BELIEVE THIS PROPOSAL MEETS THE THREE PRINCIPLES SET OUT ABOVE? PLEASE GIVE REASONS FOR YOUR ANSWER.

102. For most tribunal users the fees are affordable and simple. The fee proposal is simple for those who can and do pay the fee. However, for those who cannot afford, and are least likely to be able to afford the fees are neither affordable nor simple.

103. The proposals are complex for those who are unable to pay or who seek help with fees for the reasons we set out above.

104. Given the fact that the fees are loss making, will generate no resources and not incentivise the majority, who can afford the fees to consider settlement, the policy objectives are incapable of justifying this disproportionate interference with the right of access to justice on those who cannot afford the fees.

105. Further the fees, as we set out below under Q5 fail to exempt low value and other claims and are likely to render litigating such claims irrational or futile.

Q4. 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.

106. *Unison* did not rule out the introduction of ET fees. It also made clear that where primary legislation intrudes on an individual's access to justice, such an intrusion will be subject to an implied limit and require justification [§§88-89]. A fee will be lawful where it is set at a level that everyone can afford [§90]. A fee that makes it futile or irrational to pursue a claim because of the remedy sought is non-financial or relatively modest in sum, also obstructs access to justice [§96].

107. Our view is that the higher the fee then the more likely it is to be unlawful. For the reasons set out above ELA considers that the current proposal is not a lawful one.

Is there a consensus on charging fees in the ET and or EAT

108. ELA's response to this consultation indicates that there is no consensus about charging fees:
    108.1. 48 organisations, including trade unions, Citizens Advice and Maternity Action, are vigorously opposed to the proposal, calling it a green light for exploitation of workplace rights.
    108.2. A 31 January 2024 article from People Management, which bills itself as the UK's leading HR media brand, cites six individuals, three of whom express at least some support for the reintroduction of fees. The first caveats this by noting that the reintroduced fees would only amount to a "very small" percentage of running costs. The second posits that the fee would lead to a reduction in cases going forward, particularly for low-value matters – in other words, precisely the kind of access to justice concerns deprecated in *Unison*. The third suggests that reintroducing fees is a move likely to be welcomed by employers, by discouraging "spurious" litigation.
    108.3. Similarly, on 1 March 2024 an article from the same site, was relatively ambivalent but concluded that it was "difficult to justify the business case" for the proposed £55 fee.
    108.4. Working party members' views reflect this division in public opinion. Some highlighted the use of fees elsewhere in the court system. Others raised concerns about the deterrent effect on low-income claimants, the reduction of checks and balances on employers' conduct, and the possibility of greater confusion that fewer appellate decisions could entail.
    108.5. It therefore appears that whilst there is no consensus, even those who might support fees in principle are reticent about the proposal under consultation, as it represents poor value for money.

Is £55 an appropriate level to set fees at?

109. Members have varying views on whether £55 is an affordable sum. Additionally, there appears to be a general consensus that the revenue that will be generated by the £55 fee is very low compared to the ET's running costs.

    109.1. It is obvious that £55 represents a significantly lower sum than the fees introduced in 2013, which ranged from £160 to £1200.
    109.2. There is a substantial risk that the proposed fee of £55, in a climate where some 25% of households are struggling to cover their most basic costs, is insufficiently low to ensure that litigants are not denied recourse to the ET by virtue of their low income or existing difficulty in covering the costs of food, rent and energy bills. We address this in detail above.

109.3. Further, it is difficult to see how a fee that raises such a low proportion of the overall budget would justify its imposition and any consequential restriction on access to justice as lawful per *Unison*. Again, we address this above.

109.4. Should any expansion or improvement of Help With Fees be implemented to mitigate any chilling effects on litigation by low-income claimants, this would no doubt increase the administrative costs of the scheme and so overall running costs.

109.5. As such it appears that setting the fee at £55 pleases no one. The figure is likely to be a material hurdle to bringing meritorious claims for those on low incomes or with low-value claims, but too low to represent a meaningful contribution to HMCTS' running costs. It is recognised that these are both critical factors in setting the level of any proposed fee and that they exist in fundamental opposition. This might indicate the inherent unsuitability of requiring ET fees without a robust, efficient and generous fee remission system.

110. In conclusion, there is no existing consensus as to whether or not fees should be charged and little can be gained from comparing the ET to fee-charging forums such as the small claims track. There is nevertheless consensus that the proposed sum of £55 is inadequate, as it represents a significant cost to the most disadvantaged but will make an inconsequential contribution to Tribunal administrative costs.

Q5. ARE THERE ANY OTHER TYPES OF PROCEEDINGS WHERE SIMILAR CONSIDERATIONS APPLY, AND WHERE THERE MAY BE A CASE FOR FEE EXEMPTIONS? PLEASE GIVE REASONS FOR YOUR ANSWER. IN RESPONDING TO THIS QUESTION, THE WORKING PARTY

111. The working party has considered the categories of cases that would benefit from a blanket fee exemption:

111.1. Some collective claims;
111.2. Low value claims;
111.3. National Minimum Wage / Living Wage claims;
111.4. Interim claims;
111.5. Declaratory relief;

We also deal below with some practical considerations.

112. The proposal has set out three very limited exceptions to the fee scheme on pages 12 and 13 of the proposal document. These are exceptionally limited claims, and do not seem to address the points raised by responses to previous consultations on a fee scheme within the ET. Although the Government's suggested approach appears logical on the face of it, the working party considers that this approach to be too narrow approach to fee exemptions and that it is neither fair nor practically workable.

Some collective claims

113. On collective claims, particularly those that involve protective awards (such as redundancy cases or cases involving a failure to comply with information and consultation obligations under TUPE), ELA questions if the application of fees to such claims is appropriate taking into account the particular characteristics of such claims. Awards in these claims are not compensatory in nature, they are uniquely punitive. Also, these claims are limited to a class of persons with the right to issue such proceedings, with this usually being done by unions or employee representatives. In the view of this working party it would be wrong to charge employee representatives who are bringing claims on behalf of those they represent a fee to do this.

Low value claims

114. Low value claims must also be given due consideration for exclusion (or at least claims that are for a sum below a fixed value) that are based on quantifiable sums (akin to a debt) e.g. for holiday pay, unpaid commission, or other contractual benefit. Most of these claims are generally brought by lower paid workers, and are often disposed by default judgment, brief short track hearing or shortly settled after issuing of a claim. Unless these claims are exempted there is a risk of futility. We would propose that any claim below £300 is, accordingly, exempted from any fees.

National Minimum Wage / Living Wage claims

115. In relation to claims involving the National Minimum Wage, or Living Wage, where the fact that these claims will be brought by individuals claiming to have received less than this figure, these individuals be less likely to afford to pay any fee involved in bringing a claim. A fee could have the result of being a deduction on their claim reducing it so that they do not recover the National Minimum Wage or the Living Wage. Accordingly, Government should exempt this class of case so as to protect the claimant's right to the minimum wage. In addition, failure to pay the National Minimum Wage or the Living Wage may be a criminal offence. It seems inappropriate to us that individual claimants should have to pay a fee in cases where their employer is potentially criminally liable.

Interim claims

116. There are some claims that require no intervention of ACAS, such as an application for Interim Relief. Interim Relief claim requires no ACAS Early Conciliation process to be engaged and has a strict, exceptionally short, timescale to issue. Under the proposal, a claimant seeking to bring this claim has a new burden applied to them whilst seeking to comply with a time scale that has no possibility of extension. Failure to pay or issues with payment could lead to a claimant losing a right before the ET if payment fails or is denied or a remission application is pending outcome. Any fee should be delayed until after the resolution of the Interim Relief hearing

Declaratory relief

117. Any claims seeking declaratory relief only should also be exempt as there may be no compensation (for example, for written particulars of employment). Otherwise a fee would render such a claim inevitably loss making to a claimant and potentially futile.

Practical considerations for exemptions

118. There is yet no indication that the ET1 form, or the online portal, will be adapted to provide clear, simple and easy to understand guidance on how to engage an exemption on instigating proceedings. The listed claims are effectively the Insolvency Service scheme claims, which are relatively complex and are likely to be poorly understood by the majority of claimants. Guidance will also be needed on what happens if a judge considers these applications and states that the claim is not one that meets the exemption criteria, are claimants put in the same position of those who have issued a claim with a defect and only once this defect is rectified will it be considered correctly issued, with jurisdictional issues on time limits being raised? Currently the myHMCTS portal and/or ET claim form is ill designed for any exemption process.

Q6. 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. PLEASE GIVE REASONS FOR YOUR ANSWER.

119. The working party has considered the various factors that may affect a potential claimant's decision to bring a claim in the ET, including:

119.1. Claimant feels unfairly treated;
119.2. Claimant has no other option;
119.3. Fees and other associated costs;
119.4. Prospects of success and remedies available;
119.5. Access to legal advice;
119.6. Misinformation shared in communities and on the internet/social media platforms;
119.7. Time limits;
119.8. Delays in the ET process;
119.9. Ability to enforce a judgment and recover a financial award;
119.10. Fear of repercussions both at work and on immigration status.

120. In our experience, there are a multitude of factors which inform the decision as to whether an individual brings a claim in an ET ("ET"). Whilst some of these factors are more significant/important for some individuals than others, employment disputes are often personal in nature, and it is not uncommon for individuals to have one or more different reasons for seeking redress through the ET system.

121. We set out below a summary of common factors which are often seen in practice as reasons for bringing ET proceedings or barriers for individuals to do so.

Claimant feels unfairly treated

122. The vast majority of Claimants decide to make an ET claim because they feel they have been poorly treated or 'wronged' by their employer/an organisation with whom they work. Their decision to pursue litigation is often motivated by a sense of injustice or unfair treatment and through a belief that the ET process will help uncover the truth and give them a judicial and public finding that they were treated unlawfully. Most claimants also bring claims for financial gain, so they are compensated in monetary terms for their wrongful treatment.

123. Whilst, we do have some experience of claimants bringing claims for other reasons, for example, motivated by a desire to cause aggravation/in a vexatious way, or to seek to punish their managers/employer, or tactically because of the more favourable cost/fee regime in the ET where they can obtain findings of fact to be used in other legal proceedings, these tend to be exceptional cases rather than the normal day to day work of many employment lawyers.

Claimant has no other option

124. Despite the mandatory ACAS Early Conciliation process, and the active encouragement by the judiciary of ADR in the ET process, it is sometimes the case that prospective or actual claimants (particularly those working in the public sector) are unable to agree commercial terms to settle their dispute and avoid bringing or seeing through ET proceedings.

125. Some organisations are unable to make settlement offers to avoid proceedings, meaning that there is simply no option for a claimant who feels wronged other than to bring an ET claim and proceed to a final hearing.

126. Some organisations are unwilling to settle disputes at an early stage, or at all, because they believe the claims have little or no legal merit/prospects of success, or for tactical or other reasons such as testing the resolve of the claimant or deferring decision making because the delays in the ET system mean that significant costs won't be incurred by a respondent for some time.

127. Some organisations, particularly those not paying for legal representation, do not engage in the process at all and in exceptional cases take steps to shut down their business to avoid liability.

Fees and other associated costs

128. The fact that the ET forum is a 'no fee' environment where an individual can bring a claim without having to pay any court fees is a significant factor in access to justice for many individuals and their decision to bring an ET claim.

129. In addition, as an individual can represent themselves in ET proceedings (albeit they are often disadvantaged in some way when up against lawyers acting for respondents) this assists with the decision making to bring a claim.

130. The current costs regime in the ET system means that costs awards are rarely made, so most claimants can decide to bring a claim and litigate their case without fear of a costs award being made against them.

131. However, many weigh up issuing a claim against the cost of time needed to prepare their case, including time off from undertaking paid work to prepare documents and prepare for hearings, unpaid time off work to attend hearings and other costs such as childcare and travel.

132. In addition, the not-for-profit sector reports clients seeking support after receiving letters from respondents and respondent solicitors threatening them with costs orders in the event that they continue to pursue their claims. Even if there is no substance to this threat, many potential claimants do not understand the rules on costs and so feel worried and may withdraw their claims.

Prospects of success and remedies available

133. Some prospective claimants (particularly those who are able to pay for/access legal advice either through a union) will be guided by legal professionals and able to assess the legal merits of their claim at an early stage and obtain advice on the likely prospects of success if they were to bring an ET claim and the likely remedy if they were to succeed.

134. The likely prospects of success of a claim are often a factor in the decision making of an individual or group of prospective claimants as to whether they decide to bring an ET claim. However, in some instances, ET claims are brought where an individual or group has limited prospects of success based on the current law, either because they are backed by a legal adviser or trade union or group who are campaigning for a change in the law, or because the law in that area is developing and the individual wishes to help influence the position.

135. Some individuals also bring claims which have limited or low prospects of success for a variety of reasons, including because of a lack of knowledge of the law, inability to seek legal advice due to the absence of legal aid and the poor supply of legal advice in the not for profit sector, and sometimes an unwillingness to access legal advice or take the advice because they simply wish to try to elicit a financial settlement (hoping the organisation will pay out at an early stage to avoid the costs of defending a claim

or for reputational or other reasons) or because they feel aggrieved/a sense of injustice notwithstanding the fact the law may not be set up to protect them in that way.

136. For individuals who cannot afford to pay for legal advice or cannot access it through lack of supply in the not or profit sector, there are wide gaps in the public's knowledge on law in the workplace and this is a particularly acute problem for vulnerable workers including:

136.1. Those from migrant communities - many migrants do not recognise that they are being exploited or, if they do, are unaware that they have legal rights and recourse within the UK.[23] Recent research with over 400 Turkish and Kurdish workers showed that 40% of workers were not aware of any employment rights.[24]

136.2. Parents including pregnant women - a 2016 report prepared by IFF Research on behalf of the Department for Business, Innovation and Skills and the Equality and Human Rights Commission found that a lack of knowledge was a barrier to raising complaints.[25]

136.3. From sectors where there is higher risk of non-compliance with basic workplace rights, including those in cleaning, hospitality, domestic work, cleaners, construction, car washes and nail salons.[26] For example, the 2023 Resolution Foundation research into social care workers found that many were being paid below the minimum wage once travel time was taken into account. Many were not aware of this.[27]

136.4. Those on irregular contracts including zero hours contracts, agency contracts, gig economy contracts.[28]

137. In addition, the mislabelling of employment status means that many low paid workers, particularly in the construction industry, cleaning and care sectors are labelled as self-employed by organisations, often incorrectly. As they do not have the knowledge

[23] "Rights and Risks: Migrant labour exploitation in London Research report" Victoria Boelman, Dr Alessandra Radicati, Amelia Clayton, Sophie De Groot and Oliver Fisher June 2023
[24] "Perspectives of migrant workers from Turkey in London's labour markets" - Research by the Refugee Workers Cultural Association, funded by Trust For London.
[25] "Pregnancy and Maternity Related Discrimination and Disadvantage: Experiences of Mothers" Authors: Lorna Adams, Mark Winterbotham, Katie Oldfield, Jenny McLeish, Alice Large, Alasdair Stuart, Liz Murphy, Helen Rossiter and Sam Selner. 2016 p14
[26] "THE UNHEARD WORKFORCE Experiences of Latin American migrant women in cleaning, hospitality and domestic work" Nahir de la Silva, Lucila Granada and Dolores Modern Latin American Women's Rights Service July 2019
[27] Who cares? The experience of social care workers, and the enforcement of employment rights in the sector Nye Cominetti Resolution Foundation January 2023
[28] "THE GIG IS UP: PARTICIPATORY RESEARCH WITH COURIERS IN THE UK APP-BASED DELIVERY SECTOR" Focus on Labor Exploitation 2021

or skills to challenge this, they do not therefore understand that they may have legal claims or that the ET has jurisdiction to determine their claim.

138. This means that there are many workers do not make the decision to bring ET claims because they simply do not know they are being treated in an unlawful way.

139. Furthermore, while those who have access to legal advice are likely to be guided about the possible and likely remedies available in the ET, those who are unable to access legal advice often have a poor understanding of the potential quantum of claims meaning that they can often bring an ET claim under a misguided assumption that a remedy or amount of quantum is available when it is not.

140. In our experience, there can also be confusion about what compensation means in an ET in comparison with the civil courts where individuals also bring personal injury claims, for example. Some LiPs believe their claim is worth more than is realistic or they may feel the only way to obtain justice is for a judge to decide the value of their claim.

Access to legal advice

141. It remains the case that, in practice, for many individual citizens who cannot afford to pay, it is a challenge to secure any legal advice. The process of accessing justice in employment rights can be complex and it is generally seen as helpful to have support from an expert in workplace rights. However:

    141.1. Only 22.3% of employees are members of a Trade Union[29];
    141.2. There is no Legal Aid available for common complaints such as unauthorised deductions from wages, holiday pay claims or unfair dismissal;
    141.3. The not-for-profit sector is unable to meet demand as it is under-funded and under-resourced. There are often long delays in accessing services and they can usually offer no more than a one-off advice call.[30] The third sector relies on grant funding, with lawyers and caseworkers often in precarious employment positions, leading to a de-skilling of the sector and attrition of qualified advisors; and
    141.4. For low paid, non-unionised workers with no resources to pay for legal advice, there is often little option but to navigate the justice system alone.

142. We understand the services of ACAS are regularly sought by workers, but the feedback received is that the advice is often generic rather than specific to their particular circumstances and not especially helpful to individuals in their decision

[29] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1158789/Trade_Union_Membership_UK_1995-2022_Statistical_Bulletin.pdf
[30] "The impact of LASPO on routes to justice" Equality and Human Rights Commission Research report 118 Dr James Organ and Dr Jennifer Sigafoos, University of Liverpool September 2018

making as to whether to pursue particular legal claims against their employer in the ET system.

143. In addition, we understand that at times ACAS advice teams signpost individuals to the 'not for profit' sector when a person needs some tailored individual advice, but many will be unable to source the support they require in the time available before their time limits expire. Some of the organisations that ACAS refers to, such as LawWorks,[31] do not in fact provide first tier advice services and the caller will be referred on again, which takes time.

144. Due to the multiple services offered by ACAS, there is sometimes confusion around the different roles of the advice team and the conciliation team at ACAS. Some LiPs believe they have started the conciliation process when they have simply spoken with the advice team. There is also confusion around the role of ACAS in providing advice. The website states, "Acas gives employees and employers free, impartial advice on workplace rights, rules and best practice" and yet many individuals report that ACAS is unable to provide individual legal advice.

Misinformation shared in communities and on the internet/social media platforms

145. In the absence of access to legal advice, many individuals seek advice from their communities, and this is a factor in their decision making as to whether to bring an ET claim.

146. For example, migrant workers are disproportionately represented among NHS workers, carers, construction workers, cleaners, delivery drivers and farm workers. Ethnic minorities make up 42 per cent of the London cleaning workforce and migrant workers make up 53 per cent of its cleaning workforce.[32] The third sector is regularly contacted by migrants working in modern slavery conditions, facing discrimination, contract violations, abuse and exploitation, and unsafe working conditions. Many rely on instant messaging chats and other forms of 'WhatsApp' or other group chats with other workers from their countries of origin who often, unfortunately, share incorrect information from unreliable sources.

147. Some migrants are targeted by so-called "street accountants" who offer assistance for a fee through social media. They often provide incorrect information, and the workers end up losing money from the process and losing out on their ability to access justice through the ET system.

148. In addition, there is often misinformation shared on social media platforms. In the absence of access to free legal advice, there is an increasing reliance on advice from non-regulated resources such as social media platforms or the internet. For example,

[31] https://www.acas.org.uk/getting-legal-advice
[32] "If I Could Change Anything About My Work…" Participatory Research With Cleaners In The UK Focus on Labour Exploitation January 2021

over 53,000 members of just one Facebook group called “UK employment law and HR advice” share their thoughts on the employment issues of other members but as there is no regulation of the advice shared, there is no guarantee of the quality of the advice. Yet many individuals rely on the opinions of others to make decisions about their workplace issues and whether to ultimately pursue their employer through the ET process.

149. There is also confusion about the labour market enforcement regime. The UK labour market enforcement system is highly fragmented compared to many other countries. In addition to the local authorities, there are several enforcement bodies:

    149.1. Employment Agency Standards Inspectorate;
    149.2. Gangmasters and Labour Abuse Authority (GLAA);
    149.3. The Pensions Regulator (TPR);
    149.4. Health & Safety Executive (HSE);
    149.5. Statutory Payments Disputes Team;
    149.6. Equality and Human Rights Commission (EHRC); and
    149.7. National Minimum Wage Unit (HMRC NMW).

150. There is often very poor knowledge of these enforcement bodies with 61% of private sector employees saying that they would not know of any organisation to approach. Just 6% of private sector employees said they would approach one of the state enforcement bodies.[33] Often workers are left having no option but to bring a claim in the ET to seek to individually enforce their rights.

151. If one of the Government’s aims is to reduce the burden on ETs, then an increased use by the various enforcement bodies of their powers to enforce employment law on behalf of a number of employees reduces the need for individual claims but maintains an effective remedy for those employees.

152. We refer to the ELA Response to BEIS Consultation - Good Work Plan: Establishing A New Single Enforcement Body For Employment Rights for a further discussion on this topic.

Time limits

153. Time limits are another factor in the decision making of individuals as to whether to bring an ET claim. Many individuals are not aware of the strict time limits of three months less one day for most claims to be brought in the ET. This means that they are often ‘out of time’ to bring a claim by the time they even realise they have a claim that they wish to bring.

154. We understand that ACAS does not have a policy of telling people about time limits from the moment they first call, and this can cause confusion and frustration when

[33] Ibid p60

individuals realise that their case is out of time at a later point when they try to access the justice system.

155. When individuals do have knowledge of time limits, the decision to bring an ET claim is often made quickly due to short period of time left before the primary time limit expires. When individuals do not have access to legal advice, claims are frequently made without:

    155.1. knowledge of applicable rights;
    155.2. understanding of the merits;
    155.3. understanding of the burden of proof;
    155.4. an informed estimate of the potential award in the event of a positive outcome; or
    155.5. awareness of the possible risk of the employer not paying.

Delays in the ET process

156. Another factor in the decision-making process for some prospective claimants is the current delay in getting a claim heard in the ET. Whilst for some prospective claimants this is simply a fact of access to justice at this time, but for others this can be a key factor in their decision making as to whether to bring an ET claim.

157. Many individuals who wish to access the ET system have either lost their job (and therefore income) or have not been paid the remuneration they believe they should have received and often they cannot afford to wait for a lengthy period of time for that income to be replaced. They therefore need to find new work and start to receive income again swiftly.

158. Others choose to focus their energy and efforts on finding new work rather than bringing proceedings, as the fact that they will need to wait for a lengthy period of time for a hearing (and potentially longer to access any money) can deter some individuals from bringing an ET claim.

159. Others may start proceedings but due to the stress involved in litigation which can affect their mental health, some litigants lose their fight and either choose not to continue their claim at any interim stage or simply abandon it before they reach the final hearing stage.

Ability to enforce a judgment and recover a financial award

160. Another factor in the decision making of a prospective claimant is whether, ultimately, the ET process will enable them to recover any financial sums owed to them, even if they are successful at a final hearing.

161. Whilst the ET process can produce a judgment in a claimant's favour, that judgment does need to be enforced which is a separate process. Some organisations refuse to pay awards even where there is an adverse judgment against them, knowing that the claimant will need to bring a separate set of proceedings to enforce the award which involves more time, possible costs and resolve in order to see the litigation through to the end.

162. It is not uncommon for prospective claimants to be wary about deciding to bring an ET claim, particularly if they are paying for legal advice, where an organisation is facing challenging economic circumstances or may become insolvent through the litigation process. This is because they will be incurring irrecoverable costs and even if they are successful and an award in made in their favour they may not be able to recover any compensation, or only a fraction of any award.

163. For some prospective claimants, there is a belief that there is no point in bringing an ET claim because judgments are difficult to enforce. Not for profit organisations report clients who have enforcement issues, particularly where the respondent is not represented. A respondent may fail to pay in spite of an adverse judgment against them. The claimant may lack knowledge about which regime to use to enforce an award - the penalty regime, the fast-track regime or the county court regime. There are risks, time and costs associated with different regimes and we note there is no information on the government website to help make the right choice.

164. Amongst many communities there is a feeling that there the ET system of justice does not work, particularly where there are examples of cases where a victory at the ET does not end in payment by the employer, leaving many feeling that the system is not there to help them or protect their rights.

Fear of repercussions both at work and on immigration status

165. Another factor in the decision making of many prospective claimants is their fear of repercussions/victimisation as a result of raising a claim.

166. For most people, raising issues at work can be stressful and frightening, particularly where there is an on-going employment relationship. Many fear repercussions from their employer/managers at work.

167. For some, this means that many decide not to bring claims. A recent Resolution Foundation report on enforcing labour market rights found that one in twenty workers would do nothing if they thought their employer violated their rights, with those in the bottom income quintile more unlikely than those in the top income quintile to take any steps.[34] The 2016 IFF research found that one in four mothers (27%) considered,

[34] "Enforce for Good - effectively enforcing labour market rights in the 2020s and beyond" Lindsay Judge & Hannah Sloughter April 2023 p57

but chose not to go through their employer's internal grievance procedure, as they said the prospect was too daunting.[35]

168. Those who are able to access legal advice and bring an ET claim often do so in the knowledge that it is unlikely that they will be able to return to work in the same organisation and therefore, whilst they may have an in-employment claim, the likely end result is a settlement with them leaving their job.

169. In addition, for migrant workers, there is an additional fear of repercussions on their immigration status. Despite many migrant workers having the right to work in the UK without being sponsored by any organisation, some remain fearful that complaining will in some way affect their ability to work elsewhere or remain in the UK.

170. We understand that some migrant workers have been told by their employers that they cannot do anything about the non-payment of wages or the way they are treated at work, as raising the issue with the ET will result in the Home Office sending them home. The lack of clarity for many about the interaction between the ET system and immigration processes can result in some migrant workers deciding not to pursue an ET claim.

Prior experience of court or tribunal processes

171. A further factor in the decision-making process for many prospective claimants is the uncertainty and fear of an unknown litigation process.

172. Those who have access to legal advice are reassured by the legal professionals they instruct and guided through the process to de-mystify it. Some prospective claimants may have already been involved in litigation proceedings or have some prior experience of court processes which enables them to cope better with process and the stressful nature of giving evidence.

173. However, for those who do not have access to legal advice or support from a legal professional, the process is unfamiliar, daunting and can be overwhelming. These individuals often have no prior experience in legal proceedings and are unlikely to understand the process or how to present their case in the best way, so are discouraged from bringing ET proceedings.

Q7. 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? PLEASE GIVE REASONS AND SUPPLY EVIDENCE OF FURTHER EQUALITIES IMPACTS AS APPROPRIATE.

[35] "Pregnancy and Maternity Related Discrimination and Disadvantage: Experiences of Mothers" Authors: Lorna Adams, Mark Winterbotham, Katie Oldfield, Jenny McLeish, Alice Large, Alasdair Stuart, Liz Murphy, Helen Rossiter and Sam Selner. 2016 p14

174. Please refer to the answers above at paragraphs 59, 66 – 73, 136, 146.

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APPENDIX 1

1. The toolkit (below) to deal with vexatious and or claims without merit available to the Tribunal and other proposals by which to strengthen the ET's control over weak and or vexatious claims which would not have the deterrent effect of a fee scheme.

Sifting procedure

2. Rule 12(1) of the ET Rules provides that, following the presentation of an ET1, a judge must reject a claim if they consider that the claim is one which the Tribunal has no jurisdiction to consider, the ACAS early conciliation requirements have not been complied with; or it is "in a form which cannot sensibly be responded to or is otherwise an abuse of the process." (Rule 12(1)(b)).

3. Accordingly, judges have a (limited) power to strike out claims, dismissing those that lack merit at an early stage through the **sifting procedure**. However, the consequence of the EAT's decision in ***William Jones School v Parry*** UKEAT/0088/16 (handed down on 2 August 2016) is that Rule 12(1)(b) of the ET Rules ceases to have any effect, and a judge cannot reject a claim form which purports to relate to a claim over which the tribunal has jurisdiction, even if it is in a form that the respondent *cannot sensibly respond to or is otherwise an abuse of the process.*

4. While the sifting procedure is accordingly limited in its scope, it *could* be broadened to give judges greater discretion in weeding out obviously meritless and/or vexatious claims at this early stage, meaning that blameless employers can avoid the time and cost of preparing a written defence to an obviously meritless or vexatious claim.

5. The tribunal service appears to have adopted a less rigorous approach to the sifting procedure over recent decades. In 2005/06 the tribunal service rejected up to 12,258 initial claims. By 2013, this had dramatically reduced, with only 1,295 being initially rejected in 2012/13.[36] We have been unable to find up to date figures, although these may well be available, however the aforementioned figures seem to suggest a reduction in the use of the sifting procedure for weeding out claims and the 2016 EAT decision will, we assume, only reduce the use further.

6. Reforming the tribunal's sifting procedure may allow judges to remove meritless and/or vexatious claims at the earliest possible stage in procedure, avoiding time and costs for both the tribunal service and respondents. Enforcing a meaningful sifting procedure and active early case management system would, we believe, be more effective than introducing the proposed fee in reducing the volume of claims that work their way through the system.

[36] Tribunal Statistics (quarterly) – April to June 2013 - GOV.UK (www.gov.uk)

Strike out of all or part of claim under ET Rule 37(1):

7. The Tribunal may, *either on its own initiative or on the application of a party*, strike out all or part of a claim or response on any of the following grounds:

   (a) that it is scandalous or vexatious or has no reasonable prospect of success; That the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent […] has been scandalous, unreasonable or vexatious;

8. Notwithstanding this, our experience is that judges will rarely if ever strike out a claim on their own initiative and, even when presented with a strike out application, will rarely use the Tribunal's power under ET Rule 37(1).

9. There is support for this view across the profession as demonstrated in the ELA 'The Future of ETs' 2015 survey in which participants concluded that the '*judiciary had failed to exercise the greater power given to them to strike out claims and responses*.' Some solicitors who participated in the survey noted they were '*yet to have a claim struck out at the initial consideration stage*' and instead '*experienced the ET insisting on having separate preliminary hearings to deal with separate issues such as strike-outs, rather than combining them at a single hearing*.'[37] Participants were in agreement that there had been little improvement in the way claims were handled with inconsistent approaches amongst judges. Arranging separate hearings to discuss 'strike outs' is yet another example of the tribunal contributing to their ever-increasing caseload.

Cost Orders

10. ET Rule 76(1)(a) and (b) provide avenues to impose cost orders against a party if they are '*vexatious, abusive, disruptive, unreasonable*' or if '*a claim or a response has no reasonable prospect of success.'* As things stand, costs orders are, in our experience, rarely applied for on the basis that they are rarely granted in practice. Making a costs order a genuine prospect, coupled with an increased awareness of this possibility amongst claimants and respondents, where a claim is meritless or vexatious would, we believe, be a more effective deterrent than the proposed fee.

Case management and procedural reform

11. From a practitioner's perspective, addressing understaffing within the tribunal service is paramount to tackling the tribunal service's caseload. Establishing a dedicated case management team to triage claims could streamline the process and alleviate the burden on the tribunal service as a whole. In a 2015 discussion document, 'Making ETs Work for All', the Law Society suggested adopting a single employment jurisdiction to handle disputes. The society proposed a system with 4 levels that covered different types of cases. Levels 1 and 2 would provide an

[37] **ELA SURVEY 2015 (justice.gov.uk) (Pg 11)**

informal, swifter and less expensive way to resolve disputes. It would involve simple facts and no new issues of law. In certain types of cases, judges could make decisions purely based on the documentation provided. Levels 3 and 4 would be more formal and would involve legal issues. Level 3 would operate in a similar way to the ET yet would promote more ADR exit points. Level 4 would operate like a civil court and could award costs in those cases. [38] The Law Society's proposed model of categorising claims into levels could facilitate a more efficient system, with less hearings for the lower levels and encouraging forms of alternative dispute resolution.

ADR

12. Encouraging settlement through methods such as early conciliation, alternative dispute resolution (ADR), and mediation may prove more effective than implementing fees. In Italy, parties must engage in a mandatory attempt at conciliation. If the judge ascertains at the beginning of the court procedure that there has been no attempt to use conciliation, the proceedings may be suspended, and the parties ordered to go back and use the procedure.[39] Currently, there is an issue with respondents not willing to engage in ACAS early conciliation. According to the ELA 2015 Survey, 44% of employers did not participate, as they either 'had no case to answer to' or were 'not willing to negotiate'.[40] 43% of participants said early conciliation should be mandatory prior to raising proceedings. The process should 'encourage all claimants to list all of their claims and provide sufficient details of their complaints at the outset so the respondent has sufficient information to assess whether or not they wish to settle'.[41] There is perhaps a benefit to moving the Early Conciliation to commence after the ET1 has been submitted. [42] Adopting a similar approach to Italy would ensure full participation in the early conciliation process to encourage settlement prior to going to Tribunal.

Appropriate use of fees

13. Considering the re-introduction of fees, while not inherently flawed, should be approached cautiously. Adopting a 'loser pays' system akin to Germany could serve as a deterrent for vexatious claims. The Labour Court in Germany requires a hearing fee and the fee is paid by the loser after adjudication.[43]

[38] lawsocietydiscusisondocument.pdf (justice.gov.uk)
[39] Individual disputes at the workplace: Alternative disputes resolution (europa.eu) , page 4.
[40] ELA SURVEY 2015 (justice.gov.uk)
[41] ELA SURVEY 2015 (justice.gov.uk)
[42] ELA SURVEY 2015 (justice.gov.uk)
[43] Litigation & Dispute Resolution Laws and Regulations Report 2023-2024 Germany (iclg.com)