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Consultation response

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Charging fees in Employment Tribunals and the Employment Appeal Tribunal

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This Ministry of Justice consultation paper examines possible options for introducing a system of fee charging into the Employment Tribunal and appeals system. The stated aim is to ensure users of the Tribunals service meet the costs of running the system. The Ministry of Justice sets out two possible options: 'option 1', which sets an initial fee for making a claim and a further higher fee before it is allowed to go to a hearing; and 'option 2' which has an initial higher level of fee only. Both proposals set three different levels of claim, based on the typical complexity in each category, with age discrimination claims placed in the third and most complex.

Key points and recommendations

- We accept that the Employment Tribunal system is far from perfect, but it is an important part of the industrial relations system in the UK, and without sufficient access many older workers will have no form of redress against ageist employers.

- Age UK is opposed to the introduction of fees, especially for discrimination claims. Setting discrimination claims at the highest level can only serve to deter people from claiming, even if their claim is sound.

- If the fees system prevents people from acting against discriminatory behaviour, this could contravene the Equality Act (2010) and in itself be discriminatory.

- Of equal importance, constructing barriers to making a claim will reduce the incentive for employers to improve employment practices in the first place.

- Both 'option 1' and 'option 2' will fail to encourage early settlement. Some of the burden must be placed on employers in order to achieve this.

- If a system of fees is to be introduced, Option 1 is preferable to Option 2. However, there are substantial drawbacks even with Option 1, as it places the financial burden wholly on the claimant.

- People on below average incomes but whose household earns above the cut-off for fee remission will be most affected by the proposed changes. For many, especially those who have been forced out of work through no fault of their own, the fees will be an insurmountable barrier to seeking redress.

- There is no evidence whatsoever of a significant number of vexatious claims being made.

1. Introduction

We accept that the Tribunals system is far from perfect, and that it should only be used as a last resort where other efforts at conciliation have failed. We welcome the Government's separate proposals, outlined in last year's *Resolving Workplace Disputes* consultation, to encourage early resolution of disputes.

However, the Employment Tribunal system is an important part of the democratic process for enforcing breaches of individuals' employment rights by employers. Age UK is concerned that the introduction of fees into the system will restrict individuals' access to justice, and that the proposals will prevent democratic accountability.

Instead, there should be a greater role for ACAS in helping reach resolution where disputes do occur, and a greater emphasis on encouraging good employer practice in the first instance. As the Government encourages people to work for longer than ever before, encouraging employers not to discriminate and using the system of redress will be of increasing importance.

We consider there are two broad underlying principles upon which the system should be based:

- Providing a means of redress where illegal practice has occurred
- Fostering good practice among employers

While cost reduction is a valid aim, the impact of these underlying principles should be considered in all decisions.

Charging fees
Age UK is opposed to the introduction of fees, in particular in relation to cases of discrimination. Furthermore, we are concerned that even among people eligible for fee remission, the system may be so complex and weighted against the individual that there would still be a disincentive to claim.

Discrimination claims are likely to be particularly affected if they are placed in the level three category which commands the highest fees under both options. Age UK recommends that fees should not be introduced for such claimants.

We question the assumption that charging will lead to more employment disputes being resolved prior to tribunal. Unless the fees system is weighted correctly between the two parties and with the right payment schedule, it could create a perverse incentive for the individual to insist on seeing the case through to the tribunal itself – see questions 5 and 16-21.

Age discrimination
Claims based on discrimination on grounds of age have been increasing over recent years, while claims for other forms of discrimination have been falling. This is likely to be explained by the fact that age was only introduced as a protected characteristic in 2006 and awareness is still low, whereas the other protected characteristics have longer histories.

Even so, the number of claims on grounds of age, 6,800 in 2010/11,[i] still falls well short of other protected characteristics, and is small relative to the scale of the problem. The 2009/10 Citizenship Survey finds that four per cent of people aged 50+ believe they have been discriminated against on grounds of age when being turned down for a job.[ii] Across England and Wales this could equate to about 750,000 people.[iii] However, it is much more common for the individual to leave their job than to pursue a discrimination claim.[iv]

Vexatious claims

One myth is that the system is riddled with vexatious claims. There is no evidence whatsoever to support such a claim.

Instead the statistics support the opposite view. The Tribunals have the power to award costs where they consider that either making the claim or the behaviour with the proceedings was vexatious or abusive. In 2010/11, 355 such awards were indeed made in favour of respondents, a very small proportion of the total number of cases brought forward. A further 132 awards were made in favour of the claimants.[v]

Furthermore, as vexatious claims would typically be made by individuals and not by multiple claimants, there is no evidence of any increase. The statistics show there has been barely any increase in the number of single claims lodged since 2005/6 – in fact, there was a drop from 2009/10 and 2010/11 – with the overall increase coming from a rise in multiple claims. This strongly suggests that there are not huge and increasing numbers of claims made in bad faith.[vi]

2. Consultation questions

Question 1 – Are these the correct success criteria for developing the fee structure? If not, please explain why.

No. The proposed success criteria place too great an emphasis on cost recovery, while ignoring the real purpose of the Employment Tribunal system – to act as a means of redress for wronged (ex-)employees, and to act as an incentive to employers to improve workplace practices.

It is essential these key aims are included.

In addition, the stated aim is to encourage early settlement of claims. While we agree with this intention, neither of the proposed options will encourage this for the reasons discussed below.

Question 2 – Do you agree that all types of claims should attract fees? If not, please explain why.

We do not agree. Introducing fees for discrimination claims is likely to act as a substantial disincentive to seeking access to justice. Discrimination claims should therefore not attract fees at all.

It also potentially undermines the Equality Act (2010). The rationale for introducing this was to prevent discriminatory behaviour – if there is no realistic option to seek redress via the Employment Tribunal system, then poor employers are more likely to discriminate.

Question 3 – Do you believe that two charging points proposed under Option 1 are appropriate? If not, please explain why.

In the context of the proposed system, the charging points seem appropriate.

However, as explained in question numbers 5 and 16-21 the charging systems are likely to disincentivise settlement.

Question 4 – Do you agree that the claims are allocated correctly to the three Levels (see Annex A)? If not, please identify which claims should be allocated differently and explain your reasons.

Discrimination claims should be allocated differently to the proposals and should carry no fee. In the event of a fee being introduced, they should fall under the Level 1 bracket.

Cost reduction, as clearly indicated by the consultation paper, should not be the only driving force behind the proposals. Access to justice (regardless of the claimant's income), and incentivising employers to adopt good practice are essential, and have been ignored under the proposals.

Question 5 – Do you think that charging three levels of fees payable at two stages proposed under Option 1 is a reasonable approach? If not, please explain why.

Charging people at different levels is unnecessarily complicated. If a fee must be introduced, then all charged cases should be made at Level 1. It also unfairly penalises people who, through no fault of their own, are the victim of an illegal act by their employer.

Option 1, as proposed, will fail to encourage settlement. Once the initial fee has been paid, there will be no incentive for the employer to settle before the full hearing fee is paid (at the second payment point).

As the onus falls entirely on the individual, employers may sit it out in the hope that the individual will not be able to pay the second instalment. Then once the second payment has been made, there will be no incentive for the individual to settle pre-hearing, unless the costs are fully recoverable.

The fee structure must place some incentive on the employer to settle – for example, the initial fee could be split 50-50 and reimbursed to both parties should a settlement be reached.

Notwithstanding these substantial drawbacks Option 1 is still preferable to Option 2 which would further exaggerate the likelihood of failing to reach a settlement.

Question 7 – Do you agree that it is the claimant who should pay the issue fee and, (under Option 1), the hearing fee in order to be able to initiate each stage of the proceedings? If not, please explain why.

As proposed in the consultation paper, both systems will act as a disincentive to settle. The employer must bear some of the initial cost to redress this.

Question 15 – Do you agree with the Option 1 fee proposals? If not, please explain why.

We do not agree. The £250 issue fee, followed by the £1,250 hearing fee is high and could prevent many people from bringing a claim.

This would have a particular impact on those whose household income falls just above the fee remission level.

Question 16 – Do you agree with the wider aims of the Option 2 fee structure? Please give reasons for your answer.

Question 17 – Do you think one fee charged at issue is the appropriate approach? Please give reasons for your answer and provide evidence where available.

Question 18 – Do you think it is appropriate that a threshold should be put in place and that claims above this threshold attract a significantly higher fee? Please give reasons for your answer.

Question 19 – Do you think it is appropriate that the tribunal should be prevented from awarding an award of £30,000 or more if the claimant does not pay the appropriate fee? Please give your reasons and provide any supporting evidence.

Question 20 – Fewer than 7% of ET awards are for more than £30,000. Do you think £30,000 is an appropriate level at which to set the threshold?

Question 21 – Do you agree that Option 2 would be an effective means of providing business with more certainty and in helping manage the realistic expectations of claimants?

We do not agree with any of questions 16-21. Option 2 would exacerbate many of the problems outlined in answers to questions 2, 4, 5, 7 and 15.

The initial fee of £1,750 would immediately prevent many people from seeking redress. Furthermore, once the fee is paid, there would be no incentive for either party to settle.

The £30,000 maximum is both an inappropriate and arbitrary figure. The level of compensation awarded should reflect the severity of the harm suffered.

There is no evidence to support such a limit – the Government should commission detailed research to examine the full impact on individuals' and employers' behaviour before proceeding.

Question 28 - What sort of wider information and guidance do you think is needed to help claimants assess the value of their claim and what issues do you think may need to be overcome?

The balance of power within the Employment Tribunal system is already heavily weighted in favour of employers, in particular large employers, who are more likely to have ready access to legal advice and understand the processes and systems involved.

Guidance for claimants would of course be useful, through a variety of means such as ACAS or the trade unions.

3. Equality impact assessment questions

Question 1 - What do you consider to be the equality impacts of the introduction of fees both under Option 1 and Option 2 (when supported by a remission system) on claimants within the protected groups?

Age UK is concerned primarily with people aged 50+, so we have not considered any protected characteristics other than age here.

Both systems would significantly disadvantage older claimants pursuing discrimination claims. The impact of any fee system would have to be carefully measured, and adjustments made accordingly.

The policy of introducing fees is contrary to the Government's 'extending working lives' agenda. As State Pension Age is increased and people need to work for longer, reduced access to redress can only encourage employers to act in an ageist manner, in the knowledge that few people will be able to make a claim.

The Equality Impact Assessment has not sufficiently accounted for the potential impact on age discrimination claims. Paragraph 13.1 gives the only mention of this issue:

> *"According to the Office of National Statistics Annual Survey of Hours and Earnings both the young and those over 65 are most likely to be economically inactive (either because they have not yet, or only just, started or have retired from full time employment). This means that they are less likely to be users of the tribunal. People of working age are more likely to be employed and to be users of the ET and EAT."*

This completely misses the point, as age discrimination affects a far wider group than just the over 65s. The fact that people aged over 65 may be less likely to use the system does not justify restricting access to justice in any case.

From approximately the age of 50, or in some cases before, incidences of age discrimination become increasingly prevalent. Research by the Chartered Institute of Personnel and Development shows that 40 per cent of employees aged 50+ believe they have been disadvantaged in the workplace for appearing too old.[vii]

A full range of older workers – meaning all those who are at risk of experiencing discrimination on grounds of their age – has to be considered before the impact assessment can be considered comprehensive.

Introducing fees to pursue age discrimination cases will reduce the probability of any given individual making a claim, thereby the difficulty of staying in work until (the higher) State Pension Age. This is contrary to the public policy objective of Extending Working Lives.

More broadly in the labour market, it is important for an individual to have access to redress when necessary. Restricting access to redress will have knock-on consequences for employment practice, as employers will be aware there is only a minimal chance of being held accountable for illegal actions.

Question 2 - Could you provide any evidence or sources of information that will help us to understand and assess those impacts?

The little available research into the topic suggests that claims that employers fear the Tribunal system or believe it has an impact on their business are over-stated. One of the few robust research projects into employer attitudes, the BIS 2010 Small Business Survey shows the following revealing statistics about the scale of the concern about business regulation:

- Regulations were considered to be the main obstacle to growth by just seven per cent of SMEs. This has fallen from 14 per cent in 2006/7.
- Of those businesses who consider regulations a barrier, just 14 per cent believe employment regulations to be so.[viii]

Before pursuing any policy changes, the Government should commission independent research to investigate the real problems with the Tribunal System and

how best to rectify these. Also it should investigate in detail the potential impact of the proposals.

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[i] Tribunals Service Annual Report 2010/11 (2011)
[ii] Communities and Local Government (2010), Citizenship Survey 2009-10
[iii] Projection based on: ONS (2010), Population estimates mid-2009
[iv] Rolfe H, Duhdwar A, George A and Metcalf H (2009) Perceptions of discrimination in employment Government Equality Office
[v] Tribunals Service Annual Report 2010/11 (2011)
[vi] Tribunals Service Annual Report 2010/11 (2011)
[vii] CIPD/CMI (2010), Managing an ageing workforce
[viii] BIS Small business survey 2010 (2011), Department of Business Innovation and Skills