Ministry of Justice Consultation
Charging fees in Employment Tribunals and the EAT
Response from Thompsons Solicitors

March 2012

About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Executive summary

- Thompsons objects to fees in Employment Tribunals
- We believe in the principle of "polluter pays"
- The government is misguided in thinking that it will raise significant revenue from fees
- Many claimants will be eligible for remissions
- Fees will not encourage settlement of claims
- If fees are inevitable then they must be set at the lowest possible flat rate
- Businesses should bear the costs of claimant's fees

Introduction

Thompsons is opposed to fees in Employment Tribunals. ETs are neither businesses nor courts. They are a specialist forum wherein UK workers can seek redress for wrongs done to them by their employers. As citizens of the UK and Europe they have a framework of rights which, as the Supreme Court recently noted:

"… [does] not require – nor should it – that both sides be placed on an equal footing. Employees as a class were in a more vulnerable position than employers. Protection of employees' rights has been the theme of legislation in this field for many years."[1]

In an area of such fundamental significance as work, the importance to society and individuals of having confidence in an accessible dispute resolution system cannot be overstated. When rights cannot be enforced abuses fill the void. This in turn brings loss of confidence, loss of productivity and loss of a shared vision of economic benefit.

Employment Tribunal fees commoditise justice in a way which fundamentally misunderstands and misstates the social contract. The government says that tax payers meet the cost of running the Tribunal service "despite the fact that most of them will never use the service."[2] It sees litigants as consumers when they are not, and it fails to appreciate that the whole of society benefits from access to redress, which is why it is a fundamental duty of any government to provide it.

[1] Lord Kerr, *Gisda Cyf v Barratt* [2010] UKSC 41, at paragraph 35
[2] *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* CP22/2011, page 3

The proposals limit that access to redress, and Thompsons endorses the Master of the Rolls' observation that:

"In our modern consumer, market-based society, with its multiplicity of laws and rights, and its increasing scope for legal disputes, it is more important than ever that we have effective, accessible institutions of law. If not laws go unenforced. They cease to be rights, but rather become privileges for those select few who can afford them." [3]

Fees will strip thousands of citizens of unfair dismissal rights, and will render many other rights worthless to thousands more by making them too expensive to pursue. Thompsons cannot accept that rights and access to justice are merely expensive luxuries to be given up in an economic downturn, especially when the ETs cost UK workers just £2.64 each per year[4] and individual taxpayers as a whole considerably less.

Thompsons therefore opposes the government's policy of seeking to recover the full cost of progressing cases through fees. Our responses to the questions below must be taken against that backdrop.

Question 1

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

The criteria proposed are:

1. Recover a contribution towards the costs from users which will be used to support and fund the system.
2. Develop a simple, easy to understand and cost-effective fee structure.
3. Maintain access to justice for those on limited means.
4. Contribute to improving the effectiveness and efficiency of the system by encouraging users to resolve issues as early as possible.

Criterion 1

The first criterion is risible. The step of imposing fees cannot be legitimately considered a success simply because the amount of fees which it garners slightly exceeds the costs of doing so. It also fails to account for any ongoing qualitative analysis of the monetised cost of administering the systems. We note that the government estimates that Option 1 will annually bear a monetised cost £17m with a net monetised yield of £7m, and that Option 2 would cost £25m and yield £9m[5], with no account made for inflation. We question whether the proper balance is struck between access to justice and costs recovery when up to 74p in every £1 of monetised benefit is lost. Option 2 also makes no attempt to distinguish between users of the system and the fee they pay save in respect of interim applications which as stated in response to other Qs is not necessarily logical.

Criterion 2

This must be seen as a bare minimum criterion. If it is not met then the weaknesses in the first criterion become even more relevant.

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[3] *Swindlers (Including the Master of the Rolls?) Not Wanted : Bentham and Justice Reform* Lord Neuberger of Abbotsbury MR, 2nd March 2011, paragraph 16

[4] *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* CP22/2011. The Foreword says the annual costs of providing the Employment Tribunal Service is £84m (although page 16 says it is £81.8m). The ONS Labour Market Statistical bulletin for January 2012 shows a workforce of 31.8m comprising of 29.12m employed, and 2.68m unemployed.

Criterion 3

The effect of introducing fees will be to limit access to justice. Maintaining access for those on limited means ignores those thousands who earn too much to benefit from remission, and too little to afford the fees. Thompsons considers that it is a serious weakness of these criteria that no criterion attempts to measure accurately the adverse effect on access to justice for the squeezed middle.

Criterion 4

It is unclear whether the reference to 'the system' here is to the ET system as a whole, or the fees recovery system. We presume the former. If so this success criterion is fundamentally flawed. The most obvious flaw with criterion 4 is that it cannot be measured in any meaningful way. An issue fee may deter issue, and a set-down fee a hearing, but any decision taken for that reason will be masked by the efforts made by ACAS.

Criterion 4 rests upon an assumption that fees will have that effect. That however is an unsafe assumption. A claimant who qualifies for full remission has no financial incentive to settle due to the fees, and the government anticipates that 26.4% of all claimants will receive a full remission.[5] The effect will be variable for those receiving type 3 remission but the government's figures estimate that 46.3% of claimants would benefit from this for fees up to £1,000.[6] The wealthy, or those with financial backers such as insurance companies will be similarly unincentivised. For remaining claimant groups the potential settlement becomes an issue of credit-worthiness as much as justice.

It also appears to ignore the fact that for a case to reach hearing stage, for instance, the following opportunities for resolution will already have occurred:

1. A disciplinary or grievance stage that parties are obliged to follow to avoid a reduction in compensation under s.207A Trade Union and Labour Relations (Consolidation) Act 1992;
2. Access to the proposed early dispute resolution mechanisms;
3. A month of pre-claim conciliation through ACAS;
4. Attempts to settle by one of the parties; and
5. Post-claim conciliation by ACAS.

If a claim is going to settle early then there are plenty of chances for it to do so. This criteria therefore fails to recognise that some cases just don't settle, and will not regardless of the fees level. The claims proceeding to the Tribunal will be, by definition, ones less easily resolvable. The government's own research into settlement behaviour with particular reference to non-settled claims (i.e. the type being targeted by these proposals) states:

"In non-settled cases, an offer by either party was more likely to be proposed in cases that went to full Tribunal (33 per cent) than in those that were withdrawn (24 per cent) or dismissed (15 per cent)." [7]

Making it harder for a claimant to afford to go to hearing is unlikely to affect that behaviour to the good. The same study looked at settlement motivation. For employers it found:

"Saving money and time were the main reasons why employers favoured settling their cases. Of those who made an offer, one half (51 per cent) cited factors related to saving money (for example, keeping costs to a minimum, more cost effective to settle) and one-quarter (25 per cent) said that they had done so for convenience and to save time." [8]

For claimants it found:

[5] Impact Assessment, paragraph 4.14, page 28
[6] Impact Assessment, paragraph 4.14, page 28
[7] *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010) BIS Employment Relations Research Series No. 107, page 81
[8] Ibid, page 83

"Claimants who were made an offer, but did not accept it, were asked why this was the case. Three in ten (29 per cent) said it was because they felt that not enough money was offered. Six per cent said that their claim had never been about money or that money was not important to them." [9]

This research clearly shows that most settlements are about making realistic offers in order to save money and are prompted by having the cost of a hearing to avoid. However, it is also true that some respondents take advantage of the fact they generally have bigger war-chests than the recently unemployed, and take an attritional stance to litigation to wear the claimant down so that they abandon their claim, or accept what offer they can. At Thompsons we see equal pay respondents (especially local authorities), instruct Queen's Counsel to do straightforward case management directions.

Respondents too often appear concerned not to be seen to settle too quickly as it might encourage others to claim. Fees will only encourage this attitude.

And when a claimant pays a fee it has no deterrent effect. On the contrary, it may act as a deterrent to settlement unless that fee is covered by the settlement. In the absence of any costs penalty a claimant may simply feel that they have bought and paid for a right to a hearing. With total fee levels set higher than many claimants will pay for a car, there will be a strong temptation to 'get their money's worth'.

These behaviours will only be encouraged by a system where the fees are initially payable by the claimant; and where a party refuses to settle, independent of the fees structure, this criterion simply cannot be a valid indicator of anything.

We are concerned that what the government actually means by early resolution is by actively preventing claims being issued, or reaching hearing. That is not dispute resolution but is simply denial of rights. For these reasons Thompsons considers that a further success criterion should be developed which seeks to monitor the extent to which, (if any), a reduction in claims is caused by genuine disenfranchisement arising from the fees so that solutions such as payment by instalments can be developed.

Question 2

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

The proposals put the cart before the horse, ahead of the outcome of Mr Justice Underhill's review of procedure. Many of the problems which the consultation seeks to address could be cured by the robust application of the Rules in case management.

As the government appears to have determined upon introducing fees it is difficult to delineate between types of claims in anything other than an arbitrary manner. There are though certain claims where it is difficult to see the justification.

Examples include:

- **A claim for written reasons for dismissal, under s.92 Employment Rights Act 1996**

  A claimant simply needs to show that they had 1 year's continuous employment. If a respondent cannot, or will not produce reasons this claim need be no more than an administrative function.

- **Most Level 1 claims where money has been withheld by the respondent**

  Typically these are resolved with a hearing lasting no longer than 2 hours with an Employment Judge sitting alone. They are straightforward and are claims where the claimant's ability to pursue a remedy is directly affected by the need for a remedy in the first place.

[9] *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010) BIS Employment Relations Research Series No. 107, page 84

- **An application by an employee that a respondent has failed to pay a protective award as ordered by the Employment Tribunal, under s.190 *Trade Union and Labour Relations (Consolidation) Act 1992***

  This is a claim that arises because the respondent is already in breach of an Employment Tribunal order. Whether or not they have paid is a simple matter of fact and this claim need be no more than an administrative function.

- **An application by an employee that a respondent has failed to pay a protective award as ordered by the Employment Tribunal, under regulation 15(10) *Transfer of Undertakings (Protection of Employment) Regulations 2006***

  This is a claim that arises because the respondent is already in breach of an Employment Tribunal order. Whether or not they have paid is a simple matter of fact and this claim need be no more than an administrative function.

- **Claims against insolvent respondents**

  Claims against insolvent respondents are generally made as a necessary precursor to an application to the Redundancy Payments Office (RPO). The claimant's fee is unlikely to be reimbursed by either the RPO or respondent and the fees are likely to reduce the value of a claim either to nil, or to a level that would bring the process into disrepute.

Although not claims, the fees for various interlocutory applications should also be considered under this question. We make the following comments:

- **Request for written reasons**

  It is settled law that

  > *"…the decision of an* [Employment] *Tribunal … must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an* [Employment]*Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted."*[10]

  It is therefore an obligation on the Tribunal to provide written reasons. There should be no charge for doing so because it flows from the hearing and should be considered part of the hearing fee (should there be one).

  Furthermore, a party cannot appeal without written reasons. Charging £100 – £250 for them is an additional appeal cost. Written reasons must be considered part of the hearing, or of the appeal, and no separate fee should be raised. The idea of charging a fee for more detailed reasons is equally objectionable.

- **Review Application**

  An application for a review may only be lodged on one of the following grounds[11]:

[10] Per Bingham LJ, *Meek v City of Birmingham District Council* [1987] IRLR 250, Court of Appeal
[11] *Employment Tribunals Rules of Procedure*, Rule 34(3)

(a) the decision was wrongly made as a result of an administrative error;
(b) a party did not receive notice of the proceedings leading to the decision;
(c) the decision was made in the absence of a party;
(d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time; or
(e) the interests of justice require such a review.

In Thompsons' experience most applications are made on grounds (a), (b) or (e). The first two are situations where the review is necessary in order to correct a mistake made by the Employment Tribunal. Thompsons sees no good reason for charging a party to correct a Tribunal's mistake.

- **Counterclaim**

  A counterclaim has an independent existence once issued, and can be pursued even if the claimant withdraws all of their claims. Thompsons cannot see any justification for the fact that there is no hearing fee for a counterclaim.

- **Mediation**

  If the purpose of a fees regime is to encourage settlement, it is difficult to see the justification for charging £750 for judicial mediation.

Question 3

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

We recognise that having an **issue fee** will deter some claimants, especially those with low value claims. We are however less sure about its ability to promote settlements. The reality is that, in the majority of cases, there will be no incentive on the applicant to settle for less than the value of the claim plus the fees. Respondents will pay both the value of the claim and the fees in order to avoid a hearing.

Some context is helpful. The BCC reports that the cost of defending an Employment Tribunal claim (including lost management time) can be between £15,000 and £125,000 or more[12]. 71% of respondents seek advice[13] and usually consult a lawyer[14]. Even the maximum issue fee of £250 is a tiny fraction of what respondents are prepared to spend on legal fees to defend a claim. It is, for instance, just 30 minutes of a Grade A solicitor's time in central London at the court approved rate.[15]

Given the insignificant impact on those figures that £250 represents, the tactically aware respondent will sit out the limitation period and wait and see whether the claimant is prepared (or able) to pay the fee, and settle only if they proceed[16]. Unlike in the courts, a respondent can adversely influence the claimant's ability to pay a fee; examples include paying them little or nothing until limitation has passed; or by undermining/delaying their benefits application by saying they were dismissed for misconduct thereby narrowing the availability of fees remission and income.

Thompsons also has concerns about the interplay between remission, limitation and the issue fee. Most claims have a 3 month limitation period. If that is missed then either no extension is available (equal pay

[12] *Employment Regulation: Up to the Job?* British Chambers of Commerce, March 2010, page 9
[13] *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010) BIS Employment Relations Research Series No. 107, page 48
[14] *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010) BIS Employment Relations Research Series No. 107, page 46
[15] *Solicitors Guideline Hourly Rates 2010* - www.judiciary.gov.uk/publications-and-reports/guidance/index/guideline-hourly-rates-2010. Hourly rate of £409 plus VAT
[16] For a worked example see page 23

claims), or it is subject to the just and equitable or reasonably practicable tests (discrimination and most other cases). This provides enormous scope for satellite litigation and uncertainty.

Our understanding is that it will be possible for a claimant to lodge a claim and provide proof of entitlement at the time or within 5 working days[17]. If the Tribunal rejects the remission claim, then the ET1 would be rejected and returned. The claimant would then have the option of appealing (we understand there are two appeal processes under the remissions scheme) or at that point paying a fee. If the claim is by then out of time then the claimant is locked into making applications to lodge out of time (assuming it is possible), and appealing the decision, and paying a review application fee for £100 - £350 for the process. We fear that such a scenario is akin to the much criticised jurisdictional bars arising from the statutory grievance procedure.

Clear guidance would have to be given on this. It will introduce a huge amount of uncertainty for respondent employers who could no longer be confident that, because a limitation period had passed, any potential dispute with an employee was over.

Thompsons is similarly concerned about a **hearing fee**. The consultation suggests that a hearing fee would be payable between 4 and 6 weeks ahead of the hearing date[18]. Level 1 cases are generally listed on receipt of the ET1, before the ET3 is received. The hearing is generally about 8 weeks on. In most of these cases the fee would be payable before the ET3 is filed. This would strip it of any incentive value and would effectively make it an extension of the issue fee.

We would also be concerned about a regime whereby the hearing fee was payable before witness statements were exchanged. Exchange of statements is a key point in a case. It is often the first time that the whole picture can be seen and fully informed decisions made about whether to continue. The proposed 4 – 6 weeks trigger date runs a real risk of colliding with witness statements, especially where there is timetable slippage.

In our view a fee, once paid, loses any value as a means of encouraging settlement. Instead it can actively hinder settlement since the claimant will need a higher offer than before so that the fee can be covered.

We note the intention is that no refunds would be made where hearings do not occur[19]. The justification is "*the behaviour of those who wait until the hearing day to consider settlement must be changed."* We agree that this behaviour must be changed but, but that the method punishes the wrong party. It will do nothing to change the behaviour of employers who, in our experience, too often refuse to consider settlement until they reach the Tribunal steps.

In the absence of any obligation upon a respondent to pay the fees, the absence of a refund will, in our view, incentivise the employer to hold out on settlement as a "sting in the tail". We have seen this type of vindictive behaviour, such as when an employer refused to make the customary payment of legal fees on a compromise agreement because the employee "did not deserve it."

So a claimant will have to choose between pressing on to hearing in circumstances where a settlement would otherwise be achieved, or absorbing a loss which might be £400 - £9,000[20].

There is existing authority for awarding costs against a party that accepts an offer late in the day, when it was made well before [21]. In our view this is a better method by which to change such behaviour.

[17] *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* CP22/2011, paragraph 68, page 29
[18] *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* CP22/2011, paragraph 107, page 36
[19] *Ibid*
[20] Range based on indicative issue and hearing fees for a level 1 case and level 3 multiple of 200+ claimants, *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* CP22/2011, paragraphs 112 and 114 at page 37ff
[21] See *G4S Security Services Ltd v Rondeau* 13th October 2009, UKEAT/0207/09

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.

We query the following:

- **Insolvent respondents**

  We query whether any fees, let alone, level 2 or 3 fees can be justified where the respondent is insolvent. Such respondents rarely participate in the claim, or defend it beyond filing a token ET3. Hearings are short, judgements are virtually 'on the nod' and the expense cannot realistically be passed onto the wrongdoer.

- **Secretary of State Agency applications (Level 1)**

  Whilst we have no experience of these claims we would expect them to involve fully contested hearings and query whether Level 1 accurately reflects this.

- **Flexible Working detriment claims (Level 2)**

  These are straightforward factual issues that can be resolved with a short hearing. We query why level 2 is selected.

- **Written Pay Statements (Level 2)**

  These are straightforward factual issues that can be resolved with a short hearing. We query why level 2 is selected.

- **Written Reasons for Dismissal (Level 2)**

  These are straightforward factual issues that can be resolved with a short hearing. We query why level 2 is selected.

- **Failure to allow accompaniment (Level 2)**

  These are straightforward factual issues that can be resolved with a short hearing. We query why level 2 is selected.

- **Interim Relief (Level 2)**

  We consider that no separate fees should be payable for this claim. A claim for interim relief can only be brought as part of an unfair dismissal claim[22] and as such this sets up a double fee situation. The claim is also classed as an interim hearing to which the rule relating to pre-hearing reviews apply[23]. Furthermore, Tribunals are statutorily obliged to list the hearing as soon as practicable after receiving the application[24] thereby making a nonsense of the stated distinction between, and purpose of, issue and hearing fees.

[22] Section 128 *Employment Rights Act 1996*
[23] *Employment Tribunals Rules of Procedure*, Rule 18A
[24] Section 128(3) *Employment Rights Act 1996*

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.

We consider that it is appropriate to make distinctions between claims which are inherently simple or complex. We query however whether that distinction has much relevance to the issue fee given that the cost of processing an ET1 and ET3 does not relate to the claim being made, but rather to administrative elements such as photocopying and postage.

Question 6

Do you agree that it is right that the unsuccessful party should bear the fees paid by the successful party? If not, please explain why.

We consider that "Polluter Pays" is an appropriate basis for cost shifting. We note however that this is not what is being proposed here. If it were then:

- there would be no proposals to encourage claimants to artificially limit their claims so as to get more affordable fees;
- there would be no continuation of any cap on damages, or talk about introducing one for discrimination cases; and
- respondents making a counter-claim would be charged a hearing fee

We note that the principle proposed, that the unsuccessful party should bear the fees of the successful party, is at odds with the position the government takes in relation to the civil justice reforms contained in the Legal Aid, Sentencing and Punishment of Offenders Bill. Those are underpinned by the belief that a there should be no recoverability from the losing party.[25].

It is unclear as to how the proposal would work. For instance, if a claimant ran 4 heads of claim, of which 3 were Level 1 claims, and one was Level 3, the fees payable would be the Level 3 rate. If the claimant won the former and lost the latter, is it the government's intention that they pay the fees because they lost the Level 3 claim, or that the respondent pays because the claimant was ultimately successful at hearing?

Clarity is required.

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.

We do not consider that it is necessary, let alone desirable, to adopt this approach. .We refer again to the opportunities for resolution pre-issue that we list above. As said, cases capable of quick resolution will have ample chance to resolve before issue under the new structure. Some cases however will require some exploration of facts and evidence, and a fee is a direct impediment to this process occurring.

A "polluter pays" approach can be achieved by other means. We note the suggestion of the Citizens Advice[26]:

[25] *LASPO Part 2*
[26] *CAB response to Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* CP22/2011 Page 6, Section 4

"… the starting point for any ET fees regime must be those employers determined by a tribunal to have been at fault. For, not only have the unlawful or unfair actions of these employers given rise to the cost of the proceedings in their particular cases, by requiring the claimant(s) to make a claim in order to enforce their legal rights, but it is the prevention and deterrence of such unlawful or improper treatment that provides the raison d'etre of the ET system. Under our alternative fees regime, therefore, all employers determined by a tribunal to be at fault would pay a fee. At its simplest, this could be a flat-rate fee, but the fee level could also vary according to whether a hearing was required to determine the claim (i.e. a lower fee could be paid where the claim resulted in a default judgment, without a hearing).

*This would be **simple**, and **cost-effective** to administer. It would ensure **access to justice**, and it would **encourage early settlement** of the claim (as employers could avoid the fee altogether by settling the claim).*

However, it would not address the concern of ministers (and the employers' lobby groups) that "the current system can be a one way bet against [employers], with [claimants] inadequately incentivised to think through whether a formal claim really needs to be lodged". The problem, of course, is how to address that concern without creating a significant barrier to justice. We therefore propose a nominal, flat-rate issue fee for claimants. However, as even a nominal fee could create a barrier to justice for those seeking to recover relatively small sums (in respect of e.g. unpaid wages paid at the National Minimum Wage), we propose exempting entirely those generally straightforward and low-value claims relating solely to unauthorised deductions from wages (i.e. formerly Wages Act claims).

We further propose that the nominal, flat-rate issue fee would be paid by all claimants, i.e. including by each claimant named on a multiple claim. As noted above, such multiple claim cases can involve hundreds or even thousands of individuals, but the ET system may need to determine only one 'lead' case. And, as the consultation paper notes, "every person within a multiple claim ultimately gains the same benefit as an individual bringing a single claim. If the lead case succeeds, then all claimants covered by that lead case succeed". So charging a fee to each claimant in a multiple claim would be equitable. It would also be simple, and would not be complicated by the merging and splitting of cases by tribunals for the purposes of hearing. And it would achieve the Government's stated aim of "encouraging those in multiple claims to consider alternative forms of dispute resolution".

Clearly, within this proposed fee structure there is any number of fee level combinations, each with the capacity to raise the some £10 million that Ministry of Justice officials say must be raised by any fees regime. For example, using the 'base case' figures for 'steady state' claims and disposals set out in paragraphs 3.2 – 3.15 of the impact assessment that accompanies the consultation paper, a nominal, flat-rate issue fee of £50 would raise £4.9 million from 98,550 claimants (37,800 single claimants, and 60,750 claimants within 2,250 multiple claim cases), and a flat-rate 'at fault' fee of £600 would raise £5.1 million from the 8,500 'losing' employers. Alternatively, a nominal, flat-rate issue fee of £75 would raise £7.4 million from claimants, with an 'at fault' fee of £300 raising £2.6 million from 'losing' employers."

Although we would suggest an issue fee of no higher than £50, with an exemption for low value claims, there are several advantages to this ex post facto approach to fees:

- It targets only those judicially determined to be at fault;
- It does not impose an excessively high artificial economic barrier to justice upon the very people likely to be at their financially weakest;
- It addresses the government's desire for a means of causing claimants to "*think through whether a formal claim really needs to be lodged, or whether it could be settled in other ways such as conciliation, mediation or informal discussions*" [27];

[27] *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* CP22/2011, Foreword, Page 3

- As the government intends to collect a levy on employers found to be in breach of employment laws[28], no additional enforcement mechanisms are required. Even if there were, this could be done via HMRC.

Question 8

Do you agree that these applications should have separate fees? If not please explain why.

Fundamentally we object to fees in employment Tribunals because of the distorting effect that they will have on the system and the disproportionate impact on access to justice for the most vulnerable.

If fees are inevitable, then we consider that it would be appropriate to levy fees on respondents to:

- Issue a counterclaim;
- Apply to set-aside judgement in default; and
- Dismiss proceedings following settlement or withdrawal.

We are opposed to claimants facing issue fees. However, if fees are to be levied then they must also apply to respondents. Respondents pursuing a counter-claim should certainly face a hearing fee.

If judgement in default has been entered then it is consistent with "Polluter Pays" to charge a fee for seeking to set that aside, especially when many applications are on the basis of the respondent's own failure.

The dismissal following withdrawal or settlement gives the respondent *res judicata* protection from the claim being re-litigated and thus only benefits them. It is appropriate that they bear the fee.

We do not consider it appropriate to impose a fee for:

- Requesting written reasons for decisions; or
- Applications for a review of the Tribunal's judgement or decision.

The Employment Tribunal is obliged to give reasons for its decisions and we repeat the observations set out at page 5 above.

There are various types of review application and we repeat the observations set out at page 5 above.

Question 9

Do you agree that mediation by the judiciary should attract a separate fee that is paid by the respondent? If not, please explain why.

As previously stated, we do not see the justification for a judicial mediation fee. In light of the structural resolution systems which will be introduced, we also question whether the continuation of judicial mediation is necessary or desirable.

Question 10

Do you agree that the HM Courts & Tribunals Service remission system should be adopted for Employment Tribunal fees across Great Britain? If not, please explain why.

We object to the introduction of fees into the Employment Tribunal. However, we recognise that there may

[28] *Resolving Workplace Disputes : Government Response to the Consultation* November 2011, paragraphs 14, 146 en passim

be economies of scale from expanding a system which is already in place. Software, systems, training and expectations are already in place. However, we have grave doubts about how effective that remission system is, and how well suited it is in an Employment Tribunal context.

Experience suggests that the remissions system is complex, and does not function either efficiently or sufficiently accurately. This is supported by the government's own research[29] which found:

> *"Evidence from the e-survey of staff indicated that approximately two-thirds of staff found processing applications for remissions complex or very complex. The main issues for staff related to processing scenario applications for Remission 3, verifying evidence, and applicants' understanding of (or lack of) the supporting documentation required.*
>
> *These findings were supported by respondents' answers to some application scenarios, which indicated that in a sizeable minority (30% on average) of cases, the processing of applications was incorrect. Staff respondents were more likely to select the correct answer where Remission 1 should have been granted. Where the correct decision was to approve Remissions 2 or 3, the majority of staff respondents gave the wrong answer."* [30]

In the courts there is a limitation of 3-6 years, and processing errors will interfere only rarely with access to justice. In the Employment Tribunal almost all claims have a 3 month limitation period. Interim relief claims must be lodged within 7 days. We are gravely concerned about the scope for incorrect assessments resulting in claimants being required unnecessarily to pay fees, or being deterred from enforcing rights if the fee cannot be found. It would be all too easy for limitation to pass before an error is spotted and corrected.

This concern is more than fanciful. The government's figures indicate that 27% of claimants will be entitled to full R1 or R2 remission, with 50% of the rest getting some R3 remission[31]. This means that 63.5% of all claimants are expected to qualify for remission, and the research suggests that 19% will have their application incorrectly processed.

The proposal is that not paying a fee, or proving remission, will be a jurisdictional bar. Thompsons is concerned that this will mark a return to the problems caused by a similar jurisdictional bar under the widely discredited statutory dispute procedures. Those procedures were so hated by employers and employee reps alike that they were repealed. By this new proposal, the government again risks imposing upon employers enormous uncertainty over whether a claim is proceeding. This is unlikely to be welcomed by the business community.

Question 11

Are there any changes to the HM Courts & Tribunals Service remission system that you believe would deliver a fairer outcome in Employment Tribunals?

If the court remission system is to be utilised it must be modified to ensure that either there is no jurisdictional bar associated with the fee/remission, or that the Employment Tribunals are empowered to admit late claims where the reason for the delay was related to establishing eligibility.

Question 12

Do you agree with the fee proposals for multiple claims under Option 1? If not, please explain why.

We do not agree with the fee proposals in Option 1.

The proposals on multiples fail to grasp the realities of large multiple cases. Before we set out our objections,

[29] *Is the 2007 Court Fee Remission System Working?* Ministry of Justice Research Series 15/09, December 2009
[30] *Ibid*, page viii
[31] *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* CP22/2011, paragraph 74, page 30

we will identify some practical issues arising from equal pay claims in particular, but which are not necessarily confined to that jurisdiction.

Multiple claims are defined in the consultation paper at paragraph 82 as being "claims against the same respondent arising out of the same circumstances". Although there is no specific reference to equal pay claims the fact that at paragraph 83 it is stated that in 2010/11 there were 157,500 people who brought proceedings as part of multiple claims must mean that equal pay claims are included.

At paragraph 84 it is stated that "every person within a multiple claim ultimately gains the same benefit as an individual bringing a single claim. If the lead case succeeds then all claimants covered by that lead case succeed". On that basis it is "appropriate that all claimants ….should pay". Accordingly it would seem that the definition of a multiple must be by reference to the fact that all claimants stand or fall together. Should that not be the case then they do not constitute a multiple, at least for the purposes of this consultation.

The time when the fee would apply under both Options is at the date of commencement of proceedings. For Option 1 there is a further fee payable at the time of listing for hearing. The assumption is that the cohort of claimants within the multiple is the same at both events. The assumption must also be that at the commencement of proceedings it can be established that the same outcome will apply to all claimants.

In equal pay claims the assumptions are unlikely to be correct and will **almost certainly** be wrong.

Typically in Local Authority equal pay claims, where there is the most experience of the mass litigation in recent years, proceedings will usually be commenced by individuals all of whom seek compensation by reference to payments of bonus or similar benefits to men doing predominantly "male" jobs such as those associated with refuse collection, grounds maintenance and highways and street cleaning. Typically claimants are women in female dominated jobs such as care, cleaning and catering, but also others. As such the local government claims may be said to be among the more straight forward equal pay claims because they are mainly for claimants and are by reference to comparators where those doing the jobs are polarised according to their sex.

But there may also be claims by men who seek the benefit of the successful outcome of claims by women on the grounds that they do like work, or work of equal value or rated as equivalent. Their claims will only succeed if the claims of the women are successful and accordingly they ultimately depend on whether bonus payments are discriminatory.

There will normally be a complex claimant comparator structure to claims with claimants seeking to compare themselves with bonus earners in different bonus schemes both as to amount of bonus, usually a percentage of basic pay, and applicable provisions. This is because employers may seek to defend different bonus schemes on different grounds. Claimants rightly seek to ensure that they retain the option of pursuing their claim in relation to all potential discriminatory payments given that at the outset they will not normally know the basis or merit of any defence an employer may seek to advance in relation to different bonus schemes.

Further there may be defences available to the employer in relation to some claimants but not others. This may be on grounds of equivalence, where the employer argues that some claimants cannot establish a claim against a comparator doing work of equal value to them

There may also be grounds upon which the employer may defend a claim by reference to the place of work of the claimant compared to that of the comparator. Or by reference to the historic pay structure the claimant and comparator were part of, either manual Administrative, Professional, Technical and Clerical (APT&C) or Craft.

For these reasons it is impossible to say at the outset of proceedings that the claimants in the multiple will all stand to gain or lose together. But, typically, claims are pursued on a mass litigation basis where the common feature is a complaint about particular bonus schemes operated by an employer. And Employment Tribunals typically administer claims by means of a multiple structure essentially defined by reference to the employer's bonus structures complained of. Whilst it cannot be said that all claims within a multiple have the same prospects of a successful outcome, it will be the case that should an employer succeed in establishing that a bonus scheme was not discriminatory (and note this would be at a pre-hearing review hearing and not a final hearing) it is likely to do so in relation to all claims seeking the benefit of that bonus scheme and hence all such claims will lose.

Equally it would be impossible, certainly at the outset of proceedings, to define a multiple to ensure that all members of it stood to enjoy the same outcome. There are too many variables to make such an exercise feasible.

The consultation paper proposes that fees should be levied on claims which will result in the same outcome, and hence involve the Tribunal system in the same burden of work.

This may well not be the case. As noted, different claims within a multiple may be defended on a variety of grounds, which will only be apparent after proceedings have been commenced, and often long after. Pre-hearing reviews may be needed to resolve these issues which would apply to a part of the multiple only. It is not clear from the consultation paper whether the fee for hearing proposed in Option 1 relates to a final hearing (in these circumstances taken to be the remedy hearing) or interlocutory ones. If the former there are very few such hearings in multiple equal pay claims. The issues between the parties are not normally to do with remedy. If the latter, will the fee be charged for each hearing and, if not, which hearings?

There is the prospect of different levels of fees for different hearings as some or all of the claimants in a multiple will be involved in particular hearings. Claimants could find themselves being required to pay fees for more than one hearing. Normally pre-hearing reviews occur because the respondent raises a particular defence which the Tribunal decides to hear as a preliminary issue, yet it is the claimants to which the hearing applies who would be required to pay the fees.

Further, some claims within the same multiple will involve the use of independent experts to determine equivalence, whilst others will be Work Rated as Equivalent claims. The burden of Tribunal time will be significantly greater for the former than the latter.

The consultation assumes that the numbers in the multiple are fixed at the outset as that is the time when, under each option, the size of the fee is determined. This will almost never be the case with equal pay claims. Because there is normally no time limit for claims where the claimants remain in employment it is common for claims to be submitted in relation to the same issues over a number of years and often after the principle issues to which the claims relate have been determined or otherwise resolved during the course of earlier proceedings. Accordingly it will be impossible to levy payment according to the numbers involved.

Assuming that all equal pay claims are level 3 under Option 1, then were initial proceedings commenced by 201+ claimants they would have to pay £1,500. Any subsequent claims would on the face of it not have to pay a fee at all. Were it to be proposed that the fee is payable each time a claim is submitted, claimants would face differing fees according to the number of fellow claimants pursuing their claim at the same time. It would be unjust to make claimants wait to commence their claim until they had a sufficient number of fellow claimants to bring the fees proportionately down because that would impact on limitation issues for some and the extent to which the claim could be backdated for all.

The issues are further complicated by the fact that claimants in the same multiple are commonly represented by more than one representative, and sometimes by none. It would be a difficult task to allocate responsibility for fees amongst different representatives and at different times in the course of litigation, in the context of the issues above.

Different Tribunals adopt differing case management procedures for equal pay claims. Some define a multiple on a time basis, closing a multiple off on a cut off date and staying all subsequent claims pending the outcome of that multiple. Others operate open multiples, defining issues by reference to lead claimants for each of the issues litigated within the multiple. Whilst not commenting on which method is better, and much will depend on the facts of the particular claims, it should not be the case that Tribunals are driven to adopt particular forms of case management to accommodate a fees structure. Of course those whose claims were the subject of a fee on commencement but then adjourned could rightly complain that they were paying for nothing. Similarly those who faced a hearing fee in relation to a pre-hearing review in circumstances where the outcome would in fact, even if not in law, determine the issue within the multiple as well as for claims stayed (for instance a pre-hearing review to determine an employer's defence of material factor), would rightly complain that they were paying for the benefit of others.

There is a mismatch between the presumptions upon which the fees proposals in multiple claims are based and the realities of multiple equal pay claims. The reality is that Tribunals are likely to be involved in far more work and cost in determining the incidence of fees, and disputes as to those issues than they will save by charging them.

Employment Tribunals do not define and allocate equal pay claims to multiples by reference to the fact that the claims being pursued will end up with the same outcome. Were they to be required to levy fees by reference to different criteria than those they use to administer and case manage claims that would serve to increase the burden they already face.

The only common feature in multiple equal pay claims which can be used to define them is the basis upon which the employer seeks to defend the excess pay of the comparators which forms the basis of the claims.

Picking up from equal pay, and looking more broadly at multiples, we consider that the government's stance in the consultation is contradictory. It states that multiples claims take up more judicial resource[32] and that "*Multiple claims are also more cost effective for HM Courts & Tribunals Service as resources are used to deal with what would otherwise be a number of single claims covering the same or similar issues on one occasion rather than many*." [33] With this dichotomy the regime of multiple fees is one which seems hard to justify.

The detail of this proposal seems to take little account of how multiples are lodged and run in reality. The assumption of a finite number of claimants lodging their claims together underpins this proposal. That certainly does occur in the majority of cases. In a significant number of cases however it does not.

In equal pay litigation, for example, multiples are added to daily as new claimants are identified and processed. The pool of claimants expands and contracts as individuals join and leave it.

Against this background the consultation's suggestion that individuals within a multiple claim will have to "*consider carefully the implications of commencing their case as a multiple set of claims*" [34] appears naïve. It assumes a degree of organisation that is simply not evident in many cases, and a degree of co-operation from advisors that may be impossible due to client confidentiality issues.

Fundamentally however the administrative complexities of working out the relative benefits of multiple versus collective make this proposal unworkable. It is unrealistic to assume that an adequate degree of co-operation could be achieved in cases with half a dozen claimants, let alone hundreds, or thousands. For solicitors the proposals would make allocating fees between clients practically impossible where claimant numbers ebb and flow. For the Employment Tribunal the administrative burden would be immense, especially when trying to bring a case to hearing. Is the government really suggesting that one member of a multiple equal pay claim can prevent the case going to hearing because of unresolved issues over the hearing fee? In light of Article 6, the right to a fair trial, it ought not.

We would suggest that the introduction of the ability to make Group Litigation Orders in the Employment Tribunal would go a long way towards removing many of the difficulties, and await Mr Justice Underhill's review of the Employment Tribunal Rules with interest. We would expect, for example, that his review will recommend ending the requirement for some types of multiple claims, such as the mass working time claims lodged by airline industry workers, to be re-lodged every three months for jurisdictional reasons. Clearly, should fees be introduced, payment in such cases should be once and once only. But awaiting the Underhill review would, we anticipate, resolve the issue.

We note that the consultation asks[35]:

> *"In multiple claims in which all of the claimants are legally represented we would expect the representatives to be responsible for payment of the fee on behalf of their clients and thereafter possibly look to their clients for repayment. For those represented by trade unions, we would expect the fee to be paid by the union. Views are welcome on what you see as the role and responsibilities of unions and representatives in paying fees in multiple claims."*

This is an extraordinary suggestion. No explanation is given for it. Would the government consider randomly imposing a third party's financial obligations upon any other business sector? Would it, for example, expect share broking companies to pick up stamp duty and fees on transactions?. We have already indicated the

[32] *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* CP22/2011, paragraph 85, page 32
[33] *Ibid*, paragraph 92, page 33
[34] *Ibid*, paragraph 88, page 33
[35] *Ibid*, paragraph 89, page 33

difficulties of allocating multiple fees, and such a move would effectively be a tax upon solicitors as a disincentive to bringing multiple claims.

Can the government confirm that the proposal that those represented by trade unions have their fees paid by the union would apply equally to all other representative bodies, including the CBI, FSB, IoD and ABI? Can the government also confirm that it will apply equally to Legal Expenses Insurers where they are funding the claim?

Trade unions who support a claim to the Tribunal indemnify their member. The government's proposals ignore that fact. It proposes that even if a member qualifies for full remission a fee would be payable by the supporting trade union. This appears to be intended to deliberately restrict trade union support for multiple claims, ignores the realities of the relationship involved, and is an unreasonable and rapacious attempt to collect fees where none would otherwise have been payable.

Question 13

Do you agree that the HM Courts & Tribunals Service remission system should be adopted for multiple claims? If not, please explain why.

We do not.

Please refer to our responses to Questions 10 and 11 for our concerns in general. These are equally applicable to multiple claims.

The proposals for remission in multiple claims are far too complicated and likely to be unworkable in practice. This will be especially so where the Tribunal joins claims or splits an existing multiple. As with issue and hearing fees in multiple cases, there is also a risk of severe injustice to individuals.

Question 14

Do you agree with our approach to refunding fees? If not, please explain why.

No.

The proposal will force the claimant to bear the full risk of the fee, at all times. It appears that no thought has been given to how a successful claimant recovers the fee from an insolvent company or of the high incidence of non-payment by respondents. The government's own research[36] found that 39% of all respondents failed to pay an award within the 42 day period of grace allowed to them[37].

The proposal also fails to recognise the reality of settlement behaviour. If a fee is non-refundable, a party may take the view that they have bought their hearing and so may as well proceed. This is compounded where a respondent refuses to offer the fees as part of a settlement. The proposed level of fees and non-refundability may simply drive the claimant to hearing.

One of the stated rationales for the non-refundability of hearing fees is "*HM Courts & Tribunals Service has incurred a cost to administer the proceedings and if a refund were available that cost would have to be borne by the general taxpayer"* [38] The Impact Assessment shows that the expected cost of collecting all the various fees in any given case is actually a rather modest £8.47[39] or 12½ pence per case per member of the workforce[40].

36 *Research into Enforcement of Employment Tribunal Awards in England and Wales,* Ministry of Justice Research Series No. 9/09, May 2009
37 *Ibid*, page 30
38 *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* CP22/2011, paragraph 105, page 36
39 *Impact Assessment TS 007*, paragraph 4.55, page 36 shows a maximum fee collection cost of £400,000 per year, and paragraph 4.8 on page 27 shows that 47,200 cases per year are expected
40 A £0.4m cost divided amongst a 31.8m in workforce (see footnotes 39 and 4 for sources)

Whilst we support the other stated aim of changing the eleventh hour settlement culture, a non-reimbursement system in which the claimant pays the fees is fatally one-sided. Respondents will enjoy a mechanism whereby they can make unreasonably low offers without fees reimbursement, knowing that the system is weighted in their favour as many claimants will be forced to accept it.

Question 15

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

No. We consider that the proposals are fundamentally flawed and we reiterate our observation that the changes are premature given that a fundamental review is underway and the outcome as yet unknown. Please refer to our responses to the above questions for further detail.

We refer to our suggestions for an alternative regime which we identified in response to question 7 (page 9).

Question 16

Do you prefer the wider aims of the Option 2 fee structure? Please give reasons for your answer.

We do not support the aims of Option 2. This states that through the provision of underlying advice, the gap should be narrowed between an individual's expectation of what they might be awarded by a Tribunal and their actual entitlement[41]. The subsequent aim is to enable both parties to grasp the likely level of the award that the Tribunal can make if the claim is successful. This is intended to give the business greater certainty over the likelihood of liability.

This is worthy enough, but it appears not to understand the Tribunal process. It seems to be trying to provide a degree of hindsight to a Tribunal decision, as if it that decision were taken right at the beginning of the process. A Tribunal's assessment is made after taking all the evidence and after a hearing which usually takes place several months after issue. Statistics show that currently only 65% of cases are heard within 6 months of issue[42] which means that hindsight is built in to the process.

Unlawful deductions from wages claims are easy to value, but most other claims are not. High valuations are not necessarily unreasonable: in dismissal cases (whether unfair or discriminatory) the bulk of a valuation is lost earnings, and lost pension (especially in a final salary scheme). The government's own figures show that the average duration of unemployment for 16-64 year olds exceeds 6 months in 49% of cases, and exceeds 12 months in 32%.[43] When valuing a claim it is not unreasonable to use those figures as a starting point, especially since unemployment is at the highest level for 17 years. However, if the claimant secures a similarly paid job shortly after issuing their claim, the value of that claim is a small fraction of what it was. That is not the claimant's fault, or due to an error on their part.

Assessing discrimination values is another example. Most parties cannot be expected to know about '*Vento'* damages (which are awarded for injury to feelings in discrimination cases), let alone apply the principles of them with calm detachment upon issue. In other claims the value is significantly affected by the period of loss. But it is something which the Tribunal assesses after hearing all the evidence, and the amount of future loss awarded is unique to that Tribunal panel. These proposals ask parties to make that assessment, without the skills or the evidence, and to do so as if guided by a crystal ball. That is unrealistic.

We therefore suggest that, even properly guided, a precise valuation of the kind this consultation envisages will be beyond most parties in most cases. It fails to take adequate account of the distinction in many claimants' minds between value and cost. In practical terms we consider that it will act as a barrier to justice.

[41] *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* CP22/2011, paragraph 188, page 40
[42] See Quarterly Tribunals Statistics, 1st July to 30th September 2011, MOJ, 12th January 2012 at Table 1.4 *Tribunals Timeliness Measure by Quarter and Jurisdiction,* page 43
[43] *Labour Market Statistics: January 2012*, available at *www.ons.gov.uk/ons/dcp171778_250593.pdf.* Data taken from Table 9(1) at page 31 and relates to the period September – November 2011 and is for all ages and both sexes combined

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.

We do not agree that any fee is appropriate, for the reasons given above.

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.

The rationale for the value threshold is stated to be in order to encourage Claimants to be realistic about the value of their claims (see our response to Q16). This is a misguided way of achieving that aim.

Whilst it may well stop a few low value claims being ascribed an unrealistic value, it will always penalise those with high value claims. The government says that the hearing fee in this scenario covers the real cost. It might – but not the real cost of an inflated (but otherwise straightforward) unlawful deductions from wages claim. The logical premise is flawed.

It is important not to lose sight of the fact that if a claim is worth a significant figure then it is because the loss which has been caused by the respondent's unlawful act has caused it. A fee based upon value like this has the perverse effect of delivering a benefit to the respondent who causes the greatest loss. It penalises the claimant even further and denies them the opportunity to get justice and recover their losses on a proper 'polluter pays' basis.

A clear example of this comes when we return to our earlier observation that a respondent can have a direct effect upon the value of a claim, and the claimant's ability to run it. Thompsons ran a claim against a local authority. The claimant offered to settle for a modest sum but the respondent refused. The respondent dragged out the proceedings to 21 days on liability; they appealed unsuccessfully twice, and went to 5 days on remedy. The case took 5 years to conclude. The claimant proved that the respondent had blackened her name on the job market so badly that the Tribunal was satisfied that she would never work in her chosen profession again. She was awarded £500,000 plus costs. Had the claimant restricted her claim to £30,000 she could not have recovered her full losses, and the respondent would have got away with a very serious act of discrimination.

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.

The implication of this question is that the government intends to make it impossible for a claimant to break though the £30,000 limit if circumstances chance. This is a shocking denial of justice. We oppose it for the reasons given in response to Question 18.

It is also highly inappropriate that the amount of any award that a Tribunal could award should in any way be curtailed by the fee paid by the Claimant. A fundamental Article 6 issue arises in these circumstances.

Question 20

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

No. We disagree with the imposition of any threshold for the reasons given above.

Question 21

Do you agree that Option 2 would be an effective means of providing businesses with more certainty and in helping manage the realistic expectations of Claimants?

No.

We would rather expect the contrary. Despite the inherent valuation problems which would be faced by claimants in particular, a fee structure like this could provide a lock-step approach. It will be exceedingly difficult to dissuade a claimant who has paid an inflated fee on the basis of a high valuation that their claim is actually worth much less. The fee will solidify that valuation in their minds. As it is paid, there is no further incentive to avoid a hearing. A claimant, who is prepared to, will easily press their claims to a full Tribunal.

Similarly respondents will be placed in an invidious position. We explained the problems of an a priori valuation at page 17. If a claim was reasonably valued high, then due to circumstances becomes of low value, a high fee will be a barrier to settlement. Claimants will see the reduction in value as something to be applauded and won as a result of their efforts to find work . Respondents will not want to pay a higher fee which was charged on the basis of assumptions rendered useless by events. If they do not it will be a bar to settlement. With the fee paid the claimant may as well proceed to trial. Either way the only certainty is that the respondent pays more for a claim which should be easily settled.

Question 22

Do you agree with our view that it is generally the higher income earners who receive awards over £30,000? Please provide any evidence you have for your views.

No.

There is not a shred of evidence cited for this view, and the impact assessment explicitly says, "*Data on claimants' incomes are not routinely collected."* [44] We respectfully suggest that it is the government which should provide any evidence it has for this view.

Whilst it is true that higher earners will accrue losses at a greater pace, many claims have high valuations for other reasons. The following are examples:

- The top banding for injury to feelings awards in discrimination cases is up to £30,000[45]. This is unrelated to earnings;
- In equal pay claims the claimant can bring claims for inequality going back 6 years prior to the date of issue, and going forwards to judgement. When dealing with lengthy periods like this a relatively small inequality can result in a big valuation;
- Calculations for pension loss based upon the substantial loss approach are regularly in excess of £30,000, even for the low paid;
- Claims which take a long time to come to come to a remedies decision (e.g. the case referred to at page 18 above); and
- Claims for payment of contractually enhanced redundancy packages are frequently large, especially where combined with other claims such as wrongful dismissal, discrimination and unfair dismissal.

[44] *Impact Assessment TS 007*, paragraph 4.13, page 28
[45] See *Da'Bell v NSPCC* [2010] IRLR 19, EAT

Question 23

Do you agree that we should aim to recover through fees a greater contribution to the costs of providing the service from those who choose to make a high value claim (and can afford to pay the fee)? Do you have any views on impacts you think this would have on Claimants or Respondents? Please provide any supporting evidence for your statement.

No. We consider that this proposal is based upon a fallacy, and is empirically lazy.

We continue to have difficulties with this idea of 'choice'. The choice which a wronged claimant has is between enforcing their rights or not. The amount of damage which they have suffered is beyond their control; they did not choose to re-enter the job market, suffer loss of earnings, or be discriminated against. If they are unsuccessful at interview they do not choose to remain unemployed.

If a claimant legitimately has a high value claim then it is due to what has been done to them, not by them.

Also, the notion underpinning the statement "and can afford to pay the fee" is dubious. This builds on the government's unevidenced assertion in Question 22 that higher claims are brought by higher earners. It also assumes that savings are at a level which supports that statement. Research indicates that in the UK average savings amount to just £1,501 in readily accessible cash savings[46]. This amounts to just 35 days average pay[47]. If that individual qualifies for remission, then this of itself shows the fallacy of that statement.

We refer to our earlier responses.

Question 24

Do you agree with the Option 2 fee proposals? If not, please explain why.

No. See our earlier responses.

Question 25

Do you agree with our proposals for multiple claims under Option 2? Please give reasons for your answer.

No. Our observations about the inherent weaknesses of both Option 2, and the multiple fees approach apply here.

Question 26

Do you agree with our proposals for remissions under Option 2? Please give reasons for your answer

No. Our observations about the inherent weaknesses of both Option 2 and the remissions process apply here.

[46] *ING Direct Consumer Savings Monitor Report* Q3 2011, page 4. Available at http://www.consumersavingsmonitor.co.uk/reports/CSM-Q3-2011-Report.PDF
[47] *Ibid*, page 4

Question 27

Do you agree with our approach to refunding fees under Option 2? If not, please explain why.

No. Our observations about the inherent weaknesses of both Option 2 and the non-refund process apply here. Indeed, we make the observation that several of the adverse aspects are magnified under Option 2 as fees are charged up front.

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?

We repeat our observations about the difficulties in assessing value, and prefer to think of this process as estimating value.

Realistically there is no substitute for proper, professional advice. Flowcharts, questionnaires and booklets may help with the broad basics, but will not assist with assessing litigation risk, and are vulnerable to developments in the law such as revised compensation limits. Pro forma advice sheets will also have to be universal application and will be unable to take account of regional variations in the same way that a local advisor could[48].

In the absence of a properly funded advice service, the bare minimum will need to include:

- For each type of claim, what remedies are available;
- For each remedy, how that is calculated;
- For each calculation, average outcomes (e.g. future loss duration) and an explanation of variations which apply.

The most obvious issues to be overcome are:

- Explaining very complex concepts in a way which is accessible, practical and useful;
- Giving information in a way that recognises the low levels of literacy in the UK[49];
- Giving information in a way that recognises the low levels of numeracy in the UK[50];
- Ensuring that what is provided reflects Employment Tribunal practice, but does not dictate it;
- To ensure that its content is based on statistically reliable data, not hearsay, conjecture or assumption;
- Delivering it early enough to be of use in the pre-claim conciliation process

[48] By way of example the ONS Regional Labour Market Statistics for January 2012 show that the unemployment rate in the North East is 12% whereas in the South East it is 6.4%. A claimant in the North East will necessarily take a more pessimistic view of the likely duration of unemployment than their counterpart in the South East, but only if they are possessed of this knowledge

49 The September 2011 NIACE report "*Work, Society and Lifelong Literacy*" found that: one in six people of working age lacks the literacy skills to function effectively in modern society; that the North East, Yorkshire and the Humber, the West Midlands and London have the largest numbers of people with literacy problems; and that one-third of those in higher managerial or professional jobs did not achieve GCSE-level literacy skills (page 6). Available at http://shop.niace.org.uk/media/catalog/product/l/i/literacy_inquiry_-_full_report-web.pdf

[50] The August 2011 Government-commissioned report A *World-Class Mathematics Education for all Our Young People* found that "*…at least 1 in 4 of our economically active adults is functionally innumerate"* (Foreword, Page 3). Available at http://www.conservatives.com/News/News_stories/2011/08/~/media/Files/Downloadable%20Files/Vorderman%20maths%20report.ashx

Question 29

Is there an alternative fee charging system which you would prefer? If so, please explain how this would work.

Yes. See our response to Question 7.

Question 30

Do you agree with the simplified fee structure and our fee proposals for the Employment Appeal Tribunal? If not, please explain why and provide any supporting evidence.

No. The underlying fees assume that all hearings before the EAT are of equal complexity and importance is misguided. We also note that the figures used are based upon current running costs whereas no adjustment appears to have been made for the reduction in lay members which the government appears intent on pursuing.

We also repeat our concerns about reviews[51] and having to sort out mistakes made by the Employment Tribunal and point out that some appeals are lodged to do just that. A fee in those circumstances would be inappropriate.

Question 31

What ways of paying a fee are necessary e.g. credit / debit cards, bank transfers, direct debit, account facilities? When providing your answer please consider that each payment method used will have an additional cost that will be borne by users and the taxpayer.

We oppose a fees regime, but should there be one then individuals will want to be able to pay by credit or debit card. If instalment arrangements are available then direct debit should also be available. There remain a significant number of people without a bank account in the UK[52]. There will need to be some cash handling capability as well.

Representatives will want to use cheques, and/or an account facility.

Given the dangers of jurisdictional bars that we have identified on page 12, we would welcome the separation of access and fees, or at least the introduction of a period of grace to allow for queries, errors or mistakes.

Question 32

What aspects should be taken into account when considering centralisation of some stages of claim processing and fee collection?

Consideration will need to be given to cash processing (see page x) and the interaction between it and tight limitation periods. Sending cash by post is not desirable, not least because of the risk that postal delays could debar a claim if limitation is thereby missed.

[51] Page 5 above
[52] The DWP *Family Resources Survey*, May 2011, Table 4.1 shows that the proportion of households without a bank account was: England (3%); Scotland (2%); Wales (3%); Northern Ireland (7%); and UK (3%)

Equality Impact Assessment

The Ministry of Justice (MOJ) states that this Equality Impact Assessment is an initial assessment where only preliminary conclusions have been reached.

Thompsons is concerned that these 'preliminary' conclusions are premature and such conclusions cannot be reached until after the consultation stage of this process. There are a number of assumptions that are made without any feedback from consultation or statistical data, which is unavailable at this stage because the proposals have not been implemented yet. For example, (paragraph 3.6) that any disproportionate impact of the proposals will be mitigated by a remissions policy. This is an assumption and is not evidenced based.

Thompsons notes that the MOJ states that their 'initial assessment' is that the introduction of fees is unlikely to amount to indirect discrimination under the Equality Act 2010 because the government considers that the proposals, if implemented, "would be likely to be a proportionate means of achieving a legitimate aim" (paragraph 3.3). This does not answer the question as to whether the proposals are likely to have a disproportionate impact on claimants who have a protected characteristic. We believe that the Government accepts that the proposals are likely to have a disproportionate impact on claimant's who have a protected characteristic.

We do not believe that the introduction of fees is a proportionate means of achieving a legitimate aim. We state in our response to the consultation that the proposals will have an adverse impact on the ability of employees seeking access to justice. The MOJ states that the proposals are designed to move the costs from the tax payer to the Tribunal user. This misses the point, Tribunal users are tax payers whether they are employees or businesses employing people. The fact of the matter is that these proposals are to deter claimants seeking justice for unfair dismissal, the non-payment of wages, discrimination and other unlawful behaviour on behalf of the employer.

Finally, we note that in paragraph 3.8 the MOJ considers that there is no risk of harassment or victimisation within the meaning of the Equality Act as a result of these proposals. Thompsons believes that the MOJ cannot make such an assumption if potential claimants for harassment and victimisation are deterred from bringing such claims. These are the most vulnerable group of employees and therefore such an assumption is not only complacent but has serious implications for the government's ability to comply with its duty under the Equality Act 2010 to eliminate discrimination. Thompsons deals with serious cases of racial, sexual, and homophobic harassment. Such employees do not bring their claims of harassment lightly, especially given the risk of victimisation.

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?

It is clear from the consultation, the impact assessment, and from any consideration of the proposals, that it is claimants who face the greatest adverse impact. This does not strike the right balance.

Claims are unproven until adjudicated, so the government should be wary of imposing financial obligations on respondents in those circumstances. However, the law of unintended consequences is at work here. The proposals set up a series of checkpoints through which a claimant must pass. Whether they do depends on many factors, including whether they can afford to. These will represent new opportunities for a respondent to test a claimant's resolve by not negotiating until those checkpoints are cleared.

A large respondent might face several Employment Tribunal claims per year. They will do the maths and will realise that every claimant that does not clear the checkpoint (and so does not proceed with the claim) represents a saving to them in terms of both damages and legal costs. The savings are easy to calculate[53]:

[53] Award figures are from *Employment Tribunals and EAT Statistics, 2010-11*, MOJ 1st September 2011, Tables 5-11. The costs figures are from *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010) BIS Employment Relations Research Series No. 107, page 55

Category	Median Award	Costs	Total
Age discrimination	£12,697	£2,500	**£15,197**
Disability Discrimination	£6,142	£2,500	**£8,642**
Race discrimination	£6,277	£2,500	**£8,777**
Religious discrimination	£6,892	£2,500	**£9,392**
Sex discrimination	£6,078	£2,500	**£8,578**
Sexual orientation discrimination	£5,500	£2,500	**£8,000**
Unfair dismissal	£4,591	£2,500	**£7,091**

Table 1 : Median Averages

Category	Mean Award	Costs	Total
Age discrimination	£30,289	£8,009	**£38,298**
Disability Discrimination	£14,137	£8,009	**£22,146**
Race discrimination	£12,108	£8,009	**£20,117**
Religious discrimination	£8,515	£8,009	**£16,524**
Sex discrimination	£13,911	£8,009	**£21,920**
Sexual orientation discrimination	£11,671	£8,009	**£19,680**
Unfair dismissal	£8,924	£8,009	**£16,933**

Table 2 : Mean Averages

Even the **lowest** figure in the two tables (£7,091) represents the following multiples of fees:

- Fees Option 1:
  - 17.7 Level 1 cases going to hearing;
  - 6.0 Level 2 cases; or
  - 4.7 Level 3 cases

- Fees Option 2:
  - 35.5 Level 1 cases;
  - 14.1 Level 2 cases;
  - 11.8 Level 3 cases; and
  - 4.0 Level 4 cases

Currently withdrawals represent 32% of claims and research suggests that 29% of those are due to cost[54]. With 47,200 claims expected by the government[55] even on current attrition rates that represents 4,380 claims per year (9.3%). Compare that to the attrition rates suggested by the above figures:

- Fees Option 1:
  - Level 1 cases – 5.65%;
  - Level 2 cases – 16.67%; and
  - Level 3 cases – 21.28%

- Fees Option 2:
  - Level 1 cases – 2.82%;
  - Level 2 cases – 7.09%;
  - Level 3 cases – 8.47%; and
  - Level 4 cases – 25%

The clear message of the proposals is that for 5 of the 7 fees levels you need only the current cost-based attrition rates to make stonewalling a profitable tactic. The 9.3% figure is based on the current nil fee regime. We can only envisage it rising if fees are introduced.

The MOJ by its own admission states that certain groups with a protected characteristic, such as black and minority ethnic employees, part-time workers employees (the majority of whom are women) and the disabled are disproportionately represented in the lower income brackets (paragraph 4.2). It seems clear that the fees would impact disproportionately upon those with discrimination claims, especially equal pay claimants. For instance, the equality impact assessment itself states that 82% of those bringing sex discrimination and equal pay claims are women[56]. Remission will not adequately ameliorate this effect. Those who do not qualify for benefits but who are nevertheless on a low income will be severely penalised.

Of particular concern is the implication that fees will remove an important incentive upon employers to respect their employees' rights.

Question 2

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

The MOJ has already cited Labour Force Surveys and the National Census. However, there are gaps in the data. We believe that the MOJ should commission its own independent research to gather the relevant evidence if it seriously intends to assess the impact of its proposals on claimants with a protected characteristic. Please see advice from the Equality and Human Rights Commission (EHCR) in 'The essential guide to the public sector equality duty' (Revised (second) edition, January 2012).

Question 3

What do you consider to be the potentially positive or adverse equality impacts on employers under Options 1 and 2?

We can identify no adverse equality impact upon employers.

[54] Withdrawal figures are from *Employment Tribunals and EAT Statistics, 2010-11*, MOJ 1st September 2011, Page 5. The reasons for withdrawal is from *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010) BIS Employment Relations Research Series No. 107, paragraph 9.7, page 84

[55] See footnote 39 for citation

[56] *Charging fees in the Employment Tribunals and the Employment Appeal Tribunal – Initial Equality Impact Assessment*, MOJ, paragraph 20.4, page 16

Question 4

Do you have any evidence or sources of information that will help us to understand and assess those impacts?

Please see our response to Q2.

Question 5

Do you have any evidence that you believe shows that the level of fees proposed in either option will have a disproportionate impact on people in any of the protected groups described in the introduction that you think should be considered in the development of the Equality Impact Assessment?

Please see our response to Q2. The MOJ accepts that it is difficult to establish the likely impact of the level of fees because there is no comparative evidence, in that the fees have not yet been implemented (paragraph 9.2). Given the potential consequences of denying access to justice to people who have a protected characteristic as per our response to Q2 we believe that the MOJ should conduct independent research and/or seek to capture evidence through targeted surveys/questionnaires and focus group meetings.

Question 6

In what ways do you consider that the higher rate of fees proposed in Option 2 for those wishing to take forward complaints where there is no limit to their potential award (the level 4 fee) if successful, will be deterred from accessing justice?

We repeat our concerns about the unsafe assumptions that appear to underpin this question[57] and the fallacy of claimant choice[58].

To answer this question we believe it is appropriate to comment on the higher fees structure in Option 1 as well. We refer to Table 3, page 27 and Annex B. In both Option 1 and 2 the MOJ accept that discrimination claims will attract the highest levels of fees because of the complex nature of those claims. This has an immediate disproportionate impact on claimants with a protected characteristic.

Due to the complex nature of these claims and combined with the fact that there is no legal aid or no win no fee provision for legal representation in employment cases we believe that claimants with a protected characteristic are more likely to be denied access to justice given that they will be required to pay a higher rate of fees.

The fee will deter those who cannot afford it as they are in the squeezed middle. It will not affect those qualifying for remission, or those with adequate resources.

Question 7

Are there other options for remission you think we should consider that may mitigate any potential equality impacts on people with protected characteristics whiles allowing us to keep the levels of fees charged under either option to the level we propose?

As there are clear equality issues, we suggest that a view is sought from the Equality and Human Rights Commission. We would also welcome a residual discretion to waive or reduce fees in individual cases.

[57] Question 22, page 19
[58] Question 23, page 20

However we do not believe that anything will mitigate the disproportionate impact of these proposals, unless the proposals are dropped.

Question 8

Do you consider our assumption that the potentially adverse effects of the introduction of fees together with the remission system will mitigate any possible adverse equality impacts on the groups covered by the analysis in our equality impact assessment to be correct? If not, please explain your reasons.

No. By the MOJ's own admission it is an assumption that the remission scheme will mitigate against the disproportionate impact of fees. The remission system will not address the potential deterrent effect of the fees on discrimination claims brought by traditionally disadvantaged groups. We refer to our earlier responses.

Question 9

Further to Q8 could you provide any information to help us in understanding and assessing the impacts?

No. We refer to our earlier responses.

Question 10

Could you provide evidence of any potential equality impacts of the fee payment process described in Annex B of the Equality Impact Assessment you think we should consider?

Please see our response to Q6.

Question 11

Further to Q10 do you have any suggestions on how those potential equality impacts could be mitigated?

No. Thompsons opposes the introduction of fees and does not believe that the remission scheme will mitigate the disproportionate impact on claimants with a protected characteristic.

Question 12

Where, in addition to any of the questions that have been asked, you feel that we have potentially missed an opportunity to promote equality of opportunity and have a proposal on how we may be able to address this, please let us know so that we may consider it as part of our consultation process.

The Orwellian nature of 'promoting equality of opportunity' by restricting access to justice is exemplified by the suggestion that those who do not seek to enforce their rights by issuing a claim will be £1,300 better off on average[59].

How can the MOJ promote equality of opportunity when a disproportionate number of claimants with a

[59] *Impact Assessment TS 007*, paragraph 4.71, page 39

protected characteristic are likely to be denied access to justice? This is a question the MOJ itself poses, at paragraph 3.9.

How can the government talk about wanting to see greater diversity in the work place when it proposes limiting access to seek justice for those denied a job, promotion or are harassed or victimised because of their sex, race, sexuality, religion, age or any other protected characteristic?

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