Bar Council response to the Ministry of Justice Consultation on Introducing Fees in the Employment Tribunals and the Employment Appeal Tribunal

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice Consultation on Introducing Fees in the Employment Tribunals and the Employment Appeal Tribunal.[1]

2. The Bar Council represents approximately 18,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

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[1] https://www.gov.uk/government/consultations/introducing-fees-in-the-employment-tribunals-and-the-employment-appeal-tribunal/introducing-fees-in-the-employment-tribunals-and-the-employment-appeal-tribunal#consultation-period

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

4. A nominal fee of £55 is reasonable in most cases provided that the fee-exemption regime is a) sufficiently generous and b) non -bureaucratic. The current fee-exemption regime in the civil courts does not meet those criteria. It should be easier to passport benefit recipients to fee-exemption, subject to a declaration regarding savings held in bank accounts.

5. Consideration should be given to those who are bringing low value wages or holiday pay claims. These can often be for very small amounts. A £55 fee is arguably disproportionate in this context. These types of claims typically arise where an employee has been underpaid. We are concerned that the requirement to pay a fee would impact such claimants at precisely the time when they are less able to pay. We note from the Equality Statement (ES) at paragraph 6.4, it appears that 17% of cases at 2013 resulted in an award of £524 or less. The 2013 SETA shows that 9% of employers were ordered to pay £499 or less, and a further 8% paid £999 or less. This is dramatically reduced in the 2018 SETA to 4% paying £499 or less and 6% paying £999 or less, however this reduction is likely to be attributable to the previous introduction of fees. In any event, we suggest that there remains a significant body of claimants who receive very low sums. In our view, there is a risk to access to justice, in that litigants are discouraged from pursuing these wages claims.

6. We consider that without this modification, the proposal is at risk of challenge. In UNISON, the Supreme Court observed that it is not just where fees are unaffordable that they can prevent access to justice; they can equally have that effect if they render it futile or irrational to bring a claim (paragraph 96).

7. A significant number of Tribunal awards are not enforced. That is to say that the individual wins at Tribunal but does not receive the compensation ordered. In many cases, there are problems with insolvency or Phoenix companies. A possible reform (which is a partial, but not complete answer) could be to give the Redundancy Payments Service the ability to refund the £55 should the individual seek to recover unpaid wages from the Secretary of State under the statutory regime. At present, the secretary of state will pay up to 8 weeks wages where the insolvent employer has failed to pay. Adding a refund of £55 to that will incur some cost, but it is in effect a

refund of money already paid to the state. This is distinct from the exemption suggested at para 38 of the consultation as these individuals will often bring claims in the Tribunal without knowing that they will ultimately be making an application to the Redundancy Payments Service.

8. The even greater risk however comes from future modifications to the proposal. That is foreshadowed by question four below.

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

9. Yes – for the same reasons given to answer one.

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

10. Yes – but with the suggested modifications.

11. We are concerned at the apparent suggestion, at paragraph 54 of the consultation document and paragraph 6.4 of the ES, that claimants could rely on unaffordability as a ground for seeking an extension of the time limit for bringing a claim. We consider that this could give rise to significant satellite litigation and unintended consequences.

12. There is a further risk of unintended consequences in the implementation of any fees proposal. This would require tribunal staff to be trained at the outset and then would require them to administer the scheme and deal with cases of non-payment or exemption. There is no additional budget allocated to this. We are very concerned that the Employment Tribunals are already struggling to meet existing workloads. For example, it is common that the telephones are not answered and any email to the Tribunal may not be responded to for weeks if at all. If fees are introduced without any increase to budget, it is likely that this will impede access to justice by extending the time it takes for a case to be heard.

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

13. No. This is the real risk of this whole proposal. The impact of fees previously had a serious impact on the ability of individuals to seek redress regarding the workplace. The Supreme Court Judgment was clear in this respect, and it is not hyperbole to note the seriousness of the impact of higher fees.

14. The risk of higher fees and of intentional or unintentional higher fees is such that if this is the potential direction of travel it is sufficient in and of itself to undermine the answer to question one and the case for nominal fees being implemented at this stage.

15. County Court fees already cause those less well off to have greater difficulty in accessing the courts. In the Employment Tribunal, the litigants may well be the unemployed or the low-paid. This must be borne in mind when drawing any equivalence with the civil courts.

16. No Parliament can bind a future Parliament. Therefore, little comfort can be offered in this respect. However, we would suggest that any statutory instrument contains a provision that any amendment may be by way of the affirmative procedure only. This wouldn't be unduly restrictive – the SI could still be repealed in its entirety and a new one submitted.

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

17. We would urge the government to consider our proposal regarding the Redundancy Payments Office set out in our answer to question one.

18. We would also suggest that no fee should be payable in order to lodge a low value claim which is a wages claim, holiday pay claim or breach of contract claim or a claim under s. 11 Employment Rights Act 1996.

19. In terms of defining a low value claim, there are a range of approaches that could be adopted. One would be to set the threshold at £550. This figure is somewhat arbitrary, but £55 is 10% of that and could be a barrier to making a smaller claim. The consultation document is not sufficiently focused on 'pay' related claims when

considering proportionality. These claims should be separated out from say, unfair dismissal.

20. Another approach may be to peg the threshold for fee payment to the statutory rate of a 'week's pay', currently at £643 and increased annually by statutory instrument.

21. In our view, the consultation does not address the issue, identified by the Supreme Court in UNISON (see paragraph 100), that a more generous system of remission would nevertheless be effective in achieving the aim of transferring the cost burden to users. As the Supreme Court noted, if the effect of fees is to reduce claims, then the fee revenue generated will also be reduced. Some assessment of price elasticity is called for. Similarly, it is possible to expand the system of remission to preserve access to justice for poorer claimants, while still achieving the proposal's objectives including to raise revenue.

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

22. On the whole, the general public does not have a strong understanding of the core principles behind insolvency and/or company law. Individuals without legal assistance do not have sufficient regard to a) identifying the correct legal entity to claim against and b) whether it is worth proceeding against that entity. Of course, the solvency of the legal entity can alter.

23. The government should seek to gain a greater understanding of the number of employers who become insolvent during the Tribunal process so that some statistical basis can be provided.

24. We mention the above factors because these are the individuals who will be impacted by paying a fee, for a meritorious claim and yet will be in a worse financial position than if they had not commenced proceedings. We would suggest that this

group of people are likely to be people dependent on their wage to meet basic monthly living costs.

25. In our view, the following are further factors that commonly affect the decision of whether or not to make an ET claim:

1. The strict time limits for bringing a claim: in most cases, there is a three month time limit. Many employees are unaware of this and find that they are unable to bring their claims at all. This is particularly the case where the employee has brought an internal grievance and may be under the impression that time limits would not apply until the internal process is concluded.
2. Time limits and dismissal and termination: where the employment has terminated, very often the employee is focussed on the pressing practical need to reorganise finances and obtain other work. Obtaining advice on and bringing a tribunal claim is often not the immediate priority. Anecdotal evidence suggests that employees either do not become aware of the need promptly to bring a claim, or are unwilling to incur the expense and inconvenience of a claim or to further burden their families.
3. Maternity: there has long been a concern amongst employment lawyers that women are at particular risk of dismissal especially purported redundancy dismissals, during or at the end of their maternity leave. Further, there is a widespread view that the three month limitation period is too short for such claims and presents a barrier to justice. Anecdotal evidence indicates that many women do not bring claims to enforce their maternity rights because they are too drained practically and financially.
4. Fear of retaliation: for employees whose employment is ongoing, the fear of retaliation is the principal reason for not bringing a claim. This is particularly the case in industries which have lower union participation, and amongst employees who are low-paid or on zero hours contracts.
5. The threat of costs being sought by employers: although costs awards are rare, many claimants may not be aware of this. Threats of costs are routinely made by many employers and have a chilling effect.
6. Poor mental health: particularly in cases of discrimination and/or dismissal, employees suffer damage to their wellbeing often including mental illness. Experience suggests that employees are deterred from bringing claims either because they have poor mental health at the time the claim would need to be lodged, or because they fear the impact of litigation on their wellbeing.

7. Further, it is common for tribunal claimants to suffer from depression at some stage during the litigation process and this can be a factor in discontinuing or settling a claim at a low value.
8. In our experience, employees are often deterred from bringing claims because they do not anticipate success, even in cases that have merit.
9. The long delays at all stages of tribunal litigation, particularly the listing of trials, are increasingly off-putting to employees. Employees with meritorious claims are more frequently discouraged from pursing their claims to conclusion by the long waits for a final hearing.
10. Further employees often find the prospect of litigation daunting and too difficult to navigate (even bearing in mind the comparatively user-friendly nature of tribunals).
11. To some extent, employees are put off by the prospect of reputational damage. This has been enhanced by the practice, in recent years, of publishing tribunal judgments. There is anecdotal evidence that employers make searches against the names of job applicants to see if they have previous claims.

Question 7: Do you agree that we have correctly identified the range and extent of the equalities impacts for the proposed fee introductions set out in this consultation? Please give reasons and supply evidence of further equalities impacts as appropriate.

26. No. There needs to be a more detailed assessment of the impact of these proposals on those who use the Tribunal system to recover essential living expenses such as pay, i.e. debts that they are owed. It is for these individuals that the Tribunal system is supposed to provide prompt and effective workplace justice. There is a risk that these individuals will be worse off, even with a nominal fee.

27. We have the following specific observations on the IA and ES.

1. The ES only considers the potential disproportionate adverse impact of proposed fees in one way, namely by asking whether disproportionately more people of a protected characteristic would have to pay fees than those without that characteristic. In our view this only assesses one aspect of impact and does not adequately assess potential impact of discouraging claims from being brought at all.

This overly narrow approach also produces the surprising conclusion that fees would not disproportionately disadvantage women, but could have that impact on men as the preponderance of tribunal claimants.

In our view, the correct question to ask is whether the requirement to pay fees would have a disproportionate adverse impact on those with protected characteristics, in that they are put at a disadvantage compared to others without the characteristic.

2. An important subsidiary question is whether the fee is disproportionately unaffordable to certain protected groups. In our view, it is reasonable to assume that the pay disparities in society at large are replicated amongst tribunal claimants. It would follow that affordability is more likely to be an issue for at least women, BAME and disabled workers. We have a particular concern in relation to BAME workers who are already disproportionately represented amongst claimants, as well as pregnancy and maternity workers for whom there are acknowledged practical barriers to bringing claims.

We welcome the affordability analysis that has been conducted as part of the IA. However, we consider that the ES does not take account of additional costs that may be borne by those with protected characteristics. For example, primary carers, who are disproportionately female, may have childcare costs to permit them to attend a hearing (including if the hearing is conducted remotely). Further, disabled employees may face higher personal costs in attending hearings.

This is a further justification for having no fee in relation to low value claims for wages and other claims (see our answer above). These claims are likely to be brought by low paid, part-time workers and those on zero hours contracts, who in turn are disproportionately more likely to be female and/or BAME workers. We note the SETA 2018 data shows that BAME employees are significantly more likely to make unauthorised deductions (wages) claims – 28% of such claimants being Black/African/Caribbean or Asian/Asian British, even though they make up 8% of the working population.

3. We note that neither the Impact Assessment nor Equality Statement acknowledge or consider the public interest and wider benefits of discrimination proceedings, even though this was a point of emphasis for the Supreme Court in

UNISON (see paragraphs 69-71 per Lord Reed). It follows from this that there is no identification of the economic value of discrimination claims or the potential value lost, if fees have the effect of reducing discrimination claims or discouraging claimants with protected characteristics.

In the previous consultation in 2012 prior to the introduction of fees in 2013, there was no consideration of the public benefit of ET claims. In the MOJ "Charging Fees" consultation and the accompanying Impact Assessment (No. TS 007), there was an express assumption that there were "no positive externalities" [paragraph 4.88] from ET claims and that the use of the ET service by claimants "results in a technical deadweight loss to society" [footnote 50]. The Supreme Court was critical of the Government's failure to consider the public benefits flowing from the enforcement of statutory rights (paragraph 102 per Lord Reed). However, the current consultation continues this omission. We consider that this omission may make the proposal open to challenge.

Further, we consider that the failure to take into account the public benefit of tribunal claims and discrimination claims in particular, may be a breach of the Public Sector Equality Duty. Workplace equalities legislation is almost exclusively enforced by litigation. Further, some cases may resolve points of genuine legal uncertainty and in relation to which a ruling is required. This has substantial benefits for the inclusion, progression and experience of minority groups at work.

As well as these important policy considerations, there may also be direct economic benefits. For some groups, for example maternity returners and some disabled employees, their inclusion in the workplace may remove or displace onto the employer costs otherwise borne by the taxpayer.

Bar Council[2]

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[2] Prepared by members of the Law Reform Committee and the Equality, Diversity and Social Mobility Committee

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