



## **Bar Council response to the MOJ's 'Review of the introduction of fees in the Employment Tribunals'**

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 paper entitled 'Review of the introduction of fees in the Employment Tribunals'<sup>1</sup>
2. The Bar Council represents over 15,000 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.

### **Overview:**

4. The Bar Council has long opposed the introduction of Employment Tribunal (ET) fees. We believe the level at which fees have been set has diminished access to justice. Further, we believe the size of the fee typically has little relation to the value of the claims pursued and that the system for waiving or reducing fees for those with limited wealth and low income is strict and unduly complex. We also note that while the introduction of fees has coincided with a decline in claims, there has not been a marked change in rates of success, indicating that some claims that would have been successful are now not being pursued.

### **The Consultation**

5. It is noted that the Review, at paragraph 2, states that it has assessed the impact of fees

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<sup>1</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/587649/Review-of-introduction-of-fees-in-employment-tribunals.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/587649/Review-of-introduction-of-fees-in-employment-tribunals.pdf)

in relation to the three objectives set out in Annexe A, namely Financial, Behavioural and Justice. The Review concludes that the original objectives have “broadly” been met (paragraph 4). It does, however, note that there are some matters of concern “that cannot be ignored”. We note, in particular, an acknowledgement that people have been discouraged from bringing a formal ET claim because of the requirement to pay a fee and that this assessment is “reinforced by the consideration given to the particular impact that fees have had on the volumes of workplace discrimination claims”. This reflects our own experience and is of grave concern with respect to ensuring access to justice.

6. The analysis of the impact of fees on workplace discrimination fees set out in Chapter 7 of the Review also gives us considerable concern in relation to impact upon discrimination and equality claims. In particular, we note the summary of findings at paragraph 299 to the following effect:

- a) Gender: that there is evidence that the financial impact of the Higher Type B fees have been greater for women compared with men but also that there is a greater impact on the volume of claims by men compared to women.
- b) Race: that people who are Black or of mixed race are five times more likely to bring proceedings, and Asian people twice as likely compared with their representation in the workforce; there has been a greater financial impact on people from BAME backgrounds.
- c) Disability: there has been a greater financial impact on disabled people who are three times more likely to bring procedures compared with their representation in the workplace.
- d) Age: the introduction of fees has had a greater impact on older people (aged 35-64) compared with other age grounds.
- e) Religion and belief: the financial impact of fees has been greater for those who identify themselves as Christian, Muslims and, to a lesser extent, Sikhs.
- f) Marriage and civil partnerships: the financial impact of fees has been greater for those in registered legal partnerships.
- g) Sexual Orientation: there is insufficient data.

7. We note that, in respect of d.-g., there is insufficient data to reach any view about the impact of fees on the volume of such claims. However, the overall conclusion must be that there is greater impact on groups who possess certain protected characteristics than with their appropriate comparators. There is clear evidence of indirect discrimination.

8. We note that the Review, at paragraphs 300 to 323 concludes that such indirect discrimination may be justified as a proportionate means of achieving a legitimate aim that is the three objectives referred to above. We do not agree with the conclusions of the Review, but note that this is the conclusion and that the questions that are now being posed relate only to how the ‘Help with Fees’ regime may be improved.

9. We are heartened to see the comment at paragraph 333 that an assessment under section 149 of the Equality Act 2010 has “reinforced the Government’s view that action is justified to alleviate the effect that fees have in discouraging ET claims generally, including workplace discrimination claims”.

10. Given that the Government and the Review's conclusions are that fees will continue and that the issue now to be addressed is how to utilise the "Help with Fees" scheme to the greatest benefit of those who are in need of this assistance, we will refrain from commenting on the general merits of the system of fees (save to say that the conclusions reached do at places appear to be based on tentative empirical evidence and should be kept under review) and comment on the 'Help with Fees' questions as follows:

### **Consultation questions**

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

11. Given that the default position is that fees will be paid dependent upon demonstrating disposable capital of less than £3000 and being under the low income threshold it should not be difficult to publicise the financial ceilings in a way which becomes general knowledge. We believe, at present, for a layperson, the scheme appears shrouded in mystery and we would like to see a simple online calculator as part of the ET1 submission that will enable a potential Claimant to readily ascertain whether he or she may be eligible for Help with Fees.

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

12. We consider that this question is tied in with Question 3, (see the next section). We remain concerned that the disposable capital sum is too low and that the gross income figures do not take account of the reality of what Employment Tribunal claims will often be about. Where a Claimant has lost his or her job, or has been discriminated against in a way which has led to them being unable to continue in employment, they will have limited resources to bring a claim. It does seem axiomatic that they have limited resources if they have capital of only £3000, which they are likely to be dependent upon for other uses. In particular, discrimination claims are often legally complex and difficult. The fee requirement will remove, at one stroke, capital which the Claimant would have otherwise had available for legal advice or other commitments. The removal of gainful employment is itself likely to cause financial hardship. The requirement to use capital to pay tribunal fees, rather than to meet other essential expenses can only deter people who have good claims. We note from the statistics in the Review, referred to above, that this is particularly likely to impact certain groups with protected characteristics. We do consider that the capital threshold should be higher for tribunal claims where loss of employment in itself creates a great demand on a person's overall financial resources.

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

13. This is also the position with regard to the increase in the gross monthly threshold. Whilst we welcome the proposed increase we remain concerned that the bar is set so low that

those persons with very low income and limited resources will remain discouraged from bringing claims. The Type B claims equate to almost one month's disposable income and it is of concern that, again, it appears that this will impact upon groups with certain protected characteristics. The threshold does not take into account financial commitments which are already existing and we question whether there should be a system based upon income and expenditure rather than simply on a gross monthly threshold income.

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

14. We do not have any comments on this question, save that we do consider that the Government should consider whether all proceedings where payment will be made out of the National Insurance Fund should be exempt, where that is the only basis on which the employee will receive any payment.

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

15. We have already expressed our serious concern that the Review does appear to demonstrate that groups with certain protected characteristics are disproportionately impacted upon. This does not reflect our experience.

**Bar Council**

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