IoD response on Employment Tribunal fees

Ministry of Justice
HQ Civil Family & Tribunals Directorate -
Employment Tribunals Fees Consultation
Level 1 (post point 1.40)
102 Petty France
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6th March 2012

Charging Fees in Employment Tribunals and the Employment Appeal Tribunal
A Response from the Institute of Directors

Dear Sir/Madam,

The Institute of Directors (IoD) welcomes the opportunity to respond to the consultation document *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* published by the Ministry of Justice in December 2011. Policy relating to employment law is of the highest interest to the IoD and its members.

About the IoD

The IoD was founded in 1903 and obtained a Royal Charter in 1906. It is an independent, non-party political organisation of approximately 45,000 individual members. Its aim is to serve, support, represent and set standards for directors to enable them to fulfil their leadership responsibilities in creating wealth for the benefit of business and society as a whole. The membership is drawn from right across the business spectrum. 80% of FTSE 100 companies and 60% of FTSE 350 companies have IoD members on their boards, but the majority of members, some 72%, comprise directors of small and medium-sized enterprises (SMEs), ranging from long-established businesses to start-up companies. IoD members' businesses are entrepreneurial and resolutely growth orientated. More than two-fifths export. They are at the forefront of flexible working practices and are fully committed to the skills agenda.

General comments

The IoD surveyed its members in 2011 on their opinions and experience of employment tribunals and related issues. Over 1100 members responded to the survey. Of these 96% employ at least one person; 39% employ 1-10 people; 24% employ 11-49 people; 18% employ 50-249 people; and 16% employ 250 or more people. 90 respondents each employ more than 1000 people. The survey results show that around 35% (400 members) have had a tribunal claim against them, but of those just 9% were won by the claimant. In 30% of cases the employer won, while in 13% the claim was withdrawn. In 40% of cases it was settled without a tribunal ruling. These figures lend further support to concerns expressed repeatedly by employers that many complaints are without merit, but that very often employers will choose to settle rather than face the time, expense and stress involved in defending a claim at tribunal.

The overwhelming criticism from IoD members who responded to the survey was that there is no risk for the claimant in bringing a claim – it is in effect a "one way bet". For the employer on the other hand there is always considerable cost and time incurred. The greatest cost comes from using lawyers to defend the case - the complexity of employment law today demands this. Other criticisms of the system include the lack of information provided on the ET1 form making it difficult to respond to claims, a feeling that the tribunal sees its role as defending the employee, and a lack of understanding on the part of employment tribunals, including Employment Judges, of the reality and pressures of commercial life.

Given such problems, the IoD supports efforts by the Government to reform Employment Tribunals, including plans to introduce fees. Too many litigants simply put in a tribunal claim because there is no cost to them, little downside

and potentially much to be gained from doing so – even if there is no merit to the claim. For employers on the other hand, the potential cost and the time involved in dealing with a case, even one without merit, can be prohibitive. Introducing fees should help deter claimants who know they have a weak case.

There are good elements to both options presented in the consultation document, so we favour a combination of the two – fees for different stages of the process and different types of claim, plus higher fees for claims over a certain level (the consultation document proposes £30,000). The first element (Option 1) could be introduced earlier by secondary legislation, while the second (Option 2) could be introduced once legislative power has been obtained. In addition, we would like to see the Government press ahead with the proposal in the *Resolving Workplace Disputes* consultation document to require all claimants to state the level of award they are seeking. We would also repeat our calls in the IoD response to *Resolving Workplace Disputes* to end gold-plating of EU directives by capping awards in relation to job applications, and abolishing awards for "injury to feelings".

We are concerned though at the proposals for remission of fees, particularly for those on certain benefits, eg Jobseekers Allowance, Employment & Support Allowance etc. This could cover the great majority of those who have lost their job and are making a claim for unfair dismissal. The Government's Impact Assessment estimates that as many as three-quarters of claimants would be eligible for full or partial remission. We believe such a high level of exemptions will undermine the effectiveness of the proposed fees regime. In our view there should be some element of means-testing involved for anyone applying for remission of tribunal fees. We would urge the Government to look again at this element of the proposals. We would be happy to work with the MoJ and other stakeholders to explore alternative solutions.

Answers to specific questions

Success criteria

The MoJ consultation document proposes as success criteria: contribution to the costs of the system; a simple, easy to understand and cost-effective fee structure; maintaining access to justice for those on limited means; and improving the effectiveness and efficiency of the system by encouraging users to resolve issues as early as possible.

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

For the IoD, an important success criterion would be that fees help to deter weak and vexatious cases so as to reduce wasted time and costs for employers, and for the tribunal system. Success against this criterion could be measured by surveying employers' perceptions of the extent to which they have been faced with such claims.

Fee types

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

Yes, for the reasons given in the consultation document – that the cost of the service should be borne across all users, that all users will make informed decisions about whether to go to an Employment Tribunal, and because it reflects the long-standing approach in the civil courts.

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

Yes we agree, to reflect the resource consumed at different stages of the process.

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.

Yes we agree that using three levels based on existing criteria used by Employment Tribunals to allocate cases to the three tracks is the simplest and most sensible approach.

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.

Yes, but we would like to see higher fees charged for claims over a certain amount, in other words, a combination of Options 1 and 2 in the consultation document.

Who pays?

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.

Yes we agree, but Employment Tribunals must take into account the gravity of the failure and evidence of whether the breach was unintentional. Otherwise this will become another penalty on employers, on top of a possible fine of up to £5,000 as planned in the follow-up to *Resolving Workplace Disputes*.

The discretion of Employment Tribunals to award, or not to award, the cost of fees against the unsuccessful party again raises the issue of consistency of tribunal decisions, especially when combined with the planned discretion to impose a penalty on employers. This issue has been raised by employers in the past, and was acknowledged in the *Resolving Workplace Disputes* consultation document, but was not addressed in the Government response to that consultation. We would like to see the Government take some concrete measures to address this problem.

We assume an employer losing a claim brought against it would only have to reimburse the fee actually paid, ie there would be no fee where the claimant had obtained full remission, and a reduced fee where there was partial remission.

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.

Yes, for the reasons given in the consultation document - only the claimant knows of the application when it is made, and respondents should not have to pay to defend themselves against unproven allegations.

Question 8 – Do you agree that these applications [eg counter-claims, set aside default judgment, application for dismissal following settlement or withdrawal, request for written reasons], should have separate fees? If not please explain why.

In principle yes, because they will involve work for an Employment Tribunal. But we question whether a fee should be charged for an application for dismissal following settlement or withdrawal – what substantive work would the ET have to do that would justify a fee? Also, we do not agree that the respondent should pay when a claim is withdrawn.

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.

Yes we agree a separate fee should be paid, but it is not clear why the respondent should pay given that both sides stand to benefit.

Remissions

The Impact Assessment (paragraph 4.14) estimates that 10% of Employment Tribunal claimants will be eligible for Remission 1 and a further 17% for Remission 2 (full fee remission). 50% of additional claimants would pay only a proportion of the two highest planned fees.

Examples given in Annex D to the consultation document include full remissions given to couples earning £28,000 a year, and partial remission for couples earning £40,000 a year. In fact, if the claimant is in receipt of Jobseekers' Allowance (JSA) or Employment & Support Allowance (ESA), their spouse/partner could be earning any amount of money, but s/he would still be entitled to full remission. This illustrates the need for means-testing with all applications for remission.

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 do not agree that the existing remissions system should be used for Employment Tribunal claims. The high proportion of claimants estimated by the Government to be eligible for full or partial remission will undermine the objectives of the proposals, not least the cost-recovery objective, and more importantly for employers, will undermine the deterrent effect of a fee in weak and vexatious cases.

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?

Whilst we can understand the attractiveness to the Government of using the established fee remission system, the type of claimant in an Employment Tribunal claim will be different from the type of claimant in the civil or family courts – those considering a claim for unfair dismissal will by definition have lost their job and many will be in receipt of Jobseeker's Allowance or some other benefit. This may be for a relatively short period of time, but it will be exactly when their eligibility for fees remission will be assessed. In our view, this justifies a different approach to eligibility for remissions in the context of Employment Tribunal fees.

We do not want to put an unreasonable barrier to justice in the way of potential claimants in genuine financial hardship. But we do believe the Government should reconsider this element of its proposals. We would be very happy to work with the MoJ and other stakeholders to explore possible alternative solutions, which in our view should involve some element of means-testing for all applications for remission of fees.

Multiple claims

Question 12 – Do you agree with the fee proposals for multiple claims under Option 1? If not, please explain why.

Yes we agree, but the situation could get complicated where claims are joined together by an Employment Tribunal, or where the ET splits up multiple claims.

Question 13 – Do you agree that the HM Courts & Tribunals Service remission system should be adopted for multiple claims? If not, please explain why.

It would be simpler to give remission to each individual entitled to it, with those not entitled continuing to pay the same level they were expecting, rather than making up the shortfall resulting from any remissions. It could take a long time to work out what the fee will be if one has to await evidence of eligibility for remission from each individual.

Refunds

Question 14 – Do you agree with our approach to refunding fees? If not, please explain why.

Yes we agree. The possibility of refunds on settlement or withdrawal of a complaint would undermine the deterrent effect of fees, and would be costly to administer.

Indicative fee levels

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

In general we agree with the proposed levels for fees which are needed to act as a deterrent to weak and vexatious cases. It is not explained though how the levels have been set, for example, whether they seek to recover a certain percentage of the overall cost.

There are some anomalies which may have a rational explanation, but it is not given in the consultation document, eg a jump in hearing fees from £250 to £1000 for levels 1 and 2 – does this reflect different resources involved in the different types of claim?

Option 2

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

We support the policy aims of Option 2 - to provide business with greater certainty over maximum liability, to narrow the gap between claimants' expectations and actual entitlements, and to respond to business concerns over high discrimination awards. These policy aims are just as valid if Option 1 is chosen. So we favour a combination of Options 1 and 2, with fees varying depending on the stage in the process, the level of claim and the level of award sought.

The consultation document rejects the idea of a flat rate cap for compensation awarded to job applicants (paragraph 119), apparently on the grounds that by itself it would not address business concerns in any meaningful way. Whilst we agree that by itself this would not be sufficient, we believe that it should be adopted, in addition to the fees

proposals. It is something explicitly allowed by the discrimination directives, so its absence is an example of gold-plating which could be removed. The IoD called for this change in its response to *Resolving Workplace Disputes.*

We would also repeat our call in that response for abolition of awards for "injury to feelings", again something that is not required by the EU discrimination directives, and which is therefore a further example of gold-plating.

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.

The disadvantages of a single fee described in the consultation document are valid points, which is why a combination of Options 1 and 2 is our preference.

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.

Yes, for the reasons given in the consultation document - to give employers greater certainty over maximum liability, and to promote more realistic expectations of awards.

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.

Yes – if it is made clear at the outset that the claimant must pay a higher fee for a claimed award above the threshold. We think it is appropriate that a claimant should be prevented from receiving an award of £30k or more if they are seeking a lower award, based on tools and guidance provided to assist them in valuing claims.

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

The consultation document does not state on what basis the figure of £30,000 has been chosen. We understand it is a threshold for income tax purposes, and so it may be a natural break point. There are arguments for and against both a lower and a higher threshold. The impact on behaviour is difficult to predict. By introducing the fess regime in two stages – the Option 1 element by secondary legislation in 2013 and the Option 2 element once legislative power has been obtained – the Government will have gained some evidence of the behavioural impact of fees which it could use to set both the threshold and the fees level for the Option 2 element.

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

Yes, but we would like to see it combined with Option 1, as previously stated.

Question 22 – Do you agree with our view that it is generally higher income earners who receive awards over £30,000? Please provide any evidence you have for your views.

The assumption in the consultation document - that a large proportion of the value of high awards is loss of earnings, implying claims are made by high earners - seems reasonable.

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.

Yes. It is difficult to speculate what behavioural impacts it might have on claimants. But greater transparency in the system through tools and guidance on the likely level of awards and a requirement to state the level of award sought can only be beneficial.

Question 24 – Do you agree with the Option 2 fee proposals? If not, please explain why.

In principle yes, but combined with Option 1.

<u>Option 2 – multiple claims</u>

Question 25 – Do you agree with our proposals for multiple claims under Option 2? Please give reasons for your answer.

Yes, it is consistent with what is proposed under Option 1.

Option 2 – remissions and refunds

Question 26 – Do you agree with our proposals for remissions under Option 2? Please give reasons for your answer.

See our comments on the remission system under Option 1.

Question 27 – Do you agree with our approach to refunding fees under Option 2? If not, please explain why.

Yes, see our answer to question 14.

Comparison of Options 1 and 2

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

The factors and Employment Tribunal will take into account in calculating awards, and typical levels of awards.

Question 29 – Is there an alternative fee charging system which you would prefer? If so, please explain how this would work.

We favour a combination of Options 1 and 2, with separate fees for issue and hearing, plus higher issue/hearing fees if an award is sought of greater than a specified level. Fees for levels 1-3 complaints could be introduced in 2013 by secondary legislation, with a power created by primary legislation to impose higher fees where the award sought is greater than a specified level. The period from 2013 would give an opportunity to analyse the behavioural impact of fees, which could be fed into decisions on the level of the threshold and the level of fees for level 4 cases.

EAT fees

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.

Yes, it seems reasonable.

Operational changes to introduce fees

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.

Centralised collection and accounting of fees, to reduce costs, is an appropriate option to consider. The Government should also consider centralised handling of all claims, not just those submitted on-line.

Thank you once again for inviting the Institute of Directors to participate in this consultation. We hope you find the comments useful.

Yours sincerely

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