



Citizens Advice Scotland

Response to the Ministry of Justice (MoJ) consultation: Review of the introduction of fees in the Employment Tribunals

March 2017

Summary

- Employment Tribunal fees continue to act as a major barrier to accessing justice in Scotland.
- Employment Tribunal fees should be removed or substantially reduced across Great Britain, in line with the Scottish Government's undertaking to remove the fees in Scotland once powers are transferred to them.¹ As well as improving access to justice, this would prevent any current concerns around "forum shopping" between jurisdictions, where potential claimants may attempt to raise their case in a less suitable jurisdiction to avoid fees if Scotland were to remove fees while England and Wales did not.
- The powers over the management, operation, and administration of the Employment Tribunal and Employment Appeal Tribunal, and specifically the powers to fix or remove fees, should be transferred to Scotland as soon as possible.

Introduction

0.0 Citizens Advice Scotland (CAS), our 61 member bureaux, extra help unit, and consumer helpline together form Scotland's largest independent advice network. In 2015/16 the Scottish Citizens Advice Service helped 330,000 clients with one million pieces of advice. In addition, the Scottish zone of CAS's self-help website received four million unique page views. In 2015/16 the Scottish Citizens Advice network provided over 48,500 new pieces of advice on employment issues, covering a broad range of topics including: discrimination at work; unfair dismissal; and achieving statutory rights such as unpaid wages, maternity pay, and holiday pay.

Devolution of powers over the Employment Tribunal

1.0 CAS has chosen to respond substantively to this consultation because it is not yet agreed between the UK and Scottish Governments when the powers over the management, operation, and administration of the Employment Tribunal (ET) and Employment Appeals Tribunal (EAT) will be transferred to Scotland.² Accordingly, if the transfer does not take place prior to the implementation of any changes pending the outcome of this consultation, Scotland will continue to be subject to the level of fees currently under consideration.

¹ A PLAN FOR SCOTLAND The Government's Programme for Scotland 2016 -17 at p.48

² s.39(1)(6)(b) Scotland Act 2016 c.11

- 1.1 CAS’s primary position, however, remains that the transfer of powers to Scotland over the Employment Tribunal and Employment Appeals Tribunal should take place as soon as possible, in particular the powers which would allow the removal of ET fees in Scotland to eradicate the current barrier to justice presented by the fees.³

Fees as a barrier to justice

- 2.0 CAS and the University of Strathclyde produced a joint report in March 2015 *The Price of Justice – the impact of Employment Tribunal Fees on CAB Clients in Scotland*.⁴ This report found that the introduction of fees acted as a barrier to bureau clients pursuing justice in employment disputes, even where claims had reasonable prospects of success.
- 2.1 This is reflected in a reduction in the amount of new advice provided by Citizens Advice Bureaux in Scotland on Employment Tribunal and appeals from before and after the introduction of fees (see Table 1).

Table 1

Year	Quarter	Employment advice	ET and appeal advice	ET and appeal advice as % of Emp advice
2016/17	Q1	12,427	505	4.1 %
2015/16	Q4	13,764	599	4.4 %
	Q3	11,347	442	3.9 %
	Q2	11,360	450	4.0 %
2014/15	Q1	12,059	456	3.8 %
	Q4	13,758	505	3.7 %
	Q3	11,664	463	4.0 %
2013/14	Q2	13,105	475	3.6 %
	Q1	12,098	485	4.0 %
	Q4	12,820	544	4.2 %
2012/13	Q3	10,513	533	5.1 %
	Q2	11,649	604	5.2 %
	Q1	11,558	625	5.4 %
2012/13	Q1-Q4	44,128	2,158	4.9 %
2011/12	Q1-Q4	45,131	2,113	4.7 %

- 2.2 From Q1 of 2011/12 to Q2 2013/14 (when fees were introduced), advice relating specifically to the ET and appeals made up an average of 5% of all

³ For CAS’s fuller position on the devolution of powers over the ET, see our response to the joint consultation from the Department for Business, Energy & Industrial Strategy (BEIS) and the Ministry of Justice (MoJ) on *Reforming the Employment Tribunal System* (2017) available to download from here: <http://www.cas.org.uk/publications/ministry-justice-and-beis-reforming-employment-tribunal-system>

⁴ Available to download from: <http://www.cas.org.uk/publications/price-justice>

new employment advice. From Q3 2013/14 to Q1 2016/17 advice on the ET and appeals on average made up only 4% of all new employment advice. Taking the average amounts of employment advice given over 2011/12 – 2015/16, this 1% decrease means that around 470 fewer pieces of advice each year have been provided to clients about the ET and appeals since the introduction of fees.

- 2.3 CAS held an employment adviser focus group in September 2016 with eight advisers, caseworkers, and lay-representatives from across Scotland to discuss their experiences of advising, supporting, and representing clients dealing with employment issues and the Employment Tribunal.⁵
- 2.4 Findings from our focus group would suggest advisers are still supporting clients who are deterred by fees from proceeding to the ET to protect their statutory rights and to seek redress, even where they would have reasonable prospects of success.

Case study 1

An East of Scotland CAB reports of a client who had an illegal deduction from wages taken by her previous employer. She has been in dispute with her former employer for around two months since she left work, but has been unable to resolve matters. The client was shocked to find out that fees to go to the Tribunal would be more than the £380 she was due.

Case study 2

A North of Scotland CAB reports of a client who was employed as a dental nurse. She was dismissed with pay outstanding and with no pay in lieu of notice. She did not want to proceed to the ET for a £390 claim due to the costs involved, as well as the time and stress of doing so.

⁵ Bureaux are independent entities, so CAS put out a call for bureaux to nominate representatives to attend the focus group who had experience of providing employment advice relating to the ET. Eight advisers were nominated (with a short biography of their relevant experience provided). All applicants were invited to attend the focus group based on their breadth of experiences. A variety of bureaux from across the central belt up to the highlands had advisers represented. All advisers were experienced in their field, with a number of them holding managerial roles overseeing the provision of employment advice and support in their bureau and surrounding area.

- 2.5 Findings from the focus group would suggest that clients find fees act as a barrier to enforcing their rights. This is particularly true for clients with lower value claims, or clients with claims which are more complex and which therefore carry more uncertainty or risk such as discrimination cases.
- 2.6 The proposed widening of the eligibility for the Help with Fees scheme would be an improvement, however it is unlikely to mitigate the full effects seen by the introduction of fees. The existence of the fees acts as a deterrent to potential claimants, and for many who fall out with the eligibility for Help with Fees, it seems likely they will continue to deter claimants from enforcing their rights and seeking redress. For that reason, CAS recommends the removal of ET fees, or at the very least a significant reduction in the level of fees, with improved staggering to take account of the value of the claim so that employees are able to pursue lower valued claims without having to pay more than their claim is worth in fees.
- 2.7 Employment Tribunal fees also have the potential to discourage unscrupulous employers from meaningfully engaging in early resolution attempts. Such employers could be aware that many employees will be priced out of raising claims against them at the ET, and they might hold off trying to resolve a dispute in the hope that the employee will not be able or willing to pay the fees to continue through with their dispute to the stage of the Tribunal.

Case study 3

A North of Scotland CAB reports of a client who faced an employer who had made a settlement offer early on in the dispute. When it came to paying the agreed settlement, the employer withdrew their offer. They then waited for the client to go through ACAS Early Conciliation and pay both stages of the ET fees before reinstating their offer.

- 2.8 Another former CAB client commented: *“The companies drag it out hoping that you will just give up and I am not surprised that some do.”* Another client concurred: *“Companies [...] know it’s very costly so many people give in.”*
- 2.9 Potential ET claimants also currently have to consider their prospects of successfully enforcing their ET award against whether or not they can afford or wish to proceed to the Tribunal. In 2013 the Department for Business, Innovation & Skills conducted a study on the payment of Employment Tribunal awards.⁶ Of the 1,200 surveyed, 200 were Scottish claimants. An estimated

⁶ DBIS, *Payment of Employment Tribunal Awards* (2013), available to download from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf

46% of claimants in Scotland were found not to have been paid anything following their ET award. For potential claimants aware of the risks that they may well not get the money owed to them, even if successful in the ET, the high level of fees could act as a deciding factor not to proceed to protect their employment rights or achieve redress.

- 2.10 Finally, there is a concern that once powers over the ET are transferred to Scotland if the fees are only removed in Scotland, employees who would have previously raised their case in England or Wales might try to raise their case in Scotland. This could have the potential to overloading the Scottish system. If fees were removed, or substantially reduced, across Great Britain, these concerns of “forum shopping” would become obsolete.

Conclusion

- 3.0 Based on the advice statistics for Scotland, case studies, and findings from our adviser focus group - the ET fees act as a real barrier to justice. Widening the Help with Fees eligibility criteria would be an improvement, however it is unlikely to mitigate the full effects seen by the introduction of fees. For that reason, CAS recommends the removal of ET fees, or at the very least a significant reduction in the level of fees, with improved staggering to take account of the value of the claim so that employees are able to pursue lower valued claims without paying more than their claim is worth in fees.