



# Priced Out: the impact of employment tribunal fees on access to justice

TUC response to Ministry of Justice consultation

## Introduction

The Trades Union Congress (TUC) comprises 58 affiliated trade unions which represent more than 6 million members who work in a wide variety of sectors and occupations, including in the public, private and voluntary sectors.

Trade unions, their officials and union workplace representatives have extensive experience of representing members and helping them to resolve workplace disputes. The TUC believes that it is in the interests of all parties to resolve workplace disputes as swiftly as possible before they escalate. Where however it is not possible to resolve disputes in the workplace, unions will seek to defend their members' interests by supporting meritorious claims to employment tribunals. Trade unions have considerable experience of representing members at employment tribunals in both individual and multiple cases. The latter may involve small groups of employees or many thousands of workers.

The TUC is seriously concerned that the Government has failed to carry out genuine consultation on the principle of whether fees should be introduced for employment tribunal users. Neither this consultation nor the earlier *Resolving Workplace Disputes* consultation sought views on the merits or disadvantages of such a proposal.

The TUC remains fundamentally opposed to the introduction of fees for employment tribunals as we believe that it will price many workers out of access to justice.

We are also concerned that in drawing up its proposals for fees the Government has failed to pay due regard to the particular characteristics of employment tribunal users. For example:

- Many employment tribunal claimants are not legally represented and do not have access to legal advice.
- Many claimants will have recently have lost their jobs and therefore are likely to have experienced a sudden deterioration in their financial circumstances. Nevertheless they may not be covered by the remission policy due to receipt of pay in lieu of notice or redundancy pay.
- The time limits for filing claims with an employment tribunal are shorter than for many other legal proceedings. It will be difficult to operate the complex fees and remission scheme in time and there are significant risks that claimants will be unjustifiably barred from an employment tribunal.

The TUC believes that both option 1 and option 2 as outlined in the consultation will create many serious and practical problems. Our main issues of concern are summarised below.

### **Key issues for the TUC**

- The proposed level of fees is too high and will limit access to justice and deter many meritorious claims. The proposed fees appear to have been set at a higher rate than fees for other parts of the judicial system.
- The MoJ's proposals will discourage early resolution of workplace disputes and are therefore not consistent with wider government policy.

- Charging higher fees for more complex claims such as claims under the Equality Act 2010 will have a disproportionate impact on individuals with protected characteristics.
- The proposed cap for compensation for higher value discrimination claims does not appear to be consistent with the requirements of EU equality law.
- The fees proposals are indirectly discriminatory and the mitigating measures, including the remissions policy do not make the policy a proportionate means of achieving a legitimate aim.
- The government's belief that the proposed remission policy will ensure claimants on low incomes will be able access to justice is misplaced. Research commissioned by the TUC indicates that a significant proportion of claimants who are paid at NMW and living wage rates will still be required to pay fees.
- Some claimants could be barred from an employment tribunal due to the short time limit for filing claims and the requirement that remissions from fees must be approved before a claim can be admitted by an employment tribunal. The proposals are likely to increase the need for Pre-Hearing Reviews to determine whether time limits should be extended. This will incur costs for employers, claimants and the tribunal service.
- The fees and remissions policies are very complex and will be difficult for unrepresented claimants to understand and navigate. This is likely to lead to some claimants paying fees which exceed the cost of processing their claim which is not consistent with Treasury Guidelines for the charging of fees.
- The lack of an effective refunds policy will discourage early settlements of disputes.
- The proposals are not likely to be cost effective as they will entail additional administrative processes and bureaucracy for employment tribunals. They are also likely to generate extensive satellite litigation which will delay proceedings and incur additional costs for employers, workers and the tribunal service.
- The proposals place too great an emphasis on the transfer of costs from the taxpayer onto employment tribunal users at the expense of preserving access to justice and maintaining an effective system for the enforcement of employment rights.

**In the light of these concerns the TUC calls on the Government not to proceed with its proposals for the introduction of fees for employment tribunal users.**

## Introducing fees in Employment Tribunals – impact on employees

The TUC believes that the proposals for the introduction of fees will limit access to justice and will deter a large proportion of meritorious claims. This will undermine the effectiveness of the enforcement system for employment rights. It will mean that workers are more likely to be mistreated at work and that unscrupulous employers will be able to flout the law without fear of sanction. This in turn will create unfair competition for good employers.

### **Effectiveness of the remissions policy**

One of the success criteria for the proposed fee charging structures is that access to justice for those on limited means should be maintained. **The TUC argues that this criteria is paramount and should not only be confined to those of limited means but should apply to access to justice for all.**

The government relies heavily on its proposed remission policy to ‘ensure’ that those on lower incomes are not priced out of the tribunal system, but the TUC has grave reservations as to whether that the remissions policy will preserve access to justice. To date it appears that there has been no evaluation of whether the existing court fee remission system is being accessed by the targeted UK population – those most in need of financial support with court fees.

According to the Impact Assessment (IA), some 9.5% of the ET claimant population would be entitled to Remission 1, 16.9% to remission 2 and that therefore 26.4% or just over a quarter of claimants would receive a full remission that would exempt them from paying any fees. This still means that around three-quarters of claimants would be reliant on applying for Remission 3 under which they would be likely to have to pay some proportion of the fees.

The gross annual income thresholds for Remission 2 are set at very modest income levels. For example, for a single person without children who is claiming Remission 2 the £13,000 per annum a gross threshold equates to £250 per week. Based on a full-time working week of between 37-40 hours, this gives an hourly pay rate of between £6.25 and £6.75. These are very low hourly rates, not much above the National Minimum Wage and basically require that all single claimants earning above these very low income levels apply for remission 3 where they are likely to be required to contribute to the cost of the fee for bringing a claim.

The TUC commissioned independent analysis of the likely impact of the government’s proposed remissions policy from leading academics Peter Urwin and Franz Buscha at the University of Westminster and Paul Latreille at Swansea University.

In particular, the analysis commissioned by the TUC attempted to find out to what extent individuals from households on low incomes (earning the NMW or living wage) were not fully covered by the proposed remissions policy and would therefore be required to pay some or all of the proposed fees for using the employment tribunals.

Using *Understanding Society* as a data source (a survey of some 50,000 individuals in 30,000 households), the analysis reached the following conclusions.

### **Individuals and households in receipt of benefits:**

- Out of the 33,000 (employed or unemployed) individuals in the sample, 7.6% are on the relevant benefits that would make them eligible for remission 1.

### **Impact of remission 2 on households**

The research considered the proportions of single and couple households that were eligible for remission 2 according to whether they had dependent children and if so the number of children. The key findings included:

- Unsurprisingly, given that entitlement to remission 2 is based on household income, while 21.88% of single person households with no children were eligible for Remission 2, only 11.89% of couple households without children qualified.

### **Impact of the remissions policy on those earning the NMW:**

The research also considered the extent to which individuals who are paid at NMW rates or less may nevertheless be required to pay fees when making an employment tribunal claim.

It is generally recognised that single individuals who are paid on NMW rates are likely to be earning £13,000 a year or less. They are therefore likely to be covered by remission 2 and will not be required to pay fees. However, the TUC-commissioned research suggests that a significant proportion of individuals **who are paid on NMW rates** and are part of a couple may nevertheless be required to pay fees due to their partner's income.

The research found that:

- Under **remission 3**, only 5.45 per cent of individuals who are paid an hourly wage of £6.08 an hour would not be required to pay any level of fees and approximately 70 per cent of such individuals may be required to pay £345 or more.<sup>1</sup>

It appears that a higher proportion of those earning NMW rates may be able to rely on **remission 2**. Nevertheless a significant proportion of those earning £6.08 or less an hour who are in a couple would not benefit from **remission 2**:

- Considering childless couple households with income levels above the cut-off for Remission 2, between 26 and 36 per cent contain an individual whose wage is at the level of the NMW.
- Considering one-child couple households with income levels above the cut-off for Remission 2, between 27 and 40 per cent contain an individual whose wage is at the level of the NMW.
- Considering two-child couple households with income levels above the cut-off for Remission 2, between 22 and 37 per cent contain an individual whose wage is at the level of the NMW.

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<sup>1</sup> It is recognised that for some claims the issue fee may be less than £350.

*[These figures are presented as intervals to accommodate missing values in labour income and/or hours worked when calculating wages]*

### **Impact of the remissions policy on those paid the living wage**

The research also suggests that an even higher proportion of those earning the living wage will nevertheless be required to pay fees in order to take a claim to an employment tribunal.

The analysis suggests that:

- Considering all couple households with income levels above the cut-off for **Remission 2**, the research estimates that an average of between 84 and 88 per cent contain an individual whose wage is at or below the level of the Living Wage.
- Only 4.23% of those on the living wage would be fully exempt from paying fees under **Remission 3**. Some 70% of this group would pay £385 or more to take a claim to an employment tribunal.<sup>2</sup>

### **The remission scheme and the discriminatory impact of the proposed fees**

The government has also argued that the remission scheme will ameliorate the discriminatory impact of the proposed fees. The TUC strongly disagrees with this view for the reasons outlined throughout this response and in particular in our responses to questions on the EIA outlined in Appendix A.

### **Take up of the remission policy**

The TUC is also concerned that due to the complexity of the remissions policy, take up of the remissions policy is likely to be lower than expected by the government. As a result a higher proportion of claimants will be required to pay full fees. In practice this means that more meritorious claims will be deterred.

The IA and EIA are silent on the take up of remissions and appear to assume that all those eligible for remission apply for it, are correctly assessed for it and are granted it, but this may not be the case. Applying a means-test may discourage some claimants from applying for remission (for example due to: complexity of application process; stigma of applying for something that is means-tested; lack of access to the full information required to apply such as HH income and supporting evidence; time limits for submitting ET1).

In *'Inequality and the State'* (Hills, J 2004) an analysis of DWP official estimates show that in 2000-01 while take up for Child Benefit was found to be near to 100 per cent, means-tested benefits showed take-up shortfalls. For example, at least a fifth of those entitled to Council Tax Benefit and income-based JSA and just under a third of those entitled to (then) Family Credit failed to claim

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<sup>2</sup> It is recognised that for some claims the issue fee may be less than £350.

their benefits. More recently a National Audit Office (NAO) report ‘Means Testing’ showed the same differential take-up between means-tested benefits and Child Benefit which is, at least currently, a universal benefit. Where claimants are deterred from applying for remission and cannot afford to pay the fees in full, they may not be able to pursue a legitimate claim.

The IA and EIA also take no account of whether applying for remission might have a disproportionate impact on certain groups of claimants such as older workers (stigma of means testing) awareness of remissions policy and understanding forms for claimants for whom English is not a first language.

### **Errors in assessment for remission**

Research commissioned by the MoJ into the Court fee remission system showed that errors in assessment occur due to the complexity of the assessment and documentation required. The 2009 Ministry of Justice report ‘*Is the 2007 court fee remission system working?*’ found that:

- Around two-thirds of staff respondents found that processing applications for remissions complex or very complex; in particular assessing entitlement to remission 3 was considered problematic along with verifying the necessary evidence.
- in an average of 30% of cases, the processing of applications was incorrect in those appeals where the individual was entitled to either Remissions 2 or 3 the majority of staff respondents gave the wrong answer.

Given the unreliability of the existing remission process there is a serious concern that claimants who are incorrectly refused a remission may decide not to pursue their claim due to cost. The appeal process for claimants whose initial application for a remission is erroneously refused is also likely to be expensive and time consuming. More worryingly it may mean that individuals are barred from filing their claim due to the short time limits for employment tribunal cases.

The IA assumes that only those individuals who would be entitled to any type of remission would apply for one (para.4.55). In practice this is extremely unlikely to be the case and the IA therefore fails to account for these additional costs of administering the remission scheme, plus the cost of those who appeal against a decision that they are ineligible for remission.

### **Disproportionate cost burden for employees**

The MoJ Impact Assessment (IA) shows that the costs of introducing fees are borne disproportionately by employees. The IA estimates that employees will initially incur fees of between £9-10m (Option 1) and £10-£13m (Option 2) per annum. Furthermore under Option 2, the IA states that claimants will potentially lose up to £5m per year in lower awards. Employers on the other hand are expected to enjoy net benefits of between £1-9m (Option 1) and £2-£20m per annum (Option 2). The fact that claimants bear the costs up-front is particularly

worrying given the known difficulties that claimants can face in recovering tribunal awards from employers.

The TUC believes that it is misleading to cite as a potential ‘benefit’ to employees avoiding the costs of making a claim where they ‘choose’ not to do so as a result of the introduction of fees. For many claimants, there may be no choice – they can either afford to pursue a claim or they cannot. Where a claimant decides not to pursue a claim as a result of the introduction of fees, this does not mean that the issue has gone away or is resolved satisfactorily. The risks of allowing employment disputes to remain unresolved in the workplace are not certain, but it is likely that resulting employee dissatisfaction will have negative consequences that go beyond the impact on the individual.

The IA concedes that it does not have a clear idea of the extent to which paying claimants would respond to the introduction of fees of differing amounts, although it agrees that the overall effect would be to reduce the number of claims. (Para 4.9)

The IA sets out two scenarios of demand response (para. 4.11) - low and high responsiveness which assume that for every £1 of fee increase, demand falls by 0.01% or in the high responsiveness scenario 0.05%. In practical terms this means that a £100 fee rate will cause demand to fall by 1% or 5%. The IA does not clearly set out the basis for these assumptions and does not take account of likely differential impact on different groups.

The TUC disagrees with the conclusion in para. 4.10 of the IA that ET claimants would not be highly price sensitive to fee-charging. This remains an unknown. The IA conclusion is based on previous (2007) Ministry of Justice (MoJ) research ‘*What’s cost got to do with it? The Impact of changing court fees on users*’ which found that 7 in 10 of those surveyed said that court fees were not much of a factor in their decision to progress to court. However, there are dangers in generalising this finding to the employment tribunal System as:

- Fees have never been charged in employment tribunals and employment tribunal users have different characteristics to users of the courts system. For example, some respondents were involved in family cases involving divorce and child custody and their relative price inelasticity is likely to reflect this. We anticipate that the behavioural reaction to the introduction of fees in the employment tribunal system will be greater.
- It is notable that the same MoJ research concluded that ‘*court fees are more of an issue for those individuals claiming money back*’. Significantly the MoJ report concluded that for this group if the cost of the court fees took a significant proportion or exceeded the total value of the claim then it was likely to affect the decision to proceed to court, despite being payable by the defendant of the case is won. In other words up-front fees can be a deterrent, particularly where they are considerable as the sums proposed under Options 1 and 2 are.

In fact, the Impact Assessment concedes that ‘the underlying drivers of (employment tribunal) user behaviour are not well understood at present’ and that the ‘*price elasticity of demand for ET and EAT services is unknown because*



*fee-charging has never existed.....the risk remains that users (who would not benefit from fee remission) would react more strongly than is currently anticipated.’ (para. 5.3)*

The MoJ research referred to above also asked respondents what they would do when court fees reached a level where they said they would no longer pursue a court claim. It is notable that a sizable minority (29% or 3 in 10) said that they would drop the issue. As we have already pointed out, dropping the issue is not the same as resolving it. A significant proportion (15%) said that they would fund the fee increase through taking out a loan or going into debt or borrowing from family. Unsurprisingly, those in socio-economic groups ABC1 were more likely to be able to fund an increase in court fees from savings / personal income than those in groups C2DE (59% compared with 48%).

Given the gaps within the current Impact Assessment, the TUC is concerned that the government has failed fully to evaluate the implications of the introduction of fees for employment tribunal claimants. **We therefore believe that it is essential that the government carries out a further impact assessment and consults on the findings before proceeding with any proposals on fees.**

### **Discouraging dispute resolution**

The Impact Assessment does not anticipate ‘*any significant changes in workplace behaviour beyond the reduction in demand for ET and EAT services as a result of fee charging.*’ (Para. 5.12) This ignores two likely effects:

- **the impact on employer behaviour and dispute resolution:** Employers may be less likely to seek resolution of disputes at an early stage in the workplace knowing that under the proposed fee structures it will be the employee who has to pay upfront to initiate employment tribunal action. Knowing that employees face greater financial hurdles in accessing employment tribunals, less scrupulous employers may be emboldened to treat employees in a worse manner.
- **the effects on motivation and morale of workers** who are unable to achieve resolution of their dispute with the employer because they cannot afford to bring a claim to ET and other attempts to resolve the matter have failed.

While difficult to try to quantify, these could be real unintended consequences of the fee charging policy.

The IA also does not currently take into account other changes that are being proposed / implemented such as ACAS pre-claim conciliation, changes to legal aid and the review of tribunal rules and procedures.

### **Misplaced approach**

The government approach is worrying as it takes a wholly economic ‘consumer’ approach to the services that employment tribunals provide. The consultation paper states: ‘*It is Government policy to charge for many publicly provided goods and services. This approach helps allocate use of goods and services in a rational way because it prevents waste through excessive or badly targeted consumption.*’ It does not however, necessarily allocate goods and services in a fair way. Those

that use the employment tribunal service are not shopping around for a good deal on a luxury item of choice. It is essential that claimants can access employment tribunals if other reasonable means of resolving a dispute have failed and cost should not be a barrier to access. If they are denied access to the ETS, some claimants may have nowhere else to go to resolve their dispute.

In applying a strictly ‘consumer’ approach, the government is ignoring the important public policy role of employment law and effective resolution of workplace disputes. Parliament has set down minimum standards for payment of wages, annual leave, working time and also for the protection of groups with protected characteristics, such as disability. These public policy aims and objectives should not be lost sight of; they are indicative of the sort of fair workplaces and constructive working relationships that the Government should be promoting. It is not only the immediate parties to an ET cases that can benefit from its resolution, there are wider social benefits. Knowing that they can be held to account in public for evading legal duties provides a powerful incentive for employers to comply with employment law and if effective enforcement is undermined (as we fear will be the case with the introduction of fees) this sends entirely the wrong message to rogue employers who will inevitably undercut those who are meeting or exceeding their legal obligations.

## Responses to the Consultation Questions

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

The consultation document states that the purpose and success criteria for Option 1 are:

#### **Purpose:**

- To transfer part of the cost burden from taxpayers to users of the employment tribunals and the Employment Appeal Tribunal.

#### **Criteria:**

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

The TUC does not agree with the proposed purpose for the fees structure. In our opinion the overriding aim of the employment tribunal system and the EAT should to provide an effective system for the enforcement of employment rights which is accessible to all, including those on limited means. Indeed any other aim is likely to be inconsistent with the requirements of Article 6 of the European Convention on Human Rights.

The TUC believes that the government's success criteria place too great an emphasis on the aim of transferring the costs of running the tribunal service from the taxpayer to employment tribunals. We believe that this objective is being pursued at the expense of protecting access to justice.

The TUC is not convinced that the government has succeeded in developing a simple easy and cost-effective structure. On the contrary, the proposals for different levels of fees and the proposed remission scheme are highly complex and it will be very difficult for claimants, in particular those who are not represented, to understand or navigate the system.

The TUC is also not convinced that the government's proposals are cost effective. The administrative costs of operating a fees and remission system are likely to be considerable. The proposals are also likely to generate significant levels of satellite litigation which will incur additional costs for employers, workers and the tribunal service.

The proposed fees for employment tribunal claims are too high and will prove prohibitive for many workers on low and medium incomes. The TUC believes that government's confidence that the remission scheme will ensure those with limited means can access justice is misplaced. The proposals for fees will also not encourage the parties to resolve disputes. Rather it is likely that the current proposals and in particular those outlined in Option 1 will actively discourage the

early settlement of disputes and will increase the likelihood of claims proceeding to a full hearing.

Although the TUC agrees that generally parties should be encouraged to settle disputes at an early stage, the success criteria should also recognise that employment tribunals play a critical role in interpreting and applying new rights and in providing employers with guidance on how to comply with the law. This supports effective employment relations.

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

No. The TUC is opposed to the introduction of fees for all types of claims.

We believe that the proposed structure and level of fees is too high and will limit access to justice and will deter many meritorious claims.

**More specifically the TUC believes that the proposed level of fees is disproportionate,** particularly for those claimants bringing low value claims for under-payment of the NMW, for unpaid wages or holiday pay.

For example, under Option 1 it is proposed that a fee of £400 should be payable for a Level 1 claim relating to unfair deductions from wages, redundancy payments and payments in lieu of notice which proceed to a hearing. However compensation awards made in Level 1 claims are generally very low. The 2008 Survey of Employment Tribunal Applicants (SETA 2008) revealed that the median award in successful cases where unfair deductions from wages was the primary claim, was just £850<sup>3</sup>. The BIS annual report on NMW enforcement for 2010/11 also showed that HMRC recovered over £3.8m arrears for over 23,000 workers with arrears averaging £165 per worker.

This means that under Option 1, the average individual seeking to recover unpaid wages would be required to pay fees **which amount to nearly half of the value of their claim** (47 per cent). Similarly, an individual claiming non-payment of the NMW could be required to pay a fee **amounting to nearly two and a half times the value of their the average award** they might expect to receive (242 per cent).

If a claimant has been dismissed for claiming non-payment of the NMW they will be required to pay fees of up to £1200 to file their claim and proceed to a hearing. This sum **well exceeds the gross monthly earnings for an individual paid the NMW for a 35 hour week.**

**In our view, this level of fees is clearly disproportionate and will limit access to justice.**

The government argues that the proposed remission policy will ensure that those with limited means are not prevented from accessing justice. However for the reasons outlined above the TUC does not believe that the proposed remission

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<sup>3</sup> BIS *Findings from the Survey of Employment Tribunal Applications 2008* Employment Relations Research Series No. 107, Figure 9.3: Amount awarded by tribunal, by primary jurisdiction, p.84 <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008>

policy will be effective in ensuring all low paid individuals can access the employment tribunal system (see pages 4 to 7 of this response).

The TUC is concerned that many low paid workers will be deterred from enforcing their rights and unscrupulous employers will be free to continue to underpay their workers. As a result we propose that **all low value claims and in particular those relating to the NMW should be automatically exempted** from the requirement to pay fees.

**The TUC also believes that the government's proposals for fees will be indirectly discriminatory**, as those with protected characteristics bringing Level 3 and 4 claims will be required to pay a higher level of fees. We do not agree that the policy is a proportionate means of achieving a legitimate aim. The proposed remissions policy will not mitigate the effect of the introduction of fees on those with protected characteristics.

As the remissions policy is based on household income it is likely to be of limited effect in terms of mitigating the impact of tribunal fees on women who may be trying to pursue sex discrimination and pregnancy or maternity discrimination cases. Women often have low incomes (either from working part-time or because they are on SMP or Maternity Allowance) and may find it difficult to get their partners' consent to using household income to pursue a tribunal claim that involves a substantial upfront fee.

Higher fees for discrimination claims and PIDA claims are also likely to deter claimants from bringing merited claims.

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

No. The TUC remains opposed to the introduction of fees on principle. **We also do not agree with the proposal to levy fees at two separate points for the following reasons.**

The TUC believes that far from encouraging the early settlement of disputes, the proposed charging structure will have the opposite effect. As the costs are all front-loaded for the claimant, the employer is likely to adopt a 'wait and see' position in the expectation that the claimant will be deterred by the requirement to pay upfront listing and hearing fees. The lack of refunds or partial refunds for cases which have been listed will also mean that claimants will have no incentive to agree a settlement prior to a hearing.

Having two charging points will also increase administration costs for tribunals. The need to reassess whether an individual's financial circumstances have changed between the filing their claim and the hearing will add complexity and will delay proceedings.

The consultation document does not indicate at what point specifically claimants would be required to pay their hearing fees. Presumably the payment would need to be made by a specified time period before the hearing is listed. Currently, short track cases are listed at the point that the ET1 is filed and before the ET3 is received. This practice would need to change if a 2 stage fee were introduced. It

is also unclear how fees will apply to hearings which are postponed due to lack of a panel to hear the case and to ‘floating’ cases. The TUC believes that where hearings are delayed fees should automatically be refunded to claimants.

**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.**

The proposal for three levels of fee is complex and will be very difficult if not impossible for many claimants to understand and navigate. This will be particularly the case for unrepresented claimants.

In the absence of legal advice, many individuals will not be able to assess the nature or value of their claim accurately. Some will mistakenly file a claim which attracts a higher level fee. This may only become apparent at a CMD or at a full hearing. Given that fees will not be refunded, such individuals will face an unjustified financial penalty and will be required to pay fees which exceed the actual costs of processing their claim. This is not consistent with Treasury Guidelines on the charging of fees.

The TUC is also concerned that the impact of the proposed charging structure is discriminatory. The government recognises that discrimination claims will face the highest fees but maintains that the proposed remission system will ‘ensure’ that access to justice is protected (paragraph 38 of the consultation paper). The TUC does not share this view. As argued throughout this response, the TUC is not convinced that the remissions policy will succeed in ensuring many low paid workers can still access an employment tribunal. The remission policy also assumes that all household income is genuinely shared. This view is misplaced. The TUC does not agree that the capacity of a woman to bring a sex discrimination claim should be dependent on their partner’s consent.

**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.**

No. For the reasons outlined above the TUC does not think it is reasonable to charge three levels of fee payable at two stages.

**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.**

The TUC remains opposed to the introduction of fees as a matter of principle. That said if fees are introduced, we believe that where the tribunal finds against the employer, the tribunal should order the employer to reimburse the fees previously paid by the claimant. The TUC cannot see any circumstances in which it would be appropriate for an employer not to pay the claimants fees in full.

In cases where the employer is insolvent, successful claimants should be entitled to recover fees from the Redundancy Payments Office (RPO).

The TUC is seriously concerned that a high proportion of employment tribunal claimants will face major difficulties in recovering fees from employers, even

though their claim was successful. A 2008 Citizens Advice report, *Justice denied* concluded that one in ten of all awards go unpaid. Research commissioned by the MoJ in May 2009 revealed that nearly 4 out of 10 claimants (39 per cent) received no payment at all, and 8 per cent had received part payment.<sup>4</sup> Citizens Advice has also recently reported that no money was recovered by successful tribunal claimant in 57.5 per cent of cases under the 'Fast Track' enforcement mechanism in 2011.<sup>5</sup>

It is clear that the current system for the recovery of employment tribunal awards is seriously flawed. **The TUC believes that proposals for fees should be delayed until the government has implemented effective enforcement mechanisms for the recovery of employment tribunal awards.**

The TUC does not believe that unsuccessful claimants should always be required to reimburse the fees paid by an employer during employment tribunal proceedings. In particular, employers who fail to submit their ET3 form on time should be held solely responsible for paying for an application to overturn a default judgment. The employee should not be required to reimburse the sum if their claim is unsuccessful. If the issuing of a default judgment is due to an administrative error by the tribunal, for example because a claim form was misplaced, then the tribunal service should reimburse the employer.

**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.**

The TUC also does not agree that only the claimant should be required to pay the hearing fee. This proposal will create a significant disincentive for employers to agree to settle a case either during Acas Pre-Claim Conciliation stage or after the claim has been filed. Employers are likely to wait out the process in the hope and expectation that high hearing fees will deter workers from proceeding with their claim. It also may not be in the interests of many claimants who have paid the hearing fee to agree a settlement prior to a hearing. This will particularly be the case where the employer refuses to reimburse the fee as part of any compensation package.

**The TUC believes that if a hearing fee is introduced this should be shared between the claimant and the respondent.** This will help to ensure that both parties have an incentive to try to negotiate an agreement before the case is listed for a hearing.

The TUC does not agree that claimants should always be required to pay the relevant fee in order to initiate the next stage of the proceedings. We are concerned this policy will mean that claimants could be unfairly excluded from an employment tribunal or their claim could be struck out because their application for a remission has not been processed in time or is subject to a review. This

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<sup>4</sup> <http://www.justice.gov.uk/publications/docs/employment-tribunal-awards.pdf>

<sup>5</sup> CAB Winter 2011 Evidence Report

approach will limit access to justice and is likely to adversely affect unrepresented claimants who are not familiar with tribunal procedures. The TUC believes that where a remission application is still being processed or is subject to a review, claims should be able to proceed with any issues relating to the remission and fee being determined at a later stage.

The TUC also believes it is important that employment judges are not able to exclude or strike out a claim on the basis of the papers alone. Claimants should always have the opportunity to make representations before a decision is taken. In our opinion, a hearing should be held giving the claimant the opportunity to challenge any mistakes which may have been made in processing their application or to outline any mitigating circumstances. Claimants should also be provided with time to rectify the situation, for example, by paying the correct fee or gathering evidence and applying for a remission or by waiting to see if an outstanding application for remission is accepted.

**Question 8 – Do you agree that these applications should have separate fees? If not please explain why.**

If fees are to be introduced for claimants, it is only fair that employers are required to pay a fee to bring a counter-claim in a breach of contract case and to apply to set aside a default judgement.

The TUC also recognises the case for charging employers a fee to make an application for dismissal following settlement or withdrawal. Such fees may encourage employers to seek to resolve disputes in the workplace or through Acas pre- or post-claim conciliation, rather than calling on the resources of the tribunal service.

The TUC does not agree that there should be a fee for a request for written reasons after judgement where reasons have been given orally. It is in the interests of justice for parties to be informed of the tribunal's reasoning and the facts which the tribunal relied on in reaching their decision. This information assists parties to determine if they have grounds on which to appeal.

Employment tribunal decisions are also a matter of public record. Although they do not set precedents they are nevertheless referred to by other tribunals. The TUC would therefore be concerned if the introduction of fees led to fewer written judgements being supplied to the parties.

**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.**

If fees are introduced it would seem appropriate that they should also apply to judicial mediation. We agree that the respondent should be responsible for paying for mediation. Under Option 1 claimants will be responsible for paying an upfront fee for a merits hearing if mediation is unsuccessful and under Option 2 the claimant will have been required to pay an upfront fee representing the costs of filing and hearing their claim. It is therefore appropriate for the respondent to cover the mediation costs. However we consider that the proposed fee of £750 should be reduced so as not to deter the use of mediation.



**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.**

If fees are to be introduced, it is essential that a generous remissions policy is adopted which ensures that no potential claimant is prevented from bringing a claim on grounds of cost. The TUC believes that remissions should not only be available to those in receipt of means-tested benefits. Those on low and average earnings should also benefit from a full remission.

**The TUC does not agree that the remissions policy should be based on assessment of household income.** In our view, this approach is not consistent with the promotion of equality. As a matter of principle, the ability of a woman to enforce sex discrimination cases should not be dependent on her partner's income. The current proposals also make assumptions about the sharing of resources within households that may be ill-founded. **The TUC believes that all assessments under remission 2 & 3 should be based on an individual's income.**

The TUC is also seriously concerned that the proposed remissions policy will not maintain access to justice for all claimants as the MoJ asserts. As noted above, the take up rate for many means tested benefits is low. The National Audit Office has reported that only around 58 per cent of eligible households claim Working Tax Credit. This compares with 96 per cent of eligible households claiming child benefit. This suggests that the remission scheme will not work effectively for many of those most in need.

Research commissioned by the TUC indicates that a significant proportion of claimants who are paid at NMW and living wage rates will still be required to pay fees. See pages 5 & 6 above for more detail.

Many workers will also not have the necessary evidence to demonstrate they are covered by Remissions 2 and 3. In many instances, employers will not have provided workers with wage slips or the individuals will have misplaced them. Agency workers and other workers whose working hours fluctuate will also find it very difficult if not impossible to demonstrate their annual earnings. As a result they may be required to pay full fees or be barred from the tribunal system.

It is clear therefore that that the proposed remission policy will not be effective in ensuring all vulnerable and low paid workers are able to access justice and to enforce their basic employment rights. As a result, many unscrupulous employers will successfully avoid paying the NMW and other employment rights. This in turn will create unfair competition for many law abiding employers. In our response to question 11 the TUC has set out a series of proposals aimed at improving the remission policy

We are concerned that the remissions policy is based in part on the existing means-tested benefit system that is due to change next year and we have no real indication of how the replacement Universal Credit will affect the remission policy.

The introduction of fees and the application of the remission scheme may also have serious implications for the operation of time limits. Time limits for

employment tribunal claims are very short compared to other jurisdictions. This leaves limited time for individuals to gather the evidence required by the remission scheme and for remission applications to be processed. Complaining to an employment tribunal is a very stressful and costly process for claimants and many individuals only decide to file a claim at the last minute. As a result many individuals will not be able to submit claims in time. This will almost certainly be the case where initial applications for remissions are refused and there is a need for a review or even for decisions to be judicially reviewed. The TUC is therefore concerned that many individuals who seek to rely on the remission scheme could be barred from the tribunal system and be refused access to justice.

The interaction between time limits and remissions applications is also likely to generate extensive satellite litigation on whether time limits should be extended. This will generate unnecessary additional costs for employers, workers and the judicial system.

**If the Government decides to proceed with the introduction of fees, the TUC believes it is essential that:**

- **Time limits for all employment tribunal claims are extended to 6 months. This would provide more time for disputes to be solved using workplace procedures and for any remission applications to be processed**
- **All claims should be treated as being filed on the date on which they were first received by the Tribunal, even where the appropriate fee is not attached or the application for remission is still being processed. The case should then be staid until the remission application has been finally determined.**

Finally, the TUC believes it would be preferable if the same remission scheme applied across Great Britain. We recognise however this may not be possible as the Scottish Courts and Tribunal system is independent and is therefore fully entitled to determine how fees and remissions should apply. In any event, the TUC believes that remission 3 should be retained in England and Wales even if it does not apply to Scotland.

**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?**

Under Article 6 of the European Convention on Human Rights the government has a clear obligation to maintain access to justice for all employment tribunal claimants and not simply those with limited means.

As highlighted in our response to question 10, the TUC is seriously concerned that the HM Courts and Tribunals remission system will not be effective in ensuring that even those with limited means will still have access to justice.

The TUC believes that the remission system would need to be substantially revised if fees are to be introduced for employment tribunal users. In particular the TUC believes that:

- **Assessment for the remission policy should be based on individual income rather than household income. The system should not presume that household income is shared. An individual's ability to enforce their employment rights**

should also not depend on the agreement of their partner.

- The income threshold for those who are not required to pay any level of fee should be raised significantly. Currently, a significant proportion of claimants paid at the NMW and living wage rates will be required to pay fees.
- Remission 1 should be extended to cover Housing Benefit and Council Tax Benefit which are both means tested benefits and are therefore targeted on people on lower incomes. This change would be fairer and easier to administer as applicants would only have to show proof of receipt HB / CTB rather than proof of annual income.
- Remission 1 should also apply to those in receipt of Contribution-based Jobseekers' Allowance (JSA). This will help to ensure that those individuals who have been recently dismissed and whose financial circumstances have deteriorated are able to use the employment tribunal system.
- It should be noted that some claimants who have been dismissed on grounds of misconduct may be disqualified from receiving income related JSA. Appeals against disqualification can take a long time. Fees should therefore be waived for unfair dismissal claimants who are appealing disqualification from income-related JSA.
- Special consideration should also be given to individuals who have recently been dismissed and have received payments in lieu of notice and redundancy pay. As a result, their entitlement to income-related JSA may be deferred and they may not be covered by remission 2 or 3 due their temporary increase in income. Extending remission 1 to cover contribution-based JSA may assist these individuals. Failing this, the TUC believes that payments in lieu of notice and redundancy should be discounted for the purposes of assessing entitlement to a remission.
- Women in receipt of SMP or Maternity Allowance should be exempt from fees because women who suffer maternity/pregnancy discrimination are likely to be bringing a claim within the SMP/MA period but many would not qualify for remission because their partners' income took them over the threshold for remission. Preventing unfair treatment of women and retaining attachment to the labour market through pregnancy and childbirth is critical to advancing equality of opportunity for women at work. An EOC investigation into pregnancy/maternity discrimination indicated that a significant number of women experience discrimination at this time but very few enforce their rights at tribunal.
- The income and expenditure thresholds used under remission 2 and 3 should be up-rated annually in line with average earnings. This will help to ensure that the coverage and effectiveness of the remission scheme does not diminish overtime.

### **Questions 12 and 13**

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

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

The TUC remains opposed to introduction of fees for all tribunal claims, including multiple claims. If fees are to be introduced for multiple claims, the level of fees should reflect the fact that such claims are more cost effective. Requiring each claimant in a multiple claim to pay the equivalent of a full single fee would conflict directly with the government's policy objectives that fees should reflect the cost of handling claims.

The TUC is concerned that the proposed system for calculating fees in multiple claims could produce unfair outcomes and therefore should be revised. The TUC does not agree that where all or part of the fee for one or more claimants is remitted in a multiple claim the bill for the claim should not be payable for by the other claimants.

Any fees which are charged should also reflect the actual claims being brought by the individuals involved. The fees should not be set in line with the highest value claim being brought within the group. For example, in a claim relating to TUPE, some individuals may be seeking to recover unpaid wages, whereas others are bringing claims for unfair dismissal or unfair selection for redundancy. The fees for each individual should reflect the nature of their claim and should not be levelled up to the highest level claim.

The application of fees to multiple equal pay claims will be highly complex and the current proposals could result in unfair outcomes. The consultation document appears to assume that the number of claimants in a multiple claim is fixed from the outset; but this is rarely, if ever, the case in equal pay claims. In long running litigation, cases may be added to multiples claim months and, in some instances, years after the initial application was commenced. Unions have reported that in one not atypical case new claims were added 7 years after the initial claim commenced. The judiciary can also regroup claims and add new claimants at any point in time. As there is normally no time limit for claims where individuals 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 principal issue to which the claims relate has been determined or otherwise resolved. It is also important to note that different hearings may be required to determined different aspects of a multiple claim, however not all claimants will be affected of a hearing.

**The TUC therefore believes that it will be very difficult to determine fees for multiples on the basis of the number of claims.** This approach is likely to lead to unfair outcomes and could mean that some claimants would be required to pay a fee which exceeds the actual cost of processing their claim. This would not only be unfair but could conflict with the Treasury Guidelines on the charging of fees.

If the government decides to proceed with the proposal to charge fees for multiple claims, **the TUC believes there is a strong case for exempting multiple claims from the requirement for fees in advance of any proceedings.** Given the distinctive nature of multiple claims, **fees should only be payable after the cases have been fully determined.** Fees should only be payable once any appeals on points of law had been dealt with the Appeal Courts and/or remitted and determined by the employment tribunal. Applying fees at the end of the case would simplify

administration and ensure that claimants were not overcharged. As with other claims, the TUC believes that the party that loses the case should be responsible for paying the fee.

It is also important to note that claimants in some multiple claims are represented by more than one legal representative and sometimes 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 our opinion, the claimant and not the representative should be treated as legally responsible for the fee in multiple claims. However, there should be nothing which prevents a union or a legal representative from paying the fees on behalf of their members should they so choose. Where a trade union or representative has paid the fee, any refunds should be paid to the trade union or representative and not to the claimant.

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

The TUC does not agree that fees should only be refundable where it subsequently comes to light that a claimant was entitled to a remission. Rather both filing fees and hearing fees should be at least part refunded where a claim is settled or discontinued in advance of a hearing. The TUC also believes that claimants should receive a partial refund where, following a CMD or PHR, it becomes apparent that they have inaccurately assessed the nature or value of their claim and have paid too high a fee.

The TUC believes that the approach advocated by the government will discourage the early settlement of disputes. The lack of a refund policy will mean that workers have no real incentive to agree a settlement or to withdraw their claim prior to the hearing.

This approach is also not consistent with practices in other jurisdictions and may result in claimants paying a fee which exceeds the actual cost of processing their case.

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

No. As indicated in our responses to Questions 1-14 we do not support the introduction of employment tribunal fees in general and that we have grave reservations about the Option 1 fee proposals.

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

The TUC has already commented on the overall purposes of the policy on fees in our response to Question 1.

In our opinion, both Options 1 and 2 place too great an emphasis on the transfer of costs from the taxpayer onto employment tribunal users at the expense of preserving access to justice and maintaining an effective system for the enforcement of employment rights.

Option 2 also seeks to transfer an increased proportion of the costs from the taxpayer on to individuals who are seeking to challenge long standing discrimination in the workplace and whose claims amount to £30,000 or more. We are concerned that this sends a signal that the prevention of discrimination is not considered to be a priority for this government.

The TUC is fundamentally opposed to the introduction of the £30,000 threshold and cap for compensation in Option 2. As explained below, we believe this proposal is discriminatory and conflicts with EU law.

The consultation document identifies two additional aims for Option 2 that of providing greater certainty for business over their potential liabilities and seeking to narrow the gap between workers expectations and the genuine value of their claim. The TUC does not dispute these objectives. However, we do not believe that the proposed threshold contained in Option 2 represents an effective or proportionate means of achieving these aims. Any potential benefits associated with the proposed threshold are more than outweighed by the disadvantages imposed on claimants seeking awards in excess of £30,000.

As the consultation document recognises, compensation of £30,000 or more is awarded in fewer than 7 per cent of all employment tribunal claims. The proposed threshold is therefore likely to have very limited impact on business certainty over future liabilities.

The TUC recognises that some individuals, particularly those who have no access to trade union or legal advice, may have unrealistic expectations of the potential value of their claim. However in our view there are more effective ways of addressing the needs of unrepresented claimants. The consultation highlights the need to invest in improved information and advice for potential claimants. The Impact Assessment suggests that this will take the form of web-based information and a calculator. Whilst the TUC supports the provision of additional information, we are not convinced that a web-based calculator would be capable of assessing the value of an individual's claim and whether it exceeds the £30,000 threshold or not. Calculating compensation in discrimination claims is inherently complicated. It involves the assessment of injury to feelings, the impact of on-going instances of discrimination, pension contributions entitlements, etc. We are not convinced it is possible to devise a programme which would accurately calculate these varying factors. It will also be difficult if not impossible for a programme to assess the value of non-monetary aspects of claims, for example recommendations from the tribunal or declarations of unfair dismissal. The success of such a programme would also depend on claimants having access to the internet and understanding the nature of the information which they would need to input.

The TUC believes it would be preferable to invest in advice services which can assist claimants to realistically calculate the value of their claim. To this end, the government should reconsider the closure of the EHRC helpline, the withdrawal of legal aid for employment rights advice and other funding cuts which mean that sources of reliable advice for claimants are diminishing rapidly.

### **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.**

As stated throughout this document the TUC does not support the imposition of any upfront fees for those filing an employment tribunal claim. The level of fees proposed under Option 2 is too high and will deter meritorious claims.

Although proposed fees for Levels 1-3 under Option 2 are lower than under Option 1, this is largely because Level 4 fees are significantly higher and aim to achieve the full recovery of costs. This approach is discriminatory and unjustifiably penalises those bringing claims under the Equality Act 2010. Those who have experienced a prolonged period of discrimination will be particularly disadvantaged.

While the single fee approach in Option 2 may be simpler and easier for the State to administer, it is nevertheless problematic. The fact that filing fees will not be refunded if a claim is settled before it reaches a hearing is unfair. As the consultation document recognises, the highest proportion of the costs of handling a claim arise at the hearing stage. Failing to provide refunds will mean that individuals who settle their claim before the hearing stage will have paid a disproportionate sum. Charging claimants more than it costs to process their claim is also not consistent with Treasury Guidelines on the charging of fees. More generally the absence of a refund policy will also discourage early settlements.

**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 TUC is strongly opposed to the proposed threshold, with claims which are valued by the claimant as exceeding £30,000 attracting a significantly higher level of fee. We also do not agree with the proposal to introduce legislation preventing employment tribunals from awarding compensation exceeding £29,999.99 where the claimant has not paid a Level 4 fee.

The TUC principal concerns with the proposed threshold can be summarised as follows.

- The proposed fee of £1750 for a Level 4 claim is excessive and will deter most merited claims.
- The consultation document suggests that it will be a matter of choice for individuals whether they seek to pursue a higher level claim. However, by creating a significant step change between the fee for a level 1-3 claim and a level 4 claim (the proposed Level 4 claim is nearly three times the amount of a Level 3 claim), it appears that the government is seeking to engineer workers' choices and encourage them to claim less than £30,000 even though this may not reflect their full legal entitlement.
- This introduction of a threshold and an effective cap for awards in discrimination claims is not consistent with the requirements of EU law (see question 19 for more information).

The Employment Tribunals and EAT statistics reveal that employment tribunals awarded compensation amounting to £30,000 or more in less than 7% of successful claims in 2010/11. In 11% of race discrimination cases proceeding to a hearing was compensation of £30,000 or more awarded, in 10% of sex discrimination cases, 10% of disability cases, 8% of sexual orientation cases and 31% of age discrimination cases. Overall, compensation of £30,000 or more was awarded in only 191 cases in 2010/11 which is less than 1 in every thousand cases presented to a tribunal.

Although the number of claims which would attract the higher level 4 fee may be limited, this does not in any way ameliorate the impact of higher fees for those individuals with higher value claims. The TUC is also concerned that the proposed cap on compensation for those bringing Level 1-3 claims will deter individuals from claiming their full legal entitlement to compensation.

The TUC also questions the government's rationale for the proposed threshold. We are not convinced that the value of a claim is a good indicator of the costs to the system of administering and processing cases - which is the central premise of the government's proposals for determining levels of fees. While it is recognised that complex discrimination claims require longer hearings and are more costly to administer; the same cannot be said for most unfair dismissal cases. As the Employment Tribunals and EAT statistics for 2010/11 reveal the vast majority (80 per cent) of the relevant cases related to unfair dismissal. However, if Level 4 fees were introduced it is likely that many of these claimants would be required to pay a higher fee than it costs the system to administer their case. It is therefore highly questionable whether the proposals for Level 4 fees are consistent with Treasury Guideline for the charging of fees.

This proposal would also create many practical difficulties. As noted elsewhere, the calculation of the value of discrimination claims is inherently complicated and it will be exceedingly difficult for claimants and their representatives to accurately assess the value of a claim in the short time limit during which a claim must be filed with an employment tribunal. It will also be very difficult for individuals, their representatives or indeed employment tribunals to attribute a value to non-monetary aspects of a claim, including declarations of unfair dismissal and recommendations from a tribunal in discrimination cases. In many cases the value of a claim will also change between the date on which the claim is filed and the date of the hearing. This is particularly true of unfair dismissal claims where the ultimate level of compensation will depend on the employee's ability to find and retain new employment. It is not appropriate to require claimants to make a binding conclusion on the value of their claim at such an early stage.

**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 TUC is fundamentally opposed to the proposal that tribunals should be prevented from awarding an award of £30,000 or more if the claimant does not



pay a Level 4 fee. In practice, the proposal is equivalent to a cap for compensation in higher value discrimination and unfair cases.

This proposal will have a disproportionate impact on those bringing discrimination and equal pay claims; higher value unfair dismissal claims and some PIDA claims.

It will also undermine the principle that compensation awards should reflect the loss suffered by the claimant, including injury to feelings in discrimination claims.

Most significantly the TUC believes this proposal conflicts with the principles of EU law which require that remedies must be effective, proportionate and dissuasive. Indeed in *Marshall v Southampton & SW Hants Area Health Authority (No 2)* [1993] IRLR 445 the ECJ ruled that “reparation of loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit *a priori*”.

**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?**

For the reasons outlined above the TUC is opposed to the introduction of any form of threshold

**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?**

Compensation of £30,000 or more is awarded in fewer than 7 per cent of employment tribunal claims. It is unlikely therefore that the proposed threshold will significantly increase business certainty over their potential liability.

**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.**

No. Awards of over £30,000 may arise in discrimination cases because of the substantial injury to feelings an individual has suffered and because of the high likelihood of an individual facing a sustained period of unemployment as result of substantial barriers to employment that people with certain protected characteristics face, e.g. a disabled person or an older person. In equal pay cases, an award of over £30,000 may arise because a woman has been paid significantly below a male comparator doing equal work for a significant period of time.

Even if it is higher earners who receive awards over £30,000, this will reflect the losses they have sustained as a result of employer action or the magnitude of injury to feelings award, reflecting the seriousness of the actions complained of.

**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.**

For the reasons outlined throughout this response, the TUC does not agree that the government 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.

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

As is clear from our response to questions 16 to 22, the TUC does not support the introduction of upfront fees for employment tribunal users and we have serious reservations about the proposals outlined in Option 2.

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

No.

The response to question 12 outlines our general comments on the issue of multiple claims. These comments apply equally to options 1 and 2. The TUC believes that the calculation of fees for multiple claims brought under option 2 will be further complicated where claimants involved are seeking awards which fall above and below the £30,000 threshold. The TUC does not support the threshold and believes that this proposal should be dropped.

**Question 26 – Do you agree with our proposals for remissions under Option 2?**

Please see our comments on remission policy set out previously.

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

As outlined in the response to question 14, the TUC does not agree with the Government's approach to refunding fees. We would however make one additional point. Given that the filing fee under Option 2 is so much higher, it will be important that mechanisms are adopted for the partial refund of fees where claims are settled or withdrawn in advance of a hearing. This measure is necessary to ensure that claimants are not required to pay fees that are higher than the actual costs to the system of administering their claim.

**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 TUC agrees that it will be essential for the Government to invest in additional information and guidance should they decide to proceed with the introduction of fees. This is necessary to ensure that access to justice is not limited; to assist unrepresented claimants to navigate the system and to ensure that claimants are not overcharged for using an employment tribunal.

To this end, the Government should reconsider the closure of the EHRC helpline and other funding cuts which mean that sources of reliable advice for claimants are diminishing rapidly. We would also call on the Government to reinstate legal aid for employment law advice.

**Question 29 – Is there an alternative fee charging system which you**

**would prefer? If so, please explain how this would work.**

The TUC remains opposed to the introduction of fees in employment tribunals on the grounds that any system of fees will limit access to justice.

However throughout this response the TUC has made a number of proposals which might alleviate some of the worst aspects of the charging schemes if fees are introduced. These proposals can be summarised as follows:

- Fees should be set at a far lower level than those proposed in either Option 1 or 2.
- Fees should only be charged after a Case Management Discussion (CMD) when the judge has evaluated the merit of a claim and the parties decide whether to proceed.
- Any hearing fee should be shared between the claimant and the employer.
- All low value claims and in particular those relating to the NMW should be automatically exempted from the requirement to pay fees.
- The remission policy should also be revised in the following ways:
  - The assessment for the remission policy should be based on individual income rather than household income.
  - The income threshold for those who are not required to pay any level of fee should be raised significantly.
  - Remission 1 should be extended to cover Housing Benefit and Council Tax Benefit and Contribution-based Jobseekers' Allowance (JSA).
  - Fees should be waived for unfair dismissal claimants who are appealing disqualification from income-related JSA. Such claimants should only be required to pay fees once the Tribunal determines whether they have been unfair dismissed.
  - Special consideration should be given to claimants who were recently dismissed but received payments in lieu of notice and redundancy pay
  - Women in receipt of SMP or Maternity Allowance should be exempt from fees
  - The income and expenditure thresholds used under remission 2 and 3 should be up-rated annually in line with average earnings. This will help to ensure that the coverage and effectiveness of the remission scheme does not diminish overtime.
- Time limits for all employment tribunal claims are extended to 6 months.
- All claims should be treated as being filed on the date on which they were first received by the Tribunal, even where the appropriate fee is not attached or the application for remission is still being processed. The case should then be staid until the remission application has been finally determined.
- In multiple cases, fees should only be payable after the cases have been fully determined.

**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 TUC is opposed to the introduction of fees for appeals to the EAT. The proposed issue and hearing fees represent a significant further barrier to justice. Appeals to the EAT can only be made on a point of law and the role of the EAT is determining this is a vitally important one. It is in the interests of not just the immediate parties to an employment dispute but to all workers and employers to have clarity on interpretation of the law and cases should not be prevented from proceeding on grounds of cost.

**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.**

The TUC remains opposed to the introduction of fees. If they are introduced however, it is essential that payment facilities take into account the needs of those claimants who do not have access to either a bank account or own computer facilities – enabling payment by cash for example. It should also be considered whether payment in instalments is possible where claimants are not eligible for remission and are struggling to pay the fees.

**Question 32 – What aspects should be taken into account when considering centralisation of some stages of claim processing and fee collection?**

The TUC is concerned that the proposed centralisation of fee collection may present difficulties for claimants who do not have a bank account and may be confusing if claimants are subsequently required to deal with a different local office. The Centralisation of initial fee collection and claim processing will have implications not only for staff servicing the claims but also for accessibility and access for claimants in following up queries on their claims. The potential for confusion (and resulting delays) is considerable and has implications for cost-effectiveness.

## APPENDIX A

### Initial Equality Impact Assessment Questions

#### **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?**

Those individuals who are most likely to suffer discrimination (i.e. women, pregnant women/those on maternity leave, disabled people, BME groups, younger or older workers, LGBT claimants) will be put at a particular disadvantage because of the much higher upfront fees that are proposed for discrimination claims.

The fees are likely to deter many individuals from pursuing discrimination claims at tribunal. This in turn will undermine equality of opportunity for these groups as with the reduced threat of sanction, employers will not be as concerned about eliminating and preventing discrimination and harassment. In addition, with potentially fewer cases proceeding to tribunal there will be fewer public judgements to provide guidance to other employers on how best to eliminate discrimination and harassment and advance equality of opportunity.

As the EIA points out younger people, disabled people, those from black, Asian or Chinese backgrounds are most likely to be in the lower income groups so the introduction of fees would prohibit people from these groups from bringing tribunal claims in the absence of any remission system. However, as explained in the TUC responses to Questions 10 and 11 in the consultation, the complexity of the remission schemes and the short time limits for bringing tribunal claims, will still result in some of these individuals having their claims barred. In terms of understanding and applying for remissions, migrant workers and disabled people (particularly those with learning disabilities or mental health problems) are among those most likely to be put at a disadvantage.

Low-income partnered women will be put at a particular disadvantage by the household income basis for calculating remissions in schemes 2 and 3. Women are more likely to earn less than their partners, especially mothers of dependent children as they are more likely to work part time (37.4% work part time compared to 23.1% who work full time),<sup>6</sup> older women (for whom the gender pay gap is highest)<sup>7</sup> and those on maternity leave. There is no reason to assume that all income is pooled and equally shared in households.<sup>8</sup> Women are therefore more likely to have to rely upon their partners' permission and support in order to bring a tribunal claim.

#### **Question 2: Could you provide evidence or sources of information that will help us to understand and assess the impacts?**

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<sup>6</sup> <http://www.nomisweb.co.uk/articles/ref/stories/3/Mother%20story.pdf>

<sup>7</sup> [http://www.equalityhumanrights.com/uploaded\\_files/triennial\\_review/tr\\_execsumm.pdf](http://www.equalityhumanrights.com/uploaded_files/triennial_review/tr_execsumm.pdf) see p.27.

<sup>8</sup> E.g. see section (6) of this briefing

<http://www.iser.essex.ac.uk/files/conferences/efss08/docs/briefing.pdf>

Some references have already been given in response to the previous question.

Also relevant when considering the potential deterrent effect is evidence that suggests the vast majority of those reporting discrimination and harassment problems at work do not seek to enforce their rights. For example, the EOC's formal investigation into pregnancy and maternity discrimination in 2005 found that out of the 30,000 women who lose their jobs as result of pregnancy or maternity discrimination, only a minority had sought advice and just 3% had complained to tribunal.<sup>9</sup> In the Fair Treatment at Work Survey, 7% reported that they had suffered discrimination in the previous two years which translates into about 2m employees (based on a workforce of 29 million). While it is impossible to say how many of these would have had a potential legal claim, it is a further indication that already the number of discrimination claims that reach tribunal are a tiny proportion of those experiencing difficulties.

The Fair Treatment at Work Survey 2008 (BERR) also concluded that unlike many other forms of employment rights problems there was no reason to assume a downward trend in the numbers reporting problems and the consequences of discrimination and bullying were often more serious than for other problems, e.g. individuals were more likely to report a lack of trust in their employer and to leave the workplace as a result.

In doing the full EIA, there should be some attempt to assess the costs and impact of leaving discrimination unchallenged as it is highly likely that even more individuals will be put off from bringing claims once a system of high upfront fees with limited remissions is introduced. For example, the EOC investigation on pregnancy and maternity discrimination includes estimates of the overall cost in the form of lost earnings for women and their families and the replacement and turnover costs for employers.

This initial EIA focuses most attention on the immediate impact of introducing fees on those from protected groups in the low income brackets who might seek to bring a claim. It neglects to assess the impact on higher income individuals with potential claims and the wider consequences for all individuals if even more instances of discrimination go unchallenged.

The proposal to introduce tribunal fees also comes at a time when funding for discrimination casework is being cut (e.g. the EHRC's strategic grants programme is ending) and sources of advice for potential claimants are diminishing. The impact of introducing fees in parallel to these other developments must be properly considered before a final decision is taken.

### **Questions 3 and 4:**

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

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

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<sup>9</sup> [www.equalityhumanrights.com/uploaded\\_files/eoc\\_pregnancygfi\\_summary\\_report.pdf](http://www.equalityhumanrights.com/uploaded_files/eoc_pregnancygfi_summary_report.pdf)

We have no information or evidence about the equality impacts on employers.

**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?**

As already explained above and in the TUC's responses to Questions 1 and 2 to the consultation, there will be a clear disproportionate impact on people from the protected groups as a result of the introduction of fees because they will be the people most likely to experience discrimination and to have to pay the highest fees under both options. SETA provides data on the proportions of women, disabled people, older people, younger people, etc bringing discrimination claims.

**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 (referred to as Level 4) if successful, will be deterred from accessing justice?**

The significant step increase in fees for those with claims potentially worth more than £30,000 and the decision to charge these claims on a full rather than partial cost-recovery basis is clearly intended to deter individuals from pursuing such claims. This together with the proposal that tribunals would be prevented from awarding more once the initial fee had been paid, signals to the individuals concerned (often those who have suffered the worst forms of discrimination over a prolonged period and are facing the greatest barriers to re-employment) that full justice is not something the government believes in for them.

The TUC responses to Questions 16, 18-22 in the main consultation provide more detailed information on what we consider to be the particular barriers to justice that the level 4 fee in Option 2 presents. We also explain in those responses why we consider this aspect of the proposals to be discriminatory and in conflict with EU law.

**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 while allowing us to keep the level of fees charged under either option to the level we propose?**

The TUC is fundamentally opposed to the introduction of fees for employment tribunals as we believe they will price many workers out of access to justice. The proposed level of fees is set at too high a level and will deter many meritorious claims. The fees are not a proportionate means of achieving a legitimate aim and they will have the further consequence of weakening efforts to advance equality of opportunity for protected groups.

In the TUC response to the consultation we make some suggestions for improving the remission system. In our response to Question 10, we call on the time limit for filing all tribunal claims to be extended to 6 months to provide more time for any remission applications to be processed. In response to Question 11, we suggest the

remission system should be based on individual rather than household income, should have a higher income threshold, and women in receipt of SMP or Maternity Allowance should be made exempt from the fees.

Nevertheless, it is still our view that the proposed level of fees is set at too high a level and given other aspects of the proposals, the negative impacts on equality are still unlikely to be justified or significantly mitigated (see below).

**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 we do not. The existence of upfront fees at the high levels proposed and the complexity of the remission scheme will bar many low income individuals from these protected groups from pursuing a claim.

Many medium and higher income earners with discrimination claims will also be deterred from bringing claims by the upfront fees.

Furthermore, the lower number of claims overall will undermine efforts to achieve equality of opportunity for these groups.

In particular:

- Individuals who are relying on remissions to bring a claim could be barred from justice if their application is not processed in time to file a claim.
- Low income partnered women are less likely to benefit from the remission system and to have to rely upon their partners' consent in order to bring a claim because of the household basis for assessing income.
- The upper income threshold for claiming a full remission is very low and the level of fees, particularly for discrimination claims is so high, that many medium income individuals who have suffered discrimination will be unable or deterred from pursuing a claim even if they qualify for partial remission.

In addition, the remission system alone will be insufficient to mitigate the negative equality impacts. Individuals with discrimination claims are likely to be further deterred from paying the high level 3 or 4 fees because of:

- The low success rates at tribunal for discrimination claims.
- The proposed lack of refunds once a claim has been lodged and the fee paid.
- The lack of automatic reimbursement by the employer if the claim succeeds.
- The problems securing final payment from an employer (see Citizen's Advice Justice Denied and its Winter 2011 Evidence Report).

Finally, this initial EIA states that any negative equality impacts are also mitigated by the existence of alternative dispute resolution mechanisms. However, as stated in the TUC responses to Questions 7 and 14 the proposed fee structure and lack of refunds will act as a disincentive to early settlement through these alternative means.



**Question 9: Further to Question 8 could you provide any information to help us in understanding and assessing the impacts?**

References to evidence suggesting the already low level of discrimination claims brought relative to reporting of discrimination at work have been given above.

In the absence of research on the deterrent effect of upfront fees to access court and tribunal services, MoJ must ensure effective monitoring of any decision it takes to introduce fees and the impact of the level of the fees and remissions on individuals from different protected groups.

**Question 10: Could you provide evidence of any potential equality impacts of the fee payment process described in Annex B we should consider.**

Individuals from some of the protected groups are likely to be put at a particular disadvantage by the fee payment process. For example, 23% of black households are without a current account compared to 12% of white households and 15% of Asian households.<sup>10</sup>

**Question 11: Further to Question 10 do you have any suggestions on how those potential equality impacts could be mitigated?**

See TUC responses to Questions 31 and 32 in the consultation, especially the recommendation that there should be the possibility of paying fees in cash at local offices.

**Question 12: Where, in addition to any of the questions that have been asked, do 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.**

See the TUC response to Question 29 in the consultation.

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<sup>10</sup> See <http://www.runnymedetrust.org/uploads/publications/pdfs/FinancialInclusion-2008.pdf>