

Citizens Advice Scotland

Scottish Association of Citizens Advice Bureaux



Charging Fees in Employment Tribunals

CAS response to the Ministry of Justice consultation

By Keith Dryburgh, Social Policy Officer

Citizens Advice Scotland and its CAB offices form Scotland's largest independent advice network. CAB advice services are delivered through service points throughout Scotland, from the islands to city centres.

The CAB service aims:

to ensure that individuals do not suffer through lack of knowledge of their rights and responsibilities, or of the services available to them, or through an inability to express their need effectively

and equally

to exercise a responsible influence on the development of social policies and services, both locally and nationally.

The CAB service is independent and provides free, confidential and impartial advice to everybody regardless of race, sex, disability or sexuality.

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The Scottish Association of Citizens Advice Bureaux - Citizens Advice Scotland
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Introduction

1. Citizens Advice Scotland (CAS) is the umbrella organisation for Scotland's network of 81 Citizens Advice Bureau (CAB) offices. These bureaux deliver frontline advice services throughout around 250 service points across the country, from the city centres of Glasgow and Edinburgh to the Highlands, Islands and rural Borders communities.
2. Citizens advice bureaux in Scotland advised on 50,726 new employment issues in 2010/11 – around 140 for every day of the year. CAB provided representation for clients in 1,418 employment tribunals in 2010/11. Clients seeking advice on employment issues are often low paid, relatively low skilled, are often unaware of their employment rights, and are vulnerable to poor and illegal employment practices.

Key points in our response:

- Employment tribunals are an essential service for all workers and employers in the UK. It is not just successful claimants who benefit. All employers and workers benefit from a service that protects workers, discourages rogue and exploitative employers, and ensures a level playing field for good employers. Far from being a costly burden on employers and tax payers, employment tribunals play a key role for all those in work. Placing barriers to accessing Employment Tribunals will affect the effectiveness of the service in providing this role.
- The case for reform has been based partly on a 44% increase in Employment Tribunals made in the last two years. This increase is almost solely driven by large repeat multiple claims which are inflating the statistics. Single claims have largely remained steady over the last decade. There is therefore little evidence, other than anecdotal, to suggest that tribunals are placing an increasing burden on employers.
- CAS does not support the principle of charging fees to access Employment Tribunals and does not support either of the options proposed in the consultation document. Option 1 is unclear and complex and offers little incentive to employers to seek an early resolution. It places most of the cost and risk onto the claimant and risks creating barriers to justice for many with strong claims.
- Option 2 places an arbitrary threshold on claims over which the claimant must pay a significant fee. Claimants who are owed greater amounts of money by employers must therefore pay a higher, and potentially unaffordable, fee in order to access justice and the funds they are entitled to. Option 2 also places no incentive on either party to seek an early resolution. Both options risk limiting access to justice for those with limited means and may therefore encourage poor or illegal employer behaviour.

- If fees for a tribunal were to be introduced, CAS would support an alternative fees regime proposed by Citizens Advice England and Wales. We believe that this alternative proposal better meets the criteria set out by the Government at the same time as meeting the savings that are sought.

The Citizens Advice alternative fees regime includes:

- A nominal flat-rate issue fee for claimants with exemptions for those with straightforward and low-value claims relating to wages
- Fees to be paid by all those in a multiple claim
- All employers determined by a tribunal to be at fault to pay a flat-rate fee

Citizens Advice estimate that flat-rate fee of £75 for all claimants and a flat-rate £350 fee for employers found to be at fault in a tribunal would achieve the same savings as the two options proposed in the consultation. We believe that this regime would be simpler and easier to understand than the Government's proposals, and would spread the cost of tribunals to all users – including claimants and at fault employers.

For a more detailed description of their alternative fees regime, please see the Citizens Advice (England and Wales) submission.

Consultation questionnaire

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

The success criteria outlined are reasonable given the stated purpose of recovering contributions from users. However, the two proposed options for charging fees both fail to meet these criteria.

Develop a simple, easy to understand and cost-effective fee structure

Option 1 is far from being simple and easy to understand with differing fees for types and stages of claims, while Option 2 requires users to make an assessment of the value of a potentially complex claim.

Maintain access to justice for those on limited means

While the two options offer remissions to those with the lowest incomes, the introduction of fees will adversely affect access to justice for those who have an income that is just above the limit. Those in full-time but low paid work may be deterred from making claims based on the fee structures proposed in the two options.

Contribute to improving the effectiveness and efficiency of the system by encouraging users to resolve issues as early as possible

The introduction of fees for accessing tribunals in both Options could serve to be a disincentive for employers to resolve issues before the Tribunal. Employers have little incentive to settle until they establish the ability of the claimant to be able to pay the fee.

We believe that the alternative fees regime proposed by Citizens Advice (England and Wales) would far better meet these criteria.

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

We do not believe that all claims should attract a fee. Straightforward claims relating to unpaid wages and deductions from wages should be exempt from fees. This would remove the possibility of claimants being unable to afford to make a claim due to their employer withholding due wages.

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

No, we believe that the proposals for Option 1 will act as a barrier to justice. The significant fees for claimants to access a tribunal will act as a disincentive for employers to resolve issues at an early stage. If an employer thinks that the claimant is unable to pay the fee, regardless of the strength of their claim, the employer is unlikely to come to an early settlement.

We also disagree with the principle of charging higher fees for different types of claims. This will discourage claims where the fees are higher, such as discrimination claims, regardless of the strength of the claim.

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.

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.

We disagree with the principle of charging different fees for different types of claims. A person with a strong claim should not have to pay a higher fee to access justice based on their employer's actions. There is also a risk that problems in the workplace concerning Level 3 complaints will increase if employers are aware that it is more expensive for employees to make a claim on those grounds.

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.

Given that large parts of the cost of tribunals will initially fall on the claimant, it is only right that these costs should be transferred to the employer should the tribunal find against them. This would encourage employers to have greater regard for the employment rights of their workers in order to avoid claims in the future and also to encourage employers to resolve issues before they reach a tribunal.

However, we are concerned that the proposals do not address the problem of employers failing to pay a successful claim. In 2009, research by the Ministry of Justice found that four out of ten awards in England and Wales are simply not paid at all, and fewer than half of all awards are paid in full. In Scotland, claimants can instruct sheriff officers to pursue the tribunal award from the employer, but must pay the fees to do so. Citizens advice bureaux have seen a number of cases in which employment tribunal fees have gone unpaid.

A North of Scotland CAB reports of a client who took her employer to an employment tribunal after they failed to pay her due wage. The judgement required the employer to pay the client over £1,300 for pay, annual leave, and a failure to provide terms and conditions. However, the employer is nearly three months late in making the required payment to the client. The client cannot afford the fee to instruct sheriff officers to enforce the debt. The bureau contacted sheriff officers who advised that this wasn't the first time that this particular employer had failed to pay a settlement.

A West of Scotland CAB reports of a client who received a default judgement at tribunal which requires the employer to pay the claimant a redundancy payment of £4,620, notice payment of £3,080 and holiday pay of £728. The client contacted his former employer to find out when he will be receiving the money, but was told that the employer is still refusing to make payment. The adviser informed the client that the employer will have to pay, but that it will now be treated as a court debt and needs to be formally enforced.

An East of Scotland CAB reports of a client who had been dismissed from his job and received help from the CAB to challenge the decision. A settlement of £5,000 had been agreed via ACAS, but his former employer had not paid the amount due. The client reported that he was now attending his GP for depression and was in receipt of Employment and Support Allowance as he is unfit to work. He considers that this decline in his health is the result of stress surrounding his dismissal and appeal.

The introduction of tribunal fees, alongside the risk of an employer refusing to pay an award and costs, means that a claimant could find themselves financially much worse off even if they win their case. The Government's proposals do not address this risk for claimants.

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.

No, we believe that the proposals for Option 1 will act as a barrier to justice. We support the alternative proposal of a nominal flat-rate fee for claimants making any category of claim. Where the employer is found to be at fault in a tribunal, they should then be liable for the cost of the tribunal.

We do not agree that the claimant should have to pay an additional fee to access a hearing. The claimant may have been more than willing to reach an early resolution to a strong claim, but may be forced to pay for a hearing if the employer refuses to take part in any mediation. In these circumstances, particularly where a claimant goes on to make a successful claim, it is the employer that has caused the claim to reach a hearing. Where a claimant has funds to make a claim, but not to access a hearing, the employer's refusal to take part in any early resolution would act in their interests but represent a potential denial of justice. Putting the cost of a hearing on the claimant reduces the incentive of an employer to resolve cases earlier in the process.

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

We disagree with the proposed fees for written reasons for the judgement. We believe that it is a basic right for a claimant to receive the reasons for a judgement, especially where they have paid the fees for the hearing. The written reasons for a judgement should be part of the hearing process and should not attract a separate fee.

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.

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?

There is evidence to suggest that the proposed HMCTS remission system is complex and poorly understood. Citizens Advice (England and Wales) quote a report on the remission system by Price Waterhouse Coopers that found that one in three of all decisions on an application for remission were found to be incorrect. We are therefore concerned that the proposed system for helping people to afford Employment Tribunals has been shown to be failing for some time.

We are also concerned that this system is being proposed for tribunals across Great Britain. Scottish civil courts have a different remission system already in operation, so the Government must be certain that the remission system that is used for Employment Tribunals is suitable in the Scottish context.

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

As evidenced by statistics from the Ministry of Justice at the beginning of this response, the vast majority of the increase in Employment Tribunal claims in the last four years has been as a result of an increase in repeat multiple claims.

It therefore makes sense to address the costs arising from multiple claims. However, the fee proposals for multiple claims under Option 1 are overly complex and suffer from the same problems that we have outlined for single claims in the previous questions.

A more equitable and simpler way of charging fees in multiple claims would be to charge a nominal flat-rate fee to each claimant. This would put claimants in a single claim on the same footing as a claimant in a multiple claim and ensure that merging and splitting cases would not be a complicated process in terms of fees. We would suggest a £75 flat-rate fee for single and multiple claimants as suggested in the Citizens Advice alternative proposal.

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

See answer to Question 10 and 11

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

No, we believe the fee proposals in Option 1 will act as a barrier to justice for many people with strong claims. It is a blunt and indiscriminate way in which to lower the number of tribunals and to reduce costs. Employment tribunals should act as a deterrent to poor and illegal employer behaviour and encourage employers to adhere to their responsibilities to their employees. There is a significant danger that these proposals will lead to poor practice being unresolved and that therefore poor employers will continue with this practice. This affects not only their employees, but also other employers who may feel under pressure to follow the same poor practices in order to cut costs. It is in the interests of employees and good employers that legitimate cases are resolved at tribunal. We are concerned that these proposals will act as a barrier to many of these cases.

Part 2- Option 2 fee proposals

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

No – there is a risk that the Option 2 fee structure will discriminate against those who may have to make a higher claim through no fault of their own. The £1,750 fee for making a high value claim may act as a barrier to justice for those who are

either owed a significant amount or who are unaware of the full extent of their claim. The proposals also make the assumption that those who want to make a high value claim will have a higher income with which to make a claim, when this is not necessarily the case.

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.

We support the nominal flat-rate issue fee proposed by Citizens Advice (England and Wales). The fees of between £200 and £1,750 to make a claim in Option 2 are too high and would act as a barrier to justice to those who could not afford the fees. The ability of a person to afford the fee is not related to the strength of their claim. In some cases, a client may be less likely to be able to afford the fee due to the actions of their employer.

While Option 2 has a simpler fee structure, the one fee system would do little to encourage an early settlement as the claimant will feel that they have paid for a hearing (and effectively already have).

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.

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.

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?

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.

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

We do not support the threshold and the higher fee for claiming over this threshold. Where a claimant has a strong claim, this is simply charging the claimant more because they have been treated worse by their employer. It may also act as a barrier to justice for those who are owed significant money by their employer. There seems to be little evidence for the threshold to be set at £30,000 which appears an arbitrary amount.

We are concerned that claimants would be required to make an assessment on the potential value of what may be a complex claim. The claimant may be unaware of the full extent of the poor or illegal practice that they have experienced at the

outset and which may only become apparent as the case is taken forward. We believe it would be unfair to limit awards to claimants that were unaware of the full extent of their case.

It may also be the case that a client believes that they are owed significantly in excess of the £30,000 threshold, but can only afford the lower fee (which is over £1,100 less than the higher fee). The client could only then be awarded a maximum of £29,999.99 even if the tribunal determined that their loss was far in excess of this amount.

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

No – see our response to Question 12

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

See our response to Questions 10 and 11

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?

Citizens advice bureaux provide advice and information to thousands of clients each year on their employment rights and responsibilities. In 2010/11, CAB in Scotland advised on 50,726 new employment issues in 2010/11 – around 140 for every day of the year. CAB provided representation for clients in 1,418 employment tribunals in 2010/11.

We therefore expect citizens advice bureaux to play a key role in helping claimants with their employment tribunal claim. Due to the relative income levels of bureau clients, we believe that CAB are more likely than other sources of advice to advise claimants that will struggle to afford the proposed tribunal fees.

However, the funding that is available to citizens advice bureaux is decreasing as public spending cuts hit home. CAB must be supported to ensure that claimants receive the support they require in the new employment tribunal regime.

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

As outlined in the introduction of this response, we support the alternative fees regime outlined by Citizens Advice (England and Wales). We believe that this

alternative proposal better meets the criteria set out by the Government at the same time as meeting the savings that are sought.

The Citizens Advice alternative fees regime includes:

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For a more detailed description of their alternative fees regime, please see the Citizens Advice (England and Wales) submission.