

Ministry of Justice Consultation on Introducing Fees in the Employment Tribunals and the Employment Appeal Tribunal

Citizens Advice Scotland Response -21 March 2024

Citizens Advice Scotland (CAS), our 59 member citizens advice bureaux (CAB) and the Extra Help Unit form Scotland's largest independent advice network. The Citizens Advice network in Scotland is an essential community service that empowers people through our local bureaux and national services by providing free, confidential, and independent advice. We use people's real-life experiences to influence policy and drive positive change. We are on the side of people in Scotland who need help, and we change lives for the better.

Background

The Citizens Advice network in Scotland regularly provides support and advice on a wide range of employment issues.

- > On our public-facing online portal [Advice for Scotland](#), which people can freely consult for self-help, **work-related information and advice pages registered more than 97,000 page views in Q1-3 2023/24**. This includes over 6,900 views of our advice page on dismissal, over 5,100 views of advice relating to pay, over 5,000 views of advice on employment tribunals, and more than 4,500 views of advice on discrimination at work.
- > In the same period, **bureaux provided over 24,000 pieces of tailored advice on employment issues to more than 8,500 individual clients across Scotland**. Within this employment advice, the highest advice need concerned pay and entitlements (23%). The next most common employment issues presenting at bureaux were dismissal (17% of all employment advice), grievances or problems at work (12%), and terms and conditions of employment (11%). Other issues included redundancy (7%), and disciplinary issues (5%).

Broadly speaking, these areas of employment advice sought at CAB reflect the most common issues dealt with by the employment tribunal (ET) system – with a 5-year average (from 2016-2021) showing the largest numbers of claims disposed at ET relate to issues around pay, dismissal, hours, and breach of contract¹.

The Scottish CAB Service informs people of their rights and responsibilities and empowers them to navigate often complex systems to resolve their issues, prevent detriment, and pursue recourse when things go wrong. While 8,526 individuals sought employment advice at a CAB in Scotland in Q1-3 2023/2024, only 6% of this advice concerned legal recourse

¹ Annex C: Employment Tribunal Receipts Tables' at <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-october-to-december-2022>.

and 2% alternative dispute resolution – underlining the vital role CAB play in early intervention and prevention within Scotland’s access to justice landscape and in supporting people to explore and access a range of routes to justice.

The Citizens Advice network in Scotland also provides **advice on legal issues**, with more than 15,000 individual clients across Scotland receiving over 40,000 pieces of advice on legal proceedings in 2022/23. In the same period, the **network supported 1,892 clients at courts and tribunals** (including benefits, housing, and employment), with 87% of these cases won or upheld.

Based on client experiences and data, as well as expertise from across the Citizens Advice network in Scotland, Citizens Advice Scotland’s policy work on Access to Justice aims to ensure that people’s rights are protected and realised, that people in Scotland have equal access to the justice system and legal services regardless of who they are, where they live, their digital skill level, or the specialty of their legal issue; can navigate and engage appropriately in legal proceedings; and that processes are transparent and fair.

CAS welcomes this opportunity to respond to this consultation regarding the proposed introduction of fees in Employment Tribunals and the Employment Appeal Tribunal.

Our response

CAS is wholly opposed to proposals to reintroduce issue fees for claimants at Employment Tribunals (ET) as well as appeal fees at the Employment Appeal Tribunal (EAT).

CAS is concerned that the consultation uses a very narrow set of questions which are phrased in a potentially leading way. We are also highly concerned that Q4 suggests considerations of increased fees beyond those proposed in this current consultation once the principle of charging fees is established in the employment tribunals system.

Accessing justice through the ET system

While the consultation paper presents the £55 fee as ‘modest’ and the introduction of this fee structure as an affordable, proportionate, and simple measure to transfer the cost burden of employment tribunals from general taxpayers to users of the system, it disregards the fact that **ETs and the EAT constitute crucial fora for the realisation and enforcement of employments rights by employees and workers who are generally disadvantaged by the inherent imbalance of economic power between employers and employees.**

Intended to help prevent exploitation, discrimination, and other harmful practices by employers by providing access to justice for workers and employees - including the low paid, those who have recently become unemployed or who are vulnerable to long-term unemployment - the tribunals’ societal importance cannot be reduced to the potential

benefit for the individual tribunal user who might succeed in a claim and should therefore pay to use it. The employment tribunal system provides routes to remedy for a wide spectrum of employment-related claims and therefore constitutes an essential component of the rule of law, which benefits society as a whole. This wider social significance of employees' and workers' right to access justice through employment tribunals is reflected in the fact that claims can be brought to ETs and the EAT without the payment of any fees. We believe this should not change.

A previous attempt to recoup some of the cost of the employment tribunal system via the Employment Tribunal and Employment Appeal Tribunal Fees Order 2013, which introduced a two-tier fee system for claimants and led to a sustained and significant fall in cases brought to ETs, was found unlawful and quashed by the Supreme Court in *R (Unison) v The Lord Chancellor* [2017] UKSC 51 on the basis that it prevented access to justice, was indirectly discriminatory and was not a proportionate means of achieving the stated aims of the Fees Order. This further underlines the wider constitutional significance and high degree of protection given to everyone's equal realisation of access to justice because of its centrality to the rule of law.

The consultation paper states that introducing issue and appeal fees at ETs and EAT would bring them in line with fees charged in civil courts, where some employment-related claims could alternatively be brought. This, however, runs counter to the intention behind the historical development of the ET system as payment-free fora which purposefully established them on a different footing than claims in ordinary courts in the civil justice system - which attract fees and where the rule applies 'that costs follow success'. Furthermore, other tribunals such as administrative and tax tribunals, where a similar power imbalance exists between claimants and the state as in the relationship between employee and employer, also operate without fees and allow cost orders only under quite limited circumstances.

Barriers to accessing justice

Even without fees, specialist employment advisors in the Citizens Advice network in Scotland regularly highlight that clients seeking their advice and support face barriers to accessing justice at ETs and the EAT. Often the first question a client will ask is: "Will it cost me? I don't have money." The reassurance that they don't have to pay tribunal fees is vital for many to consider making an ET claim. Even then, bringing a claim and seeing it through can be impeded by various factors.

Recent research by a North of Scotland citizens advice bureau (CAB) found that many clients were not pursuing ET claims or were abandoning them before resolution due to the complexity and stress of navigating the system, often without representation. Clients having to face their (previous) employer, who will often be legally represented and thus at an advantage from the outset, is felt to be a daunting experience in increasingly court-like settings which can be difficult to understand for a lay person. When this CAB was resourced to offer representation to preliminary hearing stage at ET, it reported improved client outcomes, with more clients empowered to pursue tribunal claims and access justice during

the time of this pilot project. This highlights the crucial early intervention and prevention role which CAB play by offering an inclusive and holistic advice service to clients. If adequately resourced to take on this additional work on a more permanent basis this could potentially play a part in reducing caseloads of tribunals.

Employment advisors at CAB also highlight that clients lacking understanding of their rights and various elements of their claims, jargon in tribunal communications and complexity of tribunal processes, lack of access to pro bono legal support or to legal aid solicitors or solicitors with expertise in employment law, as well as fears of retribution or victimisation can further prevent people from pursuing a remedy in the ET/EAT system. These barriers can be further compounded by a client's vulnerability, e.g. due to disability or a physical or mental health condition, language barriers, or immigration status. Prior experience of taking a claim to an ET can also play a role in people's ability to pursue a claim, as well as the client's mental and physical health, overall life situation and the existence or lack of support networks.

Such barriers to access to justice relating to employment rights are also exemplified in the following Citizens Alerts²:

A West of Scotland CAB reports the case of a client who has received considerable support from the bureau in preparation of the ET1 and subsequent Agenda Form. The case is quite complex, and the client feels he might struggle to represent himself at the hearing. He tried to secure legal assistance at the start but had no success. He is now considering withdrawing his claims due to the stress he is experiencing.

A North of Scotland CAB highlights the case of a client who stated that she would not be able to represent herself through a complex ET case, including a claim for unfair dismissal, due to her health issues. She hoped to find a legal representative to support her but hasn't been able to find one willing to take on her case.

An East of Scotland CAB reported the case of a client who wished to take a claim against his employer for discrimination on grounds of disability to the ET. Being unable to find a legal aid solicitor willing to take this on, he submitted his ET1 himself. The tribunal chair decided this did not include sufficiently detailed information and gave him additional time to resubmit the form. The client was again unable to find a legal aid solicitor to assist and came to the CAB for a review of what he had submitted. In the circumstances, the bureau was able to assist him to redraft the ET1 but unable to represent him further. The lack of solicitors offering advice on employment claims under legal aid coupled with the requirements of the tribunal regarding documents submitted to them is putting people in a position where they may be unable to make claims and are being denied access to legal redress when things have gone wrong at work.

² Citizens Alerts, a real-time case reporting system operated by the Citizens Advice network in Scotland allows citizens advice bureaux to submit case evidence to CAS demonstrating the impact of policies and services which they feel are failing to meet their clients' needs.

Introducing a fee requirement to the employment tribunal system would likely act as a substantial further barrier to accessing justice; the proposal should, therefore, be abandoned.

Affordability, proportionality, and simplicity of the proposed fee scheme

Keeping the ET system fee-free is even more significant in the current cost of living crisis which is affecting the great majority of the population, even though unevenly.

- > Public polling in 2023 by YouGov,³ on behalf of Citizens Advice Scotland, found that 1 in 4 Scottish consumers regularly run out of money before pay day. Asked whether they have enough money to save regularly (at least £20) for rainy days, almost a third (32%) of respondents said they would like to but can't afford it. Similarly, 30% of Scottish consumers said they don't have access to £500 to cover an unexpected, but necessary, expense nor have enough money to repair or replace broken electrical goods.
- > Our network data also shows the sustained impact of the cost of living crisis which for many has eradicated any financial resilience they may have had previously and is causing increased spread and levels of hardship. For example, in Q1-3 2023/24⁴, views of our online advice pages for help with bills were up 156% compared to the previous year; and views of our online advice pages for people struggling with living costs were up 146%, while views of online advice pages on food banks and crisis help were up by 39%. Considering advice demand at bureaux, single, working-age households were more likely to need crisis support, and full-time employed people were disproportionately seeking advice on non-priority debt like credit cards⁵ suggesting that people in work are struggling with everyday essential spending and relying on consumer debt to pay bills and buy essentials, likely leading to a legacy of debt that may last well beyond the current crisis.

Affordability of what the consultation report labels a 'modest fee of £55' has to be considered in this context, especially given that this amount has to be raised within the short time limit for lodging a claim at ET (3 months minus 1 day) and an appeal at the EAT (42 days). Many potential claimants/appellants, especially those in low paid or part-time work, in debt, or at risk of long-term unemployment would likely struggle to raise £55 at a time when many have to make difficult decisions about heating or eating, about paying their bills or their rising rents and mortgages.

³ YouGov Plc. Total sample size was 1509 adults. Fieldwork was undertaken between 13th February - 5th March 2023. The survey was carried out online. The figures have been weighted and are representative of adults in Scotland (aged 18+).

⁴ CAS Quarterly Cost of Living Analysis, [col january 2023 proof 2.pdf \(cas.org.uk\)](#).

⁵ Full time employed people make up 12% of all advice demand, but this rises to 20% for non-priority debt advice in Q1-3 2023/24 ([col january 2023 proof 2.pdf \(cas.org.uk\)](#).)

Many claims which can be brought in ETs concern small financial

amounts (such as claims for time off for ante-natal care or claims for unauthorised deductions of trade union subscriptions) **or involve no monetary awards at all** (e.g. a claim for written statement of the particulars of employment). Employment advisers at bureaux highlighted that a £55 issue fee could make it less likely for an individual to pursue such claims despite them being no less significant for the employee or worker affected, and thus would impede claimants' access to justice. It could also deter individuals from pursuing their rights in the ET system where larger financial values are at stake but, ultimately, successful enforcement of their rights seems less certain. The following Citizens Alert exemplifies this:

An East of Scotland CAB highlights the case of a client who has worked as a delivery driver for a company for around 6 months but was told that the company was going into administration and that as of that day they wouldn't be a company anymore. As a mother of 4 she was worried about payments she was still owed by the employer. The employer, however, deemed the client as self-employed while also telling her to get any monies owed from another employer with whom the client has no arrangement or work relationship. The client will now have to get an ET to determine her status before she can start to recover her unpaid wages, etc. which seems unlikely given the company is going into administration and not accepting any responsibility for its employees.

Even if a claimant wins before the ET, they might be left empty handed. In Scotland, a claimant who has been successful at ET has to write to the office that heard their case and ask for an extract of the judgement which can then be used by a sheriff officer to force the respondent to pay. However, the claimant has to pay for enforcement action to be taken – a further cost that the claimant has to shoulder without the certainty they will be able to recoup what is owed to them. In fact, many ET awards go unmet as a Study by the Department of Business, Innovation and Skills (Payment of Tribunal Awards 2013) found – just 53% of claimants who were successful before the ET received a part of the award before taking enforcement action, and even after doing so, only 49% of claimants received full payment, while 16% were being paid in part and 35% were paid nothing.

This injustice – often leading to substantial detriment for employees and workers who have done everything right - is regularly highlighted in our network data, as exemplified in the following Citizens Alerts:

A South of Scotland CAB reports the case of a client who has won his case against his former employer before the ET, but the ex-employer hasn't paid him. The client has already spent £100 trying to recover the £5,200 he is owed going through the Sheriff Court and Sheriff Officers – in vain, as the ex-employer seems to have transferred all his assets to his wife. He has now been told he has to pursue his ex-employer through the Sheriff Court and Sheriff Officers but, because of his debts, which were largely accrued due to non-payment of wages, cannot afford more outlay than what he has already spent.

A West of Scotland CAB highlights the case of a client who has received an ET award of more than £6,600 against their former employer for unlawful deduction of wages, damages for breach of contract, redundancy pay and holiday pay. The client was informed by his ex-employer that they were no longer trading. However, the company is still classed as 'active' on Companies House and no administrator or receiver has been appointed. The respondents have never responded to any mail or phone calls by the client and did not respond to the ET1 form. To enforce payment, the client must use the diligence process which will cost the client additional expense and stress. In short, having an award granted by an ET has little effect where the client is required to use diligence where the respondent refuses to pay. Clients with limited resources, and taking into account the additional stress, do not pursue it any further. The award of more than £6,600 is the client's lifeline but he will likely receive no money while already having financial difficulties following the dismissal.

In light of these unjust outcomes, we believe introducing fees to even bring a claim to ET or an appeal to EAT is not a proportional measure, as it will further restrict people's access to justice, while only raising about 1-2% of the current cost of the ET system as the consultation paper estimates.

Remissions through Help with Fees or the Lord Chancellor's Exceptional Power

The consultation paper refers to the Help with Fees scheme (HwF) and the availability of full or partial remissions for those who would not be able to afford the fees. **We are concerned that access to justice in ET and EAT would not be realised for all through the remissions scheme.** A fee scheme which requires a remission scheme causes additional paperwork, stress and worries for those seeking to pursue their claim(s) in often difficult circumstances and might act as a deterrent for some.

Employment advisers in the Scottish CAB Service highlighted concerns, based on their own and their clients' experiences of current service levels at ETs, that this would also be reliant on an efficient administrative system for determining who meets the criteria. Official statistics also show that ETs are under significant strain, with 32,000 single claim cases and 438,000 multiple claim cases outstanding at the end of September 2023.⁶

Even if the HwF scheme was administered efficiently, tribunal fees would likely act as a barrier for claimants who would not be eligible for support and fell short of the criteria (e.g., by a narrow margin). This could inadvertently deter individuals who were, for example, paid cash in hand by an employer who is unwilling to provide an employment contract and violates potential claimants' employment rights; or it could affect a person who was unfairly dismissed and applied for certain benefits such as Universal Credit (UC) but has not received a decision on their benefits application, within the 28 days limit to provide evidence of (a lack of) income to the tribunal once requested, or within the short time limit

⁶ [Tribunal Statistics Quarterly: July to September 2023 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2023).

to lodge an ET claim. A late refusal of an application for fee remission could thus further complicate or completely frustrate the justice journey for claimants.

The Lord Chancellor's Exceptional Power to remit fees for individuals who do not qualify for HwF but whose circumstances are such that they cannot realistically afford to pay the fee is exactly that – exceptional; between 2015-16, when more than 86,000 individual claims were presented at ET, it was exercised only 31 times even at a time when claimants were charged significantly higher fees of £390 to £1,200. **Given the low number of times this power was exercised previously, we are unconvinced that the Lord Chancellor's exceptional power to remit fees will act as a safeguard for access to justice for all with regard to a £55 fee.**

Aims of the proposed fees

While the consultation paper states that the introduction of fees in the employment tribunal system is needed to dis-incentivise unreasonable behaviour such as pursuing weak or vexatious claims, it is important to stress that the right to accessing justice is not restricted to claims which are ultimately successful. Even if claims fail, people can have arguable claims which they have a right to present for adjudication – they should not be dis-incentivised. With regard to vexatious claims, a dis-incentive to that effect already exists in Rule 76 of the Employment Tribunals Rules of Procedure 2013 which allows the ET to order one party to pay the other party's legal costs where the judge deems that a party has acted vexatiously, disruptively, abusively or otherwise unreasonably in bringing or conducting the proceedings, or in cases of claims or responses which had no reasonable prospect of success. The consultation paper itself recognises that this rule will remain unchanged even if the £55 fees were introduced.

The consultation, moreover, argues that the introduction of a price mechanism aims at incentivising earlier settlements. While CAS is supportive of early and alternative dispute resolution, we are highly concerned that fees to be paid solely by claimants at ET and EAT will rather embolden employers, when they know there is an additional barrier for the claimant to overcome in order to realise and enforce their rights. This could – contrary to the objectives of the fee scheme – operate as a dis-incentive to the employer to resolve at the ACAS/Early Conciliation stage.

In conclusion, CAS therefore rejects the proposals to introduce issue and appeal fees at ETs and the EAT. We would urge the Ministry of Justice to ensure access to justice for all is improved in the ET system, by alleviating the power imbalance between employees and workers on the one hand and employers on the other, providing increased support and guidance especially for unrepresented claimants, as well as simplifying enforcement of ET awards.

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