Proposal on Charging Fees in Employment Tribunals and the Employment Appeal Tribunal

Consultation Questionnaire

We would welcome responses to the following questions set out in this consultation paper

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

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.

Response: Acas recognises that it is Government policy to recover a contribution towards the costs of the system from Users and that the Government has already announced its intention to introduce fees. We agree it should be simple, easy to understand and cost effective; maintain access to justice and encourage users to resolve issues as early as possible.

Acas understands that this policy development seeks to transfer some of the cost of running the Employment Tribunal to users and welcomes the inclusion of other considerations such as the need to encourage early resolution of disputes.

The trend in employment relations over the last forty years has been a move away from resolving workplace disputes through collective action to one of resolution through individual claims to the Employment Tribunal. The proposal to introduce fees into Employment Tribunals will mean a very significant change to the system which is likely to have an impact on how disputes are resolved in future. It will not be clear until the changes are introduced how this will manifest itself but it should be recognised that the impact could spread beyond the issues covered in the success criteria into much broader workplace matters. There is no indication of how the success criteria will be measured but it will be important to have clarity on this to ensure that there are no unintended consequences of the introduction of fees.

The amount charged and the timing of any charge will affect the behaviour of parties in conciliation. Conciliation depends for its success on examining the strengths and weaknesses of each party’s case and having the opportunity to challenge perceptions of the merits of each side’s case to encourage consideration of different perspectives. The introduction of fees may harden an Employer’s attitude towards exploration of merits of the case at an early stage if they are unconvinced that the Claimant will pay the fee to proceed. In the case of Claimants it may be more difficult
to convince them to contemplate settlement or withdrawal if having paid the hearing fee they become more committed and want to pursue their claim to its conclusion.

Acas’ overriding concern is that any system introduced should maintain our ability to assist parties to resolve actual or potential Employment Tribunal cases. Acas currently plays a significant role in resolving Tribunal cases prior to hearing with over three quarters of all potential Hearing Days avoided through conciliation. If the manner in which fees are introduced were to undermine this rate it could lead to higher proportion of cases being heard and therefore increasing the overall cost of the system rather than reducing the burden on the State.

Potential claimants are likely to consider the most cost effective method of pursuing a claim and for certain jurisdictions this may be the Civil Courts. Acas has no duty to conciliate in these cases and therefore there is a greater likelihood of these cases being heard.

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

Response: There are some types of case e.g. Interim Relief where it is necessary to arrange a hearing at short notice where it may be difficult to complete the charging procedure before a hearing is due.

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

Response: Of the two Options proposed, Acas believes that the two stage approach suggested in Option 1 will allow more opportunity for resolution through Conciliation. The period following lodging of the initial fee will allow time for reflection, consideration of the merits of the case and the opportunity to consider other options including use of the Acas Arbitration Alternative before the second payment is due.

Conciliators’ experience is that parties are more willing to settle at certain points in the duration of a case and analysis of ETS data in 2002, (i.e. before the introduction of fixed conciliation periods in 2004) shows a pattern where there were two significant time points in settlements/withdrawals; the first in the early weeks of a case being registered and the other close to the proposed hearing date.

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.

Response: No response

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.

Response: No response

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.
**Response:** Clarity on this issue will be crucial in supporting conciliation. It is this element which can provide balance between the parties – Claimants pay at the point of lodging the claim but if the Claimant is successful then the burden falls on the Employer.

It is important that the system introduced creates an incentive for parties to resolve matters. If there is no incentive to consider settlement to avoid reimbursing the cost of the fee then it is likely to affect willingness to consider settlement. Please see our response to Question 14 for further detail on this point.

**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.**

**Response:** No response.

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

**Response:** No response.

**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.**

**Response:** No response.

**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.**

**Response:** It may prove difficult for Claimants to establish if they are entitled to remission when they lodge an application e.g. if they are awaiting a decision on whether they are entitled to job seekers allowance. It may also need to be borne in mind that in some cases it may be difficult for Claimants to provide written evidence of pay – indeed the lack of clear arrangements for pay may in itself may be the root of the issue complained of.

Under Early Conciliation, all Claimants will speak to Acas first and it will be difficult for Conciliators if they are drawn into discussions regarding eligibility for Remission by potential Claimants without any ability to signpost Claimants to sources of further advice.

The time limits for lodging claims at the Employment Tribunal are much shorter than in the Civil Court and measures will be needed to take account of this.

**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?**

**Response:** Consideration should be given to ensuring that the remission system should also apply to Respondents as in some cases e.g. a Disabled Person employing a carer, they too could be in receipt of benefits. It may be that to ensure equality considerations are met consideration of further support is needed to avoid unnecessary burdens on this group.
Question 12 – Do you agree with the fee proposals for multiple claims under Option 1? If not, please explain why.

Response: The proposals are complex and may prove difficult to operate in practice in certain types of multiple. The proposals may be feasible in multiples where there is a single claimant representative but in other multiple cases there can be a mix of individual claimants and several different claimant representatives who may not be aware of each other at the point of lodging their claim. It is also common for cases in a multiple to arrive over a period of time making it difficult to establish at the outset how many cases there are.

It is also common in multiples for some cases to settle while others proceed and for cases to be added into or taken out of multiples as they progress. This may mean that consideration of how this will be handled will be necessary.

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

Response: No response

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

Response: Acas supports the aim of encouraging parties to settle early but experience shows that this is difficult to achieve in practice – not least because it is often only in final preparations for the hearing that information comes to light which affects judgements on the likely success or otherwise of the case.

Payment of a hearing fee may encourage claimants to consider again the merits of their claim at this point but it is likely to encourage the opposite behaviour in Respondents who may be unwilling to consider the merits of the case until they know that the claimant has lodged the Hearing Fee.

The lack of a system for refunding fees may make claimants less willing to settle once the hearing fee has been lodged as they may feel they have nothing to lose.

In cases where settlement is being considered the question of who should cover the cost of the hearing fee may prove to be an added barrier to settlement. Respondents may resent reimbursing claimants for the cost of a hearing that has not taken place whilst claimants may be very reluctant to settle otherwise.

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

Response: Please see our answers to questions 3 -14.

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

Response: Option 2 provides challenges to the resolution of disputes. The higher levels of fees proposed under Option 2 may make claimants more entrenched as having paid the fee to lodge a claim they may wish to get the service (a hearing) which they feel they have paid for. If hearings are to be avoided Respondents are likely to have to agree to reimburse a significant sum as part of the terms, even if resolution is reached at a very early stage.
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.

Response: Please see our response to question 16

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.

Response: It may be difficult for claimants to accurately calculate the value of their claim at application stage.

In SETA 2008, claimants were asked how much money they were hoping to get and 24% did not know, 61% stated less than £30,000 and just under 5% £30,000 or more. Although evidence in this area is limited, that survey indicated that expectations of higher tribunal awards were not met.

It is also possible that claimants who have committed a larger fee may become more entrenched in their view of the value of their claim and less willing to compromise during the conciliation process.

Potential claimants will need suitable advice on the calculation of awards before lodging a claim under this proposal and we are concerned that this could lead to pressure on Conciliators to assist with calculations during Early Conciliation beyond the level of general advice we would expect to give.

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.

Response: No response

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?

Response: No response

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?

Response: In view of the difficulty in accurately calculating the likely value of claims and the low number of claims involved it seems unclear if this would provide more certainty for employers in the vast majority of claims.

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.

Response: This level of award is associated with a range of jurisdictions including discrimination jurisdictions, where high awards can reflect particularly unpleasant treatment.
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.

Response: No response

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

Response: Please see our response to Question 16

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

Response: This adds another level of complication to the difficulties outlined in our response under Option 1

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

Response: No response

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

Response: The inability to refund fees may act as an incentive to go all the way to Tribunal rather than to opt for settlement. The grounds for refund are arguably stronger under Option 2 than Option 1.

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?

Response: It would be helpful to have an online calculator to assist potential claimants in assessing both the potential value of their claim and the likelihood of remission. This would assist Conciliators in dealing with questions on these topics without being drawn into speculation.

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

Response: Acas believes that the design of any fee system introduced should place greater emphasis on facilitating the resolution of disputes for example by providing the opportunity for refunds of fees if the case is resolved.

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.

Response: Given that the intention is to introduce fees, these proposals seem consistent with that aim.
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.

Response: No response

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

Response: No response

We would welcome responses to the following questions set out the accompanying Equality Impact Assessment.

Q1 – 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 within the protected groups?

According to SETA 2008, more claimants in discrimination cases were still with their employer at the time of interview (14% discrimination, 10% fast track and 4% standard track). Discrimination claimants are also more likely to make a claim before their employment ceased than others, meaning that more might have to pay the full fee. However, after the case is resolved, fewer discrimination claimants are in paid employment compared to others (56% discrimination, 66% fast track and 64% standard). This suggests discrimination claimants could potentially experience greater costs than other claimants.

Q2 – Could you provide any evidence or sources of information that will help us to understand and assess those impacts?

No response

Q3 – What do you consider to be the potentially positive or adverse equality impacts on employers under Options 1 and 2?

No response

Q4 – Do you have any evidence or sources of information that will help us to understand and assess those impacts?

No response

Q5 – 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?

No response

Q6 – 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 (the Level 4 fee) if successful, will be deterred from accessing justice?

No response

Q7 – 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 levels of fees charged under either option to the level we propose?

No response

Q8 – 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 response

Q9 – Further to Q8 could you provide any information to help us in understanding and assessing the impacts?

No response

Q10 – Could you provide evidence of any potential equality impacts of the fee payment process described in Annex B of the Equality Impact Assessment you think we should consider?

No response

Q11 – Further to Q10 do you have any suggestions on how those potential equality impacts could be mitigated?

No response

Q12 – Where, in addition to any of the questions that have been asked, 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.

No response

Thank you for participating in this consultation exercise.