



# **Unite Response to Government Consultation: Introducing Fees in the Employment Tribunal and the Employment Appeal Tribunal**

**March 2024**

## About Unite the Union

This submission is made by Unite, the UK and Ireland's largest trade union with over 1 million members across all sectors of the economy, including manufacturing, financial services, transport, food and agriculture, construction, energy and utilities, information technology, service industries, health, local government, and the not-for-profit sector. Unite also organises in the community, enabling those who are not in employment to be part of our union.

## Introduction

The Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT) are important public Tribunals used by many thousands of workers each year, having jurisdiction in relation to workplace disputes. The disputes may concern those applying for work, those in work, and individuals who have left employment. The jurisdictions impact upon fundamental rights in our society, such as addressing allegations of discrimination involving the protected characteristics in the Equality Act, such as race and sex discrimination. The ET is the first level of legal process used by individuals if they have been unable to resolve a dispute using early conciliation (see below). Providing access to justice is a key principle for Unite, and the union recognises that many requiring assistance from the ET will not be union members, they will be litigants in person. The message learned from the earlier introduction of ET fees is that the number of claims lodged reduced significantly, and non-union members and many union members were deterred from bringing claims for a fear of entering a cost bearing legal jurisdiction.

Within the Government consultation, it is confirmed that the current cost regime in the ET and EAT will remain unchanged. The Government stresses that cost orders are rare, and whilst that is true, Unite believes that the occurrence of cost orders is increasing, and the threat of a costs application remains a common tactic employed by Respondents and their lawyers. Some years ago, the Government was asked to consider the introduction of legislation to prevent costs threats from being used against Claimants, but the Government declined to do so. The decision now to consider introducing fees to bring claims brings costs back into the consideration of Claimants, and many will reflect upon the need to pay a fee as making it more likely that other costs will arise. Unite's view is that it will also be used by Respondents and their advisers as an additional tool to deter cases from being presented or pursued at all.

Whilst the consultation does refer to exemptions, there is no recognition of the particular circumstances facing Claimants when they may need to use the ET. Many Claimants have been discriminated against or dismissed, and just at the time when they may need to watch every penny being spent, they are being asked to pay a fee of £55.00. It may be modest to Government, but for a person dealing with the cost of living crisis, the need to pay out £55.00, for example from payment for a short notice period, would still be of significance and they may not qualify for exemption. A Claimant cannot wait to see how things settle down after they may have lost a job, the basic limitation period for bringing an ET claim remains at 3 months after completing early conciliation. The time period for bringing an appeal is even shorter, being 6 weeks. Putting Claimants under additional financial pressure just when they are at their most vulnerable is an unnecessary step which will deter all potential Claimants from engaging with the process.

The ET system has been subject to significant cuts and funding over many years, leading to inefficiency and delay. Many Claimants still wait years to have their case dealt with and Unite is aware of Claimants waiting a year or more to receive a Judgment following a hearing. The Government itself predicts that by 2026 the introduction of the £55.00 fee may generate about £1.5m, a sum which will make little difference to the court budget but will be a deterrent for individuals to bring and pursue claims. The answer for the Tribunal service is a proper review of funding requirements, and for Government investment.

ET and EAT fees were introduced originally in 2013 and four years later they were declared to be unlawful by The Supreme Court. The decision taken in 2017 remains relevant to the scheme now proposed, which does engage lower fee levels, but remains unacceptable for Unite for reasons, including those set out above. It must be remembered that the ET and EAT do not provide for enforcement action on Judgments, and many of those using the service receive none of the compensation awarded, even when cases have been successful. A more efficient Tribunal service engaging effective pre-action procedures and an effective enforcement system would be a better way to seek to protect the employment rights of those needing to use the ET and EAT services. Unite considers that any final proposals may be subject to legal challenge as being unlawful, noting the inevitable impact upon access to justice and those seeking to enforce rights, such as the most vulnerable groups in our society. It appears to Unite that the motivation behind the proposal is to reduce case numbers, thereby reducing cost to the Tribunal service. A receipt of £1.5m of itself will not impact upon the efficiency of the service, contrary to the explanation document behind the proposal.

It seems to Unite that there is also a misunderstanding about the role of the Tribunal, which can raise and address important concerns about issues impacting upon substantial numbers of people, e.g. on holiday pay. Not every claim is of significant value, but together with others, the rights of groups might be protected through the ET and the proposed fee may have a significant impact upon important cases but involving moderate value.

Unite opposes the proposed fee introduction and will address the specific questions below. Reference is made above to the early conciliation process involving ACAS. The union's view is that the process should be simplified and made more effective, so that when a person wishes to engage in conciliation, that process cannot be thwarted by the other party simply refusing to engage. The complexity of early conciliation is also confusing for many people, noting the impact upon the already short limitation period. A review of early conciliation is important. Under the earlier fee regime, many employers would not seek to resolve claims until a case had been commenced, and the reintroduction of fees would, in our view, undermine the early conciliation process. Similarly, the use of judicial mediation for mainly discrimination cases should be reviewed and updated to make it a more effective option for both parties. The current Tribunal system engages unnecessary formality and delay, particularly when addressing discrimination cases, which take far too long to reach Tribunal and lead to substantial legal costs being incurred on both sides. In this regard the Tribunal is failing to achieve its statutory purpose.

## Questions

1. Do you agree with the modest level of the proposed claimant issue fee of £55.00, including where there may be multiple claimants, to ensure a simple fee structure? Please give reasons for your answer.

Answer:

Unite does not support the introduction of the proposed fee. If the Government goes forward with the proposal, the fee should be reduced, with greater areas of proposed exemption. A simple fee structure would always be preferred, and there should be a single appeal fee in all jurisdictions.

2. Do you agree with the modest level of the proposed EAT fee? Please give reasons for your answer.

Answer:

The above points remain valid, and the proposal would introduce complexity at the beginning of either the ET or EAT process, for example assessing the value of claims and determining eligibility for exemption. The union opposes the introduction of the fee.

3. Do you believe this proposal meets the three principles set out above? Please give reasons for your answer.

Answer:

There would be no possibility of the proposed fee covering the cost of the ET or EAT service. The introduction of higher fees would fall back into the trap which arose in 2013, and whilst it may lead to recovery of greater funds for Government, it would act as a bar on access to justice and a deterrent for those proposing to bring claims or appeals. A thorough review of the services and practical changes, such as those outlined above, would be of more importance and would be likely to achieve better results than increase in fees.

4. Do you consider that a higher level of fees could be charged in the ET and/or the EAT? Please give reasons for your answer.

Answer:

The scheme introduced in 2013 involved complexity and litigation about the fee process itself. The very high fees introduced were found to be unlawful, and for all of the above reasons, Unite strongly opposes the idea of higher fees, even with a small number of exempt areas.

5. Are there any other types of proceedings where similar considerations apply, and where there may be a case for fee exemptions? Please give reason for your answer.

Answer:

Unite is aware of significantly increased fees being applied across the County Court for dealing with claims such as for damages for personal injury and industrial disease. Such fees represent a significant burden for Claimants and those who support them, such as trade unions. The fee structure of the court service should be subject to review to address the inequality arising from the fee structure, which is a bar on access to justice for the above and other case types, including in other jurisdictions where fees are likely to deter individuals from pursuing claims. This includes claims required to seek to enforce payments of the National Living wage.

6. Are you able to share your feedback on the different factors that affect the decision to make an ET claim, and if so, to what extent? Please give reasons for your answer.

Answer:

Unite supports many members each year in pursuing ET and EAT claims, the introduction of ET fees would have an impact upon the union, but the majority of Claimants are litigants in person, for whom the new fees would be a bar on access to justice for the reasons set out above. In 2013 there was an assumption that ET or EAT fees could be recovered from the other party if the claim was successful. That did not always happen, and there was often an issue on recovery if the Claimant was supported by a trade union, and if a case settled. Some Respondents objected to paying back fees, and Claimants were put under pressure to accept offers which were structured so that the real value of the settlement was diminished when fees could not be included through the negotiations.

7. Do you agree that we have correctly identified the range and extent of the equalities impact for the proposed fee introductions set out in this consultation? Please give reasons and supply evidence of further equalities impacts as appropriate.

Answer:

The consultation does engage in considering the impact upon equality issues but fails to take account of the additional burden which will arise when considering discrimination cases which are already subject to inefficiency and delay in the Tribunal service. Those from certain minority groups who are already disadvantaged will be deterred from bringing claims, even if there is some technical ability to seek exemption. Most ET Claimants are litigants in person and are not experts in dealing with the ET or EAT Rules of Procedure. The very people who need the ET service the most are amongst the most likely to decide that having to deal with a fee issue at all is a reason why they may be unable to bring a claim. Not everyone has the ability to review small print in Regulations, and to seek to evidence the right to an exemption on a matter which could be the difference between bringing a claim and deciding to allow an employment rights issue to be left without redress to them as an individual.

## **Conclusion**

This proposed policy is unnecessary and Unite considers that it is a distraction from the real issues, investment in our courts and Tribunal system, and a review of the process to seek redress and to enforce employment rights. This proposal should be consigned to history and the outcome of the consultation should be that no, even “moderate” fees should be introduced for the ET and EAT.

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