The South Eastern Circuit Response to the Ministry of Justice
Review of the Introduction of Fees in the Employment Tribunals
Consultation on Proposals for Reform
March 2017

Introduction

1. The South Eastern Circuit (SEC) represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice and across England and Wales. It is the largest Circuit in the country. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners.

2. This is the response on behalf of the South Eastern Circuit ("SEC") to the further proposals of the Ministry of Justice ("MOJ") as part of its review of the introduction of fees in the Employment Tribunals.

SUMMARY

SEC's overall position with regard to the MOJ Consultation

3. The foreword to the MOJ consultation states that "*while it is clear that many people have chosen not to bring claims to the Employment Tribunals, there is nothing to suggest that they have been prevented from doing so*".

4. The SEC's position by contrast is that there is much evidence to suggest that people have been prevented by the imposition of fees from bringing claims to the Employment Tribunals ("ETs"). Moreover, a situation in which a potential claimant "chooses" not to bring an ET claim in a situation where paying the fee

would result in deprivation to themselves or their family, cannot be regarded as a "choice".

Dramatic reduction in the number of Employment Tribunal Claims

5. With respect to the fall in claims following the introduction of fees, the SEC notes that it is accepted at paragraph 105 of the Consultation Paper that "*The actual fall since fees were introduced has been much greater and we have therefore concluded that it is clear that there has been a sharp, substantial and sustained fall in the volume of case receipts as a result of the introduction of fees*." This is confirmed by the figures in Table 7 of Annex E of the Consultation Paper. This is consistent with members of the SEC's experience of the dramatic reduction in ET claims since the introduction of fees.

6. The SEC notes that, at paragraph 107 of the Consultation Paper, it is accepted that the reduction in claims following the introduction of fees as been greater for Type A (72% reduction) as compared with Type B (64% reduction). This supports the SEC's experience that the type of simple, low value claims often brought by those on very low wages for whom the figures claimed are significant for them but would not be for others, have been most greatly hit by the introduction of fees. This is discussed further below.

Reasons for this reduction

7. It is clear that the introduction of fees has triggered this dramatic reduction. .

8. Chapter 5 of the Consultation Paper, based upon information provided by ACAS, estimates that between 3,000 and 8,000 people per year (tables 13 and 14 of Annex F) did not pursue their claims before the Employment Tribunals (despite having commenced early conciliation with ACAS) because they could not afford to pay the fee (paragraph 171). That is clearly deeply concerning. Despite this the Consultation Paper states that "*We do not, however, accept that this means that they*

cannot realistically afford to pay". There is no evidence to support that non-acceptance and no reasons are provided. The analysis below of fees compared with earnings very much supports the conclusion that respondents who state that they cannot realistically afford to pay the ET fees indeed cannot realistically afford to pay those fees.

No impact upon vexatious claims

9. It is not the case that unmeritorious claims have been deterred and meritorious ones are still presented.

10. It is understood that it was hoped that the introduction of ET fees would lead to a reduction in the number of "vexatious claims". However, no evidence, other than anecdotal, has been put forward in support of the existence of a large number of vexatious claims – ie claims totally without merit.

11. Had there been such a reduction, it would be expected that the percentage of claims proceeding to a hearing that were successful would have increased. However, the Consultation Paper itself states at paragraph 205 that "*Overall, we have concluded that there has not been a significant change in the outcomes of claims following the introduction of fees*". That suggests that the introduction of fees as hit those seeking to bring meritorious claims just as much as it has hit those seeking to bring unmeritorious claims.

12. Moreover, the imposition of ET fees is not an appropriate way to address any concern about vexatious claims: fees will not prevent the wealthy from bringing unmeritorious claims and by the same token clearly deters those with limited means from bringing meritorious claims. A more appropriate alternative would be the greater use of the existing strike out and deposit orders.

Reduction in ability to seek legal assistance

13. The Conclusion paper states at paragraph 199 that it was hoped that the introduction of fees would improve the efficiency of the tribunal. It is the SEC's view that it is likely to have the opposite effect. Those who are able to afford Employment Tribunal fees may no longer be able to afford legal advice and/or representation. This is likely to result in unmeritorious claims being brought where legal advice would have advised against the same or in proceedings taking longer and using more resources due to claimants not being legally represented. Finally it is generally recognised that access to legal advice / assistance improves justice. The imposition of fees which reduce the ability of litigants to access legal advice is likely to reduce the quality of justice.

Action required

14. As such clear action is needed to alleviate the impact of fees for ET proceedings. Raising the lowest gross monthly income threshold for fee remission is clearly a first step but other steps also need to be taken as a matter of urgency including:

    a. disregarding redundancy and other termination payments designed to enable an employee to weather a period of unemployment when considering the capital test;

    b. either removing or significantly raising the capital amount permitted before fees are charged;

    c. lowering the level at which fees are set;

    d. setting a *de minimis* amount claimed below which fees should not be charged;

15. In addition, consideration should be given to splitting the hearing fee between claimants and respondents so as to reduce the impact on claimants, as well as providing an incentive for both parties to settle.

16. Further detail is provided below in answer to the specific questions raised.

QUESTION 1:

Do you have any specific proposals for reforms to the Help for Fees scheme that would help raise awareness of remissions, or make it simpler to use? Please provide details.

17. We have no further recommendations proposed in this respect. The revised simpler guidance and form, the simpler procedure, and the facility to apply online in July 2016 has already been shown to have led to an increase in remissions.

18. The focus should be on drawing a claimant's attention to the ability to benefit from a remission as early as possible. This could be done through ACAS drawing the claimant's attention to the guidance when first approached.

QUESTION 2:

Do you agree that raising the lower gross monthly income threshold is the fairest way to widen access to help under Help with Fees scheme and to alleviate the impact of fees for ET proceedings?

Lowering the level of fees

19. Whilst the step of raising the lower gross monthly income threshold is welcomed, it is the view of the SEC that simply widening access to help under the Help with Fees scheme is not sufficient. The level of fees should be significantly lowered and abolished altogether for claims in which the compensation sought falls below a certain level. The reasons for this include that:

    a. the level of fees currently set is clearly prohibitive when compared to the living wage rate, or even with average earnings;

b. the level of fees charged is wholly disproportionate to the likely sums recovered;

c. there is no guarantee that the fees will be recovered, even in a situation where the claimant is successful before the ET.

20. The SEC notes that its position is consistent with that of the Justice Committee who, in their 20 June 2016 report (HC 167) also concluded that the overall quantum of fees charged for bringing cases to employment tribunals should be substantially reduced.

Fees as compared with earnings

21. SEC's research shows that ET fees are grossly disproportionate when compared even with average earnings.

22. Based on ONS statistics for average earnings across all sectors, average gross earnings for 2016 were £26,164.67. That equates to £20,959.18 net earnings per annum. Type B fees (£1,200 total) therefore amount to 5.73% of average annual net earnings.

23. Based on a 35 hour working week and a London living wage of £9.75 per hour, gross London living wage annual earnings are £17,745 per annum. That equates to £15,233.80 net earnings per annum. Type B fees (£1,200 total) therefore amount to 7.88% of net annual earnings.

24. Based on a 35 hour working week and the minimum wage of per hour of £7.20 per hour, gross annual earnings are £13,104. That equates to £12,077.92 net earnings per annum. Type B fees (£1,200 total) therefore amount to 9.94% of net annual earnings.
http://southeastcircuit.org.uk/images/uploads/2016_hirsch_davis_et_al_report_3217_final_0.pdf

25. The Joseph Rowntree Foundation (in its report entitled "A Minimum Income Standard for the UK in 2016", published in July 2016) has provided figures for weekly earnings required to maintaining a minimum socially acceptable standard of living (including rent and fulltime childcare). As at April 2016, these were:

    a. for an individual (no children) - £286.53

    b. for a couple with two children - £776.28

    c. for a lone parent (one child) - £594.45

26. As such, a lone parent with one child is already below the threshold for a socially acceptable minimum standard of living, even where they earn as much as the national average per week (£403.06). Clearly such an individual would not be able to pay a fee of £1,200 given that he or she is already unable to afford a socially acceptable standard of living for them and their child.

27. A couple where both work full time and both earn as much as the national average, would earn approximately £806.12 per week. Based again on the Joseph Rowntree foundation figures, that only leaves £29.84 per week in addition to what is required for a socially acceptable standard of living. Again clearly such a couple would be unable to pay afford a fee of £1,200 without bringing their or their children's lives below a socially acceptable standard.

28. The figures are clearly going to be even more prohibitive where earnings are below the national average. For example a couple where both work full time and both earn the London Living Wage, earn approximately £585.92 per week. That is already below the Joseph Rowntree Foundation figures for what is required for a socially acceptable standard of living for a family with two children including rent and childcare (£776.28). Again clearly such a couple would be unable to pay afford a fee of £1,200 without bringing their or their children's lives even further below a socially acceptable standard.

29. As such, it is clear that ET fees should be significantly reduced so as to be affordable for those on average incomes and below.

Fees as compared with Tribunal Awards

30. Not only are fees unaffordable for many (as set out above) but they are also disproportionate when considered against typical awards in the Employment Tribunal. In a claim for "ordinary" unfair dismissal (a Type B claim), any award is capped at the lower of £78,962 and a year's pay (Section 124(1ZA) ERA 1996), ie £17,745 for those on the London living wage and £13,104 for those on minimum wage, in each case based on at 35 hour working week. A fee of £1,200 is clearly excessive when compared with those amounts.

31. The figures are starker when actual awards are considered, for example, for the median unfair dismissal award for 2015/2016 was £7,332 (taken from the government's statistics for ETs for 2015-2016). As such ET fees represent 16.3% of the amount awarded. Similarly the median disability discrimination award was £11,309, with a Type B award representing 10.6% of the amount awarded.

32. As such the level of Employment Tribunal fees is currently wholly disproportionate to the value of Employment Tribunal awards.

33. Given that compensation is generally related in the main to loss of earnings, those on lower earnings who are less likely to be able to afford ET fees as also likely to be those for whom the fee represents a disproportionate amount of the potential / likely amount recovered, whatever the type of claim.

Low value claims

34. The SEC is not aware of statistics available for the reduction in numbers of low value claims, in particular the low value, non-complex claims for unpaid wages, notice pay, holiday pay and some straightforward unfair dismissal claims. We note

that the evidence given to the Justice Committee in their report of 20 June 2016 was that:

> *"Many judges reported that they now hear no money claims at all. Prior to the introduction of fees money claims were often brought by low paid workers in sectors such as care, security hospitality or cleaning and the sums at stake were small in litigation terms but significant to the individual involved. There are few defences to such claims and they often succeeded."*

35. The accords with the experience and understanding of members of the SEC, including those who sit as fee-paid (ie part time) employment tribunal judges. It is clearly a concern that the lowest paid in society seeking the most basic form of justice should be denied the same as a result of the imposition of fees.

36. Recovery of say £500 in unpaid wages may be of vital importance to a low paid worker. It cannot sensibly be suggested that such a worker should be required to pay £390 to recover such an amount, assuming that they can obtain the money.

37. ***As such, consideration should be given to removing fees in cases where the amount claimed falls below a certain threshold.***

Non-Recovery of Fees – introduction of a free recovery service

38. The Department of Business, Innovation and Skills 2013* study of claimants who had succeeded before the ET showed that, of its respondents:

    a. only 49% had been paid their awards in full;

    b. a further 16% had been partially paid;

    c. 35% had received nothing at all.

(* There are no statistics available since this date.)

39. The 65% who had received at least something included those who had been required to take formal enforcement steps.

40. The risk of not only not being able to recover sums awarded but also sums paid by way of fees is likely to amount to a further disincentive to those of limited means who seek to bring ET claims. It also means that those who achieve a successful result are doubly penalised where the employer refuses to pay compensation awarded, because the successful employee is similarly unlikely to recover the ET fee from their employer / former employer.

41. Consideration should therefore be given to the introduction of a fee enforcement service for those seeking to recover ET fees (with the costs being recouped from the person against whom enforcement is being taken).

Fees as a deterrent to settlement / Introduction of hearing fees for respondents

42. A stated aim of the introduction of Employment Tribunal fees was to encourage people to consider alternatives to ETs to resolve their disputes.

43. However, the SEC considers that, in some cases it is having the opposite effect. The greatest concern is that, in a situation where an employer knows that an employee is unlikely to be able to raise the Employment Tribunal fee, the employer will refuse to enter into settlement negotiations in circumstances where they would have sought to settle an otherwise meritorious claim.

44. The SEC notes that the Justice Committee at paragraph 69 of their report also concluded that "*In many cases the existence of fees erects a disincentive for employers to resolve disputes at an early stage*".

45. This point is referred to at paragraph 167 and 174 of the Consultation Paper. Contrary to paragraph 174 of the Consultation Paper, this is not addressed by the ability of the ET to order the fee to be reimbursed at the end of a hearing in which

a claimant has been successful: if the claimant cannot afford to pay the fee, then the case will not progress to that stage. Moreover, as discussed above, recovery rates for awards of compensation suggest that in many cases the respondent will not pay the claimant the fee, even where the Employment Tribunal has ordered the respondent to do so.

46. One way of addressing the deterrent on employers to settle claims at an early stage would be to introduce fees for respondents, for example, by requiring the parties to share the cost of the hearing fee. By requiring respondents to contribute to the hearing fee, an incentive is created for employers (as well as employees) to settle claims prior to a hearing taking place.

QUESTION 3

Do you agree with the proposal to raise the gross monthly income threshold for a fee remission from £1,085 to £1,250? Please give reasons.

47. Whilst the SEC strongly agrees that the gross monthly income threshold for fee remission should be increased, it strongly disagrees that the proposed increase will be sufficient to alleviate the SEC's concerns about access to justice as a result ET fees. This is both because of the continuing unaffordability of ET fees for those on average earning and below and the continued impact of the disposable capital test.

Comparison with wages / disproportionate effect on those with average / below average earnings

48. A gross monthly income of £1,250 amounts to a gross annual income of £15,000. That is less than the annual earnings of someone who works 35 hours a week on the London Living Wage. As set out above, based upon the Joseph Rowntree Foundation figures, a single person with a child earning that amount would not be able to afford to pay an ET fee. Similarly a couple where both earn that amount and who have two children would be unable to afford the ET fee.

49. It is in any event axiomatic that someone who earns £15,000 gross per annum (approximately £13,367.20 net per annum) is extremely unlikely to be able to spend just under 10% of their annual income on ET fees. It is unacceptable to require people to risk 10% of their annual income in order to seek justice.

50. The SEC's position is that the threshold should at the very least be based upon average earnings, with those households earning less than £26,164.67 gross per annum, being exempt from fees. That would require raising the monthly earnings threshold to £2,180.39.

51. The SEC would also recommend a graduated fee scheme for earnings above that amount.

Disposable capital test

52. For the reasons above, even then that would be insufficient because of the impact that the disposable capital test can have.

53. The SEC is concerned about the impact of the non-availability of fee remissions for those with £3,000 or more of savings, particularly where that amount includes a redundancy payment received. Such amounts can often represent the amount money that a person has to live on / use to their support their family in a situation where they have just lost their job. It would clearly be imprudent for such sums to be spent on the vagaries of litigation. Moreover, the short time limits for ET claims (three months) mean that often someone will not know how soon they are likely to obtain another job before the time limit for bringing a claim expires. In a situation where someone does not know when they are likely to start earning again, they cannot be expected to spend their savings on ET fees, especially in a situation where they are unlikely to be able to afford to take legal advice before doing so.

54. A recent example from an SEC member shows the adverse and unfair impact the disposable capital test can have:

> *"I did a pro bono case for some minimum wage cleaners, and one of them received a redundancy payment of £3,000. This put her life savings in the bracket which meant she got no remission. She had been earning minimum wage for 37.5 hours per week. She found alternative employment (also cleaning) but only for 20 hours per week. However, she had a gap before starting new employment, and thereafter obviously was earning significantly less. During the interim period she lived on her redundancy payment (some might say, that being the point of a redundancy payment). So the fees (which in fact in this instance were paid by a charity in support of her claim that she had been selected for redundancy because she was campaigning for the London Living Wage) would have been prohibitively expensive for her."*

55. Clearly it is not acceptable for such an applicant to have to rely on being able to obtain charitable funding in order to bring her claim before the ET.

56. As such the SEC's position is that, either savings should not be included at all or alternatively, they should exclude redundancy (or similar) payments. In addition the capital test should be subject to a much higher minimum amount, for example, £10,000, to be increased each year in line with an appropriate measure of inflation.

QUESTION 4

Are there any other types of proceedings, in addition to those specified in paragraph 355, which are also connected to applications for payments made from the National Insurance Fund, where similar considerations apply, and where there may be a case for exempting them from fees? Please give reasons.

57. No.

58. However, as set out above, the SEC believes that low value, Type A claims should be exempted from the ET fee regime. As set out above, there has been a dramatic fall in these types of claims. These types of claim are typically relatively simple claims that take up very little of the ET's time, where the amounts are small but which are very important to those bringing them.

59. There are clear access to justice issues in a situation where those on the lowest incomes are in effect prevent from bringing the simplest, lowest value claims. That the fee remission system is not an answer to this problem is shown by the fact that it has not prevented such a dramatic fall.

60. Moreover, there is little principled reason why those bringing such claims which take up so little of the ET's time should be required to pay such high fees which are wholly disproportionate to the type of claims that they are bringing, both in terms of amounts awarded and time taken by the ET / use of ET resources.

QUESTION 5

Do you agree with our assessment of the impacts of our proposed reforms to the fee remissions scheme on people with protected characteristics? Are there other factors we should take into account, or other groups likely to be affected by these proposals? Please give reasons.

61. We do not agree with the assessment of the impact of the proposed reforms because we remain of the view that the impact of the fees on some groups has not properly been assessed.

62. We remain concerned about the effects of the capital test on economically vulnerable groups, such as, but not limited to, women bringing claims of pregnancy and maternity discrimination. The survey commissioned jointly by the Equality and Human Rights Commission and the Department for Business,

Innovation and Skills showed that 11% of mothers are dismissed, made redundant or driven from their employment by poor treatment.

63. The effect of the capital test is to require a woman in such a position with savings or a redundancy payment at or around the upper limit to qualify for remission (£3000) to expend over a third of her disposable capital in pursuing a tribunal claim. A prudent potential claimant faced with the economic uncertainty of being out of work with a new baby and with the increased financial outlays associated with a new baby is likely to be deterred from brining proceedings. Not only does this mean that these women are deprived of access to justice, it also means that the deterrent effect on employers of the protections for new mothers is much reduced.

64. This is apparently reflected in the Government's own ET statics. For example, in the periods 2010/2011 and 2011/2012 respectively 173 and 166 claims were brought in the ET for sex discrimination. The figure for 2015/2016 was just 36.

CONCLUSION

65. It is clear and undisputed that there has been a dramatic reduction in the number of ET claims bring brought since the introduction of ET fees. This is clearly due to the unaffordability of bringing such claims for many potential claimants as a result of such fees. At the same time there has been no dramatic increase in the n umber of successful claims before the ET. This means that many employees / former employees with meritorious claims are being denied access to justice as a result of their impecuniosity.

66. The SEC believes that that is unacceptable. It therefore proposes that, not only is the minimum income threshold for fee remission increased significantly, but also that:

a. the capital test is either scrapped or revised with redundancy payments being taken out of account and a higher threshold amount for other payments introduced;

b. ET fees are reduced;

c. low value, Type A claims are excluded from the fee regime; and

d. hearing fees are shared with respondents.

The South Eastern Circuit
March 2017