Employment Tribunal Fees:
Effect on Clients of Citizens Advice Bureaux

Prepared as part of the research project Citizens Advice Bureaux and Employment Disputes, August 2015

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Executive summary

This report considers the effect the introduction of Employment Tribunal (ET) fees has had on workers who seek advice from Citizens Advice Bureaux (CABx) for their employment problems.

The data presented are a subsample of 14 workers about whom information was collected as part of a European Research Council funded project entitled *Citizens Advice Bureaux and Employment Disputes*. The overall aim of this project was to understand workers' experiences as they attempted to resolve problems faced at work, including identifying barriers to justice.

ET fees affected all of the workers in this subsample. Key findings about the effect on ET fees are as follows:

- Fees deter many workers from pursuing claims in the ET. Workers who have recently lost their jobs are generally not in a position to pay potentially up to £1,200 to take a case to the ET. This is particularly so if their previous work was low waged and there is a high likelihood that their future employment will also being low waged.

- Fees are contributing to a sense of disaffectedness amongst workers about their ability to enforce the rights they have in the employment relationship.

- Being prevented from pursuing justice can have a detrimental effect on a worker's future employment prospects. In particular, it can mean that a worker has a 'blemish' in their employment record, such as an unexplained departure from a job, which could deter a prospective employer from employing them.

- Acas Early Conciliation can offer an alternative route to resolution. This can be through the use of conciliation prior to the lodging of an ET1 or after lodging an ET1 (by paying the lodgement fee) but prior to the hearing (and payment of the hearing fee).

- Settlement through Acas Early Conciliation may not directly address the wrongdoing. A settlement can be reached without the employer admitting to any wrongdoing. Further, the confidentiality that is often a requirement of the resulting conciliation agreement can mean that a worker is not able to fully explain to future prospective employers why they left their job.

- Providing partner's income details for remission can be problematic. If a worker's partner is unable or unwilling to provide financial information about themselves it can prevent a worker from obtaining fee remission.

Introduction

This report considers the effect the introduction of Employment Tribunal (ET) fees has had on workers who seek advice from Citizens Advice Bureaux (CABx) for their employment problems.

The data that are presented were collected as part of a European Research Council funded project entitled *Citizens Advice Bureaux and Employment Disputes*[1]. The overall aim of this project was to understand workers' experiences as they attempted to resolve problems faced at work, including identifying barriers to justice. Our particular focus was on workers who could not easily afford the services of a solicitor. As such, participants were recruited through CABx who are a key provider of employment advice to this group. We tracked the experiences of workers as they sought to resolve their workplace disputes – from their initial advice session with CABx to the closure (or in some cases abandonment) of the problem[2].

This report focuses on a subsample of study participants—those who considered pursuing their claim in the ET after the introduction of fees, i.e. 29 July 2013. (The vast majority of participants in the study considered pursuing their claim in the ET prior to the introduction of fees). The format of the report is as follows: firstly, a brief account of the ET fee and remission systems; secondly, a description of our subsample of study participants who considered pursuing claims in the post-fees environment; thirdly, key findings in relation to these workers' perception of the effect of ET fees; and fourthly, case study vignettes of two study participants.

Employment Tribunal fees and remission

Fees payable by workers to take their case to the ET were introduced on 29 July 2013. These are charged at two levels depending on the nature of the claim and are payable at two stages—on lodging the claim and before the hearing itself. The total costs for going to full hearing are: Type A claims (including unpaid wages) £390 and Type B claims (including unfair dismissal and discrimination claims) £1,200.

Remission from fees is available in limited circumstances based on the workers' and/or their household's financial details. There are two types of fee remission. Remission 1 is a full remission based on receipt of one of a list of means-tested benefits. Remission 2 is a full or partial remission based on gross monthly income before tax and other deductions. Determining eligibility for either remission involves two tests. Firstly, there is the disposable capital test. Here, if the claimant's household disposable capital is below a certain threshold, they will pass this test. If the claimant passes this test they are then required to go through the second test, the gross monthly income test. If the claimant is in receipt of any of a stated list of means-tested benefits, he or she will be entitled to a full fee remission. This is called Remission 1. If the claimant and, if applicable, their partner's, gross monthly income – in the month preceding the fee remission application – is below a certain threshold, varying depending on the number of children the claimant has, they will qualify for a remission. If the gross monthly income exceeds the threshold but is below an income cap, the claimant will qualify for a partial remission. These are called Remission 2. Certain stated evidence must be presented to the ET to prove eligibility for fee remission.

[1] For more information about the broader project, refer to our interim report: http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/cabxinterim.pdf.
[2] Refer to the Appendix for further details of the methodology.

One year on from the introduction of fees, data from the Ministry of Justice reveals that there was an 81% decline in the number of cases lodged in the ET for the period January to March 2014 compared with that same quarter in 2013.

Fees subsample

The subsample of participants detailed in this report includes those who considered taking a claim to the ET when fees were payable to do so. It comprises 14 participants (5 from England and 9 from Scotland). All of these participants were affected in some way by ET fees.

- Two participants viewed fees as preventing them from pursuing their claim.
- Two further participants viewed fees as preventing their going down the ET route, so sought a settlement through Acas Early Conciliation.
- Two participants paid the lodgement fee, but viewed the hearing fee as a factor deterring them from attending the ET, so sought a settlement through Acas Early Conciliation.
- One further participant paid the lodgement fee but then abandoned their claim in part due to the cost of the hearing fee.
- Three of these participants (all from Scotland) received full fee remission.
- One further participant (also from Scotland) received partial fee remission. This participant reached a settlement with the employer after two pre-tribunal hearings.
- Three participants had issues proving their eligibility for remission or knowing about the remission scheme and fees acted as a deterrent from pursuing their claim.

It is clear that ET fees are acting as a major influence on the decisions taken by workers considering pursuing their employment disputes. They can act as an outright deterrent from taking action, a factor that influences the strategy taken by workers as they attempt to resolve their dispute, or a factor, amongst others, that can present difficulties in worker efforts to take their claims forward.

Key findings

Fees deter many workers from pursuing claims in the Employment Tribunal

Workers who have recently lost their jobs are generally not in a position to pay potentially up to £1,200 to take a case to the ET. This is particularly so if their previous work was low waged and there is a high likelihood of their future employment also being low waged. Even if workers consider and/or have been told by legal advisors that they have a strong case, they recognise that there is always the risk of not being successful on the day. This presents them with the possibility of losing the fees paid out.

Since the introduction of fees, workers have commented on the difficulty of obtaining legal advice from those offering services on a no-win, no-fee basis. However, one worker who did find a solicitor prepared to take on his case on this basis felt that pursuing his claim in the ET would not add up financially. Even if he were to win the case, by the time he deducted all that was required to actually have the case heard, he would hardly be any better off in the end. This was without factoring the risk of losing the case having paid fees.

Fees are contributing to a sense of disaffectedness amongst workers about their rights

There was a sense of disaffectedness amongst workers who felt that fees restricted their ability to pursue their claims. They viewed themselves and other workers as having less and less power in the

employment relationship compared with employers. Workers are in a position of feeling that they have suffered a wrongdoing in the hands of their employer. Yet, some feel powerless to seek a remedy for this wrongdoing. Comments, such as the following, are common: "Well as far as I'm concerned, for me, there is no law or legal system … as far it is me getting justice, you know. You've got to pay for justice. What sort of justice is that, you've got to buy it?" [DC032]

ET fees tended to be viewed as part of broader trends towards a reduction in the rights of ordinary working people. For example, the increasing use of zero hours contracts was identified as being highly problematic for workers, yet perfectly legal for employers. "The ordinary working man … there's no rights. The laws are there but everybody's breaking them. Zero hour contracts … Nobody can get a mortgage on a zero hour contract. Nobody can get a car insurance on a zero hour contract" [Mother, accompany DC027 to her CAB meeting]

Being prevented from pursuing justice can have ongoing negative effects for workers

The inability to pursue an employment dispute can have a detrimental effect on a worker's future employment prospects. In particular, it can mean that a worker can have a 'blemish' in their employment record, such as an unexplained departure from a job. This can be especially problematic for those in low waged and low to unskilled work. The current economic climate, together with government policies encouraging those on benefits to take up work, mean that employers of low wage workers tend to have ample options of workers available to choose from. There may be a tendency for employers to overlook those who appear 'difficult' and select instead those who can explain their reasons for departing previous jobs.

Further, finding future work can be problematic for workers who are slightly older, yet in pre-retirement age. Similarly, the negative psychological effect of having lost one's job and facing unemployment can make it difficult for people to actively seek work.

The result of not finding work is typically the necessity to apply for social security benefits. This is not something that workers tend to hope for and it can have negative consequences for their outlook and self-esteem.

Acas Early Conciliation can offer an alternative route to resolution

Four of the participants in the fees subsample successfully used Acas Early Conciliation to reach a settlement for their dispute. This approach was viewed as a means of achieving some form of resolution to the dispute without having to pay all or some ET fees.

There were two different paths by which the workers utilised Acas. Firstly, two participants felt that the fees were unaffordable, so sought conciliation through Acas from the outset, i.e. they did not lodge an ET1 form. Secondly, two participants lodged an ET1 form, paying the lodgement fee, and then achieved a settlement via conciliation prior to the hearing. In the later path, the cost of the hearing fee was a motivating factor in seeking a settlement through Acas. (Other motivators were, in one case, the thought of having to represent himself in the ET and, in the other case, the cost of further legal representation).

In general, workers who used the Acas Early Conciliation scheme were happy with the service provided. Some noted particularly positively the Acas representative's efforts in communicating with them the status of the negotiations.

Settlement through Acas Early Conciliation may not directly address the wrongdoing

At least one of the participants who achieved a settlement via Acas commented that there were some limitations with this form of dispute resolution. In particular, the employer did not need to

admit to any wrongdoing, and the confidentiality that is often a requirement of the resulting conciliation agreements meant that the participant could not fully explain to future prospective employers why she left her job. Participant DC031, an architecture assistant who was forced to resign from her job because it was alleged that she did not disclose a medical condition, something which DC031 denies, reflected on the process: "I'd rather it had been a bit more public of what they'd done and what kind of company they are. But now, because of that, I have to be hush, hush about it and nobody's going to know what they're actually like … like this [£amount] is not admission of guilt … basically they weren't admitting to what they'd done was wrong." In respect of the outcome, she noted: "I'm glad in a way that something's been done, [but] because I was doing the [confidential settlement] contract thing … they've never accepted responsibility for it all, admitted that what they've done is wrong, which I think is what I wanted initially – just to say 'yeah, what we did was wrong, we went about it the wrong way' … That's what I wanted and they've certainly never done that". In addition to this, the participant's conciliation agreement meant that she could only state to future prospective employers that she had left her job by 'mutual agreement'. She was not particularly happy with this because it was not the case that she agreed to leave her role. She did not want to leave her job. However, if the participant didn't agree to this clause in the conciliation agreement she would not have received her financial pay out.

Providing partner's income details for remission can be problematic

Two participants may have been eligible for remission but, for different reasons, were not easily able to supply details of their partner's income. This prevented them from receiving remission and resulted in their not pursuing their claims. One participant's wife was self-employed. She was not able to supply all the required tax details of her business in large part due to the fact that she was dealing with her mother's recently diagnosed cancer. The other participant's partner was reluctant to get involved in the formal process of going to the ET. He preferred that his partner walk away from the situation. As such, the worker did not feel it appropriate to push her partner for his financial details. She did not make an application for fee remission and could not afford to pay the fees.

Case studies

Laura [DC027], fees deterred her from pursuing her claim

Laura worked in a large supermarket chain for more than six years. A store security guard filmed Laura on CCTV going to her car during her break. He claimed she was taking illegal drugs. Laura states that she was taking hay fever remedy. After returning to work from being in her car, Laura was approached by a manager and informed that she was suspended. She asked the reason for this and was told it was due to the incidence that happened earlier in the evening. Laura did not know what incident was being referred to. The next day she received a letter from her employer informing her that she was working under the influence of drugs. Laura vehemently denies this. She contacted her employer and offered to have a drug test taken (it was still within the appropriate time period that would make this valid). They declined to do so. Laura then had her own test taken, which proved that she had not been under the influence of illegal drugs.

Laura had a disciplinary meeting. Because she was not a member of a union, the employer, in line with its own policy, provided two staff representatives to attend with Laura. However, these representatives weren't union representatives, nor did they have sufficient training on store procedure or employment law. One of the representatives indicated to Laura that the matter was above her head and that she didn't have a clue how to help fight it for her. Laura offered her drug test results to prove her innocence. The manager informed her that they don't need further proof

as their evidence reveals the matter is beyond reasonable doubt. Laura was fired from her job. She appealed this decision. However, the appeal still found the dismissal justified.

In her first meeting with the CAB, Laura felt confident that she had a strong case. She had studied the employer's procedures on managing such matters and had identified numerous breaches of procedure by her managers in her dismissal.

But in a later meeting with the project researcher Laura was significantly more downcast. She had learnt that she would need to pay ET fees of £250 to lodge a claim and then a further £950 to have her claim heard. She was not eligible for remission because she was in receipt of contribution-based Employment and Support Allowance. Laura felt that there was nothing more she could do to deal with the situation because she couldn't afford to pay the fees.

> *"At the end of the day … I could've won and I might not have done. I haven't got £1,100 to pay on something I might not win. ...I'm on my own with two children without a job at the moment… If I knew I could claim my money back … even if I lost, at least I've got that money back, I would've been okay, you know, I would've been a bit gutted but I would've been all right. But I can't afford to pay over £1,000 for something which is a gamble. I might as well just go to the bookies."*

Laura felt aggrieved. She had wanted to fight her employer, but felt that she was denied the opportunity to do so. Laura had been informed by Acas and the solicitors and union representatives with whom she had consulted that she had a strong case. She had made many efforts to prove her innocence and fight for her cause, but felt that the power was vastly on the side of her employer and that she couldn't do anything about this. For example, she had undertaken research and sought advice about her employer's human resources policies and relevant employment law, she had put a number of written questions to her employer in her appeal hearing but the employer's written response simply ignored many of these, and she had looked up regulation relating to workplace use of CCTV and had lodged a complaint with the Surveillance Camera Commissioner.

However, the reality of her situation was that she was struggling financially and still without a job. She had applied for a number of positions, but was finding it virtually impossible to find work because she now no longer had a clean employment record. Indeed, Laura did not even know the detail of what her previous employment record stated. A family member advised her to obtain copies of her file from her former employer. Laura was preparing to do so.

Mary [BiC118] and Heather [BiC117], fees a factor that deterred them pursuing claim

Mary and Heather, a mother (73 years) and daughter (55 years), were employed by an agency as contract cleaners and had been so for 10 and 8-9 years respectively. Their most recent contract, which they had held for a number of years was cleaning the offices of a bank. Mary and Heather both took a period of sick leave when the mother's husband and daughter's father passed away. During this time, the employer hired a replacement cleaner to clean the bank offices. When Mary and Heather returned to work they were only offered reduced hours at locations further away, which made the jobs unsuitable. The situation was particularly galling because Mary and Heather had developed a very strong relationship with the bank staff, who made them feel like they were part of the workplace family.

Heather expressed her anger at being treated as so replaceable after showing such loyalty: "When ah start tae talk aboot it, ye know, I get myself intae a state because ah think 'how can they treat people like that?' After, eight years ah was there, going on nine years, ma mum was there for ten, so

why treat us like that… tae think that ah was there nearly ten years, and ye get treated like that. y'know what ah mean? Never a complaint against ye or anythin'. Why did they dae that tae us?"

Mary and Heather approached the CAB for advice. The CAB solicitor suggested they raise a grievance formally with their employer. However, he did note that their employment contracts suggested that their hours may be varied so the employer's decision may be difficult to argue against. The solicitor advised that they consider making a claim with the ET if their grievance is ignored. Further, he calculated that around £500 were owed in wages to Mary and around £1500 to Heather, before any of the owed holiday pay, or consideration of loss of future earnings if they had effectively been dismissed

After sending the grievance letter, Mary and Heather were quickly called to a grievance meeting. The employer seemed apologetic and made some loose promises of more hours at more suitable locations. The employer also suggested the company would make some payments to them with respect to owed wages and sick pay. However, Mary and Heather doubted that this would materialise.

In due course, the employer did make some offers of alternative work. However, these were not satisfactory. For example, the offer of a 45 minute cleaning job that Mary and Heather would have had to travel to by bus, costing half their earnings. Mary and Heather received some pay slips outlining wages that were owed but this was never paid (nor a correct calculation of the full amount). A staff member delayed the proper dealing with the matter by continually telling them it was some other person in the company they should speak to, but these people could never be pinned down.

Mary and Heather were not entirely surprised by their employer's behaviour. They had experienced ill-treatment from their manager before and found they had no voice at work. Heather noted: "She [supervisor] wasnae helpful. If we had a grievance we would ask her tae come doon and talk tae us, she wouldnae come near us. We never saw her doon there." Further, they found out that the employer was now withholding wages from the person whom they had given the bank cleaning contract.

ET fees were being introduced during this period and Mary and Heather failed to lodge a claim before their introduction. They had difficulty getting in touch with the solicitor at the CAB and the prospect of paying fees put them off pursuing the matter further. They are not aware of the fee remission scheme, which they may have been eligible for given that they were both still out of work. Despite periodic efforts to contact the employer and also the CAB solicitor, their dispute fell by the wayside. With all the difficulties with the employer's intransigence and then the concern about fees, Heather felt, "we're just hittin' a brick wall everywhere we go." The employer, on the other hand, was just "gettin' away wae it."

Appendix: Methodology

Data collection for the project *Citizens Advice Bureaux and Employment Disputes* ran from July 2011 to December 2014. The methodology involved 'tracking' CAB clients from their initial contact with bureaux through the process of their working their way through their employment dispute. Information has been collected from at least 150 CAB clients from 7 bureaux throughout England, Scotland and Northern Ireland. (It should be noted that fees are not payable for claims made in Northern Ireland's Industrial Tribunals). Data sources included observation of CAB advisor and client interviews, engaging in ongoing interaction with CAB clients as they work through their disputes, observation of ET hearings, and interviewing CAB advisors and managers.

Fees were introduced in England, Wales and Scotland on 29 July 2013. At this point we were in the final stages of recruiting new participants into the study. Rather, we were focusing on the ongoing 'tracking' of what was happening with the disputes of already recruited participants. However, 14 participants were recruited in the post-fees environment. Eleven of these participants were 'tracked' in the usual way as with other participants. Data collected from the remaining 3 participants was done so in one-off retrospective interviews after the pursuance of their dispute had discontinued.