

Introducing Fees in the Employment Tribunals and the Employment Appeal Tribunal: Equality Statement

1. Introduction

1.1 This Equality Statement considers the impact of the Government's plan to introduce Employment Tribunals (ET) and Employment Appeal Tribunal (EAT) fees against the duties in the Equality Act 2010. The proposal, as set out in the consultation document '*Introducing Fees in Employment Tribunal and the Employment Appeal Tribunal*', is to introduce 2 different fees:

- (a) a £55 issue fee for each claim made to the ET, payable by the claimant(s); and
- (b) a £55 appeal fee for each application to appeal a decision of the ET at the EAT, payable by the appellant(s).

1.2 During the consultation period we will further consider the impact of these proposals and will update our equalities considerations with any relevant evidence submitted in response to our equalities question.

2. Background

2.1 The Government previously introduced fees in ETs and the EAT in 2013. The fee regime provided for two 'types' of claims and different fees were payable dependent on the type of claim brought. Type A claims (which covered simple disputes such as unpaid holiday pay) attracted an issue fee of £160 and a hearing fee of £230, totalling £390. Type B claims (which covered more complex disputes such as discrimination) attracted an issue fee of £250 and a hearing fee of £950, totalling £1200. The EAT attracted a £400 issue fee and a £1200 hearing fee, totalling £1600. Prior to these fees being introduced the Government published an Equality statement which can be found online.¹

2.2 The introduction of fees lead to a substantial fall in the number of claims brought to ETs. ET case volumes fell by 54% in the 12 months after the fee change, from 60,000 cases between July 2012 and June 2013 to 28,000 cases between July 2013 and June 2014.² *In R (Unison) v The Lord Chancellor [2017] UKSC 51*, the Supreme Court quashed the Fees Order as it held that the fees were unlawful as (a)

¹ <https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/>

² Note: ahead of the previous ET fees regime coming into force on 29 July 2013, the month of July 2013 saw an uncommonly high volume of new claims being brought. Case volumes taken from Tribunal Statistics Quarterly, January-March 2021, Table ET_1.

they were in practice unaffordable, and (b) they rendered pursuing non-monetary and low value claims – which suffered a greater fall in volumes – futile and irrational, which effectively prevented access to justice. found that these fees were unlawful as (a) they were in practice unaffordable, and that (b) they rendered pursuing non-monetary and low value claims (which suffered a greater fall in volumes) futile and irrational, which effectively prevented access to justice. Individuals who paid a fee during the period of these fees were eligible for a refund.

- 2.3 There are currently no tribunal fees in the ET and EAT jurisdiction.
- 2.4 The Ministry of Justice recognises that the fees introduced in 2013 did not strike the right balance between meeting the policy objective for claimants to meet some of the costs of the ET and EAT and protecting access to justice. Therefore, in developing the fee proposals subject to this consultation, we have carefully considered the lessons learned following the 2017 UKSC ruling and have endeavoured to ensure that the proposed fees meet the tests of affordability, proportionality and simplicity.
- 2.5 The current proposal to introduce modest fees in ETs and the EAT aims to relieve some of the cost to the general taxpayer by requiring tribunal users to pay for the tribunal system, where they can afford to do so, to ensure that the service can continue to run efficiently and effectively, whilst remaining affordable to users and therefore protect access to justice. The level of fees being proposed is significantly lower than those introduced in the 2013 regime, which were considered to be “practically unaffordable” by the UKSC. Additionally, in contrast to the previous fee regime which charged different fees depending on the type of claim brought, the fee proposal in this consultation does not make distinctions between different types of claims. The same issue fee will be charged for all types of claims. This approach addresses the UKSC’s finding in 2017 that the previous fee regime was indirectly discriminatory in setting higher fees for ‘Type B’ claims, which encompassed all discrimination claims brought by people with protected characteristics. The Help with Fees (HwF) scheme is crucial in supporting the Lord Chancellor’s duty to protect the constitutional right of access to justice and does so by providing individuals on low income and with little to no savings with financial support towards the cost of court and tribunal fees. The HwF scheme was reviewed and generously enhanced to accurately target and support vulnerable individuals who would otherwise struggle to access justice through our courts and tribunals system. This recent revision will apply to the newly proposed fees and offers a greater coverage of financial support to those in need.

3. Policy objective

- 3.1 The consultation document 'Introducing Fees in Employment Tribunal and the Employment Appeal Tribunal' sets out the background to, and rationale for, the current proposal for introducing ET and EAT fees.
- 3.2 The three key principles that underpin the proposal are (i) affordability, (ii) proportionality, and (iii) simplicity, which were focused on when considering the main policy objectives.
- 3.3 The main policy objectives for introducing fees in ETs and the EAT are:
 - Charging fees in ETs and the EAT would be consistent with the Government's approach to charging fees in other courts and tribunals. Chapter 6 of the HM Treasury Handbook Managing Public Money outlines the general policy principles on the setting of fees by public sector organisations. It states that the standard approach is to set charges and fees to recover full costs, but gives the Ministers Discretion to set them at a lower level. This is intended to make sure that the Government "neither profits at the expense of consumers nor makes a loss for taxpayers to subsidise". While recovering the full cost of the service might not always be possible, it is appropriate that those users who can afford to pay a fee for using the tribunal system should, do so. This helps protect access to justice for everyone by making resources available for the efficient and effective running of our courts and tribunals service. whilst lessening the overall amount paid by the taxpayer.
 - Only a small minority of individuals resort to ETs and the EAT in their lifetime. However, all taxpayers are being asked to provide contributions towards financial support for the running of the service. Similarly, the Advisory Conciliation and Arbitration Service (ACAS) – which provides a pre-tribunal alternative dispute resolution service for resolving employment disputes – is also almost entirely funded by the taxpayer. Charging modest fees in the ETs and the EAT will help generate resources that can be reinvested into the system, thereby reducing the cost borne by the taxpayer.
 - These tribunals are similar to civil courts as they act as independent adjudicators with the power to make legally binding decisions in a dispute between two parties. In fact, there are claims that can be made either in the civil courts or the ETs. Users of civil courts in England & Wales, and the separate Scottish civil courts, have been charged fees for many years. Introducing ET and EAT fees will therefore place ET users on the same footing. Modest fees might also help encourage parties to consider early conciliation as a means of resolving their dispute before taking their case to an ET.

4. Equality duties

- 4.1 Section 149 of the Equality Act 2010 (“the Act”) requires Ministers and the Department, when exercising their functions, to have ‘due regard’ to the need to:
- Eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;
 - Advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not);
 - Foster good relations between different groups (those who share a relevant protected characteristic and those who do not)
- 4.2 In carrying out this duty, Ministers and the department must pay “due regard” to the nine “protected characteristics” set out in the Act, namely race, sex, disability, sexual orientation, religion or belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

5. Evidence and analysis

- 5.1 In assessing the impact of the Government’s plan for introducing fees in the ET and EAT, data on protected characteristics of ET claimants gathered through the 2013 Survey of Employment Tribunal Applications (SETA)³ is used. However, data on ET users is limited which impacts our ability to confidently assess affordability of ET and EAT fees, at any level.
- 5.2 Whilst there is more recent internal data from HMCTS (for the year 2016) and external data by way of the 2018 SETA report⁴, they are not used for the purposes of this equality statement as both sets of data were collected when the previous fee regime was in place, potentially skewing the characteristics of those applying to the ET.
- 5.3 Separately, HMCTS have an avenue for collecting data on protected characteristics through a ‘Diversity Monitoring Questionnaire’ included in the ‘ET1’ Claim Form that claimants are asked to complete when making a claim to the ET. However, this data has also not been used for the

³ Available at <https://www.gov.uk/government/publications/survey-of-employment-tribunal-applications-2013>. The samples used consisted of single claims disposed of between 3rd January 2012 and 4th January 2013.

⁴ Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899048/survey-employment-tribunal-applications-2018-findings.pdf

purposes of the equalities statement as the questionnaire has a very low completion rate (around 2-3%) and therefore is not sufficiently representative of ET claimants.

ET Discrimination Complaints

- 5.4 A claim may be made to the ET if an employee believes they have been discriminated against under one of the nine protected characteristics. The introduction of a fee will therefore affect those covered under the nine protected characteristics.
- 5.5 Table 1 below shows the number of discrimination complaints made to the ET in 2022/23. A claim may have more than one jurisdictional complaint. In 2022/23 the mean number of jurisdiction complaints per claim were 1.6. Table 1 shows that of the 137,282 jurisdictional complaints listed in 2022/23, 14% were listed as a form of discrimination, with a further 11% listed under 'equal pay'. Furthermore, table 1 highlights that the vast majority of ET claims in 2022/23 (three quarters of total complaints) were not related to discrimination.

Table 1: Number of Jurisdictional Complaints made to an Employment Tribunal in 2022/23⁵

Note: In September 2022, the ETs and EAT migrated their data to a new case management system, resulting in some claim volumes not being fully recorded in published statistics. As such the figures above are likely an underestimate of true complaint volumes and should be treated as a lower bound.

Note: a case may have more than one jurisdictional complaint. 'Others: non-discrimination complaints will include complaints such as: unfair dismissal, breach of contract, redundancy pay etc.

	Volume	Proportion (%)
Discrimination		
Age discrimination	1,951	1
Disability discrimination	7,444	5
Race discrimination	3,968	3
Religion or belief discrimination	819	1
Sex discrimination ⁶	3,999	3

⁵ Tribunal Statistics Quarterly: July to September 2022 - GOV.UK (www.gov.uk)

⁶ The 'Sex Discrimination' jurisdiction includes complaints made in relation to the protected characteristics 'Sex', 'Marriage and Civil Partnership' and 'Gender Reassignment'.

Sexual orientation discrimination	490	0
Suffer a detriment / unfair dismissal - pregnancy	1,259	1
Non-discrimination		
Non-discrimination complaints	102,720	75
Other		
Equal pay	14,632	11
Totals		
Discrimination	19,930	14
Non-discrimination	102,720	75
Other	14,632	11

ET claimants with protected characteristics

- 5.6 Table 2 represents recognised groups with protected characteristics in the UK and highlights whether they are overrepresented among ET claimants compared to the general population. We have utilised data from the 2013 SETA report, rather than the most recent 2018 SETA report, as this is the latest data available prior to the introduction of fees in July 2013. We assume this data more accurately reflects the present cohort of ET users who also do not pay any fees, compared to the 2018 SETA report which profiles fee-paying users of ET and EAT during the period of fees from 2013 to 2017.
- 5.7 The table below compares the number of individuals with protected characteristics as a proportion of total ET claimants against the UK's working population as a whole. It assesses which groups are likely to be disproportionately impacted by the introduction of the proposed fees. Significance testing was carried out in the 2013 SETA report and only differences which are statistically significant at the 95% confidence interval or above are described in the following paragraphs.

Table 2: Comparison of protected characteristics in ET claimants, as per the 2013 SETA Survey, to the working population

Protected Characteristic	Proportion of ET claimants (%)	Proportion of working population (%)
Ethnicity		
Asian/Asian British	5	6
black/African/Caribbean/black British	7	2
Mixed/Multiple ethnic groups	2	1
Other ethnic groups	1	1
White	82	90
Missing	2	*
Sex		
Male	57	51
Female	43	49
Disability		
Limiting illness or disability	19	11
Non limiting illness or disability	7	16
No illness or disability	74	73
Age		
16-19	1	4
20-24	6	10
25-34	15	24
35-44	25	23
45-54	29	24
55-64	20	13
65+	3	2
Religion		
Christian	58	60
Other religion	9	7
No religion	30	33
Missing	3	*
Marital status		
Married or registered in a same-sex civil partnership, and living with spouse	48	50
Married separated from spouse	3	3
Single (never married)	38	38
Divorced or formally registered in a	8	8

same-sex civil partnership which has now been dissolved		
Widowed or surviving partner from a same-sex civil partnership	1	1

Source: Table 8.3 in “Findings from the Survey of Employment Tribunal Applications 2013”

5.8 Ethnicity: The data compares the ethnicity of ET claimants to the proportion of these groups in employment from the 2012 Annual Population Survey. This shows that 82% of claimants were white compared to 90% of the workforce in general; and that black/African/Caribbean/black British and mixed/multiple ethnic groups made up 15% of claimants compared to 10% of the workforce in general. Overall, this suggests that black/African/Caribbean/black British and mixed/multiple ethnic groups are likely to be overrepresented in ET claimants and therefore would be disproportionately adversely affected by the introduction of a fee when compared to white ET claimants.

5.9 Sex: ET claimants are more likely to be male than female, compared to the wider working population. This would suggest that men would therefore be disproportionately adversely impacted by the introduction of a fee. However, analysis of the 2013 SETA report responses⁷ finds that male claimants were disproportionately more likely than females to report higher salaries. 49% of male claimants said that their salary was £30,000 or more, compared with 43% of females. This suggests that salaries may mitigate some of the potential adversely disproportionate impacts on men.

5.10 Disability: Table 2 shows that while the proportion of those with a limiting or non-limiting illness or disability is in line with employee population, the proportion of claimants whose illness or disability is limiting is higher in the claimant population (19% compared with 11%). This shows that the introduction of a fee would likely have a disproportionately adverse impact on claimants with a limiting illness or disability.

5.11 Age: Table 2 shows that in comparison with the workforce as a whole, ET claimants are more likely to be aged 45 or over (52% of all ET claimants compared to 39% of all employees). Therefore, people over 45 are more likely to be adversely impacted by the introduction of a fee.

⁷ Department for Business, Innovation and Skills, Employment Market Analysis and Research. (2015). Survey of Employment Tribunal Applications, 2013. [data collection]. UK Data Service. SN: 7727, DOI: 10.5255/UKDA-SN-7727-1

- 5.12 **Religion:** The data shows that the religious profile of ET claimants broadly matches that of the workforce in general, with two thirds of claimants having regarded themselves as belonging to a religion (67%). This suggests the fee introduction will not adversely affect people with the protected characteristic of religion.
- 5.13 **Marital status:** The data shows that 48% of ET claimants were married or in a civil partnership at the time of the claim and this broadly reflects the working population, where 50% were married. This suggests the fee introduction will not adversely affect people who are married or in a civil partnership.

6. Equalities impact summary

- 6.1 Consideration has been given to the impact of the proposed fees on individuals against the statutory obligations under the Act. These are outlined below.
- 6.2 **Direct discrimination:** We assess that the proposed introduction of ET and EAT fees will not be directly discriminatory within the meaning of the Act, as they will apply equally to all claimants bringing a claim, and all appellants lodging an appeal against an ET decision. The proposed fees are not considered likely to result in people being treated less favourably because of their protected characteristic.
- 6.3 **Indirect discrimination:** As set out above in Table 2 and explained in paragraphs 5.8 to 5.13 individuals from a black, Asian or ethnic minority background, men, those over 45 years of age, and those with a limiting disability are likely to be over-represented in ET claims and will be disproportionately adversely affected by the introduction of any fee. Additionally, as set out above in Table 1 and explained in paragraphs 5.6 and 5.7, one of the grounds for making a claim to the ET is where an employee believes they have been discriminated against under one of the nine protected characteristics. As such, the introduction of a fee will likely also adversely affect these groups of claimants.
- 6.4 In developing the fees that are proposed as part of the consultation, alongside the policy rationale as set out in the consultation document and highlighted in paragraph 3.2 above, the issues of affordability and proportionality have been of paramount importance:
- **Affordability:** Affordability was explored in relation to the thresholds of the newly revised Help with Fees remission scheme, and the time individuals have to raise the fee. We assess that a fee of £55 is generally affordable for claimants and appellants filing a claim to the ET and/or the EAT. The £55 fee represents a

maximum of 1.3% of disposable capital and 3.6% gross monthly income for those individuals who would not qualify for full fee remission under the Help with Fees scheme, with increased affordability where claimants bring a claim together. Claimants generally have 3 months (6 months in claims about redundancy or equal pay) to make arrangements to pay the issue fee. Additionally, where a dispute reaches ACAS within the time limit, claimants have a maximum of 6 weeks to engage in early conciliation, during which time the 3- or 6-month time limit for bringing the claim is paused. After engaging in early conciliation, claimants receive an early conciliation certificate, and they have a minimum of 1 month from the date of receipt to make a claim to the ET. As the minimum of 1 month runs alongside the amount of time a claimant has remaining on their 3- or 6-month time limit, it provides additional time to claimants who had less than 1 month remaining on their claim when they started early conciliation. With regards to the appeal fee, either party seeking to make an appeal has 42 days from the date of the ET decision (or reasons, where they weren't provided at the hearing) and therefore 42 days to make the relevant fee payment arrangements.

- Proportionality: We also assess that the proposed fees are proportionate to the varied range of remedies (including non-monetary remedies) available to and sought by ET claimants. In developing this proposal, proportionality was explored in relation to the costs incurred by individuals bringing a claim to ETs. 2013 and 2018 Surveys of Employment Tribunal Applications (SETA) reports were relied on to analyse affordability of fees.⁸ The 2018 SETA report found that 90% of claimants that settled or were successful at a hearing received financial compensation with a median value of £5,000 (an increase from £2,500 in 2013). This indicates that claimants whose claims have merit would generally expect a financial award to more than cover their fees. However, the modest level of fees proposed have been developed factoring in claimants who may also come to an ET seeking low value or non-monetary awards, so as not to render making such claims futile. Those seeking low value or non-monetary awards make up a small percentage, with data collected as part of the 2013 SETA report stating that of those who received a monetary settlement, 83% received a settlement above £525.

⁸ Both surveys have been used as the most recent 2018 survey was carried out when the previous fee regime was in place, potentially skewing the characteristics of those applying to the ET.

6.5 As HMCTS only routinely collect outcome data in discrimination and unfair dismissal claims, we conducted an internal file review to assess the size of awards made in other types of claims heard by the ET;

- For claimants, the proposed fee amount is of a similar value to personal costs incurred when bringing an ET claim. The 2018 SETA report found 33% of claimants incurred communication costs with a median value of £50 and 36% incurred travel costs with a median value of £60.
- Of the 51 claims analysed in the file review exercise we found that 20% of the awards made under claims such as breach of contract, unauthorised deductions from wages, redundancy pay, maternity and pregnancy related discrimination and Agency Worker Regulations were for less than £500, the lowest award being £84.70, meaning a £55 claimant fee is proportionate to the range of possible awards (both monetary and non-monetary);
- Some claimants seek non-monetary outcomes such as a change in policy or reinstatement to a job position. According to the 2018 SETA survey, in 90% of cases that went to a tribunal and a decision was made in favour of the claimant, the award involved a monetary element, demonstrating that approximately 10% of cases involved a non-monetary award;
- According to HMCTS' internal management information, approximately 8% of awards in discrimination and unfair dismissal cases alone were for £1,000 or less, with the lowest award being £131 in 2020/21, further demonstrating that a £55 is proportionate even to low value awards.

6.6 Therefore, based on the policy rationale and considerations that form the basis for the proposal to introduce modest fees in ETs and the EAT, we consider that the potentially adverse disproportionate impacts on those with the protected characteristics of race, sex, disability and age are not likely to result in anyone suffering a particular disadvantage in relation to the introduction of these fees. We also consider that in the unlikely case that there might be any indirect discrimination, this would be justified as a proportionate means of achieving our legitimate policy aims of introducing modest ET and EAT fees to ensure that the service can continue to run efficiently and effectively, whilst remaining affordable to users and therefore protect access to justice. The mitigations given below will further support those on low incomes.

6.7 As HMCTS only routinely collect outcome data in discrimination and unfair dismissal claims, we conducted an internal file review to assess the size of awards made in other types of claims heard by the ET;

- 6.8 ***Discrimination arising from disability and duty to make reasonable adjustments:*** As described above, we do not consider that the proposals are likely to result in unlawful discrimination on the basis of disability. Although the introduction of a fee would likely affect individuals with a limiting illness or disability, we consider that the proposal is proportionate, having regard to its aim. We will continue to make reasonable adjustments for claimants and appellants with disabilities using the ET and EAT services.
- 6.9 ***Harassment and victimisation:*** We do not consider there to be a risk of harassment or victimisation in implementing these changes.
- 6.10 ***Advancing equality of opportunity:*** We have considered how these planned changes might impact on the duty to advance equality of opportunity by meeting the needs of those who share a particular protected characteristic, where those needs are different from the needs of those who do not share that particular protected characteristic. We consider the availability of the Help with Fees scheme alongside the Lord Chancellor exceptional power to remit fees will help to ensure equality of opportunity is advanced for those with protected characteristics who cannot otherwise afford to pay fees.
- 6.11 ***Fostering good relations:*** We do not consider that there is scope within the policy of setting and charging tribunal fees to promote measures that foster good relations. For this reason, we do not consider that these proposals are relevant to this obligation.

7. Mitigations

- 7.1 Those having to pay the new ET and EAT fees will be able to apply for help with paying their fees through the Help with Fees scheme. The Help with Fees (HwF) scheme provides individuals on low income and with little to no savings with financial support towards the cost of their court or tribunal fees. Provided they meet the eligibility criteria, applicants will either be eligible for partial remission or full fee remission.
- 7.2 The Ministry of Justice has launched a revised, more generous HwF scheme to provide greater financial assistance to those most in need. This includes significantly raising the income thresholds which determine an applicant's eligibility based on their level of income, including increased financial support for families through higher partner and child allowances. The reforms also increase the minimum capital threshold, which is the minimum amount of disposable capital an applicant can have, depending on the level of fee payable. This will allow applicants to have more capital before they become ineligible for any fee remission.
- 7.3 For claimants and appellants who do not qualify for the Help with Fees scheme but whose circumstances are such that they cannot realistically afford to pay the fee in question, a remission can also be granted under

the Lord Chancellor's Exceptional Power to waive fees. This power will apply where the payment of fees would cause undue financial or other hardship. Decisions are based on the merits of each individual application by considering the applicant's income, disposable capital, expenditure or other extenuating circumstances. The Lord Chancellor's Exceptional Power offers an additional safeguard for those with no disposable means to pay a fee.

8. Ongoing equalities analysis

- 8.1 We recognise that the equality duty is an ongoing duty. We will update this equality statement in the light of any new evidence from the consultation on equalities impacts. We will continue to monitor and review the ET/EAT fee introductions for further potential equalities impacts on claimants and appellants with protected characteristics to help ensure that we have considered any unintended consequences of this policy to help ensure access to justice is maintained.