



Law Society  
of Scotland

# Consultation Response

## Review of Introduction of Fees in Employment Tribunals

13 March 2017



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Employment Law Sub-committee welcomes the opportunity to consider and respond to the Scottish Government's consultation *Review of the introduction of fees in the Employment Tribunal*. The Sub-committee has the following comments to put forward for consideration.

## General Comments

1. Members of the committee who lodge and defend claims at the Employment Tribunal have had a different experience of pre-claim conciliation than that suggested by the conclusions of the Review.

At paragraph 153 of the Review, the conclusion is offered that: "*while there was a sharp, significant and sustained drop in the volume of ET claims following the introduction of fees, the combined impact of fees with the mandatory requirement to consider Acas conciliation, has been successful in encouraging people to use alternative dispute resolution services (and specifically Acas's conciliation) to help resolve their disputes.*"

Members agree with the first part of the statement, but not the second. Conciliation which has been made mandatory cannot be regarded as being "successful", simply because it has been "used." Members' own experience was that very few claims were either the subject of negotiation at all or settled during pre-claim conciliation prior to an action being raised.

Members observed that this was in large part due to the introduction of the fees regime. With the requirement under the fees regime that a Claimant pay either £160 or £250 to lodge a claim, their experience was there was no longer any positive incentive to motivate potential Respondents to seek to settle a claim before it was raised, when instead they could simply wait to see if the fee was paid by the Claimant.

It is their experience that the conciliation service being “used” consisted largely of the mandatory steps being taken, i.e. of intimation of a claim and then initial contact being made by Acas with the Respondent, but that matters would go no further at that stage, and it would only be after the claim has been lodged (and either £160 or £250 paid) that negotiations would begin. Mere contact with Acas cannot be regarded as a “success” if it is a mandatory step in the process.

The members noted that the Review, at paragraph 163, found differences in its findings on the extent to which conciliation had achieved a formal settlement (i.e. actual “success”), between the figures provided by Acas and the Government’s own figures. The committee asked that further research be carried out on this area, and, that account be taken of the study *“Experiences and perceptions of claimants in the employment tribunal”*<sup>1</sup> which monitored the outcome of 158 claims in association with the Citizens Advice Bureau, and found that the introduction of fees has had *“a direct influence on the decision-making strategies of claimants, employers and their advisers.”*

While the Review refers to some employers delaying negotiations to see if a claimant pays the fee or not (at par 167), this is described as “anecdotal”. The members would wish further research to be commissioned by the Government before any further changes were introduced.

2. The Members also requested that further research be carried out into the actual outcome of claims, rather than any recommendations being based solely on the numbers who had taken part in conciliation.

This is based on members’ own experience, but also supported by the above *Busby* research which found that *“the most common experience among those given an award was that they did not receive this money from their employer – at least initially.”* This highlights an essential aspect of the fees system which does not appear to be considered within the Review, even though it has been highlighted previously in a report by the Law Society of Scotland in July 2014 prior to the fees regime being introduced, that 35% of successful claims were never actually paid.<sup>2</sup>

3. The Members also ask that further research be carried out into the number of claims which would previously have been made in the Employment Tribunal which are now being pursued in other legal forums, which have lower costs than ET fees.

The Review looked at the England and Wales County Court system only, to establish if there had been an increase in the number of “employment claims” being pursued there. It found (at par 212) that the way the county courts record information means that it could not establish whether there had been an

<sup>1</sup> *Green’s Employment Law Bulletin 2017*, 137, 2-4, Prof Nicole Busby, University of Strathclyde, January 2017; full report available at <http://www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project/>

<sup>2</sup> <http://www.lawscot.org.uk/media/334389/employment-tribunal-fees-report.pdf>

increase or not, but nevertheless it was “satisfied” (par 213) that it was unlikely that such an increase had occurred. No mention is made of the Scottish Courts.

However, there has been one reported example of a case being pursued in the Sheriff Court in Scotland, *Dawson v Carr Gomm*.<sup>3</sup> In his written judgment, Sheriff Collins QC highlighted the issues the choice of forum produced:

*Had the pursuer brought proceedings in the Employment Tribunal, rather than the Sheriff Court, he might have had good grounds to argue that there had been a breach of regulation 12 of the Working Time Regulations 1998, and to seek compensation for this under regulation 30 ... The pursuer might also have had grounds to argue that there had been a breach of the National Minimum Wage Regulations 2015, and again, the Tribunal would have had the power to grant him a financial remedy in respect of that ... While the Tribunal is clearly the preferable forum for determining the present dispute ... proceedings in the small claim court for this pursuer may well now be cheaper, and are in any event not subject to the more restrictive time limits applicable in the Tribunal. The downside for the pursuer is that he can only succeed if he can establish a contractual, rather than statutory, entitlement to the payment he seeks.*

Members would draw the Government’s attention to the Sheriff’s view about the ET being the “preferable forum” for employment disputes, and the implications for the justice system more broadly.

4. The Members would also ask that, rather than the consultation being in relation only to an extension to Help with Fees, the Government consider again the following proposal, which was originally outlined by the Law Society of Scotland in their report of July 2014, as follows:
  - (a) Pre-claim conciliation remains in place, and free;
  - (b) On lodging of an ET1, the Claimant is required to pay £125. Upon lodging an ET3, the Respondent is required to pay £125;
  - (c) No later than seven days before a hearing, both the Claimant and the Respondent are required to pay £450 each;
  - (d) On determining the outcome of the case, the Tribunal will determine whether either party will be awarded any of the above costs against the other party.

The Members see the benefits of this proposal being as follows:

- (i) It would address the difficulty identified above regarding pre-claim conciliation, as both the respective Claimant and Respondent have a financial incentive in reaching a settlement, as they would both save a ‘lodging fee’ of £125;

<sup>3</sup> *Dawson v Carr Gomm*. 2016 GWD 35-6309 (*Sh Ct (Tayside) (Dundee)*). See 2017 137 Emp LB 4-6 for comment

- (ii) For the same reason, it would also promote settlement after a claim was lodged, but prior to a hearing of evidence;
- (iii) There would be no overall reduction in the fees generated for the public purse;
- (iv) It would act as a disincentive to claims now being brought in the Sheriff Court (where small claims fees are currently £100).

Finally, the committee's formal response to the five questions posed in the Consultation is as follows:

1. Rather than amending Help with Fees, our proposal is in relation to fees themselves, as set out at 4. above;
2. It is agreed this would widen access, but the proposal put forward above would be a more broadly fair system;
3. As 3. above;
4. No specific comments;
5. Rather than assessing the impact upon a particular sector of the community, we submit that our proposal would be broadly more fair to all sectors.

**For further information, please contact:**

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