



Justice Committee

Oral evidence: [Courts and tribunals fees and charges](#), HC 396

Tuesday 17 November 2015

Ordered by the House of Commons to be published on Tuesday 17 November 2015.

Written evidence from witnesses:

- [Ministry of Justice](#)
- [Equality and Human Rights Commission](#)
- [Working Families](#)
- [Maternity Action](#)
- [Citizens Advice](#)
- [Unison](#)
- [TUC](#)
- [Thompsons Solicitors](#)
- [Eaton Smith LLP](#)
- [Peninsula Business Services Ltd.](#)
- [Federation of Small Businesses](#)

[Watch the meeting](#)

Members present: Robert Neill MP (Chair); Alberto Costa MP, Philip Davies MP, Mr David Hanson MP, John Howell MP, Andy McDonald MP, Victoria Prentis MP, Marie Rimmer MP.

Questions 77–186

Witnesses: Rosalind Bragg, Director, Maternity Action, Rebecca Hilsenrath, Chief Executive, Equality and Human Rights Commission, Sybille Raphael, Advice Team Leader, Working Families, Emma Wilkinson, Senior Employment Expert, Citizens Advice, gave evidence.

Chair: Good morning, everybody. Thank you very much for coming to give evidence to us this morning. This is the second of the evidence sessions that we have had in our inquiry. We want to look particularly at employment tribunal and related fees. As you know, I am the Chair of the Committee. I am a non-practising barrister. We just have to check whether any of my colleagues have any interests that they wish to declare that are relevant to our proceedings today.

Andy McDonald: I was formerly a solicitor in the employ of Thompsons, who are giving evidence this morning.

Philip Davies: Formerly—a few years ago—I had a free annual membership of Peninsula Business Services. I never utilised it particularly, but I should declare it at this stage.

Victoria Prentis: I am a non-practising barrister. I was formerly an employee of the Treasury Solicitor's Department, which was involved in the Unison judicial review.

John Howell: I spent a day with the employment tribunal, as part of the Industry and Parliament Trust.

Alberto Costa: I am a practising English and Scottish solicitor.

Marie Rimmer: In St Helens I was formerly a lay trade union official.

Mr Hanson: I don't think I have anything to declare.

Chair: You are fine, David.

Mr Hanson: I have lots of interests—they are just not relevant.

Q77 Chair: Thank you very much. I suggest that the panel introduce themselves, and we will then go straight into the questions. That is probably the easiest thing.

Rosalind Bragg: I am Rosalind Bragg, director of Maternity Action.

Rebecca Hilsenrath: I am Rebecca Hilsenrath, chief executive of the Equality and Human Rights Commission.

Sybil Raphael: I am Sybil Raphael, team leader of the Working Families helpline.

Emma Wilkinson: I am Emma Wilkinson, senior employment expert at Citizens Advice.

Q78 Chair: Thank you very much for coming in to give evidence to us. Can I start with the issues of principle? The Ministry of Justice say that employment tribunals are a service that costs the taxpayer a degree of money. Is it wrong in principle for them to say that some of that burden, however it is arrived at, ought to be shifted on to those users who can pay? It is a separate issue as to whether or not they get right how they do that.

Rosalind Bragg: Maternity Action does not agree in principle with charging individuals bringing claims to the employment tribunal. Those who benefit from a claim are not just the individual who raises that claim. There are employees who do not face unlawful treatment as a result of the deterrent effect of the employment tribunal. There are employers

who do not face unfair competition from other businesses that reduce their costs by non-compliance with employment rights. There are also broader social and economic benefits from enforcement of employment law. In the case of pregnant women and new mothers, those are about promoting gender equality and protecting the health and wellbeing of the mother and the baby.

Q79 Chair: So it is a bottomless cheque on the taxpayer.

Rosalind Bragg: It would be appropriate for taxpayers to pay the costs of tribunals.

Q80 Chair: Whatever the cost.

Rosalind Bragg: Indeed.

Sybil Raphael: I believe that it is wrong in principle for the justice system to be self-funded. Like the Army, it is one of the basic public goods. The rule of law is vital and is one of England's great contributions to the world. I do not think that I exaggerate when I say that these fees imperil the rule of law. In practice, they remove the protection of the employment tribunal from a very large proportion of employees. It is fundamentally wrong.

Q81 Chair: That sounds very absolutist as a position. Is that sensible in terms of public policy?

Sybil Raphael: I believe so, yes. I believe that the cost of the employment tribunal service is minimal. The fact that it is currently making a profit just shows how back to front and Alice in Wonderland we are.

Q82 Chair: Is it a bad thing to make a profit?

Sybil Raphael: I think that it is making a profit.

Q83 Chair: Under those circumstances.

Sybil Raphael: Yes.

Chair: Really?

Sybil Raphael: I know that I am not the only one. I do not know whether you need to hear from the Employment Lawyers Association—

Q84 Chair: We will have some lawyers later in our session, so there is plenty more to come. Are there any other thoughts on that?

Emma Wilkinson: Citizens Advice would argue that the employment tribunal system is a public service that has a social benefit for all and to which all members of society should have access. Any costs for a user need to be set at a level that does not exclude the most vulnerable members of society from the employment tribunal process. In a research report, the "Fairer fees" report, which was published in January 2015, we found that 82% of the clients who participated said that the current level of fees deterred them from bringing an employment tribunal claim, and 47% of potential type B claimants—those bringing unfair

dismissal or discrimination claims—said that they would have to save all their discretionary income for six months in order to be able to afford a type B claim. We are talking about, for example, vulnerable clients who have not been paid and cannot afford to access the employment tribunal system in order to get that pay.

Rebecca Hilsenrath: Our concern under the Human Rights Act is in relation to effective access to justice and to the principle of non-discrimination. We also have a concern both that the Equality Act is effectively implemented and accessible for redress and in terms of the principle of effectiveness for redress under EU law. For us, it is about how it is implemented. Colleagues have already mentioned the level of fees. Citizens Advice has done some very helpful research in that area.

Actually, it is about looking at the Government's own intentions—we will probably come to this in more detail later—and asking whether they have been implemented in the way envisaged. If you look at the fee remission system and the figures for those who have benefited from it against those who were predicted to benefit from it, there is a very significant discrepancy. It was believed that about 21% would benefit from it partially or wholly, but in fact the figure is about 63%. I am sorry; it is the other way round. About 63% were predicted to benefit, but about 21% have. It is about fee levels and the fee remission structure. It is also about looking at disproportionate impact.

Q85 Chair: Okay. There is the principle argument, which I understand perfectly well. Then there is the issue of whether it works and has the outcomes in practice. There are two levels. Let us assume that the principle is okay and that there is a public good that comes out of employment tribunals—employment law and the protections. Is there anything wrong with seeking to make sure that we have that accessible for good, valid claims, but that there should be some system that weeds out weak and vexatious claims—those that take up a lot of time, incur cost to the public purse, as well as to other parties, and really do not have a hope? Should fees be a part of that filter?

Rosalind Bragg: We see no evidence that fees are effective in removing weak or vexatious claims. In terms of pregnant women and new mothers, very few women take action when they experience unlawful treatment at work. Research from 2005 found that only 8% of women who had experienced substantive discrimination took any sort of formal action. Within that, 3% took their cases to the tribunal. We are talking about very small numbers of women pursuing action against what are often quite appalling experiences in the workplace. With the advent of fees, we have seen a 40% drop in the number of claims for pregnancy-related detriment and dismissal, so fewer than 1% of claims are coming through. There is little doubt that we are losing many claims that are well founded, as well as potentially some claims that are a bit weaker.

Rebecca Hilsenrath: There is some evidence that the number of successful cases has gone down since the introduction of employment fees—from 9% to 4%. There has also been a small decrease in the number of unsuccessful cases, with the large majority either settled or withdrawn, but at this point there is no evidence of the fees having an impact on vexatious claims. To look more carefully, you would need to carry out an analysis of the legal merits of the claims that have been withdrawn or settled.

Emma Wilkinson: I concur with everything that has been said.

Q86 Andy McDonald: Good morning, everyone. I was going to ask you about vexatious claims. What is the relationship? Those who are practising and giving advice will deal with a meritorious claim and then someone will come along with a weak or vexatious claim. Is there any relationship whatsoever between the introduction of fees and the impact on cases that you deem as weak progressing or otherwise?

Emma Wilkinson: To reiterate the point, the statistics demonstrate that there has been a significant reduction in claims being brought—a 69% reduction in single claims. If they were disincentivising unmeritorious claims, you would expect the success rates to increase, but they have not increased. If we look at the statistics, the success rate has not changed, so an objective of weeding out unmeritorious claims has not been met. I would argue as well that current systems within the employment tribunal structure, such as strike-outs and costs, are available if that is the objective. Preventing access to justice via a high fee level is not just weeding out unmeritorious claims—it is weeding out all claims.

Q87 Andy McDonald: If the percentage of successful claims has dropped drastically—

Emma Wilkinson: The percentage of successful claims has remained the same. The percentage of claims that have been brought has dropped drastically. If you were weeding out unmeritorious claims, you would expect the success rate to increase. It has not.

Q88 Andy McDonald: Thank you for that. Are you advocating that the fees be abolished or substantially reduced? One or two of you have expressed a view already. If anybody has not, this is their opportunity to say so.

Emma Wilkinson: We would advocate that any tribunal fee level creates an access to justice environment for claimants. We understand that, practically speaking, there may need to be some level of fees. In our “Fairer fees” report, we asked what level of fees people would be willing to pay, and 90% of people said that they would not be put off by a £50 fee.

Rebecca Hilsenrath: Could I come back to your earlier question in relation to vexatious claims? I know that the Committee is hearing comments on tribunal fees and not on other aspects of access to justice reform. However, the restrictions on legal aid availability and what is known about the lack of awareness of eligibility mean that people have less access to advice before they take a case on, so there is less effective signposting. You would also expect that not to contribute towards vexatious claims being taken out of the system.

Sybillé Raphael: There is also a perverse effect of the fees, because we do not find that employment law is more respected. On the contrary, at Working Families we find that there are rogue employers who consider that they do not have to obey and will not obey the rules, unless they are forced to do so. They are well aware that the fee creates a major barrier to people bringing claims. The fee does not help the good employers who respect the law. Actually, it discriminates in favour of the rogue employers.

In all the employment cases with which I have been involved at Working Families, when there has been a settlement, for instance, it has been extremely late in the day, much later than it used to be prior to fees. Employers wait until the very end—until the hearing fee is paid, three weeks before the hearing—to engage in meaningful discussions, wasting

everybody's time and the tribunal's resources. There is a category of employers who will not engage with anything unless they know that the employee has paid his £1,200.

Q89 Andy McDonald: If the fees were abolished, there would be a loss of income for HMCTS and the MOJ. Have you any thoughts as to how that might be recouped from elsewhere, or are these costs that simply have to be borne by the state? What is your view?

Rebecca Hilsenrath: I am not sure that that question is in my remit, but it is also about looking at charging within context. In relation to recoverable damages won at employment tribunals, we know that less than half get paid in full, and that about 35% never get paid. The damages awarded are normally fairly low. You are looking at under £4,000 or £5,000 for many discrimination cases and disability discrimination cases, which means that you are paying an awful lot of money against not much more to be won and a huge likelihood of not getting it. That is a hugely important issue in weighing up whether you are going to go for it in the first place.

Q90 John Howell: As you are probably aware, cases are divided into type A and type B cases. Type A cases are the simple ones and type B cases are the complex ones. Do you think that there is scope for type B claims to be re-categorised as type A claims? Clearly this has stumped you.

Emma Wilkinson: So a type B claim would cost £390 to present to the tribunal?

Q91 John Howell: The type B claims are the more complicated type of claims. The type A claims are the simple claims, such as non-payment of wages. What do you feel about the distinction made between those two types of claims?

Sybille Raphael: In my practice, dealing with parents and with parental employment rights, we do an awful lot of discrimination cases. As soon as there is a discrimination element, it has to be a type B claim. In my experience, type A claims are only about wages, when the employee is still in employment. Quite often, when the employee is still in employment, he or she does not want to bring a claim against his or her employer, because the priority is to stay in the job. Most of the claims happen when they are dismissed or they leave. The claims that happen when they are still in employment, like flexible working requests being refused and so on, are type B claims anyway. Currently, we very rarely have just type A claims. Most of our cases are a mixture of type A and type B, so they become type B claims.

Q92 John Howell: When I went to the employment tribunals in London, I sat with three judges for the day on the first of seven days brought by an individual on a particular claim. He was representing himself. The fee was not an issue for him; he had found the fee for that. What is your reaction to that sort of case? Do you not think that the charge was appropriate for the seven days that he had of three judges sitting there?

Rebecca Hilsenrath: I do not think we are arguing—I am not anyway—that if you are able to afford to pay fees that is necessarily an inappropriate way of covering the costs. If he has been able to find the fee, by definition that takes him out of the concern that we have been expressing about those who cannot afford to pay.

Q93 Chair: Can I raise a point on that, before we go on to the next bit? The EHRC's written evidence suggested that things such as rest break claims and daily and weekly rest claims

were in type B cases. That seemed odd, on the face of it, because you could say that it is pretty obvious that the discrimination point that has been raised is a much more serious matter and goes into type B. We were interested in whether or not those things could be more sensibly moved into type A cases.

Sybil Raphael: Currently almost any working time claim is a type B claim. Clearly they are simpler than unfair dismissal claims.

Q94 John Howell: I want to look at the remission system at the moment. As you will be aware, the rules for that changed quite recently. It is now known as the help with fees system. Behind that change of name there are some substantial changes in the way the process is dealt with. It is much more straightforward and the forms are somewhat shorter. Is that enough, or can the remission scheme be further refined?

Emma Wilkinson: First, we welcome the changes that have been brought with the help with fees scheme. Generally speaking, they are moving very much in the right direction.

There are two relevant points in terms of the fee remission scheme. The first is that an awareness issue exists. The second is that the complexity of the eligibility requirements is particularly harsh for vulnerable clients within our client base. Our research shows that three in 10 people who responded to the survey did not know that the fee remission system existed. Of those who knew that the system existed, 51% who thought that they were not entitled to full or part remission were in fact entitled to full or part remission. We would advocate for changes to the fee remission system to be part of a wider discussion within the employment tribunal system, to raise awareness and to assist with understanding the eligibility requirements.

Sybil Raphael: In our experience, the fee remission system is very low and very unfair. For instance, if you have just above £3,000 in savings—I believe that we want to encourage people, especially low-paid employees, to save—you cannot benefit from the fee remission system. We have terrible cases of women who were sacked the minute they told their employers that they were pregnant and who have absolutely no income, but cannot bring a claim for unfair dismissal because there is no way that they can spend nearly half their savings on a highly uncertain employment tribunal claim—especially when we know that, even if they win, there is a 50% chance that the employer will not pay anything, so she will be £1,200 worse off for having dared to claim her rights to her salary. The fee remission system really needs to be reviewed on that front.

Rebecca Hilsenrath: Earlier, I made some comments about looking at it against the Government's own predictions. Echoing other comments, you are not entitled to either partial or full remission if you have £3,000 in savings or £1,800 monthly income. Those are very low figures.

Q95 John Howell: I agree that the thresholds have not been changed. I just wanted to get a feel for what experience you have had of dealing with the new remission system.

Emma Wilkinson: It has only been in for two weeks. I have not had a huge amount of experience with it—sorry.

John Howell: That is absolutely fine as an answer to the question. I just wanted to get an understanding of your experience with it.

Q96 Mr Hanson: You have all touched on the fact that there is a discriminatory impact on women, ethnic minorities and people generally on lower incomes because of the proposals that are currently in place. I have guessed from what you have said to date that the view is that there should be abolition or a very low charge. Do you have other suggestions to reform the regime that the MOJ or, indeed, the Committee could consider and that would assist with that challenge to the discriminatory impact?

Rosalind Bragg: We do not see value in employment tribunal fees under any circumstances, but I would point to some groups that seem to be specifically disadvantaged. If you are seeking to address the equalities issues, there are groups that have particular disadvantages that could be addressed by reducing fees in those cases. While we oppose tribunal fees for all claimants, the evidence in relation to pregnancy and maternity is quite pressing. We know that the incidence of pregnancy discrimination has risen dramatically in the past 10 years.

Recent research found that 54,000 women each year—11% of all pregnant women in the workplace—lose their job as a result of pregnancy discrimination. That is almost twice the figure from similar research in 2005, when 30,000 women each year were found to have lost their job as a result of pregnancy discrimination. On top of that, there are myriad day-to-day problems faced by women, such as 10% of women reporting that they were discouraged from attending antenatal appointments. We are talking about a very substantial scale of bad practice in relation to pregnant women and new mothers. There is scope for quite a range of interventions better to support women to exercise their rights.

Q97 Mr Hanson: In your view, is it related solely to income, or are there other things that the MOJ could consider in relation to improving engagement with the tribunals?

Rosalind Bragg: There is an enormous range of work that can be undertaken to address the very low number of women who make use of the tribunal system or, indeed, the conciliation system. There is very low awareness among women of their rights. Often incidences of discrimination are not acknowledged as being such. Women perhaps think that they have been treated unfairly, but they do not understand that they have a legal right that has been breached. Similarly, we know that many employers are not aware of their obligations towards pregnant women and new mothers. Small businesses may encounter a pregnancy among their staff once every 10 years, so significant work is needed to raise their awareness of their obligations. Leadership in pointing out to employers that an economic downturn is not a satisfactory excuse for bad practice would also be extremely welcome.

There are major challenges in supporting women to exercise their rights during pregnancy and as new mothers. They have significant demands on their time from their new baby, there are the emotional demands of starting or increasing a family and, of course, there is the financial cost of a new child. We are dealing with a whole range of barriers to accessing justice.

Rebecca Hilsenrath: It is important to understand that there is a range of impact of the fees in relation to the drop in cases on a number of protected characteristics, not just in relation to women. That is partly about looking at cases like sex discrimination and unequal pay, which have seen the biggest drop and where four fifths of claimants are women. It is also about looking at the indirect impact of cases. For example, national

minimum wage claims are predominantly by women and ethnic minority claimants, while 52% of discrimination cases are by disability claimants. The system is inherently impacting in relation to a number of people from a range of different protected characteristics. In terms of what can be done, it is important to look at issues affecting access to justice across the board.

Q98 Mr Hanson: You argued in your evidence that there is a risk of breaching the ECHR. Can you elaborate on that for the Committee?

Chair: Could I ask people to speak up, so that it is captured for everybody?

Rebecca Hilsenrath: The issue for us in relation to the Human Rights Act is around article 6, the right of access to a fair trial. That is coupled with article 14, in relation to the principle of non-discrimination. If you look at the statistics, there is a drop in cases across the board for those with different protected characteristics who are struggling to get to tribunal, and that is the heart of our concern.

Emma Wilkinson: I have a couple of points to make. First, we would argue that more detailed research is necessary on the levels and structure of the fees. No significant research has been undertaken in this area, so we would strongly recommend that some further research be carried out.

In order to answer your questions, there were two points that I wanted to make. First, there is the possibility of introducing a low-value, simple claim level in addition to the current type A claim, where simple claims could be resolved via a non-tribunal procedure, possibly on the papers. The second point in terms of alternatives concerns the very specific circumstance where non-formally insolvent employees are seeking to recover statutory redundancy pay from the Insolvency Service. At the moment they have to get a tribunal award, which will cost them up to £390, and there is no prospect of recovery in those circumstances. There could be an exclusion or a waiver in that very specific circumstance, which would prevent barriers to justice for those people.

Q99 Mr Hanson: The Ministry of Justice would argue to us that discrimination cases are complex—that was touched on earlier by Mr Howell—and therefore require a higher fee. Do you think that there is any validity in that position?

Rebecca Hilsenrath: It is a principle of effectiveness. It comes back to the sort of framework that we were discussing earlier, in terms of the amount of the fee, the amount of the likely award and the likelihood of getting that award paid. However complex the case, if it is simply not effective financially to take a case—that is not getting into the place of being aware of what the claim is and having proper advice, through the telephone gateway, to understand what your rights are—it is about not having effective access to remedy. That comes back to the convention on human rights, which is where we started. It is fair to say that in the Unison case, although it was not successful, the Court of Appeal expressed the view that they were very troubled by the drop in the number of cases and what that might indicate in terms of the effectiveness of access to justice.

Sybil Raphael: We deal with people who have just lost their income and are incredibly scared about the future. Paying any kind of fee looks like throwing good money away for something that is highly uncertain. It is the same point, really. The claims we are dealing

with are quite small value financially, even though they are really important for respect of the law. In that view, it is not reasonable to allocate a good portion of your income to a tribunal case.

Q100 Mr Hanson: My final question is to Working Families. You mentioned the ACAS early conciliation scheme and the fact that it is mandatory, so claimants do not need encouragement from fees to pursue conciliation. At the moment, as you know, there is an obligation to notify ACAS, but people do not have to go down the route of conciliation. Do you think, therefore, that fees still play a role in that respect, or not?

Sybil Raphael: As I explained to you, our clients—the claimants—would be delighted if their employer were to engage in the conciliation process. The problem is not the claimants; the problem is the respondents, who do not engage at all. They do not take the call from the ACAS conciliator and they wait until the very end, until just before the hearing, when the hearing fee has been paid, to consider settlement. They think, and with good reason, “There is quite a big chance that this employee won’t be able to pay the £950 for the hearing fee, so we’re not going to waste our time negotiating beforehand.”

Q101 Philip Davies: One thing we have not heard a great deal about is the affordability of these tribunals for employers, small businesses and people who may be one-man bands or who may employ only one or two people. I am not entirely sure whether you are saying you accept that there are vexatious complaints and that there is a better way of dealing with them, or you do not believe that there are many vexatious complaints at all. Which side of the coin are we on?

Rosalind Bragg: It is very difficult to determine whether a complaint is or is not well founded without pursuing it through advice services or through the tribunal. We certainly assume that women are approaching their claims with good intentions. The evidence does not provide support for the perception that there is a significant number of vexatious claims from pregnant women and new mothers. In fact, the evidence for the women we work with is that very few pursue any action of any kind at all; 71% take no action, not even discussing it informally with their manager. I have yet to see evidence that we are dealing with significant numbers of vexatious claims.

Q102 Philip Davies: Let me just throw a bit at you. In a previous regime that, presumably, you would like us to go back to, between 1999 and 2005, the success rates for sex, race and disability discrimination cases at employment tribunals, according to the employment tribunals service, were 28% for sex discrimination, 15% for race discrimination cases and 29% for disability discrimination cases. To most people, that would indicate that quite a lot of vexatious complaints were being dealt with by the employment tribunals service in that time. If you do not have a system of charges to weed out some of those, what system would you have in place to stop the burden on employers of having to spend lots of money defending themselves against cases that clearly did not have any merit?

Rebecca Hilsenrath: There is a distinction between a vexatious claim and an unsuccessful claim. On the figures that you have given, it is quite clear that they were not all successful, but that does not give any evidence of whether they were actually vexatious. I would not expect there to be a 100% success rate.

Q103 Philip Davies: Your stated position is that you do not believe that there are vexatious complaints on the grounds of discrimination that go to employment tribunals. Is that really your serious point? Most employers watching this would be astounded that you could think that.

Rebecca Hilsenrath: I have not said that.

Q104 Philip Davies: What are you saying then?

Rebecca Hilsenrath: I have not said that. I said that there is no evidence as to the extent of the problem. The evidence that we have given during the past session suggests that the imposition of tribunal fees may not be the best way to address it, because it does not seem to have succeeded in altering the success rate.

Q105 Philip Davies: How would you address it? What is your solution?

Rebecca Hilsenrath: There are a whole range of issues that could reasonably be addressed by the Government. We have discussed the remission structure and the levels that are set. The level of the fee is of concern.

Q106 Philip Davies: What is the solution for the employer facing a vexatious complaint? What is your solution to that particular issue, which affects lots of small businesses around the country?

Rebecca Hilsenrath: I also think that better access to discrimination advice in the first place may help to deter vexatious claims. That is an issue that goes to legal aid availability and the efficacy of the mandatory gateway.

Sybille Raphael: To go back to your percentages, what they do not take into account is the far bigger number of claims that are settled either during the tribunal process or before the tribunal process. They would not be settled if there was not a tribunal there—if there was not an end of the line, both for employees and for employers. I really do not believe that you can say that, because the success rate of race discrimination claims is 15%, it means that 85% of claims are vexatious. That is completely wrong. You need to take into account all of the claims—

Q107 Philip Davies: What would your estimate of the number of vexatious cases be?

Sybille Raphael: A tiny proportion. There will still be—there are bound to be—some vexatious claims, but those may be less than 5%, even less than 2%. In my experience, it is a really small proportion of claims. I can give you my experience as a French lawyer as well, because I used to deal with that sort of thing as part of the Paris Bar. Proper vexatious claims are really a much smaller proportion than we think they are.

Chair: Mr Costa, do you want to come in on that point?

Q108 Alberto Costa: Thank you, Chair. Putting aside for a moment the definition of unmeritorious or unsuccessful claims as against the definition of vexatious or spurious claims, in most developed countries litigation carries a financial risk. To expand on the point made by my colleague, what element, if any, of financial risk should there be on any claimant who wishes to raise an action through the tribunal?

Rosalind Bragg: The question is, what public policy outcome are the Government seeking from the tribunal? I would say that in the case of discrimination claims, in particular, they are seeking to—

Chair: Could we keep our voices up, everybody?

Rosalind Bragg: The question, I would suggest, is about the public policy goals of running a tribunal process. In the case of tribunal claims, I would imagine that the goal is to reduce discrimination, so I would see the question of financial risk as inappropriate in that circumstance.

Q109 Alberto Costa: Taking that point further, as I mentioned, in any mature litigious system there is an element of financial risk for any claimant or, indeed, defendant in respect of an action. The whole point is that justice has to be served, but there is a financial risk. Why should we single out this particular form of litigation as special in requiring no financial risk on claimants?

Rebecca Hilsenrath: It is important to say that a lot of our concerns have been about the level of financial risk, not the principle. Tribunals are not the High Court; they were set up as an informal system that would be more readily accessible to individual litigants. It comes back to the issue of the efficacy of the system and the need to comply with obligations to allow people to have access to justice. When you are looking at a fee that is a very substantial amount of your possible damages won, and there is limited likelihood of having those damages enforced even if you are successful, it stops being about financial risk and starts being a barrier to justice.

Q110 Alberto Costa: To be clear, your position is that there ought to be no financial risk attached to the prospective claimants that the witnesses have dealt with historically?

Rebecca Hilsenrath: No. That is not what I said.

Q111 Alberto Costa: With respect, I will ask the question again. What element, if any, of financial risk should attach to claimants raising actions in employment tribunals?

Rebecca Hilsenrath: It is about looking again at the levels and at the efficacy of the fee remission system.

Q112 Victoria Prentis: Do you think that we ought to look at the level of damages and adjust the fees accordingly? Is that one proposal you would be keen on?

Rebecca Hilsenrath: It would be helpful to look at the system for enforcing the payment of damages. That would be very helpful.

Q113 Victoria Prentis: But you would not like a proportionate system that looked at the level of damages claimed and looked at the fees accordingly—to do it that way round?

Rebecca Hilsenrath: I do not have any comments on that.

Q114 Victoria Prentis: Ms Wilkinson suggested £50 as a starting point. Do the rest of you want to come in on that?

Sybillé Raphael: I would be slightly scared if you started to look at a proportion of the damages. That does not take into account the financial position of the claimant, so the problem of a barrier still exists. On financial risk, when you lodge a claim, by definition you are at financial risk, because most of the time you have lost your job. The employee and the employer are not on a level playing field.

Q115 Chair: Of course, you can be at a financial loss if you are on the receiving end of a breach of contract. It might be argued that the act of commencing the litigation should attract the financial risk, so that you think about whether or not that is a wise and prudent thing to do. The point is, should this be any different? You might say that it should be different.

Sybillé Raphael: I think that it should be different.

Q116 Chair: Why?

Sybillé Raphael: As I explained, I do not think that the Army should be self-funded, and I do not think that justice should be self-funded. I go back to a deeply held belief that the rule of law needs to be respected. This is the way employment law is respected. If employees do not have access to employment tribunals, employers can do what they want—or we advise people to seek private justice, which we do not want.

Q117 Chair: Forgive me, but the rule of law includes the law of contract and contractual disputes. Anyone who goes to the High Court in a contractual dispute puts themselves at financial risk. Surely you are not saying that that should all be without financial risk.

Sybillé Raphael: Employers can sue their employees as well, so they are in the same position. I am not saying that employers should pay the employment tribunal fees. I am just saying that it should be accessible to all.

Q118 Alberto Costa: I go back to a point that was made by my colleague. We should not always think of employers as being the stronger party. Often small employers are in fact the weaker party. It would be interesting to hear what your comments on that might be.

Emma Wilkinson: The experience of Citizens Advice is that the client base is largely vulnerable and has a number of problems accessing justice, including low income, not having English as a first language and being scared of the system. They are dealing with an employer base that is a rogue employer, for want of a better word, because they have not paid them, for example, or given them access to the basic minimum rights. Those people are starting from a position of having to overcome significant barriers just in order to start out.

Sybillé Raphael: It is usually the same with us. We deal mostly with very low-paid employees.

Chair: We will have some evidence from employers' organisations later on, so we will gather other sides of the argument. Thank you very much for coming to give evidence to us. We are very grateful to you. We can now move on to the second panel.

Examination of Witnesses

Witnesses: **Kate Booth**, Partner, Eaton Smith LLP, **Sally Brett**, Senior Policy Officer, Trade Union Congress, **Stephen Cavalier**, Chief Executive, Thompsons Solicitors, and **Shantha David**, Legal Officer, Unison, gave evidence.

Q119 Chair: Good morning. Thank you very much for coming along; we are very grateful to you for your time. The format will be the same as for your colleagues on the previous panel. If you would like to introduce yourselves, we will get straight into the questions. I know that you have all submitted some written evidence, which we have seen.

Kate Booth: My name is Kate Booth. I am a partner in a law firm called Eaton Smith. I represent employees and employers.

Sally Brett: I am Sally Brett. I am the senior employment rights officer at the TUC.

Stephen Cavalier: I am Stephen Cavalier, chief executive of Thompsons Solicitors.

Shantha David: I am Shantha David. I am an in-house solicitor at Unison legal services.

Chair: Thank you very much.

Q120 Marie Rimmer: You understand the purpose and the principle of the introduction of the fees and charges—basically, that there is a burden on the taxpayer. Do you accept the Ministry of Justice’s position that some of the cost of running the employment tribunal should be moved away from the taxpayer on to those who can afford it?

Sally Brett: No. As has already been said this morning, we believe that the employment tribunal system is an important public good which ensures that our basic employment rights are effective. I would like to make the point that often a division is made between taxpayers and users of employment tribunal systems, but all taxpayers are potentially users of employment tribunal systems. They are a very important backstop to ensure that basic rights such as the right to a minimum wage, rights to paid holiday, rights to time off and maternity leave and rights not to be unfairly dismissed or discriminated against are effective.

Those rights bring important social and economic benefits for this country. They ensure that more people can participate in the labour market without facing unfair discrimination. They give vulnerable workers more job security and stability of income. They help to encourage a committed and engaged workforce and the retention of skilled workers. As has already been said, if there is not that ultimate sanction that employers may face if they breach employment rights, it encourages rogue employers increasingly to flout the law, which undermines and puts at a competitive disadvantage businesses that are striving to meet the employment standards or to exceed them and use good practice.

Q121 Marie Rimmer: Thank you. Would you like to comment, Stephen?

Stephen Cavalier: Yes. I will add a couple of points, if I may. First, I am not sure that it is right to say that the purpose of this was to defray the costs of the tribunal service. The statement from the Cabinet Office Minister, Mr Hancock, was that the purpose of these fees was to deter people from bringing claims. To that extent, it has obviously been successful, if you look at the statistics. I do not think that it was intended to cover the cost

of tribunals. I believe that it covers something like 12% of the cost of tribunals, so it is not seeking to do that. I have not seen any analysis—I do not know whether analysis has been done—on the extra cost of administration and staffing in the tribunal service of having to administer the fees, because that was not a system tribunals had to deal with before. Presumably the handling of money will involve some extra cost in administration.

Coming back to the point that Mr Howell made earlier, one consequence—perhaps unintended—of the introduction of fees and the reduction in the number of cases is that we have found that hearings are getting longer. Employers are trying to string things out in cases and, unfortunately, tribunals are listing cases for longer hearings, which is putting both parties to considerable extra cost. I am not sure that it has been a cost-effective measure.

Q122 Marie Rimmer: Shantha, would you like to comment on that?

Shantha David: Yes. I endorse what both Sally and Steve said. Part of the problem is that the intention was to reduce the cost, but what it has done is create a more inefficient tribunal system. Cases are still taking as long to be heard. Cases are listed and often go unallocated, with all the parties having to attend hearings, so we end up spending costs on barristers and solicitors and in management time for employers. The average clearance times for multiple cases are actually longer than they used to be. This has not created a more streamlined process or a better system. In fact, all that has happened is that the numbers of claims have dropped exponentially and the tribunal system continues to be inefficient, when it could be slightly better.

Q123 Marie Rimmer: Kate, you have a slightly different view.

Kate Booth: Yes, I do. Boiling it down to the principle, as you asked, if the option was between saying that we need to find more taxes in order to pay for the system or asking the people who want to access and make use of the service, I would be supportive of there being some fee that people wanting to use the employment tribunal service had to pay. My concern is that the fee is far too high and it is excluding far too many people. I am interested in Shantha David's comment that in fact the outcome has not been that we are living with a more streamlined system. Perhaps that is where some attention needs to go.

Q124 Marie Rimmer: I have heard your comments. Do you have any recommended alternative that would allow HMCTS or the MOJ to recoup some of the revenue, should they abolish or substantially reduce employment tribunal fees, or do you believe that they should not recoup them alternatively?

Stephen Cavalier: They should abolish the fees.

Sally Brett: The contribution to the cost of running the tribunal system that fees have made is just 12.5%. That small contribution has come at the cost of a 70% decline in tribunal claims. As Steve has already said, we do not know what the cost of administering the fee system and the remission system has been. We know that the fee system and the remission system are having an impact on the efficiency of how some cases are being dealt with now within the system. I am concerned that, if we talk about reducing the fees to a level where they are not a deterrent for most claimants, the court system will get in an even smaller amount of money to contribute to the costs of running it.

Q125 Marie Rimmer: Are you saying that, in your view, what is coming in is a great cost to what would have been the appellant or the victim? Should we reduce further the amount to be paid?

Sally Brett: You could end up making a very small contribution to the cost of running the system, but you still have the cost of administering the collection of that fee.

Q126 Marie Rimmer: But your view is slightly different, Kate.

Kate Booth: I do not have enough knowledge to comment on the mechanism for recovering the costs and administering all of that. My personal view, based on the principle—which is what you asked—is that I see no reason why people wishing to access a system, in the same way that they might bring a breach of contract claim, should not have to pay something. My concern is the level we set it at.

Shantha David: The cost of setting up this whole process was also very expensive. I suppose that that was a cost to the public purse, and it is something that is not mentioned very often. It is something to bear in mind that perhaps that amount of money should not have been spent to produce a system to employ people to collect fees. What is so wrong with having an accessible statutory scheme that gives effect to employment rights for working people at no cost, as it was in the past?

In my experience, no individual employee wants to sue their employer; they would rather still be in employment. If we have bad employers who do not like to manage their employees, or simply treat their employees unfairly, this becomes a question of access to justice and an entitlement to protect basic employment rights. It is not easy to give evidence in a tribunal situation. My clients are often amazed by how overwhelming it is to sit in such an environment, to have to give evidence in front of a judge and be cross-examined and so on. They often come back saying, “Gosh, that was really emotional and really hard, but I am glad we did it, because we now know that we have ensured our rights,” whatever it may be—the minimum wage, maternity rights or rights to paid annual leave, or if they have been unfairly dismissed—but it is not an easy process.

Q127 Marie Rimmer: Ministers have said that the advantage of employment tribunal fees is that they discourage weak or vexatious claims and that under the previous system many such claims were brought. What is your view on that?

Stephen Cavalier: There is absolutely no evidence for that. First, there is a conceptual point. Ministers should be clear on what the purpose of fees is. Are they intended to fund the tribunal system? In that case, they should be clear about it. If the tribunal system is to be funded by users, it should be taken into account that employers are users, as well as claimants. If it is not that and the intention is to deter claims—which I believe probably is the intention—this is not the effective way to do it.

There is no evidence that it has deterred vexatious claims. You have already heard the statistics from the earlier witnesses, which I endorse. If you had such a massive drop in claims, you would expect a significant increase in the success rate if the vexatious claims were dropping out. We have not seen that at all. Moreover, I do not know that there are

any statistics on the number of vexatious claims. If there are, I apologise and I would be interested to see what they say. There is an existing mechanism in place.

If someone brings a claim that is frivolous, vexatious or otherwise unreasonable and is unsuccessful, the employer can apply for costs. Indeed, at earlier stages of the proceedings, the employer can apply for a pre-trial review for deposits, to deter claims that are without merit. There is simply no evidence that there are loads of these claims washing around the system. If employers are faced with vexatious claims and they are properly advised, they will oppose them. If they succeed, they will apply for costs. That is the appropriate deterrent, and it already existed.

Shantha David: You have probably seen what the president of the employment tribunals, Mr Brian Doyle, said. He suggested that only a very small percentage of claims can be identified as weak or unmeritorious and that we need to be a bit careful about the way in which we bandy around the term “vexatious” when it comes to claims. Tribunal judges have a lot of powers. They have a range of powers to deal with such claims. They can strike claims out and require deposit orders before hearings. I have been involved in hearings where I have acted for the employer, there has been an unreasonable claimant and we have got our costs back. There are systems within the tribunal that can deal with vexatious claimants, but not this sledgehammer to crack a nut approach.

Kate Booth: To look at it slightly from the other side, in my submission I say that between May and August this year 185 queries from employees came through my doors, based on an advertising scheme we were part of. A number were non-respondent after I sent them an email or message with tribunal fees in it. Of the 112 I spoke to, I myself rejected 27 for having no merits and six for being extremely low quantum and, frankly, not worth pursuing, and I think a couple were out of time. That leaves 71% that had merits and were worth allowing to cross the start line, but could not. Of the ones that I rejected, I do not believe—except in a very small number of cases—that the people themselves were pursuing a claim without merit. They thought that there might be something in it and they wanted some help. It was not the fact that they were out to cause a nuisance, although I accept that there are cases where that does occur and I have come across them.

Q128 Marie Rimmer: It has been put to us in written evidence by Peninsula Business Services that, prior to introducing fees, an unfair financial burden could fall on the respondents to claims, who could either settle or incur costs to defend against a claim. What is your comment on that?

Stephen Cavalier: I have read their submission. There appears to be absolutely no evidence for the assertion that they make in the submission. I do not see that there is any evidence whatsoever that before this system was introduced there was a high number of vexatious claims. If they found that the employers they represent were faced with claims without merit, my advice would be that they should defend the claims, deal with them appropriately and, if they were without merit and vexatious, apply for costs, which is the existing regime. I do not see any evidence there of vexatious claims or of the tribunal fees making a change to that.

Q129 Marie Rimmer: Does anyone else have any comments?

Kate Booth: There is certainly a high burden to the employer who has to defend a claim. That is part of life as a business, but there are products out there, in terms of legal expenses insurance that a number of my clients take advantage of, so there are ways to safeguard against those costs.

Shantha David: One of my clients has also written in to this inquiry. He brought a claim of unfair dismissal at a time when there were no fees. He had been unfairly dismissed; he had two sons in education and bills to pay, so he felt that he had to bring the claim. He tells me that, if he had had this fee, he would not have been able to bring such a claim. The risk he was taking was that he was taking on a large local authority, which had significant legal resources—public money—that allowed it to fund the case against him.

Financially, the system was weighted heavily against him and in favour of the employer, so I do not accept Peninsula's points about the respondent struggling. In his particular case, we took over the claim. The case deals with a point of law, so it is now at the Employment Appeal Tribunal. He tells me categorically that he could not have afforded it—making new law and trying to get his job back—if we had not been supporting him.

Chair: Thank you very much. You do not have to answer every question if you think that your bit has already been covered. Mr Howell wants to follow up on that point.

Q130 John Howell: You mentioned that the root of this is charging costs on an unsuccessful claimant, in this case. My experience of employment tribunals is that they are very unwilling to apportion costs to claimants, because of the difficulty of being seen to charge people who cannot afford it.

Stephen Cavalier: It is largely because they do not accept that the claim was frivolous, vexatious or otherwise unreasonable. I come back to the point that Mr Davies made—

Q131 John Howell: No. This is at the end of a process in which the claimant has not proved their case and should have costs made against them. The judges are unwilling to make those costs.

Stephen Cavalier: First, they have to establish that it was frivolous, vexatious or otherwise unreasonable. To come back to the point that Mr Davies raised earlier, the fact that a case is unsuccessful does not mean that it was frivolous or vexatious. There will be a proportion of claims that are unsuccessful in any form of judicial system; that is only to be expected. First, that rather makes the point that there are not that many frivolous, vexatious or otherwise unreasonable claims. Secondly, yes, there will be a point about the affordability of it. There would not be much point in awarding costs against someone who was not able to meet those costs, but that is a minority of cases. A far bigger issue, as has been mentioned by witnesses already, is the proportion of tribunal awards that are not enforced against employers, where people have won a valid claim and have not ended up with their compensation at the end of it.

Q132 Chair: Mr Cavalier, let us say that you have a breach of contract case. You may not have the money, but even if it is not vexatious you give it a run in court and you lose, you expect to pay the costs. What is wrong with that in the employment area?

Stephen Cavalier: It is an interesting point, Mr Neill. My view on this may not be the same as that of my colleagues. Of course, it is worth making the point that there is a

distinction between fees, which are paid to the tribunal service, and costs, which are paid between the parties. Personally, I favour a system where costs follow the event in employment tribunals. If you are successful in your claim, you get your costs from the other side; if you are unsuccessful, the employer gets their costs back. You can insure against that, or there would be arrangements that trade unions and others would put in place. That is a personal view. It may not be shared across the trade union movement, but that deals with your vexatious point, as opposed to your funding of tribunals point.

Chair: That is helpful.

Kate Booth: If I may reply to that myself, thinking of the employer clients I act for and the occasions on which I have tried to recover costs, it was extremely difficult with the mechanisms that we have in place now. It is a significant point that, if you got an award of costs, trying to recover that from the claimant would be very difficult. It would be something of a moral victory, not a recoupment of the expenditure that you had had as an employer.

Sally Brett: Can I make a point on costs? Cost shifting is not something that we support. I have heard from trade unions that increasingly employers are threatening that they will apply for a costs order against an individual. We often deal with individuals who are taking on large employers, with big legal services departments, employing expensive barristers. They threaten and try to deter that individual from standing up for justice.

Q133 Chair: It is not cost shifting to say that costs follow the event, is it?

Sally Brett: No, sorry. We also believe that, where a case is not proved to be weak or frivolous but has just been unsuccessful, it does not mean that there was no merit in its being determined in court, and often—

Chair: I understand that.

Sally Brett: Often in many of the cases that trade unions take, because they are involved very early in the workplace—the individual is advised very early on and they attempt to resolve issues in the workplace—it tends to be the very weak, vexatious or frivolous claims that are screened out. The ones that often go all the way to tribunal are those where there are quite complicated issues to determine—quite grey areas. There is a benefit to those being heard at tribunal and being determined by a judge.

Q134 Chair: I get that. Equally, if you do that—leaving aside figures—logic says that, if you lose, the costs go against you.

Sally Brett: Yes, but we are dealing with individual workers who have lost their jobs and experienced discrimination. They will often struggle to regain employment.

Chair: An individual who has been on the receiving end of a breach of contract is in the same position, aren't they?

Q135 Andy McDonald: The new fee remission scheme has been in for only a couple of weeks. I do not know whether anybody has experienced it—please don't answer this if you haven't—but is it now easy enough for applicants to understand and complete?

Shantha David: The form is a bit better; that's for sure. I welcome the new form. However, it has not changed the thresholds and things remain the same. If you recall, in the original equality impact assessment back in July 2012, the idea was that 53% of claimants would get full or partial remission. We understand that that figure is 21%, but looking slightly further at the statistics, the recent analysis from the MOJ looks at cases rather than individual claimants, and they say that 21% of all cases have received remission. If you look at claimants, as the equality impact assessment did, the figure is that more like 9% of all claimants are getting their fees back. That is a very small amount, and certainly not the 53% that was envisaged back in 2012.

Q136 Andy McDonald: Would anybody else like to respond on fees? If you do not feel that you are able to comment, please don't.

Sally Brett: A couple of the trade unions I have spoken to said that, when they have applied for remission on behalf of a client, they very rarely received it.

Q137 Andy McDonald: Can I direct this question to Sally and Shantha, in particular? You criticised the fact that a claimant's partner's income is included in the gross monthly income test. What is wrong with including household income for the purposes of remission?

Sally Brett: It is potentially sex discriminatory. The lower-earning partner in a household is frequently the woman, particularly if there are children and she has taken the primary responsibility for caring and reduced her hours. We know that often when women want to reduce their hours to accommodate caring responsibilities they have to take lower-paid, part-time work. They then experience discrimination or a problem at work and lose their job. They are in a position where, effectively, they have to get their partner's permission to help to fund their case and take it forward.

As we heard this morning, pregnancy and maternity discrimination is still rife; it is still an issue that I hear frequently. Very rarely do I come across women who are willing, with a new baby coming along and the expense of that, to stand up and take a case to tribunal. You have women who have lost their jobs, which has a big impact on household income. If they are still in employment and have experienced a problem, they are about to experience a big drop to statutory pay levels, but their partner is in work. With all the pressures on the household, they have to persuade their partner to allow them to take a case.

Shantha David: Which may or may not succeed. I have an actual example of some of our clients who are on national minimum wage and are trying to bring claims for unpaid wages. They do not have things like their payslips, because they are not being paid properly or they have not received payslips, so they cannot access the remission system, or their partner is also on national minimum wage, which means that they earn more than the threshold. The threshold is £24,660. Two people earning national minimum wage will earn about £26,000, so they would not be entitled to any remission for a claim to enforce rest breaks, for example. If a person who is a carer was not getting their rest breaks or not being paid their wages, they would not be entitled to remission. We are talking about people who are earning approximately £13,000 to £14,000.

Kate Booth: As an addendum to that, before coming here, I did my own calculation, based on information from the Office for National Statistics as to average income, average

household expenditure and average rent or mortgage payments. If you take all those averages and there are two people earning in a family with two children, it will take them three and a third months to save up for their hearing fees, and that is taking the partner's income into account. It will take a significant length of time.

Q138 Andy McDonald: Finally, from the evidence, I turn to issues of redundancy payments. It seems that if an employer becomes insolvent and is not able to pay redundancy payments, the employee applies to the redundancy payments office. They might be paid, but they may need to issue employment tribunal proceedings. There is an issue fee of £150 and then a court fee as well. They will not get those fees back. Is that right? What is the extent of the issue, and what should we do to put it right?

Stephen Cavalier: Perhaps I can deal with that, Mr McDonald. Yes, you are right. To correct an error in our evidence, for which I apologise, it is an issue fee of £160 and a hearing fee of £230. Quite often the redundancy payments service will require the employee—the claimant—to take the case to the tribunal to establish that the employer is insolvent and they are entitled to the funds. Often that will need to go to a hearing, which may be uncontested, but it will be a hearing none the less. At the conclusion of that, they will successfully recover their redundancy payment and other moneys due to them under the statutory arrangements protective award, but they will be out of pocket by the £390 that they will have had to pay because of the fees. That seems to me utterly unjust and unfair. Really they should be reimbursed those fees by the service as well or the fees should not apply in circumstances where they are clearly not recoverable.

I hope that the Justice Committee would have some influence over a specific matter such as that and over the fact that Government Departments are among the worst offenders for not participating in early conciliation through ACAS. We have found that in our experience Government Departments do not engage in early conciliation. The worst among those offenders is the National Offender Management Service, which is very poor at engaging. If there is any influence that the Committee could bring to bear on that—I know that there are distinguished former Government lawyers among us—that would be very helpful.

Chair: That is very timely. Mr Howell wants to come in on conciliation.

Q139 John Howell: The alternative dispute resolution approach to this has not been a great success, has it? Why is that? What can be done to make it a success?

Kate Booth: I sit on both sides of the fence. When I advise an employer, why would they engage in early conciliation? You wait for the employee to pay a fee. Ultimately you want to call their bluff—are they prepared to put their money where their mouth is?—so you sit back and see whether they do it. There is absolutely no incentive to engage in it early, unless you know that you are going to go down. Why would you?

Sally Brett: I endorse that. From what we hear from our trade unions, it is often the case that employers, and some Government Departments, do not engage until the hearing fee has been paid. If the individual has paid the hearing fee and there is then a settlement—serious discussions are undertaken, a settlement is reached and the hearing does not go ahead—there is no automatic refund of that hearing fee to the individual.

Stephen Cavalier: I am a strong supporter of early conciliation; it is an excellent idea. It is a shame that it was not introduced separately from any fee system. If it had been introduced first and we could see how it operated in isolation, I suspect that it would have resolved a significant number of claims at that stage, not least because many unrepresented claimants, who will not necessarily be aware of the strength of their claims, could have that discussion with ACAS, which can give them a realistic assessment of whether or not it is worth proceeding. As Kate and Sally said, unfortunately the introduction of fees has had the opposite effect. Employers sit on their hands and do not engage.

Shantha David: I endorse everything that has been said so far, but in some circumstances—for example, in a transfer of undertakings-type situation—early conciliation may not work. You might have one respondent who says, “Yes, there was a transfer,” while the other respondent says, “There wasn’t a transfer.” Unfortunately, that is the end of that, and there is no early conciliation.

Chair: We have a bit of a time constraint. Let us try to get through as quickly as we can.

Q140 Victoria Prentis: We touched briefly—I think most of you were here—on the European convention point. I wonder whether you could give us the benefit of your experience. Do you still think there is a problem with effective access to justice? Is that the sort of thing you would consider litigating in the near future?

Stephen Cavalier: It is certainly a problem. It is arguable that it is a breach of article 6, on access to justice. It is arguable that it is discrimination under article 14 as well. It is arguable that there are breaches of EU law about remedies being effective, proportionate and dissuasive.

Q141 Victoria Prentis: But there was a problem finding claimants.

Stephen Cavalier: Yes. That was the position Unison found itself in, in relation to the first judicial review. The courts have tended to take the view that, unless you have an actual live claimant who has lost out, you have a higher hurdle to satisfy. Of course, if you wait for that you run the risk of being too late; the court may well say that you should have brought your claim earlier.

I would not necessarily advocate that one should always go to litigation in these circumstances, but there are profound issues. It is very worrying that the Government have made a change to the ministerial code to remove the obligation on the Government to comply with international law and standards. That is very worrying in the context of this provision and various other pieces of legislation.

Sally Brett: Although the Unison case was not successful, the judges in the case made comments about how the drop in tribunal cases was sufficiently startling for there to be a more thorough investigation. They said that, given such a large drop, it was likely that within that there were people who did not just decide that they did not want to take the risk but who genuinely could not pay. We believe that there is still an arguable case that it has led to problems with access to justice and, potentially, discrimination problems, given the huge drop in discrimination claims.

Shantha David: There should be an effective remedy to EU rights. We can see, for example, that in the last published set of statistics there were approximately 800 sex discrimination claims. Compare that with the same quarter two years previously, when there were no fees: about 6,000-odd claims were lodged at that time. Either we say that there were 5,400 women per quarter who had nothing else to do but bring claims, or we say that we are missing out on all those valid claims. If you multiply that by nine, we are missing out on approximately 45,000 or 50,000-odd claims—women who have not had access to the tribunal system.

Q142 Victoria Prentis: But clearly people did not feel strongly enough to bring claims. You could not find the right claimants between you, with all your experience and access to people.

Shantha David: This is obviously the subject matter of legal proceedings, so perhaps—

Q143 Victoria Prentis: Finished legal proceedings.

Shantha David: Not quite.

Victoria Prentis: Okay.

Shantha David: Perhaps we should wait until the court—

Q144 Victoria Prentis: Can I ask an utterly unrelated question? You might know the answer. How many people, vaguely, are supported by their union in an employment tribunal? What proportion of claimants? Does anybody know?

Stephen Cavalier: I do not know what the actual proportion is.

Victoria Prentis: Sorry—it was just something I had written in my notes.

Stephen Cavalier: The statistics are that something like 75% of claimants are represented by their trade union, a lawyer or other adviser. Within that, I do not know what the trade union proportion is. What we do not know is what proportion of employers are represented by lawyers. I think that it is a very high proportion, which is what really contributes to the cost of the system.

Q145 Alberto Costa: To what extent can the fall in claims to the employment tribunal service be attributed to claimants instead bringing claims for breach of contract to the county court?

Shantha David: Only certain types of claims—breach of contract, for example—can go to the county court system. The only forum for everything else is the employment tribunals. Was that your question?

Q146 Alberto Costa: Yes. Let me ask the solicitors specifically. In what circumstances would you advise claimants to bring actions in the county court?

Kate Booth: It is not something that I have done with my clients.

Stephen Cavalier: Obviously, you are a solicitor.

Shantha David: I am a solicitor.

Stephen Cavalier: We have certainly not experienced a big switch. We are not advising people to bring claims in the county court, rather than in employment tribunals, unless there is a good reason for doing so. If it is a substantial claim and it is a breach of contract that would exceed the compensation limits in the employment tribunal, obviously you would go to the county court. In the county court you also have a fees regime and a high small claims limit, which means that there is no cost recovery in that forum either. We certainly have not seen a mass shift from tribunals to county courts.

Q147 Alberto Costa: Specifically for a firm that is well known as a claimant firm, what percentage of claims prior to the introduction of the fees were brought in the county court in respect of employment matters?

Stephen Cavalier: A very small proportion. That would remain the case.

Shantha David: If you are still in employment, the only forum for you is the county court. The employment tribunal is available to you for a breach of contract claim only if you have left employment. That is still the correct forum.

Q148 Alberto Costa: Do you have any comment on why the proportion of successful claims does not appear to have risen since the introduction of employment tribunal fees?

Stephen Cavalier: Because the introduction of tribunal fees has deterred all claimants across the board, and has not been successful in deterring vexatious claims.

Q149 Alberto Costa: I have heard figures of a drop of around 80% in the number of employment tribunal claims being issued. Would you agree with that percentage?

Sally Brett: Across the board?

Alberto Costa: Yes.

Sally Brett: Everyone uses different figures, depending on what periods they are comparing—

Q150 Alberto Costa: What is the figure across the United Kingdom?

Sally Brett: Seventy per cent.

Stephen Cavalier: There has been a 70% drop. Those are the latest tribunal service figures.

Q151 Alberto Costa: Can I ask a question of Stephen Cavalier? As the chief executive of a well-known claimant firm, would you think that such a drop in business is affecting the way in which chief executives in firms like yours view this particular Government policy?

Stephen Cavalier: There are probably not many firms like ours with chief executives, so it is difficult to make a comparison, but—

Q152 Alberto Costa: Well, managing partners of many firms in your position.

Stephen Cavalier: Actually, it is interesting that the concerns expressed are not expressed just by claimant firms. They are concerns that valid claims, people with potentially valid claims, are being shut out of the system. Although we are a claimant firm, occasionally we

represent respondents, when trade unions have claims brought against them by employees or by members. We have had claims brought against ourselves as well, and have dealt with those appropriately. Indeed, I was involved and was a witness in a case brought against us by a vexatious litigant who was subsequently declared a vexatious litigant, so there are methods for dealing with that.

A bigger problem—to come back to a point that was raised by a couple of members of the Committee—is that tribunal cases are taking too long and are too complicated, and that employers, by and large, are stringing them out. The 2010 to 2015 Government removed discrimination questionnaires, which enabled the gathering of evidence at the start of the case but also enabled claimants to be aware of whether or not they had a case. They may have not got a job and thought that the job had gone to, say, a white man, and that they should have got it, but when they look through the documentation in the questionnaire, they may find that there were perfectly valid reasons for that, so the case goes no further. That procedure is no longer available to them. The only way of testing it out is for them to go through the process, ending up with a long hearing and an expensive case for all concerned.

Q153 Alberto Costa: Can I bring you back to the question that I asked? If you have seen a 70% drop in business in firms like yours in this particular area, it must be an issue of concern for you. Surely it must impact on the view that chief executives or managing partners of firms like yours take on this Government policy.

Stephen Cavalier: Genuinely, we are not interested in promoting large numbers of employment tribunal claims. We would much rather that matters were resolved in the workplace, with trade union representatives. What we are concerned about is not the drop in business for us but the number of people who are no longer able to bring claims. That is true. There is a drop in claims even among trade union members, where the unions themselves are providing loans to assist with the fees. Believe me, employment tribunal business is not something where one would actively seek to encourage a large number of claims.

Q154 Chair: Out of interest, do you notice anything around appeals? Has there or has there not been any change in the number of cases being taken to appeal since the fee structure changed?

Stephen Cavalier: I have not. Have you?

Shantha David: Not particularly, no.

Stephen Cavalier: No, I do not think so. There is obviously a fee again at that level. There is an impact. Judges are not very keen, at any level, on litigants in person. That tends to lead to rather more protracted cases, but I suppose you would expect a lawyer to say that, wouldn't you?

Chair: Some of us have been there. Does anyone have anything to add?

Q155 Marie Rimmer: I have a question on employment tribunal awards not being paid in full. You said that the figure was less than 50%. Do you think that the enforcement of tribunal awards is an issue for us to consider, along with the employment tribunal fees?

Shantha David: It is a very important thing to consider, given that you then have to go off to the county court to enforce the award. It would be better if tribunals had some sort of power.

Chair: You had already made that point to some degree, but it has been reinforced. Thank you very much for your time. We are very grateful to you.

Examination of Witnesses

Witnesses: **James Potts**, Legal Services Solicitor, Peninsula Business Services Ltd, and **Michael Mealing**, Chair, Employment Policy Unit, Federation of Small Businesses, gave evidence.

Q156 Chair: Gentlemen, thank you for your time. Thanks for coming to give evidence to us. Would you like to introduce yourselves?

Michael Mealing: Thank you. The opportunity to talk to you is much appreciated. I am Michael Mealing. I am the chairman of the employment committee of the Federation of Small Businesses and an honorary officer of the federation. I have a day job. My business involvements have included sitting as a panel member on employment tribunals.

James Potts: I am James Potts. I am an in-house solicitor employed by Peninsula Business Services. During the course of our work, we represent respondents only in the employment tribunal.

Q157 Chair: We have seen some of the evidence, and you have heard some of what has been said in the course of today. From an employer's point of view, it must be desirable that good employers are not undermined by those who treat their workforce badly and, in effect, create an unfair level of competition. Does the drop in claims give you any concerns, from an employer's point of view? Is it all to the good that there are fewer claims? Is it purely because they were unmeritorious, or are there risks from your angle?

Michael Mealing: One ought to draw the distinction between small business and large business. As members of the Committee have already pointed out, small businesses are indeed small. The Federation of Small Businesses has nearly 200,000 members. Where our members employ people, the average number is only seven. There are hundreds of thousands of businesses like that in the UK; indeed, most businesses are small businesses. A microbusiness of that nature will not have the specialist resources that a large business has and will not necessarily have the financial resources to retain external expertise, so an employment tribunal application against it can be a truly horrendous event, particularly so if—rightly or wrongly—the employer believes that no unfairness has occurred.

Because it is so expensive to resist a weak claim, I am afraid that it is becoming very common to buy off weak claims, as it is cheaper to do so than to resist them successfully. That is the primary reason why we welcome the drop in claims. The early conciliation facility is, in many ways, doing the same job—weak claims are being bought off—but claimants are aware of the fees and would certainly be less hesitant about going forward without them. The federation therefore welcomed the introduction of fees. At the time, we would have preferred to see lower fees but a more robust remission system, because it is

still possible for people—depending on their domestic circumstances—who are relatively adequately remunerated to have a no-cost option of going to an employment tribunal. The other thing that would help the situation from our perspective would be a change in the presidential guidance that employment judges get, in terms of the application of the facilities that have been mentioned to award costs, to ask for deposits and so on.

Q158 Chair: To make that more robust, I imagine, from your point of view.

Michael Mealing: Indeed.

Q159 Chair: For your average member, how much management time for a small business is taken up to deal with a contested employment claim?

Michael Mealing: That is exactly the point. We think of an average cost of £8,000 to retain legal representation to fight a case, but often, if a business has only a handful of employees, the cost to the business of the employer—the owner-manager—being tied up in an employment tribunal for days on end and spending many hours preparing the case is even greater, because they are the business’s greatest asset.

Q160 Chair: Mr Potts, do you have anything to add?

James Potts: We would say that the introduction of fees has had a positive effect, as have the other legislative changes that have been introduced in addition to the implementation of fees. We welcomed the reduction in the number of claims on behalf of our clients. Earlier, we heard some statements about the number of vexatious claims. I would perhaps avoid using the word “vexatious”. The word that we used in our written submission was “speculative”. We think that the introduction of fees has had a positive effect in relation to the reduction in the number of speculative claims that have been raised. In that sense, I would say that we do not have any particular concern about the reduction in the numbers.

Q161 Andy McDonald: Mr Mealing may be able to answer this, Chair. I wonder whether he encourages his members to embrace early conciliation in the process. Is there active encouragement for people to talk and conciliate?

Michael Mealing: No. We would take a neutral stance on that.

Q162 Andy McDonald: What would your stance be on costs following the event in tribunal cases?

Michael Mealing: As has come out already, it is relatively unusual for costs to be awarded. Our view is that the unwillingness of employment judges to award costs is unfair, particularly to small businesses, which will have suffered enormously from appearing and finding unreasonable behaviour on the part of the claimant.

Q163 Andy McDonald: Would you therefore support the principle of changing the cost regime in employment tribunals to have costs following the event?

Michael Mealing: We would.

Q164 Andy McDonald: We received a lot of evidence that remissions do not safeguard access to justice. For example, we heard the example of a pregnant woman, with a claim for unlawful pregnancy-related dismissal, who had saved just over £3,000 to pay for the expense

of having the baby. That meant that she was not eligible for remission but was unable realistically to pay the fees. What is your comment on that?

James Potts: We do not have any particular involvement in the remission system. We are not au fait with the particular nuances of that system, so we would not necessarily be able to comment on specific cases. As we heard, there have been improvements to the remission system very recently. We believe that that is having a positive effect. The remission system is one of a number of options that might be available to claimants in those circumstances, who might be able to benefit from after-the-event insurance or from financing from either a firm of solicitors or union representation in order to assist with bringing the claim. We do not necessarily believe that remission is the only option available to a claimant in those circumstances.

Q165 Andy McDonald: Would you be supportive of costs following the event in employment tribunals?

James Potts: No, I do not think that I would. I am not saying that the current system is perfect by any means, but it is certainly having a much more positive effect. We would say that the implementation of fees is much more beneficial than costs after the event.

Q166 Andy McDonald: Not costs after the event—costs following the event, with the successful party recovering their costs from the unsuccessful party in the employment tribunal. Would that be a change for the good?

James Potts: Not necessarily. In our view, there has to be an element of financial risk that the claimant has to undertake in order to bring the claim before—

Q167 Andy McDonald: Mr Potts, I am sorry to interrupt, but if the claimant loses they will be responsible for the respondent's costs. That is the risk they would run. Is that not a step in the right direction?

James Potts: I understand the point, but it is the matter of being after the event, as opposed to taking the initial financial risk before deciding to issue the claim.

Q168 Andy McDonald: The fees do that.

James Potts: They do, yes.

Q169 Victoria Prentis: You told us about the financial cost of responding to a claim and a little about the business cost of people being tied up—giving evidence and so on. Do you want to comment on the emotional and other cost to business?

Michael Mealing: Small businesses are all about personal relationships. A handful of people working in one location do not have the problems of communication and so on that can happen in a larger organisation. Yes, some FSB members have found a tribunal a very stressful activity. Again, they are encouraged to settle, whether or not they feel that any unfairness has been involved.

James Potts: I would go further. Some of the cases I have dealt with have involved relationships that break down between family members, in some situations, or even very close personal relationships. It is not necessarily the costs associated with simply defending the claim itself but the costs of the breakdown of that relationship. Claims that

are issued by brothers against brothers or daughters against mothers have an everlasting effect on that relationship. There is a perception that claims that are issued in the employment tribunal are against respondents with huge HR departments—that they are a large corporate entity. Often that is not the case.

Q170 John Howell: In the last session, you heard the witnesses say that the existence of fees was inhibiting the advancement of alternative dispute resolutions. Do you agree with that? If not, would you say how we can make sure that alternative dispute resolutions are part of the system?

Michael Mealing: There is some truth in the fact that alternative dispute resolution has not been as successful as we hoped. Things may well change over time. There are still a significant number of cases resolved; I understand from the House of Commons Library briefing on tribunal fees that ACAS reckon to have settled 22% of the cases they were involved in. That is a significant number, which we hope will grow. I believe that the relationship between a free conciliation service and a fee-paying justice system is appropriate.

James Potts: We would say that early conciliation has had a really positive effect. The success rate ACAS referred to is not necessarily borne out in the early conciliation work that we do as a company. We would regard a successful early conciliation matter to be one where the claimant is informed by somebody neutral and independent, through ACAS, that perhaps there are issues with the claim that do not warrant the airing of those particular issues in the employment tribunal, so a claimant may choose, through early conciliation, not to pursue a claim that might struggle to have success. We would regard that as a successful early conciliation matter.

There are other areas of alternative dispute resolution we have not touched on. There has been a rise in the prevalence of settlement agreements to resolve workplace disputes. In our experience, those have become increasingly popular. There is also a rise in mediation services available to employers and employees to resolve the rising number of workplace disputes that do not get to the line of the employment tribunal, when once they might have.

Q171 Chair: The obligation is to notify ACAS. Could it be strengthened by putting some obligation upon the parties genuinely to engage and to comply?

Michael Mealing: It is very difficult to be obliged genuinely to engage. The alternative dispute resolution depends very much on both parties, or at least one party, being very keen to reach a settlement.

Chair: On good will.

Michael Mealing: If that is totally absent, I cannot see the advantage of making them go there just to go through the motions.

Q172 Chair: I understand that. Mr Potts, you mentioned other forms of mediation and other types of alternative dispute resolution. Looking at the legal services market more generally, are there other changes that you might see as developing alternative ways of access to justice? If so, what are they?

James Potts: In terms of employment law?

Q173 Chair: Yes, for example. Are contingency fees an issue that might arise?

James Potts: Contingency fees are more prevalent among firms of solicitors who represent claimants. We have some experience of them, albeit anecdotally, but I am not sure that I am able to comment on that particular issue.

Q174 Chair: The converse point is that that could encourage speculative litigation. What is your thought on that, Mr Mealing?

Michael Mealing: As my colleague stressed in his written submission, there is encouragement on some potential claimants to become claimants.

Q175 Chair: You would regard that as undesirable, I take it.

Michael Mealing: Yes.

Q176 Andy McDonald: I wonder whether you think there would be any merit in having a legal aid system that was contingent—where people had to pass the merits test before a legal aid board and, if successful in recovery, would pay the money back to the taxpayer. Would that be a good way of going about funding litigation, not only in employment tribunals but elsewhere?

Michael Mealing: It is a very interesting idea. Small business is interested in fairness. As I indicated earlier, our main concern is the unfairness of a totally blameless employer incurring huge cost, stress or both in being taken to a tribunal or, indeed, being pressurised to pay one's way out of it. Anything that looks at the merits of a case would be welcome. Obviously, it should not be so stringent that people are reluctant to use it.

Q177 Mr Hanson: You said “a totally blameless employer”. What is your assessment of the numbers of totally blameless employers that you would quantify in that answer?

Michael Mealing: It is an imperfect world—there are seldom blameless people in any situation—but there is some indication from the success rates for employment tribunal cases that take place. A professionally advised employer should not lose a case. They should have settled it before they got there.

Q178 Mr Hanson: The key point the Committee would want to look at is the number of claims that are now not progressing because of the fees. How many of those claims would you assess as not having merit?

Michael Mealing: I could not offer a finite number. There are still a significant number of claims that get through to a tribunal—there is no doubt about that—but I would not like to hazard a percentage. My feeling is that there are significant numbers of claims that have very little chance of success. That is evidenced by the advent of the early conciliation facility, where, as well as leaning on employers to pay up, ACAS can persuade claimants not to proceed.

Q179 Chair: Are you able to say in broad terms how many employers you think would take the view, “I will take a commercial decision here. It is not worth defending this case, even though I think I have a good case”?

Michael Mealing: My belief is that a majority would.

Q180 Chair: A majority?

Michael Mealing: Of course, unfortunately, if you pay for something, you get more of it. As a result, more claims come forward.

Q181 Chair: I understand that. Do you have any statistics as to the cost? We talked about the emotional cost, but there is a financial cost to the small business sector.

Michael Mealing: We have done some research that suggests that the financial cost is £8,000, on average, but the point came out earlier that, if cases are getting longer, the cost to everyone, including the state, increases. That is particularly true where a small employer is retaining professional representation.

Q182 Alberto Costa: This is a question for Mr Potts. I understand that your organisation has argued that there are two main indications that employment tribunal fees are not discouraging claimants from pursuing legitimate claims. I understand that Peninsula has stated that the drop in employment tribunal claims has not been accompanied by a commensurate rise in the number of cases being brought in an alternative jurisdiction where the fees would be cheaper, such as the civil courts. Isn't it the case, as we heard in earlier evidence; that some claims, such as claims for pregnancy-related detriment or dismissal, must be brought to the employment tribunal and that therefore it is not surprising that we have not seen a commensurate rise in claims brought in alternative jurisdictions?

James Potts: We would argue that the focus is more on the type 1 claims we spoke about earlier—simple wages claims or claims for notice pay; things of that nature—which could perhaps be brought in an alternative jurisdiction, such as the county court. Despite the statistics saying that the type 1 claims are the ones that have been deterred by the introduction of fees, we have not seen a commensurate rise in the number of claims being brought in the alternative jurisdiction. I take your point, but I would argue that it is at the lower end of the scale.

Q183 Marie Rimmer: The number of claims being brought to an employment tribunal has dropped significantly. To what extent do you think the employment tribunal fees have affected that number?

Michael Mealing: They have undoubtedly affected the number, but I do not think that it is a situation where there is just one factor in play. The number of claims can reflect changes in economic activity or prosperity. It has affected the weaker claims disproportionately, because early conciliation and the fact of having to pay make people think very carefully. Previously, until fees were introduced, it was a no-cost option, as far as the claimant was concerned. The fundamental principle that we would advocate is that there should always be some level of fee. We can argue about what that should be, but there should be some financial risk attached to the ability to take an employer to a judicial situation and incur really substantial costs for a small employer.

Q184 Marie Rimmer: Success rates have remained roughly the same since the fees were introduced. Is it not fair to say that employment tribunal fees have not discouraged unmeritorious claims being brought?

Michael Mealing: They have not discouraged all the claims. Personally, I believe that some will have been discouraged, but some people want their day in court and the claim will be heard.

Q185 Marie Rimmer: It has been suggested that if would-be claimants have recently lost their job they are less likely to bring a claim, because they feel that they cannot afford it, even if they have some savings. What is your comment on that? They feel that they have no access.

Michael Mealing: Obviously unemployment is a disaster in many situations, but it is not always so. Some people leave employment having been made redundant, with quite a large financial settlement. Some people move into another job very quickly, or have the prospect of doing so. I still feel that the proper test is that it should cost something to have access to the court system.

Q186 Marie Rimmer: What about people who have lost their job and were on the minimum wage and therefore do not have anything at the back of them? Do you feel that they still have access to this avenue of justice?

Michael Mealing: I do not think that the remission system is perfect at the moment. There should be a remission system, but I still feel that it is not appropriate for this to be a totally no-cost option.

James Potts: We would say that access to justice is through the remission system that is in place and the alternative ways to fund a claim for somebody in those circumstances that might be available to them to bring that claim. Despite the implementation of fees, we would still say that there really is not an access to justice issue.

Marie Rimmer: Thank you for that.

Chair: Do other colleagues have questions for the witnesses?

Gentlemen, thank you very much indeed. I am grateful to you for your evidence. Of course, the written submissions are taken into account as well. Thank you for your time; we are much obliged to you.