FRU

Free Representation Unit

Free Representation Unit ("FRU") response to the Ministry of Justice ("MoJ") consultation on Introducing Fees in the Employment Tribunals ("ET") and the Employment Appeal Tribunal ("EAT")

1. FRU was founded in 1972 to provide free advice and representation in employment, social security, and criminal injuries compensation tribunals for people with tribunal claims in London and the South-East of England who could not afford professional legal representation and for whom legal aid is not available. We are among the foremost providers of free representation to workers in the ET and EAT, representing hundreds of claimants every year. We do not represent employers.

2. FRU has already contributed to the responses of the Employment Lawyers Association ("**ELA**") and Employment Law Advice Network ("**ELAN**") to this consultation. As an organisation with specialist expertise in social security law and considerable experience of representing low-income claimants in ET claims and EAT appeals, we are well-placed to supplement those responses with some additional reflections on the proposed scheme, and some case studies drawn from the experiences of our clients.

Question 1: Do you agree with the modest level of the proposed claimant issue fee of £55, including where there may be multiple claimants, to ensure a simple fee structure? Please give reasons for your answer.

3. FRU does not agree that the proposed claimant issue fee of £55 can be characterised as modest for many of the claimants that we work with. While the flat, one-off issue fee is a considerable simplification of the fee structure introduced by the 2013 Fees Order, given the experience of the last fees regime, we suspect that it will be anything but simple for claimants to navigate or for HMCTS staff to administer in practice. Finally, the £55 fee will not be modest for claimants bringing low-value claims or claims for declaratory relief, and low-paid workers will face the hardest decisions about whether to issue ET claims against their employer.

4. Our clients mostly live in London. ONS data for 2023 suggests that the median disposable income in London after tax, living costs, and rent is £500 per month.[1] 25% of Londoners – around 2.2 million people – live in relative poverty after housing costs, defined as less than 60% of the median household income.[2] London has the highest levels of destitution in the UK (defined as lacking or being unable to afford basic necessities) at 1.3% of the working age population.[3] The extent of recent declines in

[1] Finder, "Disposable income in the UK" (12 October 2023) (Accessed at: https://www.finder.com/uk/banking/disposable-income-around-the-uk)
[2] House of Commons Library, "Poverty in the UK: statistics" (1 December 2023) (Accessed at: https://researchbriefings.files.parliament.uk/documents/SN07096/SN07096.pdf)
[3] G. Bramley, & S. Fitzpatrick, "Destitution in the UK 2023: Technical report" (24 October 2023) (Accessed at: https://doi.org/10.17861%2Fcjwk-nf02)

UK living standards has been somewhat disguised by historic levels of household borrowing and indebtedness. The ratio of total household debt to gross disposable income in London has increased from the pre-pandemic level of 94%.[4] For a significant proportion of the working age population, £55 represents an unaffordable amount of money, enough to decisively influence their decision about whether to bring a tribunal claim.

5. Tribunal claimants who have lost their job will have to draw from whatever savings they have and rely on subsistence-level benefits such as Universal Credit ("**UC**") to meet their basic living costs until they find a new job. The standard allowance of UC, which is the basic element of the benefit payable to all claimants, stands at £368.74 per month for a single claimant aged over 25 and £578.82 per month for a couple, one of whom is aged over 25.[5] That amount must cover priority bills, food, and travel expenses, including expenses involved in attending job interviews not reimbursed through the flexible support fund administered by work coaches.[6] It must also cover the travel and communication costs involved with running a tribunal claim identified in the consultation paper.

6. The sum of £55 represents 15% of the entire monthly income of a single UC claimant aged over 25, and 19% of the entire monthly income of a claimant under-25. Research published in January 2024 demonstrated that a single person on UC now receives 22% less than what it costs just to eat and keep warm.[7] UC is payable below basic subsistence levels and it is therefore incorrect to characterise £55 as a modest sum for many of those who will be relying on that income when they need to decide whether they can afford to submit a claim to an ET.

7. While the effect of the introduction of fees on benefit claimants will be mitigated by the fact that those workers can be 'passported' through the Help with Fees ("**HwF**") scheme, that will not cover every situation. Discretionary or application-based assistance schemes do not produce uniform results, and in many cases only widen existing inequalities. This is arguably borne out by the fact that the rate of remission under the 2013 Fees Order was much lower than had been anticipated prior to the implementation of fees.[8] The potential issues FRU has identified with the revised HwF remission scheme are set out below.

Categories of tribunal claimants vulnerable to the introduction of fees

8. FRU recognises that the £55 claim issue fee is likely to be affordable for many ET users. However, it would likely have a significant impact on low-paid and migrant workers:

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[4] ONS, "Personal financial & property debt by age and region: April 2018 to March 2020" (January 2022)
[5] The rates for single claimants under 25 is £292.11 per month, and £458.51 for joint claimants both under 25.
[6] In principle, however, that money may also need to be used to pay for the excess of a claimant's rent not payable under the housing costs element of UC, which is set at Local Housing Allowance rates below market rent. Renters can apply for discretionary assistance from local authorities to meet the shortfall. Only mortgage interest can be claimed under Universal Credit, with no provision for the principal.
[7] Financial Fairness Trust, "Does Borrowing Behaviour Influence Financial Wellbeing? The UK's Inadequate and Unfair Safety Net" (22 January 2024), 4
[8] *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869 ("***UNISON***"), at [43]

precisely those workers who already find it most difficult to access employment justice and who are most vulnerable to mistreatment at the hands of unscrupulous employers.

9. The users of the ET reflect the diversity of the UK labour force and trends towards greater casualisation and flexibility in employment relationships. It is not uncommon for ET claimants to have insecure immigration status, experience in-work poverty, speak limited English or have limited literacy, or be unable to access sources of early employment advice. There are already significant practical barriers in the way of those workers' access to the ET, including a widespread lack of awareness of employment rights, difficulty in accessing advice and support for employment matters, and strict time limits on bringing ET claims.

10. Several recent reports and articles have highlighted the difficulties migrant worker victims of trafficking, modern slavery, or labour exploitation face in getting their claims to an ET, including a recent report by The Guardian and The Bureau of Investigative Journalism into the widespread labour exploitation of migrant care home workers.[9] 'Apsana', our client, was interviewed for that report. She is one of only six care workers known to have issued ET claims alleging similar forms of mistreatment, where the underlying practices are thought to be widespread. The current system is already a barrier to access to justice for workers like 'Apsana' even without a £55 claim issue fee.

11. These workers are unable easily to bring ET claims to enforce their employment rights because the Home Office visa sponsorship system means that their permission to remain in the UK can be withdrawn at the whim of their employer. If they bring a claim, they are likely to lose their job and they will likely be left destitute and homeless as a result. They are unable to claim means-tested benefits due to the "no recourse to public funds" condition ("**NRPF**") and will become "overstayers"' in the UK unless they can find a new employer to sponsor them within 60 days. Not only is the £55 fee likely to be unaffordable for those workers, but they may be dissuaded from bringing an ET claim by the duress and difficulty of their circumstances, and out of fear of the authorities finding out about their situation. There are no current proposals for how those claimants might be assisted through the fees regime or HwF remission scheme.

> ***'Apsana'***
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> Apsana is a Nepali national who was employed at a care home in London on an employer-sponsored Health and Care Worker visa. She paid more than £20,000 to get her job in the UK. Upon arriving in London, she finds that her employer does not give her the shifts she is promised and deducts her wages unlawfully. When she tries to complain about this, she is dismissed summarily. She has 60 days to find a new sponsor before she loses her immigration status in the UK and is potentially subject to removal. She manages to find an immigration

[9] ATLEU, "It has destroyed me: a legal advice system on the brink" (11 October 2022) (Accessed at: https://atleu.org.uk/news/2022/10/17/it-has-destroyed-me-new-report); BIJ, "Visa system forces care workers to stay silent on rape and abuse" (11 March 2024) (Accessed at: https://www.thebureauinvestigates.com/stories/2024-03-11/visa-system-forces-care-workers-to-stay-silent-on-rape-and-abuse/)

adviser to help her make an application to extend her leave, while also finding an employment adviser to help her make a tribunal claim against the care home within the three-month time limit. She has NRPF so she cannot apply for Universal Credit and must instead rely on food bank vouchers and discretionary support from a local charity to meet her basic needs. She would not have been able to afford the £55 issue fee.

12. 'Apsana' was fortunate in that she already had family in the UK and was able to find a Citizens Advice Bureau employment adviser who could advise her on her ET claims. Many in 'Apsana's' situation are not so fortunate.

13. Arguably, a failure to introduce relevant exceptions to the fee regime for victims of trafficking could put the UK in breach of its procedural obligations under Article 4 ECHR (because it arguably deprives a victim's right to claim compensation from their traffickers of its effectiveness) and potentially under Article 15 of the Council of Europe Convention on Action Against Trafficking in Human Beings ("**the Trafficking Convention**").[10]

14. FRU's experience working with survivors of labour exploitation or human trafficking is that, even where claimants succeed at ET, many are unlikely to see any of the compensation they are awarded, given the opacity of their employers' finances and the limited enforcement powers of the ET. The experience of 'Farhanah', another of FRU's clients, is sadly typical.

> ***'Farhanah'***
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> Farhanah, a Malaysian national with indefinite leave to remain in the UK, was employed as a domestic worker for an individual employer in London. She was provided with accommodation but was paid significantly less than the NMW throughout her employment and was not allowed to take any holiday. One day, her employer stopped paying her wages altogether. After begging her employer for months to pay her and borrowing money from friends to pay her living costs, she ran away. She was left destitute and homeless. She was helped by charity workers to present her ET claim. She succeeded at ET and was awarded over £70,000 in compensation.
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> To date, Farhanah has not received any of the compensation she was awarded by the ET. FRU referred Farhanah's enforcement case over to a Magic Circle law firm, who now have a small team working on her civil claim against her employer. Freezing orders have been placed on the employer's accounts, but not in time to prevent him from dissipating his assets. It is likely that Farhanah will not receive any of the unpaid wages and holiday pay that she is owed.

15. FRU would stress that these problems are not limited to victims of trafficking and labour exploitation, or indeed to migrant workers generally. We regularly act for

[10] See e.g. *Hounga v Allen* [2014] UKSC 47; [2014] I WLR 2889, in which the Supreme Court held that there was an obligation on the United Kingdom to ensure that victims of trafficking have a right to compensation for trafficking and for related acts of discrimination.

workers against employers who dissipate company assets or abusively use so-called "phoenix company" arrangements to avoid costly ET claims against them. Most, if not all, of those employers engage in poor employment practices – in many cases denying workers their minimum statutory employment rights altogether – and then fail to engage with the ET claim process once the worker sues them. The worker will then likely have to embark on separate enforcement proceedings against the employer at cost for any monetary award made by the ET, without any guarantee of recovering the sums they are owed.[11]

16. This raises two potential issues. First, it suggests that the introduction of fees will only entrench the impunity with which unscrupulous employers currently act because it creates an additional barrier to workers vindicating their rights against them. Second, it suggests that the £55 fee will, at best, provide those workers with a means of obtaining declaratory relief about their basic employment rights and a claim for a debt against their employer which they might never recover. For those workers, a £55 claim issue fee cannot be described as a "modest" fee. Instead, it may decisively influence their decision to bring an ET claim, as workers in their situation – particularly where they cannot access information or advice about the enforcement options available – are likely to believe that there is no point in pursuing an ET claim against their employer where the possibility of recovery is so remote.

17. Even where workers can ultimately recover fees, they will only be able to do so at the end of the litigation, which, given current ET backlogs, could take years.

Low value claims and claims for declaratory relief

18. The £55 claim issue fee will likely constitute a high percentage of the value of low-value claims. It may not have much impact in the context of an unfair dismissal or discrimination claim, where the compensation sought is likely to be a figure in the thousands. However, in the context of a claim for a week's notice pay plus a small amount of accrued holiday pay, or for a claim for declaratory relief, it may be much more significant.

19. It is worth noting that ET claims for declaratory relief secure important employment protections: for example, claims under s.11 and 12 Employment Rights Act 1996 about failures to provide itemised payslips or statements of terms and conditions.

20. FRU considers that the introduction of fees would likely disincentivise low-value claims and claims for declaratory relief. It is low-paid workers who will face the hardest decisions about whether to bring a low-value claim against their employer.

The process of rejecting claims presented without the correct fee

21. Certain aspects of the new fee regime are likely to be difficult for claimants to navigate and for HMCTS to administer. The ET Rules still contain provisions dealing with the rejection of claims for non-presentation of fees or applications for remission. Rule 11(1)

[11] The cost of HCEO enforcement proceedings is currently £71 (See: https://www.hceoa.org.uk/fees-charges/fees-charges-for-recovering-a-debt)

provides that claims not accompanied by a fee or remission application will be rejected and the claimant notified. Alternatively, if the submitted remission application is refused or a sum less than the correct fee is presented by the claimant, and the correct fee is not then paid within the time specified by the tribunal, the claim will be rejected, and the claimant notified thereafter (rule 11(2)). Where the claim is rejected, the claimant will have to make a new claim with the correct fee.

22. Given the resource constraints and long delays currently common in tribunal administration, in some cases the notice of the rejection will arrive after the relevant primary time limit has expired.[12] There is currently no facility for asking for reconsideration of the decision to reject the claim, or waiving the requirement to pay the fee in the interests of justice, as there is for other types of substantive defects in claims. The claimant will have to file their claim with the ET again, in many cases, after the primary time limit has expired.

23. Not only does the rejection procedure suggest increased administrative cost to HMCTS, in practice it is likely to increase the number of preliminary hearings dealing with claimants' applications for extensions of time. Furthermore, it might encourage employers to delay settlement discussions until the fee is paid, thereby discouraging early settlement of claims, a common tactic used by employers when the 2013 Fees Order was in effect.[13]

The revised HwF remission scheme

24. FRU considers that the revised HwF remission scheme is an imperfect solution to the problems identified above. First, many ET claimants will likely be unaware that such a remission scheme exists.[14] Second, the scheme itself sets further obstacles in the way of accessing justice in employment disputes. While the new HwF remission forms are simpler than the old forms, the requirement to complete a 26-question online questionnaire or 8-page EX160 form requesting detailed financial information, and to supply substantial supporting evidence of that application, is potentially forbidding for an unrepresented worker, particularly where that worker has limited literacy or speaks little English.

25. Because of the short time limits in ET claims, and the limited circumstances in which those time limits can be extended for non-discrimination claims, a worker will likely have to put in a remission application speculatively at the time of submitting their claim, or else risk only filing their claim once they have received a response to the remission application, at which point it may be too late to file their claim in time. Again, this is

[12] See e.g. *The Sports PR Company Limited v Cardona* [2023] EAT 110, a recent EAT appeal in which FRU represented the successful claimant, Ms Cardona.

[13] House of Commons Library, "Employment tribunal fees: briefing paper 7081" (18 December 2017), 43 (Accessed at: https://researchbriefings.files.parliament.uk/documents/SN07081/SN07081.pdf)

[14] Citizens Advice, Written advice to Parliament (30 September 2015) (Accessed at: https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/court-fees-and-charges/written/22048.html). Respondents to the CAB survey of ET claimants showed that only 3 in 10 clients with employment problems were aware of the remission scheme, and that 51% of claimants who believed they were ineligible for remission were in fact eligible for a full or partial fee reduction.

likely to lead to more preliminary hearings for extensions of time than already is the norm.

26. The HwF form is easier to navigate for those 'passported' through the means test by their receipt of means-tested benefits such as UC. However, that is of limited benefit to many tribunal claimants, who may have only recently claimed means-tested benefits for the first time after losing their job. UC will be paid in arrears after 5 weeks from the date of claim and there may also be a delay in deciding their claim initially. There is an incentive in these circumstances to delay putting in an ET claim until UC is in payment, which will likely lead to further hearings dealing with extension of time issues.

27. Tribunal claimants subject to the NRPF condition, who have forms of restriction placed on their ability to claim means-tested benefits, or who receive a contributory benefit, will not be 'passported' through the scheme, because they will not be entitled to a qualifying benefit.

28. FRU envisions other potential difficulties with the HwF scheme. For example, providing a partner's income details for fee remission might be problematic for workers whose partners are unable or unwilling to provide them, or those who experience financial abuse. There was a concern under the 2013 Fees Order regime that women bringing sex discrimination and pregnancy/maternity discrimination claims, would, in some circumstances, effectively be required to ask their husbands for permission to bring a claim.

29. Further, while the new HwF Fees scheme simplifies the definition of capital to cover all savings and investments (thereby reducing the complexities associated with of an exhaustive list of capital types), there are inherent difficulties with assessing and quantifying capital ownership. Two-thirds of MoJ staff respondents to a report commissioned in 2009 agreed that processing remissions applications for claimants was "complex" or "very complex" for that very reason.[15] The same report also concluded that an average of 30% of the remission decisions made by MoJ staff were incorrect.

30. Ultimately, FRU accepts that an expanded, accessible, robust HwF scheme which is better advertised to ET claimants would cater to *most* of the objections it has raised about the affordability of the fees. However, we doubt that this is feasible given the severe resource constraints currently imposed on the ET.

31. The proposal and impact assessment, read together with the consultation response for the new HwF scheme, suggests that it will be HMCTS staff in the ET who handle all the decision-making, including dealing with appeals of fee remission decisions. The associated administrative costs do not appear to FRU to have been properly estimated in the MoJ impact assessment, and the ET evidently currently does not have the resources to be able to administer the HwF scheme effectively, let alone well enough to be able to mitigate the access to justice concerns FRU has raised.

[15] MoJ, "Is the 2007 court remission system working?" (9 December 2009) (Accessed at: http://webarchive.nationalarchives.gov.uk/20100111120959/http:/www.justice.gov.uk/publications/docs/2007-court-fee-remission-system.pdf)

The Lord Chancellor's exceptional power to remit fees

32. As other respondents to the consultation have also noted, so far as the Lord Chancellor's exceptional power to remit fees is concerned, the exceptional power to remit fees was so rarely used under the old 2013 Fees Order regime as to not be a realistic solution to plugging gaps in the Help with Fees remission scheme.[16] There is no reason to think that the exceptional power to remit fees would be used more widely than it was when the 2013 Fees Order was in force.

Question 2: Do you agree with the modest level of the proposed EAT appeal fee? Please give reasons for your answer.

33. FRU does not agree with the level of the proposed EAT appeal fee, mostly for the reasons set out above. Those reasons apply *a fortiori* to the EAT because the £55 appeal fee will be charged *in addition* to the £55 claim issue fee in the ET for claimants (a total of £110), and because the shorter time limits for appealing (42 days from the date of issue of the decision or written reasons) means that workers have a compressed timetable in which to find or borrow the money needed to issue their appeal.

34. While Question 2 does not invite responses on the underlying issue of principle, other respondents to the consultation have identified the clear public good that comes from an accessible, specialist appellate tribunal which clarifies and reinforces principles of employment law and good industrial relations practice. FRU agrees with and endorses that position wholeheartedly.

35. FRU's experience of the EAT system comes from its joint administration of the Employment Appeals Referral Scheme ("**EARS**") with Advocate, as well as a long-standing partnership with the Employment Law Advice Appeal Scheme ("**ELAAS**") administered by the Employment Law Bar Association ("**ELBA**"). There is greater demand for our services than there is the supply of volunteer barristers, solicitors, and law students able to take on our appeals work.

36. Many of the same considerations apply to fees in the EAT as in the ET. However, there are significant *additional* hurdles for an unrepresented worker to overcome if they want to present an appeal. Specialist expertise in employment appeals is difficult to come by, and most litigants-in-person struggle to identify arguable errors on points of law unassisted. The legalistic nature of proceedings at the EAT, and their greater formality compared to proceedings in the ET, can be intimidating for unrepresented workers.

37. Sources of help with appeals to the EAT are limited. ELAN's consultation response rightly notes that the sources of potential help with appeals identified in the 2023 EAT Practice Direction do not actually assist with drafting notices of appeal. The ELAAS scheme, for example, through which barristers assist appellants pro bono at permission hearings in the EAT, is only set up to assist workers who have properly instituted their appeal within the short time limits, have then survived an initial paper sift, have written

[16] *UNISON*, at [44]

to the EAT to request a rule 3(10) permission hearing on any grounds of appeal refused permission, and have then applied for help under the ELAAS scheme.

38. The experience of our client 'Hamza' illustrates the sorts of difficulties an EAT appellant might face if required to pay a £55 appeal fee.

> ***'Hamza'***
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> 'Hamza' lost his job during the first coronavirus pandemic due to redundancy. He lost his ET case for unfair dismissal in 2021, having represented himself at that hearing. Hamza drafted his own notice of appeal and was then represented pro bono at the rule 3(10) hearing through the ELAAS scheme and by FRU at a full appeal hearing in 2023. His appeal succeeded and a finding of unfair dismissal was substituted by the EAT.
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> Hamza says that, had he been required to pay the £55 fee, he likely would not have appealed the tribunal decision:
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> "*I wouldn't have paid £55 to appeal my tribunal case to the EAT. That fee would have been prohibitive for me because I was unwell at the time, I had caring responsibilities for my parents, and I had no money coming it other than Universal Credit. I was very disappointed and disillusioned with how the tribunal had handled my case, and I was ready to give up. The £55 fee would have put me off making an appeal*."

Question 3: Do you believe this proposal meets the three principles (affordability, simplicity, proportionality) set out above? Please give reasons for your answer.

39. FRU does not agree that the proposal meets the three principles identified.

40. As regards **affordability**, while FRU accepts that the £55 fees are likely to be affordable for many ET and EAT users, they are most likely to be unaffordable for precisely those workers currently least able to access justice in the employment context. FRU agrees with the conclusion of the ELA response that the MoJ's evident failure to consider the potential disparate impact of the introduction of fees on those groups currently least able to access justice in the employment context is potentially irrational, or else constitutes a failure to take into account relevant factors when exercising the power to set fees in s.42(1) of the Tribunal, Courts, and Enforcement Act 2007, which leaves the Lord Chancellor open to a potential judicial review.

41. As regards **simplicity**, FRU is concerned that the fees regime and the HwF remission scheme are likely to be difficult in practice to navigate for workers, and difficult for HMCTS staff to administer.

42. The latter is a source of particular concern for FRU because it suggests that resources will be diverted from existing tribunal administration. The backlog of ET claims stood at 483,000 in September 2023.[17] The backlog continues to have a deleterious impact on

[17] MoJ, *Tribunal Statistics Quarterly: July to September 2023* (Accessed at: https://www.gov.uk/government/statistics/tribunals-statistics-quarterly-july-to-september-2023/tribunal-statistics-quarterly-july-to-september-2023)

the resolution of employment disputes through the ET. The clearest example of this is the listing schedules for claims. We reproduce in a table below examples of typical delays faced by clients referred to FRU:

Claimant (Tribunal venue)	**Case type**
Claimant A (Cambridge)	A 5-day indirect sex discrimination and direct disability discrimination claim. Claim received by ET on 13/06/2022. Preliminary hearing for case management on 16/02/2023, resulting in hearing listed 11/11/2024-15/11/2024.
Claimant B (Ashford)	A 4-day unfair dismissal claim received by ET on 04/06/2022. Preliminary hearing for case management on 14/12/2022, resulting in hearing listed 03/12/2024-06/12/2024.
Claimant C (London South)	A 3-day wages claim received by ET on 20/09/2021. Preliminary hearing for case management on 03/03/2023, resulting in hearing listed 17/07/2024-19/07/2024.

43. Delays of over a year for hearings of 'fast-track' and 'short-track' claims (i.e. simple wages and dismissal claims mostly of between 1-2 days) are not uncommon in the ETs we mostly operate in. Calls and emails to the ET regularly go unanswered, and hearings are often cancelled or postponed at short notice. It is now the norm that interlocutory applications made within 2-3 months of the final hearing will only be dealt with at the final hearing.

44. Any additional administrative burden imposed on HMCTS staff in the ET will have the effect of worsening the user experience for all the ET's users absent a commitment from HMCTS to increase ET staffing numbers and resources. FRU is concerned that the foreseeable additional administrative costs of the fees regime and the HwF remission scheme do not appear to have been properly allocated in the Impact Assessment.

45. Indeed, the probable additional delays which might arise from the increased administrative burden on the ET caused by fees may open the Lord Chancellor to HRA damages claims under the civil limb of Article 6 ECHR where workers are unable to access a tribunal within "a reasonable time".[18]

46. As regards **proportionality**, the rationality of the relationship between the objective to be achieved (i.e. funding the tribunal system and Acas) and the introduction of fees *solely* levied on workers is unclear. First, it is not clear why employers should not also contribute to the costs of the ET and Acas: perhaps through 'costs-switching', as other respondents to the consultation have suggested. After all, in many cases, it will be the employer's conduct which has created the need for workers to use either service in the

[18] See e.g. *Frydlender v France (GC) (App. No. 30979/96)*. The ECHR jurisprudence consistently stresses that employment disputes by their nature call for expeditious resolution before a court/tribunal.

first place. Second, the fact that employers' contractual counterclaims have been excluded from the requirement to pay the ET claim issue fee is at best an oversight, and at worse supports an inference that the introduction of fees is really intended to deter workers from bringing claims, rather than to transfer some of the costs of the service to its users.

47. The MoJ proposal rightly avoids any direct suggestion that the introduction of fees would deter vexatious or unmeritorious claims. There is nothing to suggest that the new £55 fees, or indeed fees set at any level, would have this effect. The evidence of the 2013 Fees Order was that the much higher fees then in force, which ranged from £160 to £1,600 between Type A and B claims, did nothing to reduce the volumes of unmeritorious claims relative to the total number of ET claims, and in fact increased them. The Lord Chancellor accepted this in the *UNISON* case:

> "*The results show that the proportion of successful claims has been consistently lower since fees were introduced, while the proportion of unsuccessful claims has been consistently higher. The tribunal statistics, which record the figures for all claims, show the same trend.* ***The Lord Chancellor accepts that there is no basis for concluding that only stronger cases are being litigated****."*[19]

48. FRU's view is that the £55 ET claim and EAT appeal issue fees represent the worst of all possible worlds. They will not meaningfully contribute to the costs of running the ET or EAT, either on the (limited) financial modelling the MoJ has done or considering the foreseeable additional costs of administering the fee regime and HwF remission scheme within the ET, not to mention the potential satellite litigation that fees are likely to generate. The fees themselves will disproportionately impact those currently least able to access employment justice, likely entrenching poor working conditions for the low-paid and for migrant workers.

49. A decent labour market and a respectful workplace culture free from prejudice and discrimination are universal public goods which benefit us all. At present, those public goods are secured at modest cost to the Treasury by a freely-accessible ET system: something which should rightly be a source of considerable pride for the UK. The normative case for shifting the cost of that system, in whole or in part, to workers alone is, from FRU's perspective, a weak one at best.

Question 4: Do you consider that a higher level of fees could be charged in the ET and/or the EAT? Please give reasons for your answer.

50. FRU does not consider that higher fees could be charged in the ET and/or EAT. Our reasons for that view are that, considering our submissions above and the judgment of the Supreme Court in the *UNISON* case, the higher the level of ET/EAT fees, the more likely they are to be found to be an unlawful impediment to access to justice.

Question 5: Are there any other types of proceedings where similar considerations apply, and where there may be a case for fee exemptions? Please give reasons for your answer.

[19] *UNISON*, at [57]

51. FRU can add little to the very thorough analysis undertaken in the ELA response of the ET claim types which should be subject to fee exemptions. That list includes claims for protective awards (in TUPE/redundancy contexts), interim relief claims, claims for declaratory relief and/or small sums of money, and NMW claims. FRU agrees with ELA that the case for exempting fees in those cases is the same, or substantially the same, as for proceedings where individuals use the ET to establish their right to a payment from the National Insurance Fund.

52. However, FRU would add that, as regards claims raising issues of human trafficking and/or labour exploitation, failures to introduce relevant fee exemptions may leave the Lord Chancellor open to challenges based on the UK's procedural obligations under Article 4 ECHR and Article 15 of the Trafficking Convention.

53. FRU's view is that even once the appropriate categories of exemptions are defined, *identifying* the cases which are or should be subject to an exemption would be administratively complex. This issue is compounded by a problem that FRU regularly encounters in practice: namely, that unrepresented claimants without access to early legal advice often fail to accurately describe the nature of their complaint. In those circumstances, judicial assessment of the claim may be required to determine whether the exemption criteria are met in an individual case.

54. The procedural effect of any such decision would be unclear, particularly so far as the validity of the claim is concerned. Once a claim is identified as ineligible for an exemption, but where that claim has been presented without the correct fee, the same problems identified above in paras 21-23 would likely arise. Alternatively, where the claim properly qualifies to an exemption, but a fee has been paid, it is unclear whether the fee would then be refunded to the worker.

Question 6: Are you able to share your feedback on the different factors that affect the decision to make an ET claim, and if so, to what extent? For instance, these could be a tribunal fee, other associated costs, the probability of success, the likelihood of recovering a financial award, any other non-financial motivations such as any prior experience of court or tribunal processes etc. Please give reasons for your answer.

55. FRU would adopt and agree with the submissions made in the ELA and ELAN consultation response, which accurately identify and describe the range of motivations and factors which might influence a worker's decision to make an ET claim.

56. The experience of FRU's client 'Anna' illustrates how four important factors identified in the proposal and ELA/ELAN's consultation responses weighed on her decision to bring a claim against her employer: (i) the significant time and effort required to run a case as a litigant-in-person against a represented employer, which can extend to family and friends ("*other associated costs*"); (ii) the broader impact that an ET case might have on working conditions within a particular workplace ("*non-financial motivations*"); (iii) the personal risks that ET claimants run in bringing claims against their employer ("*other associated costs*"), and (iv) the risk that claimants may not be

ultimately able to recover sums they are owed by their employer ("*the likelihood of recovering a financial award*"):

> ***'Anna'***
>
> Anna is a young graduate who was working at a small charity in London. She was in 'sham' self-employment, a device which allowed the charity to avoid giving her minimum statutory entitlements. Anna and her colleagues felt they had been mistreated over several years by the charity's director, and she brought her ET claim because she didn't want her or her colleagues to be further mistreated. She also complained that she and others had not been paid the NMW.
>
> Anna ran the case herself for a year before she obtained pro bono representation from FRU. She experienced mental health issues because of her mistreatment, which continue to impact her to this day. Fortunately, her mother was able to assist her to run her case:
>
> "*It took me 6 months of solid 9-5 work to help Anna prepare her ET case. We struggled to find information about employment law online, as we were complete novices. We couldn't find anyone to give us advice. Anna couldn't really work for a year, and I had to take time off work too, which cost me pension contributions close to my retirement. Anna had a really good opportunity to start a new job, but the job offer was retracted because the charity director refused to give her a reference out of spite."*
>
> Anna won her ET claim, with the ET making a preparation time order in her favour when the charity conceded the claim in full at the hearing. Following Anna's success in ET, other workers at the charity sought to challenge its previous practice of mislabelling their employment status. The financial difficulties of the charity were well-known at that time to its employees. However, it transpired that the charity had been dissipating assets for several years prior to the ET claim. To date, Anna has not received any of the £20,000 she was awarded by the ET.

57. 'Anna's' experience shows that there is a complex matrix of factors which motivate a worker to bring an ET claim. In that matrix, the decision to bring a claim may be decisively influenced by even a relatively modest fee. While Anna's own reflection on the proposed introduction of fees was that she would *not* have been dissuaded from bringing a claim by a £55 ET claim issue fee, she reflected that she thought that others at her workplace may well have been dissuaded by a modest fee, particularly given the perceived risk of recrimination from the charity director and the financial difficulties the charity faced.

Question 7: Do you agree that we have correctly identified the range and extent of the equalities impacts for the proposed fee introductions set out in this consultation? Please give reasons and supply evidence of further equalities impacts as appropriate.

58. Save for our comments above about the likely disparate impact of fees regime on migrant workers (see paras 10-14, *above*), FRU does not have anything to add to the equalities impacts identified in the consultation or by other respondents.

FREE REPRESENTATION UNIT

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