Trinity Term
[2017] UKSC 51
On appeal from: [2015] EWCA Civ 935

JUDGMENT

R (on the application of UNISON) (Appellant) *v* Lord Chancellor (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Kerr
Lord Wilson
Lord Reed
Lord Hughes

JUDGMENT GIVEN ON

26 July 2017

Heard on 27 and 28 March 2017

Appellant	*Respondent*
Dinah Rose QC Karon Monaghan QC Iain Steele Matthew Purchase (Instructed by UNISON Legal Services)	David Barr QC Victoria Wakefield (Instructed by The Government Legal Department)
	Intervener (1) Michael Ford QC Mark Whitcombe Spencer Keen (Instructed by Equality and Human Rights Commission)
	Intervener (2) *(Written submissions only)* Aidan O'Neill QC (Instructed by Balfour & Manson)

(1) Equality and Human Rights Commission
(2) Independent Workers Union of Great Britain

LORD REED: (with whom Lord Neuberger, Lord Mance, Lord Kerr, Lord Wilson and Lord Hughes agree)

1. The issue in this appeal is whether fees imposed by the Lord Chancellor in respect of proceedings in employment tribunals ("ETs") and the employment appeal tribunal ("EAT") are unlawful because of their effects on access to justice.

2. ETs have jurisdiction to determine numerous employment-related claims, most of which are based on rights created by or under Acts of Parliament, sometimes giving effect to EU law. They are the only forum in which most such claims may be brought. The EAT hears appeals from ETs on points of law. Until the coming into force of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893 ("the Fees Order"), a claimant could bring and pursue proceedings in an ET and appeal to the EAT without paying any fee. The Fees Order prescribes various fees, as will be explained.

3. In these proceedings for judicial review, the trade union UNISON (the appellant), supported by the Equality and Human Rights Commission and the Independent Workers Union of Great Britain as interveners, challenges the lawfulness of the Fees Order, which was made by the Lord Chancellor in the exercise of statutory powers. It is argued that the making of the Fees Order was not a lawful exercise of those powers, because the prescribed fees interfere unjustifiably with the right of access to justice under both the common law and EU law, frustrate the operation of Parliamentary legislation granting employment rights, and discriminate unlawfully against women and other protected groups.

4. The issues relating to discrimination are addressed in the judgment of Lady Hale, with which I respectfully agree. The present judgment deals with the remaining issues.

The statutory basis of the Fees Order

5. Section 42 (1) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") provides that the Lord Chancellor may by order prescribe fees payable in respect of anything dealt with by the First-tier and Upper Tribunals or by an "added tribunal". Section 42(3) defines an "added tribunal" as a tribunal specified in an order made by the Lord Chancellor. The ET and the EAT were so specified by the Added Tribunals (Employment Tribunals and Employment Appeal Tribunal) Order 2013 (SI 2013/1892).

The background to the Fees Order

6. Relationships between employers and employees are generally characterised by an imbalance of economic power. Recognising the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result, Parliament has long intervened in those relationships so as to confer statutory rights on employees, rather than leaving their rights to be determined by freedom of contract. In more recent times, further measures have also been adopted under legislation giving effect to EU law. In order for the rights conferred on employees to be effective, and to achieve the social benefits which Parliament intended, they must be enforceable in practice.

7. In 1968 the Donovan Report (the Report of the Royal Commission on Trade Unions and Employers' Associations, Cmnd 3623) recommended that labour tribunals should be established to provide "an easily accessible, speedy, informal and inexpensive procedure" for the settlement of employment disputes (para 578). As a result, the jurisdiction of industrial tribunals, originally established by the Industrial Training Act 1964 to hear appeals concerning training levies, was extended to include jurisdiction over a wide range of employment rights. In 1998, they were renamed employment tribunals.

8. ETs are intended to provide a forum for the enforcement of employment rights by employees and workers, including the low paid, those who have recently lost their jobs, and those who are vulnerable to long term unemployment. They are designed to deal with issues which are often of modest financial value, or of no financial value at all, but are nonetheless of social importance. Their procedural rules, which include short limitation periods and generous rights of audience, reflect that intention. It is also reflected in the fact that, unlike claims in the ordinary courts, claims in ETs could until recently be presented without the payment of any fee. The Leggatt Report (the Report of the Review of Tribunals, 2001) identified the absence of fees as one of the three elements which had rendered ETs successful.

9. In January 2011 the Government published a paper entitled *Resolving Workplace Disputes: A Consultation*, in which it announced its intention to introduce fee-charging into ETs and the EAT. Charging fees was considered to be desirable for three reasons. First, and most importantly, fees would help to transfer some of the cost burden from general taxpayers to those that used the system, or caused the system to be used. Secondly, a price mechanism could incentivise earlier settlements. Thirdly, it could dis-incentivise unreasonable behaviour, such as pursuing weak or vexatious claims.

10. Detailed proposals were published in December 2011 in a consultation paper issued by the Ministry of Justice entitled *Charging Fees in the Employment Tribunals and the Employment Appeal Tribunal*. Two alternative options for ETs were discussed, one of which went on to form the basis of the system set out in the Fees Order. The option which was ultimately preferred (Option 1) based the fee on the subject-matter of the claim (since the level of tribunal resources used generally depends on the complexity of the issues raised by the claim) and on the number of claimants (since claims brought by two or more people that arise from the same circumstances are processed together as multiple claims). It was proposed that an "issue fee" should be paid at the time of lodging the claim, and that a further "hearing fee" should be paid in advance of a final hearing.

11. The paper explained that the main purpose of a fee structure was to transfer part of the cost burden from the taxpayer to the users of the service, since a significant majority of the population would never use ETs but all taxpayers were being asked to provide financial support for this service. However, fees must not prevent claims from being brought by making it unaffordable for those with limited means. A fee remission system would therefore be a key component of the fee structure. The other issues taken into account were the importance of having a fee structure which was simple to understand and administer, and the importance of encouraging parties to think more carefully about alternative options before making a claim.

12. The paper noted that the impact of fees on the number of claims was difficult to forecast, in the absence of research concerned specifically with ET users. Research into the impact of fee-charging in the civil courts suggested that tribunal users required to pay a fee would not be especially price sensitive. The charging of fees in two stages, at the commencement of the proceedings and prior to a final hearing, was intended to reflect the cost of the services provided at each stage, and to encourage users to consider settlement during as well as before the tribunal process.

13. An impact assessment was published in May 2012. It concluded that it was not possible to predict how claimants would respond to the introduction of fee-charging. Two alternative assumptions were therefore made for modelling purposes. On the low response scenario, demand was assumed to decrease by 1% for every £100 of fee. On the high response scenario, demand was assumed to decrease by 5% for every £100 of fee. The methodology was then to place an economic value on the costs and benefits of implementing Option 1. One of the non-monetised benefits was identified as being "reduced 'deadweight loss' to society as consumption of ET/EAT services is currently higher than would be the case under full cost recovery". In that regard, the analysis proceeded on the basis that the consumption of ET and EAT services without full cost recovery resulted in a "deadweight loss" to society. As was stated:

> "This assumes that there are no positive externalities from consumption. In other words, ET and EAT use does not lead to gains to society that exceed the sum of the gains to consumers and producers of these services." (p 38)

Under the heading "Justice Impact Test", the document adverted only to the financial impact on HM Courts and Tribunals Service (HMCTS).

14. A response to the consultation and an equality impact assessment were published in July 2012. The response announced that the Government had decided to implement Option 1 with some amendments. Access to justice would be maintained by ensuring via the remissions scheme that those who could not afford to pay fees were not financially prevented from making a claim. Suggestions that the deterrence of individual claims would have wider societal impacts were rejected.

15. On 25 April 2013 a draft of the Fees Order was laid before Parliament. It was debated and approved by both Houses under the affirmative resolution procedure. It was made on 28 July 2013 and came into force on the following day.

The Fees

16. The Fees Order makes provision for fees to be payable in respect of any claim presented to an ET and any appeal to the EAT. So far as the ET is concerned, article 4 provides that an "issue fee" is payable when a claim form is presented, and a "hearing fee" is payable on a date specified in a notice accompanying the notification of the listing of a final hearing of the claim. Fees are also chargeable on the making of various kinds of application.

17. The amounts of the issue fee and hearing fee vary depending on whether the claim is brought by a single claimant or by a group, and also depending on whether the claim is classified as "type A" or "type B". There are over 60 types of claim which are defined as type A. All other types of claim are type B. Type A claims were described in the consultation documents as claims which generally take little or no pre-hearing work and usually require approximately one hour to resolve at hearing. Unfair dismissal claims, equal pay claims and discrimination claims are classified as type B. Type B claims generally require more judicial case management, more pre-hearings, and longer final hearings, because of their greater legal and factual complexity.

18. The fees for a single claimant bringing a type A claim total £390, payable in two stages: an issue fee of £160 and a hearing fee of £230. For a type B claim the

fees for a single claimant total £1,200, comprising an issue fee of £250 and a hearing fee of £950. The fees payable by groups vary according to the type of claim and the number of claimants in the group. For the smallest groups, of between two and ten claimants, the fees total £780 for type A claims and £2,400 for type B claims. For the largest groups, of over 200 claimants, the fees total £2,340 for type A claims and £7,200 for type B claims. Counsel for the Lord Chancellor were unable to explain how any of the fees had been arrived at.

19. In the EAT, fees of £1,600 are payable, again in two stages: £400 on the date specified in a notice issued by the Lord Chancellor following the EAT's receipt of a notice of appeal, and £1,200 on the date specified in a notice issued by the Lord Chancellor following a direction by the EAT that a matter proceed to a final oral hearing. There is no distinction between different types of appeal or between single and group appellants.

Comparison with court fees

20. Many claims which can be brought in ETs are for modest financial amounts. The fee structure is however very different from that applied to small claims in the County Court. ET fees for single claimants are set at one of two fixed rates: £390 for type A claims, and £1,200 for type B claims. The difference reflects the tribunal time which the claims are expected to require, and therefore has the effect of penalising claimants according to the complexity of their claims. Although most claims of a kind attracting low monetary awards tend to be classified as type A, the fees prescribed by the Fees Order bear no direct relation to the amount sought, and can therefore be expected to act as a deterrent to claims for small amounts and non-monetary claims. In the County Court, on the other hand, fees for small claims are graduated according to the value of the claim. For claims issued online, they begin at £50 for claims up to £300, and rise in stages to £745 for claims between £5,000 and £10,000. The fee structure has thus been designed in a way which is likely to have a less deterrent effect on the bringing of small claims. There is also no penalty for bringing a complex claim rather than a simple one. It is only once a claim exceeds £3,000 that the fees payable in the County Court exceed the ET fees for a type A claim. Even the highest fees in the County Court for small claims are well below the ET fees for type B claims.

Remission

21. Article 17 of the Fees Order makes provision for the remission of fees in accordance with Schedule 3. As substituted by the Courts and Tribunals Fee Remissions Order 2013 (SI 2013/2302), with effect from 7 October 2013, Schedule 3 provides that claimants and appellants are not entitled to remission unless they

satisfy “the disposable capital test”: that is to say, their disposable capital must be less than a specified amount, which varies according to the amount of the fee. “Disposable capital” is the value of every resource of a capital nature belonging to the party on the date on which the application for remission is made, subject to certain exclusions. For these purposes, the disposable capital of a claimant’s partner is treated as the claimant’s disposable capital, unless the partner has a contrary interest in the matter to which the fee relates. In respect of any fee up to and including £1,000 (which includes all the fees payable by single claimants, except for the £1,200 hearing fee in the EAT), no remission is available if the claimant is treated as having £3,000 or more in disposable capital. There is no explanation of how that figure, or any of the other figures relating to remission, were arrived at. Where the fee is between £1,001 and £1,335 (including the EAT hearing fee of £1,200), no remission is available if the claimant is treated as having disposable capital of £4,000 or more. Thus, if a claimant and his or her partner have savings of £3,000, the claimant will have to pay the full £390 for a type A claim in the ET and the full £1,200 for a type B claim, regardless of their income. It has to be borne in mind that some potential claimants may have temporarily inflated capital balances, due for example to payments received on the termination of their employment or to savings made in anticipation of childbirth. So, for example, if a woman has been selected for redundancy on a discriminatory basis, she will be disqualified from receiving any remission in proceedings to challenge the discrimination if the redundancy payment amounts to £3,000 or more.

22. If the disposable capital test is satisfied, then the amount of any remission is calculated by applying “the gross monthly income test”. To qualify for full remission, the gross monthly income (which includes any partner’s income as well as the claimant’s own, unless they have contrary interests in relation to the matter in dispute) must be below a specified amount, which varies depending on whether the claimant is single and whether he or she has children. The specified amount for a single person without children is £1,085 per month. That figure rises by £245 per month for each child. The specified amount for a couple without children is £1,245 per month. That figure also rises by £245 per month for each child. For example, for a couple with two children, the specified amount is £1,735 per month.

23. Partial remission is available on the basis that, for every £10 of gross monthly income above the specified amount, the claimant must pay £5 towards the fee. For example, a claimant with a partner and no children has to pay a full issue fee for a type A claim once her and her partner’s gross monthly income exceeds £1,565, and a full hearing fee once it exceeds £1,705. A couple with two children have to pay the full issue fee for a type A claim once their gross monthly income exceeds £2,055, and the full hearing fee once their gross monthly income exceeds £2,195. So far as type B claims are concerned, a claimant with a partner and no children has to pay the full issue fee once her and her partner’s gross monthly income exceeds £1,745, and the full hearing fee once their gross monthly income exceeds £3,145.

24. To put the figures discussed in the preceding paragraphs into perspective, the national minimum wage of £7.50 per hour produces an income of £1,300 per month, assuming a 40 hour week. That is before taking account of any benefits and tax credits (which, subject to specified exceptions, are included in the calculation of income under the remissions scheme). A couple each earning the national minimum wage would therefore have an income of £2,600 per month, before benefits and tax credits were taken into account. Such a couple would not normally qualify for any remission of fees for a type A claim, but might qualify for partial remission of the hearing fee for a type B claim.

Exceptional circumstances

25. Paragraph 16 of Schedule 3 to the Fees Order provides that a fee may be remitted "where the Lord Chancellor is satisfied that there are exceptional circumstances which justify doing so." Non-statutory guidance as to what are regarded as exceptional circumstances is published by HMCTS. The guidance has been amended on a number of occasions, but all versions indicate that remission under this head is confined to persons facing exceptional hardship. Unpublished guidance to HMCTS staff states:

> "In considering whether an applicant 'cannot realistically afford to pay', it is not enough that it may be difficult for a claimant to pay the fee. It is reasonable that a person might need to forego (sic) other spending in order to pay the fee. Instead, in order to be entitled to remission, a person must be in a position where, realistically, they simply cannot afford the fee."

The effect of non-payment of fees

26. Under the rules of procedure of the ET, a claim must be rejected unless it is accompanied by an issue fee or a remission application, and must be dismissed if a hearing fee (or other relevant fee) has not been paid and no remission application has been presented. Similar rules apply in the EAT: an appeal must be struck out if the appellant has not paid a fee or presented a remission application.

The recovery of fees by successful parties

27. The traditional view that ETs should be an inexpensive forum is reflected in the fact that the usual rule on costs which applies elsewhere in the civil justice system - that costs follow success - has never applied in ETs. In general, a party to ET proceedings is only required to pay costs where he has acted vexatiously,

abusively, disruptively or otherwise unreasonably in either bringing or conducting the proceedings. The rules of procedure of the ET and the EAT were however amended, when the Fees Order came into force, so as to give them a discretionary power to make an order that one party should pay the other the amount of any fees paid under the Order. A series of decisions in the EAT have held that such an order should normally be made in favour of a successful party, although it will not be appropriate in every case (for example, where their success was only partial, or where the respondent is unable to pay the sums in question).

28. Although it is therefore possible to recover fees in the event that a claim is successful, it is necessary to bear in mind that it is generally difficult to predict with confidence that a claim will succeed. That is so for a number of reasons. One is that estimating prospects of success is not an exact science, especially before proceedings have been initiated. Depending on the nature of the case, initial estimates can often change during the course of proceedings as new information comes to light. In that regard, it is relevant to note that the pre-claim questionnaire procedure, under which an employer could be required to provide an explanation for a difference in treatment in advance of a claim being issued, was abolished in 2013. Secondly, a reliable estimate depends on legal judgment and experience, which may not be available to an employee contemplating bringing a claim in an ET: employment disputes generally fall outside the scope of legal aid. Thirdly, employment law is characterised by a relatively high level of complexity and technicality. It is also important to bear in mind that, even if an order is made for the reimbursement of fees, there is a significant possibility that the order will not be obeyed. This will be discussed shortly.

29. More fundamentally, the right of access to justice, both under domestic law and under EU law, is not restricted to the ability to bring claims which are successful. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication.

The claims brought before ETs

30. The majority of successful ET claims result in modest financial awards. For example, it appears from statistics published by the Ministry of Justice that in 2012/13 (pre-fees), 34% of successful race discrimination claims resulted in awards of less than £3,000. 52% resulted in awards of less than £5,000. The corresponding figures for religious discrimination claims, and claims of unfair dismissal, were similar.

31. Some types of claim generally result in much lower awards. Statistics published by the Department for Business, Innovation and Skills in June 2014

indicated, for example, that the median award in successful claims for unlawful deductions from wages in 2013 was £900, and that 25% of successful claimants were awarded less than £500 (Findings from the Survey of Employment Tribunal Applications, Research Series No 177). Some claims are for even smaller amounts: for example, claims for time off for ante-natal care under sections 55-57 of the Employment Rights Act 1996 (implementing Directive 92/85/EEC), where the award is the amount of remuneration to which the employee would have been entitled had she been granted the time off; claims for a statement of reasons for dismissal, under sections 92 and 93 of the 1996 Act, where the award is of two weeks' pay; and claims for unauthorised deductions of trade union subscriptions under sections 68 and 68A of the Trade Union and Labour Relations (Consolidation) Act 1992, where the award is the amount deducted. Leaving aside claims for unfair dismissal, breach of contract, unlawful deductions from wages, redundancy pay and discrimination, the median award in all other types of claim in 2013 was £1,000.

32. Some important types of claim before ETs do not involve monetary awards. An example is a claim for a written statement of particulars of employment. The particulars set out important information about such matters as working time, pay and holidays, which is vital to the enforcement of other employment rights. Employers are required to provide employees with such particulars by section 1 of the Employment Rights Act 1996. Where an employer fails to provide a statement, or there is a question as to whether all the necessary particulars have been included, the employee is entitled to refer the matter to an ET under section 11. These provisions give effect to Directive 91/533/EEC. Article 2 of the Directive imposes an obligation to provide the particulars, and article 8 provides:

> "1. Member states shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities."

As the words "consider themselves wronged" make clear, the obligation imposed by article 8 is not confined to employees whose claims turn out to be well-founded. A reference of this kind is classified as a type A claim.

33. Some other claims in which no compensation is payable are classified as type B, with the consequence that fees of £1,200 are payable in order to proceed to a hearing. An example is the right of fixed-term workers to obtain a declaration that they are permanent employees, under regulation 9(5) of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034),

implementing clause 5 of the Framework Agreement on Fixed-Term Work annexed to Directive 99/70/EC.

34. Other claims may also result in no award of compensation, even if successful. An example is a claim by an employee that he has not been permitted to take rest breaks as required by the Working Time Regulations 1998 (SI 1998/1833). The employee is entitled to bring such a claim before an ET under regulation 30 of those regulations, implementing the Working Time Directive 2003/88/EC. Compensation may be awarded, but the ET is required to take into account whether the employee has sustained any loss. Such a claim is classified as type B.

The enforcement of ET awards

35. ET awards are enforceable in England and Wales by execution issued from a county court or otherwise as if they were payable under a county court order. An applicant has to pay a further fee of £44. A similar regime applies in the sheriff courts in Scotland.

36. Many ET awards go unmet, even if enforcement proceedings are taken. A study carried out by the Department of Business, Innovation and Skills, shortly before the introduction of fees, found that only 53% of claimants who were successful before the ET were paid even part of the award prior to taking enforcement action ("Payment of Tribunal Awards", 2013). Even after enforcement action, only 49% of claimants were paid in full, with a further 16% being paid in part, and 35% receiving no money at all. This was noted to be of particular concern in the light of the forthcoming introduction of fees.

37. Although new provisions were brought into force in 2016 in order to enable the Department for Business, Energy and Industrial Strategy to enforce unpaid awards, under sections 37A to 37Q of the Employment Tribunals Act 1996 (as amended by section 150 of the Small Business, Enterprise and Employment Act 2015), they do not appear to have made a significant difference. Between 6 April 2016 and 20 January 2017 the new procedures resulted in the recovery of 31 unpaid awards, which is likely to have been a very small fraction of the total number.

The effect of the Fees Order

(i) Impact on the number of claims

38. Information about the effect of the Fees Order on the number of claims can be derived from two sources. The first, relied on by the appellant, comprises the tribunal statistics published by the Ministry of Justice under the title *Tribunals and Gender Recognition Certificate Statistics Quarterly.* The court was referred to the statistics published in December 2016, which were not available to the courts below. The second source, relied on by the Lord Chancellor, is a consultation paper published by the Ministry of Justice in January 2017, entitled *Review of the introduction of fees in the Employment Tribunals: Consultation on proposals for reform* (Cm 9373) ("the Review Report"). It too was not available to the courts below. Both sources present a similar picture, although the figures are slightly different (those in the Review Report are not taken from the Ministry's published tribunal statistics, but are based on "HMCTS management information" for different periods).

39. Although there are differences between the figures given in the different sources, the general picture is plain. Since the Fees Order came into force on 29 July 2013 there has been a dramatic and persistent fall in the number of claims brought in ETs. Comparing the figures preceding the introduction of fees with more recent periods, there has been a long-term reduction in claims accepted by ETs of the order of 66-70%. The Review Report considered possible explanations, besides the introduction of the fees, and suggested that improvements in the economy would have been expected to result in a fall in single claims of about 8%. It concluded:

> "The actual fall since fees were introduced has been much greater and we have therefore concluded that it is clear that there has been a sharp, substantial and sustained fall in the volume of case receipts as a result of the introduction of fees." (para 105)

The Report concluded that "the overall scale of the fall ... is troubling" (para 336).

(ii) Impact on the value of claims

40. The Review Report referred to evidence submitted by the Council of Employment Judges, and by the Presidents of the ETs, that there had been a greater fall in lower value claims, such as claims for unpaid wages and unpaid annual leave, and in claims in which a financial remedy was not sought, such as claims to

entitlement to breaks. They argued that this suggested that, at least for some types of case, the fees were disproportionate to what was at stake in the proceedings, and people were deciding that they were not economically worthwhile. The Review also reported a greater fall in type A claims, which tend to be of lower value, than in type B claims.

41. These findings are consistent with research published by the Department for Business, Innovation and Skills prior to the introduction of fees ("Findings from the Survey of Employment Tribunal Applications 2008", 2010), which found in surveys that those whose decision whether to bring an ET claim was most likely to be influenced by the payment of a £250 fee included the low paid (whose claims tend to be less valuable in so far as awards are related to earnings), and those with claims for unlawful deductions from wages (which, as explained earlier, tend to be for modest amounts).

42. According to the published tribunal statistics, the proportion of successful claims receiving low awards has markedly decreased. For example, the proportion of successful race discrimination claims resulting in awards of less than £3,000 is recorded as having fallen from 34% in 2012/13 to 8% in 2015/16. For awards of less than £5,000, the fall was from 52% to 19%. There were corresponding falls (some larger in amount, some smaller) for all other categories of discrimination claim, and also for unfair dismissal claims. This change is also reflected in a marked rise in median awards in all categories of discrimination claim, and also in unfair dismissal claims. For example, the median award in race discrimination claims is reported to have risen over the same period from £4,831 to £13,760.

(iii) The impact of remission

43. The impact assessment published in May 2012 estimated that at least 24% of the pre-fees population of claimants would receive full remission, and that a further 53% would receive partial remission on fees up to £950. In the event, the Review Report found that the proportion of the post-fees population of claimants receiving full or partial remission was initially very low, but had increased by 2016 to about 29%. The proportion of claimants receiving remission is therefore far lower than had been anticipated. The actual number is even lower, compared with what had been anticipated, given the difference between the number of claimants before and after the introduction of fees.

44. So far as concerns the Lord Chancellor's discretionary power to remit fees in exceptional circumstances, in practice this power to remit has rarely been exercised. It was exercised 31 times during the period between 1 July 2015 and 30 June 2016:

a period during which 86,130 individual claims were presented. It was exercised 20 times during the period between 14 July and 22 December 2016.

(iv) Survey evidence

45. In 2015 Acas published research carried out on its behalf, based on a survey of a representative survey of claimants ("Evaluation of Acas Early Conciliation 2015"). It included figures relating to claimants who were unable to resolve employment disputes through conciliation but who did not go on to issue ET proceedings. The most frequently mentioned reason for not submitting an ET claim was that the fees were off-putting. More than two thirds of the claimants who gave that reason said that they could not afford the fees. Others said that the fee was more than they were prepared to pay, or that the value of the fee equalled the money they were owed.

46. On the basis of that research, and additional management information, the Review Report concluded that, of the 83,000 claimants who had notified Acas of their claims during 2014/15, "we estimate that the potential size of the group of people who said that the affordability of fees was the reason why they did not pursue a claim to the ETs would be around 8,000" (para 164). This estimate leaves out of consideration the claimants, identified in the Acas research, who gave as their reason for not bringing proceedings in the ET that the value of the fee equalled the money they were owed. It also leaves out of consideration the possibility that claimants who settled may have done so at a level which undervalued their claim, because they did not feel that they could afford the alternative of bringing proceedings in the ET.

47. Nevertheless, in the Review Report the Ministry of Justice state that "while there is clear evidence that ET fees have discouraged people from bringing claims, there is no conclusive evidence that they have been prevented from doing so" (p 6). In relation to the survey of claimants, the Review states that "it is not clear what respondents may have meant when they suggested that there were unable to afford to pay" (sic), and refuses to accept that such persons "cannot realistically afford to pay". It is suggested that they may have meant that affording the fees "meant reducing some other areas of non-essential spending in order to save the money", or that "they may be unaware of, or believe that they would not qualify for, a fee remission", or that "they may have been unaware of the Lord Chancellor's power to remit fees in exceptional circumstances". That is also the position adopted by the Lord Chancellor in these proceedings.

48. In relation to the first of these suggestions, a distinction was drawn in the responses to the survey between those who said that they could not afford to pay the fees and those who said that they were unwilling to do so, for one reason or another.

In relation to the second and third suggestions, as explained earlier, the remission scheme is of very limited scope except in relation to type B hearing fees, and the Lord Chancellor's power to remit in exceptional circumstances is exercised only in cases of exceptional hardship.

49. More fundamentally, the implicit premise of all three suggestions is that anyone who does not qualify for full remission will, in all but exceptional cases (which can be addressed by the discretion to remit in exceptional circumstances), have non-essential income or capital which can be used to pay the fees. It is on that basis that the Lord Chancellor argues that legal requirements as to access to justice are satisfied. It will be necessary to return to these issues.

(v) Hypothetical claimants

50. In addition to the tribunal statistics, the Review Report and the Acas research, the appellant has also produced details of the effect of the fees on a number of hypothetical claimants in low to middle income households. Two examples may be given.

51. The first hypothetical claimant is a single mother with one child, working full-time as a secretary in a university. She has a gross income from all sources of £27,264 per annum. Her liability to any issue or hearing fee is capped under the remission scheme at £470 per fee. She therefore has to pay the full fees (£390) in order to pursue a type A claim to a hearing, and fees totalling £720 in order to pursue a type B claim. The net monthly income which she requires in order to achieve acceptable living standards for herself and her child, as assessed by the Joseph Rowntree Foundation in its report, *Minimum Income Standards for the UK in 2013*, is £2,273: an amount which exceeds her actual net monthly income of £2,041. On that footing, in order to pursue a claim she has to suffer a substantial shortfall from what she needs in order to provide an acceptable living standard for herself and her child.

52. The Lord Chancellor disputes the use made of the Joseph Rowntree Foundation's minimum income standards. On the Lord Chancellor's approach, no provision should be made for any expenditure on clothing (for which £10 per week had been allowed), personal goods and services (£12 per week), social and cultural participation (£48 per week), or alcohol (£5 per week), on the basis that all spending of these kinds can be stopped for a period of time in order to save the amount required to bring a claim. On that basis, the amount of the claimant's net monthly income, after minimum living standards are met, is £202 per month. In order to meet the fees, she therefore has to sacrifice all other spending, beyond the matters accepted by the Lord Chancellor to be necessities, for a period of two months, in

order to bring a type A claim, and for three and a half months, in order to bring a type B claim.

53. The second hypothetical claimant has a partner and two children. She and her partner both work full-time and are paid the national minimum wage. They have a gross income, when benefits and tax credits are also taken into account, of £33,380 per annum. The claimant's liability to fees is capped under the remission scheme at £520. She therefore has to pay the full fees of £390 in order to pursue a type A claim, and fees totalling £770 in order to bring a type B claim. The net monthly income the family require in order to achieve an acceptable living standard, as assessed by the Joseph Rowntree Foundation, is £3,097: an amount which exceeds their actual net monthly income of £2,866. They therefore have to make further inroads into living standards which are already below an acceptable level if a claim is to be brought.

54. On the Lord Chancellor's approach, the family have a net monthly income available, after excluding all expenditure on clothing, personal goods and services and so forth, of £593 per month. On that basis, a claim can be brought if spending is restricted to items accepted by the Lord Chancellor to be necessities for a period of about a month.

55. One problem with the Lord Chancellor's approach to these calculations is that some of the expenditure which he excludes, such as spending on clothing, may not in fact be saved, but is simply postponed. For example, if the children need new clothes because they have outgrown their old ones, replacements have to be purchased sooner or later. The impact of the fees on the family's ability to enjoy acceptable living standards is not avoided merely by postponing necessary expenditure. A second problem is that claimants may not have prolonged periods of time available to them during which to save the amount required to pay the fees. Claimants are expected to bring their claims promptly, in keeping with the intention that the process should be speedy. The usual time limit for bringing a claim in the ET is three months, starting from the date of the event giving rise to the claim. The issue fee must be paid then, although more time is available before the hearing fee will be due. More fundamentally, the question arises whether the sacrifice of ordinary and reasonable expenditure can properly be the price of access to one's rights.

(vi) Transferring the cost burden to users of the tribunals

56. As explained earlier, the principal aim of the introduction of fees was to transfer part of the cost burden of the tribunals from taxpayers to users of their services. The Review Report states:

> "Our original impact assessment estimated that the introduction of fees would achieve a cost recovery rate of around a third, taking into account fee remissions. The actual recovery rate has been much lower: 17% in 2014/15 and 19% in 2015/16." (para 140)

(The recovery rates of 17% and 19% have been calculated without taking into account fee remissions. Once they are taken into account, the recovery rate in each of those years, on the figures given in the Review Report, was 13%.) Fees are thus making a much less significant contribution to costs recovery than had been expected. The Review Report attributes the difference to the fact that "the actual fall [in the number of claims] since fees were introduced has been much greater [than predicted]" (para 105). However, notwithstanding the evidence that the price elasticity of demand for ET and EAT "services" is much greater than had been estimated when the fees were fixed, the Review Report does not consider the possibility that reducing the fees might result in an increase in the number of claims, and consequently in an increase in fee income.

(vii) The deterrence of unmeritorious claims

57. A secondary objective of the introduction of fees was to deter the bringing of unmeritorious claims. The Review Report analysed the outcomes of single claims which had been presented after fees were introduced, and compared them with the outcome of cases during the three quarters preceding the introduction of fees. 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.

(viii) Encouraging earlier settlements

58. A further aim of the introduction of fees (described in more recent documents as a hope) was to encourage the earlier settlement of disputes. The Review Report contains information about the number of people who contacted Acas and did not proceed to make an ET claim. That number, expressed as a proportion of the total number of employment disputes notified either to Acas or to ETs, has increased greatly since fees were introduced: from 22% in 2012/13 to 78% in 2014/15 and 80% in 2015/16. In the light of those figures, the Review Report claims that conciliation has helped more people to avoid the need to go to ETs. However, those figures include cases where no settlement was reached, but where for other reasons (including the person's view of the affordability of fees) the claim was not pursued.

59. According to the tribunal statistics, in 2011/12 33% of claims were settled through Acas. The following year, the proportion was again 33%. In 2014/15, following the introduction of fees, 8% of claims settled through Acas. In 2015/16, the figure rose again to 31%. Even ignoring the exceptional figure for 2014/15, it appears that the proportion of cases settled through Acas has slightly decreased since fees were introduced. That is consistent with the view of commentators, noted in the Review Report, that some employers were delaying negotiations to see whether the claimant would be prepared to pay the fee.

The history of the proceedings

60. On 28 June 2013 the appellant issued a claim for judicial review ("the First JR") in which it sought to have the Fees Order quashed on the grounds that it breached the EU principles of effectiveness and equivalence, was brought into force in breach of the Public Sector Equality Duty imposed by the Equality Act 2010, and was indirectly discriminatory. The Divisional Court (Moses LJ and Irwin J) dismissed the claim, holding that the proceedings were premature and that the evidence was insufficiently robust to sustain the grounds of challenge: [2014] EWHC 218 (Admin); [2014] ICR 498.

61. The appellant was initially granted permission to appeal only on the effectiveness ground and to adduce fresh evidence showing the fall in the number of ET claims instituted. The appellant renewed its application for permission on the remaining grounds of challenge, and the respondent applied to set aside the order in so far as it granted permission to adduce fresh evidence. These applications were adjourned by consent to permit fresh judicial review proceedings to be commenced, taking into account the new evidence.

62. On 23 September 2014 the appellant issued a second claim for judicial review ("the Second JR") in which it sought to have the Fees Order quashed on two grounds, namely the effectiveness ground and the discrimination ground. The Divisional Court (Elias LJ and Foskett J) dismissed the claim: [2014] EWHC 4198 (Admin); [2015] ICR 390, citing with approval the conclusion in the First JR that the principle of effectiveness was not violated unless the fees were so high that the prospective litigant was clearly unable to pay them. It granted permission to appeal on both grounds of challenge. The Court of Appeal subsequently gave permission to appeal on the remaining grounds in the First JR, and the two appeals were joined. In the event, the equivalence ground in the First JR was not pursued.

63. The Court of Appeal (Moore-Bick, Davis and Underhill LJJ) dismissed the appeals: [2015] EWCA Civ 935; [2016] ICR 1. Underhill LJ, with whose judgment Moore-Bick and Davis LJJ agreed, considered that the imposition of a fee would not

constitute an interference with the right of effective access to a tribunal under EU law unless it made it impossible in practice to access the tribunal. That depended on whether the fee was unaffordable (para 41), and not on whether the payment of the fee would be a sensible use of money (para 45). In applying the affordability test to the evidence, Underhill LJ saw no safe basis for "an inference that the decline [in the number of claims] *cannot* consist *entirely* of cases where potential claimants could realistically have afforded to bring proceedings but have made a choice not to" (para 68: emphasis in the original). Only evidence of the actual affordability of the fees in the financial circumstances of typical individuals could enable the court to reach a reliable conclusion that the fees were realistically unaffordable in some cases (ibid). Underhill LJ also rejected the arguments based on the Public Sector Equality Duty and the discrimination ground.

64. The issue concerning the effect of the Fees Order on access to justice was argued before the courts below on the basis of EU law, although some domestic authorities and judgments of the European Court of Human Rights were also cited. Before this court, it has been recognised that the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law. The case has therefore been argued primarily on the basis of the common law right of access to justice, although arguments have also been presented on the basis of EU law and the European Convention on Human Rights. The appellant has also argued the discrimination ground, and has been permitted to advance a new ground of challenge, namely that the Fees Order is ultra vires because it frustrates the operation of a variety of statutory provisions. The argument advanced below on the basis of the Public Sector Equality Duty has not been pursued.

Is the Fees Order unlawful under English law?

65. In determining the extent of the power conferred on the Lord Chancellor by section 42(1) of the 2007 Act, the court must consider not only the text of that provision, but also the constitutional principles which underlie the text, and the principles of statutory interpretation which give effect to those principles. In that regard, there are two principles which are of particular importance in this case. One is the constitutional right of access to justice: that is to say, access to the courts (and tribunals: *R v Secretary of State for the Home Department, Ex p Saleem* [2001] 1 WLR 443). The other is the rule that "specific statutory rights are not to be cut down by subordinate legislation passed under the vires of a different Act" (*R v Secretary of State for Social Security, Ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, 290 per Simon Brown LJ). In the context of the present case, there is a considerable degree of overlap between these two principles. For the sake of clarity, however, each of these principles will be considered in turn.

The constitutional right of access to the courts

66. The constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the "users" who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings. The extent to which that viewpoint has gained currency in recent times is apparent from the consultation papers and reports discussed earlier. It is epitomised in the assumption that the consumption of ET and EAT services without full cost recovery results in a loss to society, since "ET and EAT use does not lead to gains to society that exceed the sum of the gains to consumers and producers of these services".

67. It may be helpful to begin by explaining briefly the importance of the rule of law, and the role of access to the courts in maintaining the rule of law. It may also be helpful to explain why the idea that bringing a claim before a court or a tribunal is a purely private activity, and the related idea that such claims provide no broader social benefit, are demonstrably untenable.

68. At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.

69. Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance. When, for example, Mrs Donoghue won her appeal to the House of Lords (*Donoghue v Stevenson* [1932] AC 562), the decision established that producers of consumer goods are under a duty to take care for the health and safety of the consumers of those goods: one of the most important developments in the law of this country in the 20th century. To say that it was of no value to anyone other than Mrs Donoghue and the lawyers and judges involved in the case would be

absurd. The same is true of cases before ETs. For example, the case of *Dumfries and Galloway Council v North* [2013] UKSC 45; [2013] ICR 993, concerned with the comparability for equal pay purposes of classroom assistants and nursery nurses with male manual workers such as road workers and refuse collectors, had implications well beyond the particular claimants and the respondent local authority. The case also illustrates the fact that it is not always desirable that claims should be settled: it resolved a point of genuine uncertainty as to the interpretation of the legislation governing equal pay, which was of general importance, and on which an authoritative ruling was required.

70. Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless. The written case lodged on behalf of the Lord Chancellor in this appeal itself cites over 60 cases, each of which bears the name of the individual involved, and each of which is relied on as establishing a legal proposition. The Lord Chancellor's own use of these materials refutes the idea that taxpayers derive no benefit from the cases brought by other people.

71. But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.

72. When Parliament passes laws creating employment rights, for example, it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect. It does not envisage that every case of a breach of those rights will result in a claim before an ET. But the possibility of claims being brought by employees whose rights are infringed must exist, if employment relationships are to be based on respect for those rights. Equally, although it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail. It is thus the claims which are brought before an ET which enable legislation to have the deterrent and other effects which Parliament intended, provide

authoritative guidance as to its meaning and application, and underpin alternative methods of dispute resolution.

73. A Lord Chancellor of a previous generation put the point in a nutshell, in a letter to the Treasury:

> "(i) Justice in this country is something in which all the Queen's subjects have an interest, whether it be criminal or civil.
>
> (ii) The courts are for the benefit of all, whether the individual resorts to them or not.
>
> (iii) In the case of the civil courts the citizen benefits from the interpretation of the law by the Judges and from the resolution of disputes, whether between the state and the individual or between individuals."

(Genn, *Judging Civil Justice* (2010), p 46, quoting a letter written by Lord Gardiner in 1965)

74. In English law, the right of access to the courts has long been recognised. The central idea is expressed in chapter 40 of the Magna Carta of 1215 ("Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam"), which remains on the statute book in the closing words of chapter 29 of the version issued by Edward I in 1297:

> "We will sell to no man, we will not deny or defer to any man either Justice or Right."

Those words are not a prohibition on the charging of court fees, but they are a guarantee of access to courts which administer justice promptly and fairly.

75. The significance of that guarantee was emphasised by Sir Edward Coke in Part 2 of his *Institutes of the Laws of England* (written in the 1620s, but published posthumously in 1642). Citing chapter 29 of the 1297 charter, he commented:

> "And therefore, every Subject of this Realme, for injury done to him *in bonis, terris, vel persona* [in goods, in lands, or in

> person], by any other Subject ... may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay. Hereby it appeareth, that Justice must have three qualities, it must be *Libera, quia nihil iniquius venali Justitia; Plena, quia Justitia non debet claudicare; & Celeris, quia dilatio est quaedam negatio* [Free, because nothing is more iniquitous than saleable justice; full, because justice ought not to limp; and speedy, because delay is in effect a denial]; and then it is both Justice and Right." (1809 ed, pp 55-56)

More than a century later, Blackstone cited Coke in his *Commentaries on the Laws of England* (1765-1769), and stated:

> "A … right of every [man] is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein." (Book I, Chapter 1, "Absolute Rights of Individuals")

76. In more modern times, many examples can be found of judicial recognition of the constitutional right of unimpeded access to the courts (as Lord Diplock described it in *Attorney General v Times Newspapers Ltd* [1974] AC 273, 310, and again in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909, 977), which can only be curtailed by clear statutory enactment. Thus, in *In re Boaler* [1915] 1 KB 21, where the question was whether a statutory prohibition on vexatious litigants instituting legal proceedings extended to criminal proceedings, the Court of Appeal held that it did not. Scrutton J said at p 36 that although a statute might deprive a subject of the right to appeal to the courts, "the language of any such statute should be jealously watched by the courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension." Similarly, in *Chester v Bateson* [1920] 1 KB 829, where delegated legislation prohibited the bringing of certain legal proceedings without a minister's consent, the Divisional Court held that the regulation was invalid. Avory J stated that "nothing less than express words in the statute taking away the right of the King's subjects of access to the courts of justice would authorize or justify it" (p 836). To similar effect was the decision of the House of Lords in *R & W Paul Ltd v The Wheat Commission* [1937] AC 139, where an arbitration scheme established by delegated legislation disapplied the Arbitration Act 1889, under which arbitrators could state a special case for the opinion of the court on a point of law. That element of the scheme had not been expressly authorised by the enabling legislation, and was held to be ultra vires. As Viscount

Simonds observed in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286:

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."

77. Another important general statement was made by Lord Diplock in *Attorney General v Times Newspapers Ltd* at p 309:

> "The due administration of justice requires *first* that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; *secondly,* that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and *thirdly* that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law."

78. Most of the cases so far mentioned were concerned with barriers to the bringing of proceedings. But impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible. More recent authorities make it clear that any hindrance or impediment by the executive requires clear authorisation by Parliament. Examples include *Raymond v Honey* [1983] 1 AC 1, where prison rules requiring a prison governor to delay forwarding a prisoner's application to the courts, until the matter complained of had been the subject of an internal investigation, were held to be ultra vires; and *R v Secretary of State for the Home Department, Ex p Anderson* [1984] QB 778, where rules which prevented a prisoner from obtaining legal advice in connection with proceedings that he wished to undertake, until he had raised his complaint internally, were also held to be ultra vires.

79. The court's approach in these cases was to ask itself whether the impediment or hindrance in question had been clearly authorised by primary legislation. In *Raymond v Honey,* for example, Lord Wilberforce stated at p 13 that the statutory power relied on (a power to make rules for the management of prisons) was "quite

insufficient to authorise hindrance or interference with so basic a right" as the right to have unimpeded access to a court. Lord Bridge of Harwich added at p 14 that "a citizen's right to unimpeded access to the courts can only be taken away by express enactment".

80. Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question. This principle was developed in a series of cases concerned with prisoners. The first was *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198, which concerned a prison rule under which letters between a prisoner and a solicitor could be read, and stopped if they were of inordinate length or otherwise objectionable. The rule did not apply where the letter related to proceedings already commenced, but the Court of Appeal accepted that it nevertheless created an impediment to the exercise of the right of access to justice in so far as it applied to prisoners who were seeking legal advice in connection with possible future proceedings. The question was whether the rule was authorised by a statutory power to make rules for the regulation of prisons. That depended on whether an objective need for such a rule, in the interests of the regulation of prisons, could be demonstrated. As Steyn LJ, giving the judgment of the court, stated at p 212:

> "The question is whether there is a self-evident and pressing need for an unrestricted power to read letters between a prisoner and a solicitor and a power to stop such letters on the ground of prolixity and objectionability."

The evidence established merely a need to check that the correspondence was bona fide legal correspondence. Steyn LJ concluded:

> "By way of summary, we accept that [the statutory provision] by necessary implication authorises some screening of correspondence passing between a prisoner and a solicitor. The authorised intrusion must, however, be the minimum necessary to ensure that the correspondence is in truth bona fide legal correspondence." (p 217)

81. The decision in *Leech* was endorsed and approved by the House of Lords in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, which arose from a prohibition on visits to serving prisoners by journalists seeking to investigate whether the prisoners had, as they claimed, been wrongly convicted, except on terms which precluded the journalists from making professional use of the material obtained during such visits. The House considered whether the Home

Secretary's evidence showed a pressing need for a measure which restricted prisoners' attempts to gain access to justice, and found none.

82. A similar approach was adopted in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532, which concerned a policy that prisoners must be absent from their cells when legal correspondence kept there was examined. Lord Bingham of Cornhill, with whose speech the other members of the House agreed, summarised the effect of the earlier authorities concerning prisoners, including *Raymond v Honey, Ex p Anderson,* and *Ex p Leech*:

> "Among the rights which, in part at least, survive [imprisonment] are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment." (pp 537-538)

After an examination of the evidence, Lord Bingham concluded that "the policy provides for a degree of intrusion into the privileged legal correspondence of prisoners which is greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners" (para 21). Since that degree of intrusion was not expressly authorised by the relevant statutory provision, it followed that the Secretary of State had no power to lay down the policy.

83. Finally, in this overview of the common law authorities, it is necessary to note two cases concerned with court fees. First, the case of *R v Lord Chancellor, Ex p Witham* [1998] QB 575 concerned court fees prescribed by the Lord Chancellor under a statutory power. The order in question repealed a power to reduce or remit the fees on grounds of undue financial hardship in exceptional circumstances. The order had been made with the concurrence of all four Heads of Division, as well as the Treasury. It had also been laid before Parliament. The applicant was in receipt of income support of £58 per week, and wished to bring proceedings. The prescribed fee was either £120 or £500, depending on the amount claimed. The applicant said that he could not afford to pay a fee of either amount. There was also evidence that a person on income support could not afford the £10 fee to set aside a default judgment in debt proceedings, and that another person on income support who was facing eviction could not afford the £20 fee to be joined in possession proceedings. Laws J, with whom Rose LJ agreed, said that he saw no reason not to accept what was said, and concluded that there was a variety of situations in which persons on very low incomes were in practice denied access to the courts.

84. Laws J accepted that, notwithstanding the wide discretion seemingly conferred on the Lord Chancellor by the relevant statutory provision, there were implied limitations upon his powers: the relevant provision did not "permit him to exercise the power in such a way as to deprive the citizen of what has been called his constitutional right of access to the courts" (p 580). The rule-making power in the primary legislation contained "nothing to alert the reader to any possibility that fees might be imposed in circumstances such as to deny absolutely the citizen's right of access to the Queen's courts" (p 586). Since that was the practical effect of the fees, the order was declared unlawful.

85. The second case is the decision of the Divisional Court in *R (Hillingdon London Borough Council) v Lord Chancellor (Law Society intervening)* [2008] EWHC 2683 (Admin); [2009] 1 FLR 39. The case concerned fees payable by local authorities in connection with applications made in public law family cases. The court rejected the Government's argument that the lawfulness of the fees orders depended on whether local authorities would (or there was a real risk that they would) be *required* to act inappropriately by failing to make applications which objectively should be made. Dyson LJ stated that the impact of the fees orders "must be considered in the real world" (para 61). The relevant question was therefore "whether there was a real risk that the increase in fees will cause local authorities not to make applications which objectively should be made" (ibid).

The right of access to justice in the present case

86. The 2007 Act does not state the purposes for which the power conferred by section 42(1) to prescribe fees may be exercised. There is however no dispute that the purposes which underlay the making of the Fees Order are legitimate. Fees paid by litigants can, in principle, reasonably be considered to be a justifiable way of making resources available for the justice system and so securing access to justice. Measures that deter the bringing of frivolous and vexatious cases can also increase the efficiency of the justice system and overall access to justice.

87. The Lord Chancellor cannot, however, lawfully impose whatever fees he chooses in order to achieve those purposes. It follows from the authorities cited that the Fees Order will be ultra vires if there is a real risk that persons will effectively be prevented from having access to justice. That will be so because section 42 of the 2007 Act contains no words authorising the prevention of access to the relevant tribunals. That is indeed accepted by the Lord Chancellor.

88. But a situation in which some persons are effectively prevented from having access to justice is not the only situation in which the Fees Order might be regarded as ultra vires. As appears from such cases as *Leech* and *Daly,* even where primary

legislation authorises the imposition of an intrusion on the right of access to justice, it is presumed to be subject to an implied limitation. As it was put by Lord Bingham in *Daly,* the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve.

89. There is an analogy between the latter principle and the principle of proportionality, as developed in the case law of the European Court of Human Rights. These proceedings are not based on the Human Rights Act 1998, since the appellant is not a "victim" within the meaning of section 7(1) of that Act. Nevertheless, the case law of the Strasbourg court concerning the right of access to justice is relevant to the development of the common law. It will be considered in the context of the case based on EU law, on which it also has a bearing. To anticipate that discussion, however, it is clear that the ability of litigants to pay a fee is not determinative of its proportionality under the Convention. That conclusion supports the view, already arrived at by the common law, that even an interference with access to the courts which is not insurmountable will be unlawful unless it can be justified as reasonably necessary to meet a legitimate objective.

Does the Fees Order effectively prevent access to justice?

90. It is therefore necessary to consider, first, whether the Fees Order effectively prevents some persons from having access to justice. It is argued on behalf of the Lord Chancellor that the fees cannot be unlawful unless it is proved that they have prevented access to justice in specific cases. No-one, however, has given evidence in these proceedings that they were unable to bring a claim because they could not afford the fees. Further, it is argued, the poorest people qualify for full remission. Those who do not so qualify have some income over and above the minimum necessary to meet the essentials of life, and can therefore save the amount needed to pay the fees if they choose to do so. In exceptional cases, the Lord Chancellor can exercise his discretionary power to remit the fees. Access to justice is not prevented where the decision on whether to make a claim is the result of making a choice between paying the fee and spending one's income in some other way.

91. In order for the fees to be lawful, they have to be set at a level that everyone can afford, taking into account the availability of full or partial remission. The evidence now before the court, considered realistically and as a whole, leads to the conclusion that that requirement is not met. In the first place, as the Review Report concludes, "it is clear that there has been a sharp, substantial and sustained fall in the volume of case receipts as a result of the introduction of fees". While the Review Report fairly states that there is no conclusive evidence that the fees have prevented people from bringing claims, the court does not require conclusive evidence: as the *Hillingdon* case indicates, it is sufficient in this context if a real risk is demonstrated. The fall in the number of claims has in any event been so sharp, so substantial, and

so sustained as to warrant the conclusion that a significant number of people who would otherwise have brought claims have found the fees to be unaffordable.

92. In that regard, it is necessary to bear in mind that the use which people make of ETs is governed more by circumstances than by choice. Every individual who is in employment may require to have resort to an ET, usually unexpectedly: for example, if they find themselves unfairly dismissed or the victim of discrimination. Persons whose employment rights have been breached, or who believe them to have been breached, are often under a practical compulsion to apply to an ET for redress. Conciliation can be a valuable alternative in some circumstances, but as explained earlier the ability to obtain a fair settlement is itself dependent on the possibility that, in the absence of such a settlement, a claim will be presented to the ET. It is the practical compulsion which many potential claimants are under, which makes the fall in the number of claims indicative of something more than a change in consumer behaviour.

93. Secondly, as explained earlier, the Review Report itself estimated that around 10% of the claimants, whose claims were notified to Acas but did not result either in a settlement or in a claim before an ET, said that they did not bring proceedings because they could not afford the fees. The Review Report suggests that they may merely have meant that affording the fees meant reducing "other" areas of non-essential spending in order to save the money. It is not obvious why the explanation given by the claimants should not be accepted. But even if the suggestion in the Review Report is correct, it is not a complete answer. The question whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Fees must therefore be affordable not in a theoretical sense, but in the sense that they can *reasonably* be afforded. Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable.

94. Thirdly, that conclusion is strengthened by consideration of the hypothetical examples, which provide some indication of the impact of the fees on claimants in low to middle income households. It is common ground that payment of the fees would result in the hypothetical households having less income than is estimated by the Joseph Rowntree Foundation as being necessary to meet acceptable living standards. The Lord Chancellor argues that, if the households sacrifice all spending on clothing, personal goods and services, social and cultural participation, and alcohol, the necessary savings can be made to enable the fees to be paid. As was explained earlier, the time required to make the necessary savings varies, in the examples, between about one month and three and a half months. Leaving aside the other difficulties with the Lord Chancellor's argument discussed earlier, the fundamental problem is the assumption that the right of access to courts and

tribunals can lawfully be made subject to impositions which low to middle income households can only meet by sacrificing ordinary and reasonable expenditure for substantial periods of time.

95. The court cannot be deflected from that conclusion by the existence of the Lord Chancellor's discretionary power of remission. The statutory scheme of remission is of very restricted scope, as explained earlier. The effects of the Fees Order have occurred notwithstanding the existence of that scheme. The discretionary power of remission may be capable of greater use than has been the case in the past, but it can only be exercised "where the Lord Chancellor is satisfied that there are exceptional circumstances which justify doing so." The problems which have been identified in these proceedings are not confined to exceptional circumstances: they are systemic.

96. Furthermore, it is not only where fees are unaffordable that they can prevent access to justice. They can equally have that effect if they render it futile or irrational to bring a claim. As explained earlier, many claims which can be brought in ETs do not seek any financial award: for example, claims to enforce the right to regular work breaks or to written particulars of employment. Many claims which do seek a financial award are for modest amounts, as explained earlier. If, for example, fees of £390 have to be paid in order to pursue a claim worth £500 (such as the median award in claims for unlawful deductions from wages), no sensible person will pursue the claim unless he can be virtually certain that he will succeed in his claim, that the award will include the reimbursement of the fees, and that the award will be satisfied in full. If those conditions are not met, the fee will in reality prevent the claim from being pursued, whether or not it can be afforded. In practice, however, success can rarely be guaranteed. In addition, on the evidence before the court, only half of the claimants who succeed in obtaining an award receive payment in full, and around a third of them receive nothing at all.

97. As explained earlier, the statistical evidence relating to the impact of the Fees Order on the value of awards, the evidence of the Council of Employment Judges and the Presidents of the ETs, the evidence collected by the Department of Business, Innovation and Skills, and the survey evidence collected by Acas, establishes that in practice the Fees Order has had a particularly deterrent effect on the bringing of claims of low monetary value. That is as one would expect, given the futility of bringing many such claims, in view of the level of the fees and the prospects of recovering them.

98. For all these reasons, the Fees Order effectively prevents access to justice, and is therefore unlawful. Given that conclusion, the other issues arising in the appeal can be dealt with very briefly.

Can the Fees Order be justified as a necessary intrusion on the right of access to justice?

99. The primary aim of the Fees Order was to transfer some of the cost burden of the ET and EAT system from general taxpayers to users of the system. That objective has been achieved to some extent, but it does not follow that fees which intruded to a lesser extent upon the right of access to justice would have been any less effective. In that regard, it is necessary to point out an error in the Review Report, repeated in the Lord Chancellor's submissions. The Review Report states that the Ministry of Justice have considered whether it would be more proportionate to charge lower fees, but that "the result of reducing fees would reduce the income generated by fees, and thereby reduce the proportion of cost transferred to users from the taxpayer" (para 307). That statement is unsupported by any evidence, and appears to be regarded as axiomatic. Similarly, in his written case, the Lord Chancellor states that, in pursuing the aim of transferring the costs of the tribunals from taxpayers to users, "the higher the fees are, patently the more effective they are in doing so". This idea is repeated: in recovering the cost from users, it is said, "the higher the fee, the more effective it is".

100. However, it is elementary economics, and plain common sense, that the revenue derived from the supply of services is not maximised by maximising the price. In order to obtain the maximum revenue, it is necessary to identify the optimal price, which depends on the price elasticity of demand. In the present case, it is clear that the fees were not set at the optimal price: the price elasticity of demand was greatly underestimated. It has not been shown that less onerous fees, or a more generous system of remission, would have been any less effective in meeting the objective of transferring the cost burden to users.

101. Nor, on the evidence before the court, have fees at the level set in the Fees Order been shown to be necessary in order to achieve its secondary aims: namely, to incentivise earlier settlements and to disincentivise the pursuit of weak or vexatious claims. These issues were discussed at paras 57-59 above.

102. There is a further matter, which was not relied on as a separate ground of challenge, but should not be overlooked. That is the failure, in setting the fees, to consider the public benefits flowing from the enforcement of rights which Parliament had conferred, either by direct enactment, or indirectly via the European Communities Act 1972. Fundamentally, it was because of that failure that the system of fees introduced in 2013 was, from the outset, destined to infringe constitutional rights.

Does the Fees Order cut down statutory rights?

103. As explained earlier, the lawfulness of the Fees Order is also challenged on the basis that it contravenes the rule that specific statutory rights are not to be cut down by subordinate legislation passed under the vires of a different Act: *R v Secretary of State for Social Security, Ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, 290. That case was concerned with subordinate legislation which deprived asylum seekers of income-related benefits if they appealed against the Home Secretary's refusal of their claim. The Court of Appeal found that, if deprived of benefits, some asylum seekers with genuine claims would be driven by penury to forfeit them, either by leaving the country before their determination or through an inability to prosecute them effectively. That being so, the legislation was held to be unlawful. Simon Brown LJ stated at p 292 that "these Regulations for some genuine asylum seekers at least must now be regarded as rendering these rights [of appeal] nugatory".

104. In the circumstances of the present case, this ground of appeal does not add anything to the ground based on the common law right of access to justice. In so far as the Fees Order has the practical effect of making it unaffordable for persons to exercise rights conferred on them by Parliament, or of rendering the bringing of claims to enforce such rights a futile or irrational exercise, it must be regarded as rendering those rights nugatory.

EU law

105. The Court of Appeal identified 24 of the rights enforceable in ETs as having their source in EU law. They include, for example, the right to equal pay, the rights to equal treatment and maternity leave, and the various rights granted under the Working Time Directive. Subject to the exceptions discussed earlier, the ET is the only forum in which those rights can be enforced. It follows that, so far as applicable to these rights, restrictions on the right of access to ETs and the EAT fall within the scope of EU law.

106. EU law has long recognised the principle of effectiveness: that is to say, that the procedural requirements for domestic actions must not be "liable to render practically impossible or excessively difficult" the exercise of rights conferred by EU law: see, for example, *Impact v Minister for Agriculture and Food* (Case C-268/06) [2008] ECR I-2483, para 46. It has also recognised the principle of effective judicial protection as a general principle of EU law, stemming from the constitutional traditions common to the member states, which has been enshrined in articles 6 and 13 of the European Convention on Human Rights and which has also

been reaffirmed by article 47 of the Charter of Fundamental Rights of the European Union.

107. Article 47 guarantees in its first paragraph that “everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal”. In terms of article 52(1):

> “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

In that regard, the court has said that although the interest of the proper administration of justice may justify the imposition of a financial restriction on access to a remedy, that restriction must retain “a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved”: see, for example, *SC Star Storage SA v ICI* (Joined Cases C-439/14 and C-488/14), judgment given 15 September 2016, para 55; *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* (Case C-279/09) [2010] ECR I-13849, paras 47 and 60. The burden lies on the state to establish the proportionality of restrictions where, as in the present case, they are liable to jeopardise the implementation of the aims pursued by EU directives.

108. Article 52(3) of the Charter provides that in so far as the Charter contains rights which correspond to rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the Convention. In considering the application of the first paragraph of article 47 of the Charter, it is therefore necessary to consider the case law of the European Court of Human Rights on the corresponding guarantee in article 6(1) of the Convention: see *DEB*, para 35.

109. In that regard, one general point to note is the emphasis placed by the Strasbourg court on the protection of rights which are not theoretical and illusory, but practical and effective. That is consistent with the recognition in domestic law that the impact of restrictions must be considered in the real world.

110. The Strasbourg court has accepted that various limitations, including financial ones, may be placed on the right of access to a court or tribunal. In

particular, the requirement to pay fees to civil courts in connection with claims or appeals is not in itself incompatible with the Convention. However, such limitations must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved: *Teltronic-CATV v Poland,* Application No 48140/99, judgment given 10 January 2006, para 47. That is consistent with the principle of domestic law that such rights may be curtailed only to the extent reasonably necessary to meet the ends which justify the curtailment.

111. In the present proceedings, the Court of Appeal recognised that the fees payable in proceedings brought for the enforcement of rights conferred by EU law must be proportionate, but construed that requirement as meaning that the "basic question is whether the fee payable is such that the claimant cannot realistically afford to pay it", or whether the difficulty of paying the fee was "such as to make the payment of the fee impossible in practice" (paras 41 and 43). Although the court accepted that the introduction of fees had the effect of deterring a very large number of potential claimants who might otherwise have brought proceedings to enforce rights conferred by EU law, it felt unable to infer that "the decline [in the number of claims] *cannot* consist entirely of cases where potential claimants could realistically have afforded to bring proceedings but have made a choice not to" (para 68: original emphasis). Since, in its view, it had not been shown that payment of the fees was impossible, it concluded that the requirement to pay them was proportionate.

112. However, under the Convention, and under EU law, the ability to pay fees is not determinative of their proportionality: it is merely one among a number of relevant factors. As the Strasbourg court has repeatedly stated, the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed the right of access to a court: *Teltronic-CATV,* para 48. It has emphasised that financial restrictions on access to a court which are unrelated to the merits of a claim or its prospects of success should be subject to particularly rigorous scrutiny: *Teltronic-CATV*, para 61. In relation to the phase of the proceedings at which the restriction has been imposed, the court regards it as significant if non-payment of a fee may result in a claim's never being examined on its merits: *Teltronic-CATV*, para 61.

113. The fact that proportionality is not determined by ability to pay, and also the importance of a practical approach to the assessment of whether there has been an interference with the right, are illustrated by the case of *Stankov v Bulgaria* (2009) 49 EHRR 7. The case is particularly relevant to the present proceedings as it demonstrates that even a fee which the litigant can afford can violate the right of access to justice. The applicant in that case was required to pay, at the conclusion of the domestic proceedings, a fee equivalent to 90% of the compensation which had

been awarded to him. The fee was held to violate article 6(1), although the applicant was able to pay it, and despite the fact that his case had been heard. Although the aims pursued by the imposition of the fee were compatible with the administration of justice, the fee was disproportionate in view of the difficulty of assessing the likely award in advance (which had led the applicant to overstate the amount of his claim, leading to liability to a higher fee), taken together with "the relatively high and totally inflexible rate of court fees" (para 67).

114. The Lord Chancellor argues that that case should be distinguished from the present case, on the basis that it concerned domestic proceedings in which the state was the defendant. Certainly, that feature made the violation of article 6(1) particularly egregious: the state was taking away with one hand the compensation which it had been ordered to pay with the other. Nevertheless, the same principles would have equally applied in proceedings between private parties. As the court stated:

> "In practical terms, the imposition of a considerable financial burden due after the conclusion of the proceedings may well act as a restriction on the right to a court. The costs order against the applicant constituted such a restriction." (para 54)

That would be so because of the size of the financial burden, regardless of the identity of the defendant.

115. That is illustrated by the case of *Kniat v Poland,* Application No 71731/01, judgment given 26 July 2005, which concerned fees payable in divorce proceedings. At the conclusion of the proceedings, the applicant was ordered to pay a court fee of 10,000 PLN. She was able to pay it, having received a share of the matrimonial property amounting to 300,000 PLN. Nonetheless, the imposition of the fee was held to violate article 6(1), since the 300,000 PLN constituted apparently her only asset, and it did not seem reasonable to demand that she spend part of it on court fees, rather than build her future and secure her and her children's basic needs after the divorce (para 44). A further illustration is the case of *Kordos v Poland,* Application No 26397/02, judgment given 26 May 2009, which concerned fees payable in an action of damages between private parties. The applicant was awarded damages of 20,000 PLN and was required to pay a court fee of 3,726 PLN. The imposition of the fee was held to violate article 6(1), on the basis that the sum awarded was apparently her only asset, and it did not seem reasonable to demand that she spend it on the payment of the court fees rather than on securing her basic living needs. These judgments provide further support for the view that, particularly in cases involving modest financial awards (or none at all), the fees imposed by the Fees Order cannot be justified.

116. Returning to the application of article 47 of the Charter, it follows that the proportionality of the Fees Order in issue in the present proceedings is not determined solely by the affordability of the fees (although if they are unaffordable by some people, then the Order is unlawful under EU law in so far as it applies to claims based on rights derived from EU law). Proportionality also requires other factors to be considered, including the stage of the proceedings at which the fees must be paid, and whether non-payment may result in the claim's never being examined on its merits. They also include a factor which is of particular importance in the present case, namely whether the fees are proportionate in amount to the sums being claimed in the proceedings. Ultimately, the question is whether the limitation of the right to an effective remedy resulting from the Fees Order respects the essence of that right and is a proportionate means of achieving the legitimate aims pursued, or has led to an excessive burden being placed on individuals who seek to enforce their rights.

117. Given the conclusion that the fees imposed by the Fees Order are in practice unaffordable by some people, and that they are so high as in practice to prevent even people who can afford them from pursuing claims for small amounts and non-monetary claims, it follows that the Fees Order imposes limitations on the exercise of EU rights which are disproportionate, and that it is therefore unlawful under EU law.

Remedies

118. It is argued on behalf of the Lord Chancellor that the evidence about the impact of the fees which is now available was not available at the time when the Fees Order was made. If the original decision to make the Fees Order was lawful, but the Lord Chancellor acted unreasonably in subsequently failing to decide that it should no longer be maintained in force, then it is argued that the appropriate form of relief is a declaration to that effect.

119. That argument mistakes the nature of the illegality with which we are concerned. This is not a case in which an administrative decision is being challenged on the basis that relevant considerations were not taken into account, or on the basis that the decision was unreasonable. The Fees Order is unlawful under both domestic and EU law because it has the effect of preventing access to justice. Since it had that effect as soon as it was made, it was therefore unlawful ab initio, and must be quashed.

120. The parties are invited to make written submissions on any consequential relief which may be appropriate in these circumstances.

LADY HALE:

121. Lord Reed, with whose judgment I entirely agree, has dealt with all the issues raised in argument, save that of discrimination. As he has held that the Fees Order was unlawful *ab initio*, both at common law and under EU law (to the extent that the rights asserted before the Employment Tribunals are rights contained in EU law), it is unnecessary to reach a final conclusion on the discrimination issues. However, as the existing Fees Order is unlawful, the Lord Chancellor will no doubt wish to avoid any potentially unlawful discrimination in any replacement Order.

122. Not all discrimination is unlawful. It is helpful, therefore, first to consider what prohibition the alleged discrimination might contravene. Most straightforward is that in section 29 of the Equality Act 2010. As relevant, this provides:

> "(1) A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
>
> (2) A service-provider (A) must not, in providing the service, discriminate against a person (B) -
>
> (a) as to the terms on which A provides the service to B;
>
> (b) by terminating the provision of the service to B;
>
> (c) by subjecting B to any other detriment.
>
> (6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."

123. This prohibition applies as much to public sector providers of services to the public as it does to the private sector. The Government clearly sees the provision of Employment Tribunals as a service to the public, to which the prohibition in section 29(2) would apply, as that is why it has chosen to charge the users for that service.

But even if it were not seen as the provision of a service, it would clearly be the exercise of a public function, to which the prohibition in section 29(6) applies. Furthermore, to the extent that in providing for the claims which may be brought before an Employment Tribunal, the United Kingdom is implementing EU law, the United Kingdom must respect the Charter of Fundamental Rights of the European Union (article 51). Article 21.1 provides that:

> "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

124. It is not suggested that the Fees Order is directly discriminatory on any of the grounds prohibited either under the Charter or the 2010 Act. Rather, it is suggested that the Order is indirectly discriminatory within the meaning of section 19 of the 2010 Act, which is itself based on the concept of indirect discrimination in EU law:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -
>
> > (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> >
> > (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> >
> > (c) it puts, or would put, B at that disadvantage, and
> >
> > (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are -

age;
disability;
gender reassignment;
marriage and civil partnership;
race;
religion or belief;
sex;
sexual orientation."

125. It is not suggested that the whole of the Fees Order amounts to a discriminatory "provision, criterion or practice" (PCP) for this purpose. Rather, it is suggested that the higher fees payable, either for Type B claims in general or for discrimination claims in particular, are indirectly discriminatory against women (and others with protected characteristics too). In relation to Type B claims in general, this is because a higher proportion of women bring Type B claims than bring Type A claims. Before the Court of Appeal, UNISON suggested that 54% of Type B claimants were women, whereas only 37% of Type A claimants were women. However, the Lord Chancellor put in figures suggesting that 45% of Type B claimants were women. The Court of Appeal accepted that this was still a disparate impact (para 85). This meant that the higher fees for Type B claims might put women at a particular disadvantage when compared with men. Both the Court of Appeal and the Divisional Court therefore proceeded on the basis that "the situation" had to be justified and this has not been challenged by the Lord Chancellor.

126. Under section 19(2)(d), a PCP which puts or would put people with a protected characteristic at a particular disadvantage when compared with people who do not share that characteristic is not discriminatory if the person who applies it can show that the PCP is a proportionate means of achieving a legitimate aim. In other words, unlike the case of direct discrimination, it is the PCP itself which requires to be justified, rather than its discriminatory effect. So can the higher fees for Type B claims be justified?

127. Given that we have already held that the whole Fees Order cannot be justified, this is a somewhat artificial exercise. The Divisional Court and Court of Appeal held that it was legitimate to charge more for what was assumed to be the more costly service. In fact, while that may be so of some kinds of Type B claim, UNISON suggests that it has not been shown to be true of them all - working time claims and pregnancy dismissal claims, for example, do not take up much time. In the Divisional Court, Elias LJ accepted that some Type A claims might take longer than some Type B claims (para 69). Nevertheless, a "rough and ready" classification

such as this was held acceptable if any distinction was to be made between different types of claim.

128. The question, however, is not whether linking the level of fees to the assumed cost of providing the service is a legitimate aim: the question is whether charging higher fees for Type B claims is consistent with the aims of the Fees Order as a whole. Linking price to cost is not an end in itself, but one means of achieving the various stated aims: of transferring the cost of tribunals from the taxpayer to the users; deterring unmeritorious claims; and encouraging earlier settlements. The method chosen has to be a proportionate means of achieving those aims.

129. In this connection, it may be relevant to consider several factors. Even if there is a correlation between the type of claim and the cost to the tribunal, there is no correlation between the higher fee charged for Type B claims and the merits of the case or the conduct of the proceedings by the claimant or the incentives to good litigation and settlement behaviour on each side. A Type B claimant with a good case is just as likely to be deterred from bringing it by the higher fee as is the claimant with a bad case. The case may have been conducted as efficiently as it possibly could be by the claimant. Alternatively, the respondent or the tribunal itself may be responsible for the length and cost of the proceedings. The fees may incentivise the claimant to settle but they may have the reverse effect upon the respondent, who may calculate that the claimant will be deterred from carrying on and thus refuse to settle when he should. In the great majority of cases, the respondent is already in much the more powerful position and the higher fees simply exacerbate that.

130. It has simply not been shown that the higher fee charged for Type B claims is more effective in transferring the cost of the service from taxpayers to users. As Lord Reed has explained (para 100, above), the revenue derived from the supply of services is not maximised by maximising the price. Revenue is maximised by charging the right price, the price which potential claimants will see as constituting reasonable value for money. It might be thought, therefore, that the higher the price, the greater the deterrent effect. However, the evidence suggests that there has been a greater fall in Type A than in Type B claims (para 40, above). Nevertheless, there has been a dramatic fall in both types of claim, which suggests that neither has been priced correctly to maximise revenue.

131. Hence, these factors combine to the conclusion that charging higher fees for Type B claims has not been shown to be a proportionate means of achieving the stated aims of the fees regime.

132. The alternative way in which the discrimination case is put is that charging higher fees for discrimination claims is indirectly discriminatory against women, who bring the majority of such claims, and others with protected characteristics who also bring them. There is a superficial attraction to this argument. It is now clear that setting the fees at the rate they have been set has had a deterrent effect upon discrimination claims, among others. It is also now clear that it has deterred meritorious claims at least as much as, if not more than, unmeritorious claims (see para 57 above). This has put the people who bring such claims at a particular disadvantage. Deterring discrimination claims is thus in itself discrimination against the people, by definition people with protected characteristics, who bring them; and, it might be thought, even harder to justify than is charging higher fees for Type B cases generally, given the importance which has always been attached in EU law to the goal of achieving equality of treatment in the workplace and to gender equality in particular.

133. The Divisional Court and Court of Appeal thought it impermissible to narrow down the PCP to one sub-group of the people who were affected by the higher fees, namely discrimination claimants, for the purpose of making it easier to show that the PCP had a disparate impact upon people with a particular protected characteristic. The PCP in question should be the higher fees for all Type B claims, not just for discrimination claims. Section 19(2)(a) provides that the PCP must apply to everyone, whether or not they share a particular protected characteristic, so in this case to everyone who brings a Type B claim. Section 19(2)(b) then requires that the PCP put a sub-group of those people, who have a particular protected characteristic, at a particular disadvantage when compared with others who do not share that characteristic. It is at this point, rather than the earlier point, that a sub-group is carved out. Even if, for the sake of argument, we concentrate on the sub-group of women who bring discrimination claims, it is difficult to see how they are put at any greater disadvantage by the higher fees than are all the other Type B claimants. They are all in the same boat, the women who bring discrimination claims and the men who bring unfair dismissal claims. There is no greater or different need to justify the higher fees in discrimination claims than there is in any other sort of Type B claim.

134. It is not necessary finally to resolve this question in these proceedings, but I am inclined to accept that this is correct. If the fee charged for unfair dismissal claims had been lower than the fee charged for discrimination claims, then it might well have been necessary (and very difficult) to demonstrate that the higher fee for discrimination claims was a proportionate means of achieving a legitimate aim. But that is not this case. And in any event, it is accepted that the higher fees generally have a disparate impact and in my view it has not been shown that they are justified.