Enforcement of Labour Law Standards and Fees

Professor Michael Ford QC
University of Bristol and Old Square Chambers

Introduction: Historical Context

The early labour legislation, principally health and safety, mostly gave rise to criminal sanctions, policed and enforced by state bodies. The early Act of 1802 for the 'preservation of the health and morals of apprentices', legislation regulating health, safety and working time provided for criminal penalties supported by inspections, initially independent 'visitors' in the 1802 Act and later by factories inspectors.[1] The trend continued into the 1960s - see e.g. s.5 of the Contracts of Employment Act 1963 - and is retained today for health and safety. The process operated alongside widespread collective bargaining.

From the Redundancy Payments Act 1965 onwards, the process began of legislation conferring rights on individual workers, individual complaints replacing state enforcement (there is no labour inspectorate in the UK), and use of the ET as the exclusive forum to enforce them, with an individual receiving compensation for individual loss. This fitted with the aims of the Donovan Commission, writing in 1968, that all employment disputes should be heard in a forum (then industrial tribunals) which was 'easily accessible, informal, speedy and inexpensive'.[2] Hence the expanded jurisdiction ETs have today to hear most individual employment disputes.

There are some exceptions to this individual enforcement model, where e.g. the state plays a greater role in enforcement or where remedies go beyond the individual's loss, but they largely serve to prove the general rule. See for example:

1. Since the Nineteenth Century, a breach of workplace health and safety regulations potentially led to *both* civil claims for beach of statutory duty and criminal sanctions; from April 2013, they are enforced exclusively by criminal sanctions.[3] These are supplemented by the powers of HSE inspectors e.g. to inspect premises and to issue improvement or prohibition notices, telling employers what they must do, which it is a criminal offence to breach.[4]

2. Criminal enforcement backed by state agencies remains for some of the worst

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[1] See e.g. Parts XI and XII of the Factories Act 1961. From the Nineteenth Century the courts also allowed civil claims could be brought in the ordinary courts by workers injured as a result of a breach of safety legislation.

[2] *Royal Commission on Trade Unions and Employer' Associations 1965-1968* (Cmnd. 3623), paras 572-3. The Commission proposed too conciliation procedures to take place before tribunal hearings.

[3] See ss 38-39, 47 HSWA (the right to a civil remedy in s.47(2) was removed by the amended s.47(2)-(2B) introduced by the Enterprise and Regulatory Reform Act 2013.

[4] See ss 20-21, 33(1)(g) HSWA

kind of labour abuses, such as 'gangmasters' and modern slavery.[5] Following the Immigration Act 2016, the Gangmasters and Labour Abuse Authority will have a new power to require 'labour market enforcement undertakings' where it considers a person is committing an offence under, principally, the NMWA or the gangmasters legislation.[6]

3. The national minimum wage is enforced by four methods. First, an individual can bring a claim in the ET or ordinary courts.[7] Second, under s.19 NMWA an officer of HMRC[8] may serve a notice of underpayment on an employer where he believes the employer has not paid workers the NMW; if the employer fails to comply with the notice, the officer may bring an ET or civil claim on behalf of the workforce to recover the wages.[9] Third, the NMWA provides, since 2009, for the payment of financial penalties to the government.[10] Fourth, it is a criminal offence to refuse or wilfully neglect to pay the NMW.[11]

4. A Pensions Regulator has power to investigate and remedy possible breaches of pension law in the absence of a complaint by an individual.[12] In addition, an actual or potential beneficiary of a pension scheme can complain free of charge to the Pensions Ombudsman about suspected scheme 'maladministration', who investigates the complaint and makes a determination.[13]

5. Under the Equality Act 2010 (Equal Pay Audits) Regulations 2014, where an ET finds a breach of equal pay law, an ET must order an equal pay audit, subject to exceptions for e.g. 'micro-businesses'. The idea is that the audit will reveal any systemic under-payment of women compared with men, not restricted to the individual claimant.[14]

6. New powers to issue financial penalties in ETA ss 37A-Q ETA.

These are not the only exceptions to the individual enforcement model, but they

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[5] Gangmasters (Licensing) Act 2014 and Modern Slavery Act 2015

[6] Immigration Act 2016, ss 14-33.

[7] An individual can bring e.g. an unlawful deduction from wages claim in the ET based on a statutory contractual right to be paid the national minimum wage: see s.17 NMWA.

[8] In future probably the Gangmasters and Labour Abuse Authority following changes made by the Immigration Act 2016.

[9] See s.19D NMWA.

[10] See s.19A-D NMWAand ss 31-33 (offence to refuse or wilfully neglect to pay workers less than national minimum wage).

[11] NMWA s.31.

[12] See especially the Pensions Act 2004.

[13] Pensions Schemes Act 1993, ss.145-151.

[14] There is provision too in s.78 of the EqA for regulations requiring the publication of information by employers on the gender pay gap (draft regulations have recently been published).

emphasise the wide spectrum of enforcement models, ranging from exclusive state enforcement at one end to exclusive individual actions at the other.[15] State enforcement of labour rights is not cheap; but just as state enforcement depends on an adequately enforced enforcement agency with real sanctions at its disposal, a system which depends (exclusively) on individual claims to enforce labour standards critically depends on individuals having an effective means of enforcing their rights. This is both to ensure their individual rights are effective in practice *and* to deliver the wider social goods in the legislation (e.g. non-discrimination, fair procedures before dismissal, decent working hours). Fees have brought these issues into sharp focus: what happens to general labour standards when the risk of claims being brought is small?

B. The Context of Fees

Even before the recent reforms, a substantial body of empirical and other work indicated (i) the law had played an important role in changing employment practices (e.g. unfair dismissal law led to formalised procedures); but (ii) infringements of employment rights are probably widespread in some areas (though it is hard to obtain conclusive data in the absence of successful ET claims[16]); and (iii) quite apart from fees, workers have problems in enforcing their rights (lack of knowledge of rights, concerns about reprisals or vulnerability, lack of access to advice or legal representation, complexity of law, etc). As a general rule the more vulnerable the worker, the greater the likelihood of infringement of rights but the less likely it is that claims are brought. See e.g:

1. Genn, *Paths to Justice* (1999): a random sample of 4,125 adults found that 6% had experienced a non-trivial employment problem in the preceding five years (lost a job, changes to terms and conditions, harassment at work). Over half took advice but about 16% did nothing (e.g. because of cost, the time it would take or because of fear) and some just left their job (6%). The young, people with no educational qualifications and those with low income were all less likely to obtain advice about their legal problems.

2. The Resolution Foundation estimates that 160,00 out of 1.4 million care workers (over 10%) are paid less than the NMW.[17] According to the Office for National Statistics, in April 2015 209,000 jobs (0.8% of all jobs) were paid less than the NMW rate.[18]

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[15] Even at the extreme end, the state still supplies the forum to hear the dispute - the court or tribunal - though fees decrease its cost in doing so.

[16] Though sometimes this does emerge - see e.g. the thousands of successful equal pay claims brought against public bodies in recent years.

[17] See the report for the Resolution Foundation, L.Gardiner, *The Scale of Minimum Wage Underpayment in Social Care* (2015) at http://www.resolutionfoundation.org/publications/the-scale-of-minimum-wage-underpayment-in-social-care/.

[18] ONS, *Low Pay: April 2015*

3. Recent research by the EHRC indicates probable widespread discrimination against pregnant women, with one in nine mothers reporting that they were dismissed, made compulsorily redundant or treated so badly that they felt they had to leave their job.[19]

4. Casebourne et al, *Employment Rights at Work: Survey of Employees 2005* (DTI: 2006), who examined knowledge of legal rights and found lowest levels of knowledge among younger (16-21) and older (55-64) workers, part-time workers, those in workplaces without an HR department, those without managerial or supervisory duties, and lower earners.

These issues continue where claims do reach the ET system. For example:

1. Claimants are less likely to have legal representation than employers: see the SETA survey of ET claimants in 2013, finding that 67% of employers had representation at hearings, compared with 33% of claimants; inability to afford representation was the main reason for claimants not having a lawyer.[20] Lower paid and young claimants were less likely to be represented. (The official statistics are misleading on this issue because they include 'multiple' claims in their figures, where one lawyer may represent hundreds or thousands of claimants in e.g. an equal pay or holiday pay claim.)[21] But this costs money, which eats into compensation: the median legal fees for claimants' legal representation in 2013 were £2,000.[22]

2. In some cases it is very difficult to assess the prospects of success in advance and at little cost: discrimination claims exemplify this. Hence it is difficult for lawyers to assess whether a case has reasonable prospects of success (or whether the claimant will be able to pay their fees out of any compensation).

3. Even where claimants win, awards are low. In 2014-15, for example, the median awards for successful claims were: unfair dismissal - £6,955; race discrimination -

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(http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/lowpay/april2015).

[19] See the research for BIS and EHRC by IFF research entitled *Pregnancy and Maternity Related Discrimination and Disadvantage: Experiences of Mothers* (2016), at https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings.

[20] See the SETA 2013 survey att 6-7.

[21] See *Tribunal and Gender Recognition Statistics Quarterly: April to June 2016,* table E.3, purporting to show that 75% of claimants were represented by a lawyer in 2014-15 and 83% in 2015-16 (https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2016).

[22] See the SETA 2013 survey at 48-9.

£8,0125; sex discrimination - £13,500; in 2015-16 the corresponding figures were£7,332, £13,760 and £13,500 (see table E.4 in the April- June 2016 stats). According to the SETA 2013 survey, the median award for wages claims was £900.

4. There are very serious problems with enforcement: see the BIS 2013 research discussed in the last lecture. Though note the introduction of the new power to impose penalties on employers who don't pay ET settlements or awards - see ss 37A-Q ETA 1996. But this has had little effect: as at September 2016, 62 warning notices had been issued, leading to 10 claims being paid, and 14 penalty notices were due to be issued.[23]

The Politics and Justifications of Fees

The introduction of fees in ETs was announced in the BIS publication of January 2011, *Resolving Workplace Disputes: A Consultation*. Though described as a 'consultation', in fact the coalition Government only consulted on other proposals in the document, not on fees. The justifications were: (i) fees would help to transfer some of the costs from taxpayers to those 'who cause the system to be used' which was 'fair'; (ii) that fees would (a) incentivise early settlements or (b) disincentivise unreasonable behaviour, such as pursuing weak or vexatious claims; and (iii) that charging fees would bring the ET and EAT into line with the other courts (cf. the Donovan Commission above).

The Government repeatedly asserted that fees should not act as a barrier to justice or deter valid claims. On the consultation process, see:

1. Ministry of Justice, *Charging Fees in the ET and EAT*, 14.12.12 (originally proposing two systems, one where the fee was just charged on issue, which was dropped) - see the Foreword, drawing attention to business fears of high awards.

2. The revised impact assessment, *Introducing a Fee Charging Regime in the Employment Tribunals and the Employment Appeal Tribunal: Impact Assessment* (30.5.12). Note the somewhat unrealistic assumptions that e.g. about 24% of then claimants would obtain remission, and that 'ET claimants would not be highly price sensitive to fee-charging' (§4.12). This led it to predict a very small drop in the number of claims as a result of fees.

3. Ministry of Justice, *Charging Fees in the ET and EAT*: *Response to Consultation*, 13.7.12, which adopted the two-stage charging structure. See §§42-46, stating that it was not an objective of the policy to deter claims, and the aim to ensure that tribunals were used as an option of last resort. Note too the response to claims that fees would affect the enforcement of standards generally at §53:

> we do not accept that it is only the threat of the employment tribunal

[23] Written Answer of 7 September 2016 from Margot James to Parliamentary Question 44543.

> that forces businesses to abide by their legal obligations. The Government supports a wide range of guidance, advice provision and help-lines which help businesses to observe their legal responsibilities and helps employees to understand their rights

The Government rejected suggestions that a respondent employer should pay a fee.

4. The Equality Impact Assessment (issued for the purpose of s.149 EqA to assess any discriminatory impacts), *Charging Fees in the ET and EAT*: *Government Response - Equality Impact Assessment* (13.7.12), included evidence that some groups with protected characteristics had less income - e.g. younger people, people with disabilities, some ethnic minorities, and sex (especially single parents). But, though it 'could not rule out that fees would have the effect of deterring some claimants' (p 18), it concluded the groups with higher household income would be 'eligible for remission and less affected by the introduction of fees' (p 19). No calculations were made of the extent to which people would in fact get remission.

The Legal Mechanism

The legal mechanism for giving effect to fees operates as follows

1. **Employment Tribunals and Employment Appeals Tribunal Fees Order 2013:** introducing fees from 28.7.13. For individuals the fees are:

   (1) Type A, listed in Table 2, Schedule 2 - e.g. wages, redundancy - £160 on issue of claim form, £230 for a hearing.

   (2) Type B - other claims e.g. discrimination, unfair dismissal - £250 on issue, £950 before hearing.

2. There are some weird anomalies - most working time claims (e.g. for rest breaks are Type B), and in some cases claims have to be brought even to access to the insolvency fund (e.g. for redundancy).

3. **Remission scheme**, now the new one which applies across courts, set out in Schedule 3 to the Fees Order.[24] The details are complicated but, in summary, an individual must meet (i) the disposable capital test and (ii) have gross monthly income of below certain levels depending on the number of children.[25] The capital and income of a potential claimant's partner counts for this purpose.[26]

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[24] Introduced by the Courts and Tribunals Fees Remission Order 2013.

[25] See new Schedule 3 to the Fees Order, substituted by the Courts and Tribunal Fee Remission Order 2013, SI 1013/2302.

[26] Schedule 3, para. 14.

Unless an individual and his or her partner has disposable capital of less than £3,000 there is no entitlement to *any* remission of ET fees. [27] Disposable capital includes every resource of a capital nature, including the value of goods which could be sold (less 10% of the sale value), except for certain items such as a dwelling house and its effects, clothing, and a motor vehicle necessary for transport.[28] Other items count; so do redundancy and notice payments.

4. Note the power to grant remission by the Lord Chancellor in 'exceptional circumstances' - §16, Schedule 3, discussed in ***UNISON*** at §§21-24.

5. **ET Rules**. Linked changes to the ET Rules:

   (1) A claim is rejected or dismissed if the fee isn't paid (unless a claimant gets remission): see rules 11,40

   (2) Where a claimant succeeds in a claim, the ET normally should order the respondent to pay the fee: rules 75-6.

6. **ACAS pre-claim conciliation**. This was introduced on a voluntary basis from 6.4.14 and became mandatory from 5.5.14. It is free. It is an open question whether ACAS has provided an effective alternative to ET claims or whether fees dissuade settlements through ACAS: see the Justice Committee at 25-26.

7. **Rules on repayment of fees**. Rule 76 of the ET Rules, similar to earlier versions, provides that generally a tribunal can only order legal costs to be paid if a party has acted 'vexatiously, abusively, disruptively or otherwise unreasonably' in bringing or conducting the proceedings, or if the claim or response had 'no reasonable prospect of success'. These criteria mean it is supposed to be exceptional for the losing party to pay the legal costs of the winner[29], though in recent years costs awards have become more common: see ET stats.

8. The rule on reimbursement of ET fees is different. Here it is <u>not</u> a requirement that the other party acted unreasonably (rule 75(1)(c) and rule 76). The expectation, then, is that normally a successful claimant will recover the fees paid, though the ET retains a discretion not to order repayment of the fee, which it could exercise, for example, if a claimant only wins on one, small point and failed on others: see ***Horizon Security Services v Ndeze*** [2014] IRLR 854, EAT. Of course, whether the claimant *in fact* recovers the fee which the ET orders the respondent to pay is another matter, because it depends on the effectiveness of the enforcement system.

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[27] Fees Order, Schedule 3 para. 3.

[28] Fees Order Schedule 3, paras 5, 6 and 10.

[29] See ***Yerrakalva v Barnsley MBC*** [2012] ICR 422 per Mummery LJ at [7].

Fees - the effect

In fact fees have had a very dramatic effect on the number of claims brought. There is, to date, limited evidence on the reasons for this, though more is emerging all the time. Note:

1. A precipitous drop in the number of claims brought immediately followed the introduction of fees, and has consistently been maintained since. Comparing the nine-month period October 2012-June 2013 (before fees) and the same nine-month period October-June 2014 after fees showed a 74% decline in claims received and a 79% decline in all types of complaint.[30] Single claims are the best measure of the effect, since they are less volatile than 'multiple' claims. Figure 10 in the April-June 2016 stats shows the decline graphically. Pyper refers to a 67% decline in single claims (and a 72% decline in multiple claims).

2. The above figures ignore the additional deterrent effect of the hearing fee, on which data are limited (but see the ACAS Research Paper by Downer et al in 2016 (Ref 04/16), finding that a fifth of claimants who issued claims withdrew them because of fees).

3. The number of people granted remission has been much smaller than predicted: see the predictions in the EIA, above. Table ETF.1 for the April-June statistics gives the latest data - for example, in 2015-16 a total of 20,735 single issue fees were requested; 5,218 single claimants obtained full or partial remission (25%). As a proportion of the number of single claims *before* fees the percentage is much, much smaller.

4. There is no reliable evidence that fees have met the objective of deterring weak or vexatious claims. We don't know how many claims 'succeed' since dismissed claims include those that settle before an ET hearing, and there is no consensus how many vexatious claims are brought: see the Justice Committee at 26-7. If fees deterred weak or vexatious claims, one would predict that after fees were introduced the proportion of successful claims would increase. The tribunal statistics reveal no such trend, even though they are noisy because they include multiples and don't include settled claims.The percentage of cases which were successful at a hearing in 2014/15 was 3% and in 2015/16 it was 6%; from 2007-2013 the mean was just over 9%: see Table ET.3 in Main Tables of April -June 2016 official statistics.

5. The 2013 SETA survey of tribunal applicants, conducted before fees were introduced, found that a fee of £250 would have influenced the decision of about half of claimants to bring a claim, that the impact is greatest on temporary workers, those bringing claims for low amounts and claimants with limited

[30] This is because one claim form may include more than one type of claim.

financial resources, and that good claims as much as weak ones are deterred.[31]

6. It is difficult to attribute the decline in claims to the use of ACAS, as the Government has argued. First, the decline pre-dated the introduction of compulsory PCC. Second, figures from ACAS show that, for example, of the claims notified to it in 2015-16, 17% settled, 18% proceeded to a tribunal hearing but 65% did not progress to an ET hearing.[32] The research of Downer *et al* on the ACAS scheme is based on how actual claimants responded after PCC. It found, for example, that of those Cs who didn't settle, 43% decided not to submit ET claim (p 92). Of those who had not or would not submit an ET claim, first reason was because of fees (26%); then because resolved (20%); would lose/waste of time (12%); too stressful (8%). Fees as reason given especially by non-members of union (30% v. 15% of members). Of those who gave fees as the reason why they did not submit claim: 68% said because could not afford it; 19% said more than prepared to pay; 9% said fee equalled amount owed.

7. There is growing evidence that fees tend to deter claimants on low incomes or claims for small amounts: see the Justice Committee report at 28, citing evidence from the Council of EJs.

8. The discriminatory effects remain contentious. Women (especially single mothers), people with disabilities and some ethnic minorities have disproportionately low incomes, as the Equality Impact Assessment and much other data confirms. A powerful deterrent effect is therefore to be expected, though the data is contentious. The argument that the less well-off are more likely to obtain remission is pretty superficial: women earn less than men at all levels of employment. See the Review on this (below).

The Judicial Review Proceedings

To date, however, a judicial review challenging the introduction of fees on the bases principally of (i) breach of the EU principle of effectiveness and (ii) indirect discrimination failed, though Underhill LJ found the decline in claims "troubling": see ***R (UNISON)***, above, at §§67-8. Is the CA's distinction between 'can't pay' and 'won't pay' valid? The arguments in the Supreme Court will contend, among other matters, that the CA took too narrow view of proportionality under Article 6, that the CA should have looked at a wider range of factors on effectiveness, and the evidence here shows that some protected groups, such as women, are placed at a particular disadvantage by fees.

The Review

In the meantime, the Government has just published its review in ET fees, first promised in 2012: see *Review of the Introduction of Fees in the Employment Tribunals* -

[31] See *Findings from the Survey of Employment Tribunal Applications 2013,* pp 38-9.

[32] See ACAS, *Early Conciliation Up-date 7: April 2015-2016.*

https://www.gov.uk/government/consultations/review-of-the-introduction-of-fees-in-the-employment-tribunals. While recognising the 'sharp, substantial and sustained' fall in case receipts, and that between 3,000-8,000 claims were not brought because claimants considered they could not afford the fee, the reforms proposed are modest:

1. A small increase in the income levels for remission (the disposable capital limit is unaffected).

2. Removing fees for claims relating to payments against the Secretary of State where the respondent is insolvent.

That is, err, it.

Further reading and useful sources

The following are useful sources of information:

1. For a clear summary of the position on fees, see House of Commons Briefing Paper No. 7081, 13.5.16, *Employment Tribunal Fees* (by D Pyper and F McGuiness) - http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07081

2. For the latest statistics, see *Tribunal and Gender Recognition Certificate Statistics Quarterly, April to June 2016* (https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2016).

3. The House of Commons Justice Committee Report, *Courts and Tribunal Fees* (14.6.16), especially 16-19, 23-30, 37-40 (at http://www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/167/167.pdf. The evidence submitted to the Committee is also available - www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/167/167.pdf

4. The blog by Richard Dunstan, *Labour Pains* -https://labourpainsblog.com/

5. Research by Downer *et al* into the ACAS scheme, including what happened to claims that didn't settle through PCC - see *Evaluation of ACAS Early Conciliation 2015* (see especially the executive summary) - http://m.acas.org.uk/media/pdf/5/4/Evaluation-of-Acas-Early-Conciliation-2015.pdf