Fee remission for the courts and tribunals
Response to Ministry of Justice Consultation

Cloisters

Cloisters is a leading employment, discrimination and equality chambers, recognised as such by the *Legal 500* and *Chambers UK*. Cloisters barristers have been at the heart of virtually all major equality and discrimination developments, both through their work in the tribunals and courts, and in their contributions to legislation, guidance and policy.

Members of chambers act in cases that set the terms of equality law, and have recently helped to bring about the end of the default retirement age (*Heyday/Age Concern*); to extend discrimination law to cover carers of disabled people (*Coleman v Attridge Law*); to establish the scope of the protection to be given to volunteers under discrimination law (*X v Mid Sussex CAB*); to extend pension provision to part-time judges (*O'Brien v Ministry of Justice*) and to establish the limits on justification of direct age discrimination (*Seldon v Clarkson Wright and Jakes*).

Cloisters barristers regularly advise and act on behalf of the Equality and Human Rights Commission. During the passage of the Equality Act 2010, Cloisters was involved in drafting amendments and briefings, as well as advising several NGOs and statutory bodies on the implications of the Act for future policy and practice.

In this response to the Consultation on Fees Remissions, Cloisters has also drawn upon its members' social security expertise.

The focus of the response is on Employment Tribunals only.

We should say at the outset that we have concerns that the introduction of these fees may be in breach of the European employment framework directive 2000/78 and the equivalent race and gender directives, in particular the requirement to ensure the effective protection of the rights guaranteed therein and effective redress.

Questionnaire

Question 1 – Do you agree that there should only be one remission system in operation within HMCTS operated courts and tribunals and the UK Supreme Court?

Please state the reason(s) for your answer.

No, because the differences between client and user groups and the differences in fee structures are such that it would not do justice.

For example, the fee structure in employment tribunals is crude, taking no account of the value of the claim, when compared to the fees structure for civil proceedings. As such, if the threshold of 'universal credit with earnings of less than £6,000' was used, that targets those working no more than 18 hours a week at minimum wage. The use of UC as a 'passport' to remission predominately helps those who are unemployed or in low paid part-time work; it does nothing, when set at the 'illustrative' level, to help those in full-time work on earnings approaching the average.

Taking the proposed income thresholds, the threshold for a single person or single parent is set at just above[1] minimum wage levels for a 40 hour working week. The threshold for a couple is equal to about the minimum wage level for a 45 hour week (or 22.5 hours each if both are in employment). The thresholds are increased by £245 per month (or £56.53 pw) for each child. The Office for National Statistics data in EARN02, shows that a single person with one child on average weekly earnings[2] working in the wholesale, retail, hotels and restaurants sector would earn above the proposed income threshold.

The proposed thresholds are too low in the employment tribunal context. Access to justice is likely to be inhibited. However, that is not the only consideration. Also important is maintaining the role of employment tribunals in delivering the societal goals enshrined in the different jurisdictions within the remit of ETs.

However, it is suggested that simplicity and uniformity can be achieved through a common assessment of income and resources. The proposed approach, exemplified in the draft Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, demonstrates a rejection of the approach reflected in the creation of the Universal Credit (UC). For simplicity, the concepts and definitions should be those used in the assessments for mainstream income-replacement benefits, soon to be replaced by the UC. This course has the additional merit of utilising an existing body of caselaw. In particular, the odd definition of 'partner' in the draft Fees Order is very different from the equivalent, well-understood, definition used in income-related benefits.

Of course, the simplest method is not to repeat a means-test, nor undertake a new one. Instead, the UC threshold should be increased and act as a passport. That would limit the number of fees assessments actually required. If there is to be a threshold, it should be set at least as high as average earnings.

It is noted that the structure of the fees remission system set out in the draft Fees Order is different from that described in the Consultation document. Given the extent

[1] At Oct 2013 rates of £6.31 ph
[2] At Feb 2013

of the change, it is suggested that the introduction of fees in employment tribunals be deferred until (a) a common system is introduced (b) the system of financial penalties under s.16 of the Enterprise and Regulatory Reform Act is introduced (c) provision is made in all cases for the default option to be that the cost of the fees paid is awarded to the claimant where one or more claims have been successful and (d) the full implementation of universal credit. At present, it appears that the cost of an employer's failure to comply with employment and equalities legislation is being passed on to the individual. In that context, repetition of the mantra of targeting taxpayer subsidy towards those who are most in need, rather misses the point. Individual claimants are in that situation because of employer failure.

Question 2 – Do you agree that disposable capital should be considered when deciding fee remission eligibility? Please state the reason(s) for your answer.

The simplest and most desirable method is to disregard all disposable capital. Indeed, as each claim made to an employment tribunal may be seen as resulting from the perceived failure of an employer, there is no reason to pass the cost of that failure on to the employee or ex-employee.

The next step is to disregard certain types of capital. These could follow the UC disregards. However, in the ET context, more is required.

Where the individual has received a termination payment including pay in lieu of notice, they would usually be excluded from benefit for the period covered by the pay in lieu. As such, it would be wrong to take account of such a payment as capital.

A lump sum redundancy payment is likely to be essential to help cushion the loss of regular earnings while seeking replacement work. It is different in character to 'capital' – until new work is found, or until, say three months has passed, it would not have made the transition to a sum properly characterised as 'capital'.

For those approaching retirement, savings will have to last them for the rest of their lives. They will not have the same opportunities as younger workers to replace savings or resume work. As such, capital should be disregarded altogether; alternatively, there should be a higher threshold. Disregarding the capital value of occupational or personal pension schemes is insufficient.

Question 3 – Do you agree with the proposed disposable capital limits? Please state the reason(s) for your answer.

As for the proposed disposable capital limits, it is our view that they are too low. As a minimum if the proposed remission scheme is not to undermine the principles underlying universal credit, the capital limits should be those applicable in UC - £6,000 for the basic threshold, with a more sensitive sliding scale, akin to the 'tariff income' of UC, and a cut off at £16,000.

There is no indication whether the fee trigger levels are taken individually or cumulatively. The latter makes sense in the ET context where there are just two standard fees for a single claim – issue and hearing fees. Total anticipated fees for a discrimination or other type B claim are £1180. Taking fees in aggregate, or cumulatively, means that the proposed disposable capital threshold of £8,000 would apply. Taking them individually, with a £3,000 limit, would cut savings to £1,820. Indeed, a capital limit in discrimination cases in particular is likely to inhibit access to justice.

This problem increases if the same worker makes a second or subsequent claim. Article 9 of the draft Fees Order links the fee payable to the claims made in "the claim form". Where acts of discrimination or victimisation are continuing, including where the worker has been dismissed, presenting a second claim form is essential to avoid any time bar. As currently drafted, the draft Fees Order requires two (or more) hearing fees for a single hearing where two (or more) claims presented by a single claimant are consolidated and heard together. Although a new cause of action postdating an existing claim may be added to that claim by way of amendment, such an application is understood to be within the scope of the definition of 'claim' in the draft Fees Order.

A requirement to pay a second issue fee and a second hearing fee is likely to lead to delay in presenting claims in the first place. Inevitably, this will inhibit access to justice. Further, the proposed system fails to give victims of discrimination the effective personal remedy against the person or body who has perpetrated that discrimination as is required by the relevant European equality directives.

Question 4 – Do you agree with the proposed terms of the disposable capital test?
Please state the reason(s) for your answers:

See Q 2, Q3 above. No, it should include either the full range of UC capital disregards plus the suggested employment-related disregards, or be supplemented by disregards of capital earmarked for disability-related expenditure.

Question 5 – Do you agree with the proposed evidence requirements and enforcement mechanism of the capital test? Please state the reason(s) for your answer.

A declaration seems sensible. However, without sight of the suggested application form, it is difficult to ascertain how effective or safe the requirements and enforcement mechanism might be. It is suggested that if a common income-related assessment is to be used, the better course is to utilise the expertise of staff delivering social security benefits.

Question 6 – Do you agree that these proposals strike the right balance in targeting eligibility for full and partial remission through a simple and workable system? If you do not agree, please explain why, and what alternatives you propose.

See Qs1-5 above to explain why the answer is no. Further, the proposals include no appeal rights. Appeal rights are essential if the system proposed is to be seen as fair.

If the suggestion of utilising or basing the assessment of income and capital resources on the universal credit disregards is taken up, it would also make sense to have a right of appeal to the First-tier Tribunal. Utilising what is already in existence is likely to be simpler, cheaper and less disruptive to the employment tribunal system, than the proposed exercise.

The Government is said to consider that the current Remission 3 test for partial remissions is 'complex for users to understand and burdensome on applicants and staff'. It is not understood how that view squares with its claims made about the introduction of universal credit. If a remissions scheme is complex for court and tribunal staff, the simple solution is to have the assessment undertaken by the same staff who assess universal credit. Simpler still to increase the level of the UC passport.

Question 7 – Do you agree that there should be a gross monthly income cap so that those with a certain amount of income would be ineligible for a partial remission and would pay the fee in full? If so, do you agree that a single cap of £4000 is appropriate or should the Government consider varying the cap for different fee levels? Please state the reason(s) for your answer.

A cap is inappropriate. What counts is disposable income. If the remission system generates a reduction in fees, it follows that the assessment has identified a need for help with the fees. That reduction should be delivered.

Question 8 – Do you agree with the proposed evidence requirements for the income test? Please state the reason(s) for your answer.

See above. Further, the proposals appear cumbersome and onerous for claimants and court staff alike. There is no indication that the practicalities have been considered. The reference to 'introducing an IT system' is hardly encouraging.

The sensible course is surely to increase the passporting threshold of UC and to pass on the remaining fees assessments to DWP and jobcentre staff. That would have the further advantage of lower initial and continuing training costs.

The advent of paperless bank accounts does not seem to have been addressed.

Question 9 – Do you agree that eligibility to a remission should be based on assessment of household means? Please state the reason(s) for your answer.

No. This is not, we would suggest, appropriate in the employment tribunal context. Taking account of a partner's resources reduces the ability of a worker to enforce domestic and European legal rights against his or her own employer.

Consideration of this issue depends also on the definition of household and what is required to retain membership of a household.

Annex E gives a workable definition of retained membership as 'including a person with whom the applicant usually lives with as a couple but is not currently living with due to force of circumstance'. This is too wide in scope and would be better addressed by using the concepts found in income-related benefits assessments. Moreover, the version found in the draft Fees Order is obscure – 'and includes a person with whom the party is not currently living but from whom the party is not living separate and apart'.

It is suggested that including an absent partner in a household assessment is inappropriate in all cases where the absent partner is maintaining a separate home, say for work or education purposes.

If the absent partner is in hospital or long-term residential or care home, it would not be appropriate to take account of their resources.

Question 10 – Do you envisage other circumstances where a contrary interest could apply? Please state the reason(s) for your answer.

In the employment tribunal context, a contrary interest could arise where the partner is the employer, or an officer of the employer.

Question 11 – Do you agree that the existing process for third party applications should be applied to all courts and tribunals subject to this consultation, and that the current practice in the Court of Protection should continue? Please state the reason(s) for your answer.

N/A

Question 12 – Do you agree that providing copies of documents and searches should be exempt from the remission system? Please state the reason(s) for your answer.

N/A

Question 13 – Do you envisage circumstances where charging for copy or search fees would restrict access to justice? Please state the reason(s) for your answer

N/A

Question 14 – Do you agree that the time limit for making a retrospective remission should be reduced to two months? Please state the reason(s) for your answer.

No. The reason for the proposed reduction rests on the administrative burden on court staff in 'retrieving and reviewing a court file which may no longer be readily accessible'. In the employment tribunal, the average time from receipt of the claim form to obtaining an outcome is 76 weeks, with the median being clearance in 30 weeks. The file remains live. While the case remains undecided, there is a prospect that a claimant will eventually obtain advice and discover that she or he was entitled to remission of the fees already paid.

Dealing with archived case files is a different matter. However, where a claim has been struck out for non-payment of fees, the time limit of six months should be retained.

Question 15 – Your views are welcome on whether there are any other factors we need to take into account for claimants seeking remissions in multiple claims.

The focus has been on matters with multiple claimants. In the employment tribunal context consideration needs to be given to multiple claim forms presented by single claimants.

Question 16 – Overall, do you agree that this provides a fair, transparent and workable structure for determining fee remissions for HMCTS and the UK Supreme Court? Please state the reason(s) for your answer.

See answers to the above questions. Further, the timing of the consultation makes it difficult to address the relevant issues clearly. Currently, a number of different cuts or

reforms in benefits and in service provision are beginning to be implemented. Assessment of the impact of the proposed fees remission scheme is very difficult to predict in such circumstances. Inevitably, the different changes will interact, putting greatest pressure on low paid workers within the scope of current income-related benefits. It is this group that we predict will be most at risk of being denied effective protection of the rights guaranteed in European directives by being denied effective redress to enforce those rights.

Question 17 – Do you think the proposed remission system is likely to have any positive or adverse equality impacts? Please state the reason(s) for your answer.

Question 18 – If you think the proposal is likely to have any adverse equality impacts, how could these impacts be mitigated? Please state the reason(s) for your answer.

Question 19 – Are you aware of any further evidence that could aid our analysis of potential equality impacts? If so please provide us with this evidence.

See above. On balance, the negative equality impacts are likely to prove a fruitful source of work for Cloisters' employment and discrimination team. However, for the reasons given above, this is not something that we seek actively.

SALLY ROBERTSON

ANNA BEALE

CATHERINE CASSERLEY

On behalf of Cloisters' Employment and Discrimination team

16 May 2013