VEXATIOUS CLAIMS

CHALLENGING THE CASE FOR EMPLOYMENT TRIBUNAL FEES

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Access to Justice; Effective Judicial Protection; Employment Tribunals; Court Fees; Unison v Lord Chancellor 1 & 2; Vexatious Claims

Since July 2013, recourse to Employment Tribunals in the United Kingdom has attracted fees of up to £1,200 for single claimants. The impact of this reform has been dramatic: within a year, claims dropped by nearly 80%. In this paper, we challenge the legality of the fee regime as introduced, suggesting that it is in clear violation of domestic and international norms, including Article 6(1) ECHR and the EU principle of effective judicial protection. Drawing on rational choice theory and empirical evidence, we argue that the resulting payoff structures, negative for the majority of successful claimants, strike at the very essence of these rights. The measures are furthermore disproportionate in light of the Government's stated policy aims: fees have failed to transfer costs away from taxpayers, have failed to encourage early dispute resolution, and have failed to deter vexatious litigants. The only vexatious claims, we find, appear to be those which motivated the reforms in the first place.

We will sell to no man, we will not deny
or defer to any man either Justice or Right.
Magna Carta, cl XXXIX

INTRODUCTION

Access to the courts is the bedrock of the rule of law: 'rights are valueless if they cannot be realised … and it is therefore essential that all … citizens have fair and equal access to justice.'[1] In the context of employment law, the Donovan Commission recognised early on that only a specialised tribunal system could ensure the 'easily accessible, informal, speedy and inexpensive' resolution of disputes between workers and their employers.[2] Today, Employment Tribunals ('ETs') have come to play 'a

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[1] L Neuberger, *Justice in an Age of Austerity* (Tom Sargant Memorial Lecture 2013) at [28], [26].

[2] Donovan Commission on Trade Unions and Employers' Associations 1965-8 (Cmnd 3623).

central role in British employment relations'.[3] With the demise of collective representation,[4] and in the absence of consistent state enforcement,[5] the ET system represents the only credible mechanism for vindicating most individual employment rights.[6]

Claim numbers have grown accordingly, from a mere 13,555 actions in 1972, the year in which unfair dismissal protection came into force, to 191,541 cases in 2012/13.[7] With this rise in claims came concerns from some quarters about the cost implications for employers; not least because costs awards have not traditionally been available in order to protect the tribunals' 'essential character' as a 'cost-free user-friendly jurisdiction.'[8] Freedland and Davies detect a change of emphasis in the 1980s, away from the realisation of rights 'to discouraging "undeserving" applicants from wasting management's time over "hopeless" claims'.[9]

The Coalition Government elected in May 2010 soon heeded these concerns, with the introduction of employment tribunal fees becoming one of the central elements of its extensive programme of employment law reform. Since July 2013, claimants have been charged issue and hearing fees of up to £1,200 in order to bring their claims to trial. The impact of this change was swift and dramatic: within a year, claims had fallen by nearly 80%. Despite widespread stakeholder concerns and multiple rounds of judicial review proceedings, however, the fees regime remains in force.

This paper sets out to challenge the Government's case for tribunal fees.[10] We argue that tribunal fees have become a powerful barrier to justice, in violation of domestic and international norms which protect the fundamental right of access to courts or tribunals – from the EU law principle of effective judicial protection to Article 6(1) of the European Convention of Human Rights ('ECHR'). The regime as introduced violates the very essence of these rights, as the majority of meritorious claimants are faced with a net financial loss, even following success in their substantive arguments. As detailed scrutiny of the Government's economic policy case shows, the Fees Order 2013 is furthermore a clearly disproportionate measure in pursuit of the twin aims of transferring cost from taxpayers to workers and influencing claimant behaviour.

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[3] S. Corby, 'British Employment Tribunals: from the Side-Lines to Centre Stage' (2015) 56 Labor History 161, 161. See P Davies and M Freedland, *Labour Legislation and Public Policy: A Contemporary History* (OUP 1993) 161-164, 204-208. The original terminology of Industrial Tribunals was abolished by s 1(1) of the Employment Rights (Dispute Resolution) Act 1998.

[4] Department for Business, Innovation and Skills, *Trade Union Membership 2014: Statistical Bulletin* (London, June 2015): 6.4million members or 25% density.

[5] The United Kingdom appointed labour inspectors as early as 1833; today there remains but a limited patchwork of area-specific agencies: Lab/Admin, 'Labour Inspection: What it is and What it does' (ILO 2010) 8.

[6] We discuss the role of alternative dispute mechanisms, including notably ACAS, below.

[7] Corby, n 3 above, 163.

[8] *Gee v Shell Ltd* [2002] EWCA Civ 1479 at [35].

[9] Davies and Freedland, n 3 above, 208. For subsequent attempts to temper enforcement, see e.g. B. Hepple and G. Morris, 'Employment Act 2002 and the Crisis of Individual Employment Rights' (2002) 31 ILJ 245, 247.

[10] Whilst the regime as introduced covers both ETs and Employment Appeal Tribunals (EATs), judicial review proceedings have focused on the former as representative for both; we proceed on the same assumption.

A brief introductory section outlines the fees regime, and maps its dramatic impact on claim numbers. Section two turns to the hitherto unsuccessful legal challenges. Focusing on EU law and the European Convention, we argue that the domestic courts' focus on claimant ability to pay the fees is, with respect, a misguidedly narrow reading of remarkably consistent Luxembourg and Strasbourg jurisprudence. Drawing on rational choice theory and official tribunal receipts, disposal, and cost statistics alongside survey evidence from the most recent official *Survey of Employment Tribunal Applications* (SETA 2013), section three then demonstrates how the fees regime denies the very essence of Article 6(1) ECHR and the principle of effectiveness: given a claimant's expected payoffs, negative in a significant proportion even of successful cases, the charges have become a major obstacle to the effective vindication of workers' rights. Section four, finally, scrutinises the proportionality of the regime as introduced: whilst most of the aims pursued might in principle appear legitimate, a detailed examination of the Government's economic policy case demonstrates how tribunal fees are unlikely to transfer the system's costs, encourage quicker dispute resolution, or deter vexatious claimants; indeed, the reforms may have had the opposite effect. A brief conclusion summarises the case for the abolition of the 2013 fee regime, and offers suggestions for significant reform in the alternative.

A INTRODUCING EMPLOYMENT TRIBUNAL FEES

Calls for employment tribunal fees are not new: concerns over the expense and timeliness of proceedings have been voiced for several decades, with fees as a potential remedy explored in proposals made by a Conservative Government in 1986,[11] as well as in New Labour's *Routes to Resolution* (2002).[12] Ultimately, however, the fee model was dropped in both instances amongst widespread concern that claimant charges would deter meritorious claimants.[13]

Following the financial crisis, employment regulation once more became characterised as an impediment to 'the search for efficiency and competitiveness',[14] and was singled out as a significant barrier to growth in several Government consultations.[15] Against this background, the characterisation of Employment Tribunals as hunting grounds for the unemployed and vexatious resurfaced with renewed vigour, not least as a result of Government policy characterising workers 'with nefarious undertones; possessing a savvy understanding of employment law which (it seems) evades employers' own.'[16] In this introductory section, we outline the tribunal fee regime as introduced in July 2013, and chart the dramatic fall in employment claims which ensued.

[11] Department of Employment, *Building Businesses, Not Barriers* (Cmnd 9794), paras 7.4-7.11.
[12] See, for example, Department for Trade and Industry, 'Routes to Resolution: Improving Dispute Resolution in Britain' (London, 2001) at para 5.8-5.10.
[13] Hepple and Morris, n 9 above, 249.
[14] A. Beecroft, 'Report on Employment Law' (BIS 2011), 2.
[15] Department for Business, Innovation and Skills, 'Resolving Workplace Disputes – A Consultation – Response Form' (London, January 2011) 2, 3. Ministry of Justice, 'Charging Fees in employment tribunals and the Employment Appeals Tribunal' Consultation Paper CP22/2011 (London, 2011).
[16] D. Mangan, 'Employment Tribunal Reforms to Boost the Economy' 42 ILJ 409, 418.

B The fee regime

Despite a wide range of objections during the consultation period, *The Employment Tribunals and the Employment Appeals Tribunal Fees Order 2013* (the Fees Order) came into force on 29 July 2013,[17] introducing a multi-tiered fee structure for ET claims. A list of relatively straightforward and low-value 'Type A' claims (such as unauthorised deductions from wages, median award £600)[18] are set out in Schedule II to the Order; the remaining 'Type B' claims (including unfair dismissal, median award £5,016)[19] attract significantly higher fees 'to reflect [their] likely greater cost'.[20] Claimants have to pay fees at two stages: an issue fee to lodge their claim, and a further hearing fee when the final hearing is listed. The amounts levied vary according to type of claim and number of claimants, as set out in Table 1. The Fees Order does not provide for recovery in case of successful claims; litigants may however apply to the Tribunal for a discretionary costs order against unsuccessful respondents.[21]

Table 1: Fee Structure (£)

Number of claimants	Type A		Type B	
	Issue Fee	Hearing Fee	Issue Fee	Hearing Fee
1	160	230	250	950
2-10	320	460	500	1900
11-200	640	920	1000	3800
>200	960	1380	1500	5700

Source: *Fees Order*, Schedule II

A fee remission scheme was put in place to ensure that 'the taxpayer [would] fund the employment tribunals for any individual who cannot afford to pay the fee'.[22] To be eligible in principle, the claimant and their partner cannot own combined disposable capital of more than £3,000.[23] Any actual remission is then dependent on household gross monthly income: for a two-person family without children, for example, full remission will only be available to those with a combined monthly income of less than £1,245.[24] The actual number of remission applications has been significantly

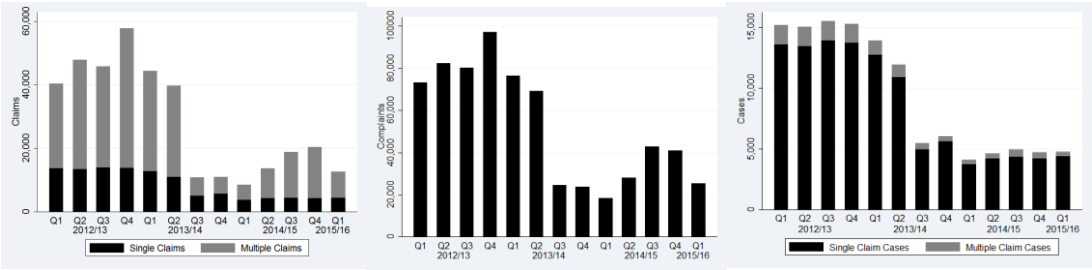
[17] SI 2013/1893.
[18] 2013/14 values. Authors' calculations from the *Survey of Employment Tribunal Applications 2013*: Department for Business, Innovation, and Skills: Employment Market Analysis and Research, *Survey of Employment Tribunal Applications 2013* [Data Collection SN 7727] (London, 2015).
[19] 2013/14 values. Employment Tribunal and Employment Appeals Tribunal Annual Tables: January to March 2015, Table E.4.
[20] Explanatory Memorandum to The Employment Tribunals and Employment Appeals Tribunal Fees Order 2013, No. 1893 & The Added Tribunals (Employment Tribunals and Employment Appeals Tribunal) Order 2013 No. 1892, at [2].
[21] ET Rule 76(4); see also, mutatis mutandis, *Look Ahead Housing and Care Ltd v Chetty* [2015] ICR 375, at [52].
[22] Fees Consultation, n 15 above,12.
[23] Where capital includes savings account balances, investment bonds, stocks and shares. See HM Courts and Tribunal Service, *Guide: How to Apply for Help With Fees* (London 2015).
[24] The full criteria are set out in Schedule 3 to the Fees Order.

lower than predicted.[25] Despite recent changes to the remission system, its design remains contentious.[26] Judicial representatives and claimant support groups alike have argued that the capital and income thresholds are set too low given the often precarious financial position of claimants,[27] and the fact that many claimants might have temporarily inflated capital balances when bringing a claim due, for example, to employment termination payments or savings just before child birth.[28]

B Impact

There are three measures of demand for ET adjudication: volume of cases, volume of claims, and volume of jurisdictional complaints.[29] As Figure 1 clearly demonstrates, demand fell significantly upon the introduction of the fees whichever measure is used. Between the second and third quarter of 2013/14, the volume of claims, complaints, and cases accepted by the employment tribunals fell by 73%, 70%, and 65% respectively. This dramatic decline appears to be permanent: in the first quarter of 2015/16, claim receipts remained 72% lower compared to the same period in 2013/14.

Figure 1: Claim, Complaint, and Case Receipt Volumes



Claims Complaints Cases

Source: Tribunal and Gender Recognition Statistics Quarterly: January to March 2015, Main Tables, Table 1.2.

This drop was much larger than anticipated.[30] A predicted fall in single claims to between 31,863 and 33,816 cases per year following the introduction of the fees,[31] for

[25] See Ministry of Justice, 'Introducing a fee charging regime into Employment Tribunals and the Employment Appeal Tribunal: Impact Assessment, IA TS007' (London, 2012), 27.
[26] Guide: How to Apply for Help With Fees, n 23 above.
[27] Employment Tribunals (Scotland), Written Evidence to Courts and Tribunals Fees and Charges Inquiry, 13 October 2015, at [19].
[28] Evidence from Employment Judge Brian Doyle, Written Evidence to Courts and Tribunals Fees and Charges Inquiry, 28 September 2015 at 12. See also 'Camilla's story' in Working Families, Written Evidence to Courts and Tribunals Fees and Charges Inquiry, 13 October 2015.
[29] The volume of cases is smaller than the number of claims, as claims bought by two or more people that arise from the same circumstances are processed together (multiple claims). The number of claims in turn is smaller than the number of complaints as a claim may be bought under multiple jurisdictions – combining unfair dismissal and sex discrimination claims, for example.
[30] Not least because there are no estimates of the price elasticity of demand for justice. Lord Dyson highlighted this 'lamentable' evidence base when giving evidence at the House of Commons Justice Committee: Courts and Tribunals Fees and Charges, HC 396, Tuesday 26 January.

example, stands in stark contrast with the 16,420 such cases actually received in 2014/15.[32] The Government's official impact assessment furthermore failed entirely to anticipate the disproportionate impact of fees on low-value (as opposed to low-merit) claims.

Since July 2013, claims with low monetary awards at stake have all but disappeared from the tribunals: in a survey of employment tribunals, 'many judges reported that they now hear no money claims at all.'[33] The proportion of awards for unfair dismissal claims valued at less than £500 (two week's pay at the minimum wage level), for example, fell by nearly 80% in the first year. The average compensation for sex discrimination cases, on the other hand, more than doubled from £10,552 to £23,478 in the same period, even though the number of successful claims had fallen by a third.[34] *SETA* data corroborate these findings: claimants with lower expected awards were more likely to be discouraged by the fees compared to those with higher expected value claims, even when controlling for claim merit and other factors,[35] and those pursuing low value Wages Act cases were most likely to report that fees would deter them.[36]

As we explain in more detail in the subsequent section, these changes in claimant behaviour suggests that litigants have responded to the fee system in a rational way: low value claims are deterred because the costs imposed by fees are disproportionate in the light of monetary compensation and likelihood of recovery. In Wage Act cases, for example, claimants have to pay a combined issue and hearing fee of £390 upfront in order to receive (if successful) a median award of around £600,[37] only 56% of which will be paid in full.[38] As Employment Judge Brian Doyle noted, 'Employment Judges now see very few short track cases (claims for unpaid wages, etc), the obvious inference being that a combined fee of £390 represents a considerable investment in proportion to what might be a relatively modest sum at stake.'[39]

Official sources have nonetheless taken the magnitude of the decline as an indicator of the policy's success: (then) BIS minister Matthew Hancock MP, for example, was widely reported citing the dramatic fall in ET cases since July 2013 as evidence that 'tens of thousands of dishonest workers have been squeezing the life out of businesses with bogus employment tribunal claims for discrimination and harassment'.[40]

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[31] Impact Assessment, n 25 above, 27.
[32] Tribunal and Gender Recognition Statistics Quarterly: January to March 2015, Main Tables, Table 1.2.
[33] Council of Employment Judges, Written Evidence to Courts and Tribunals Fees and Charges Inquiry, 13 October 2015.
[34] Tribunal and Gender Recognition Certificate Statistics Quarterly April to June 2015, Employment Tribunal and Employment Appeals Tribunal Tables, Table E.5 and E.7, respectively.
[35] Younger claimants and those on lower incomes were also more likely to be influenced by the fee. Amongst individuals pursuing their claim for monetary motivations, women were more likely than men to report that a fee would have influenced their decision. The full set of regression results are given in Table A1 of the Online Appendix.
[36]Department for Business, Innovation, and Skills, *Findings from the Survey of Employment Tribunal Application 2013*, (London, 2014) Research Series No. 177, 39.
[37] Authors' calculation from SETA 2013, n 18 above.
[38] Department for Business, Innovation and Skills, 'The Payment of Tribunal Awards: 2013 Study', (London, 2014), Table 5.4, 30.
[39] Employment Judge Brian Doyle, n 28 above.
[40] T Ross, 'Minister hails 80pc fall in employment tribunals', The Daily Telegraph, 26 April 2014.

The vast majority of commentators, on the other hand, expressed deep reservations. Whilst the Ministry of Justice pointed to the wider economic climate as an explanation of the dramatic decline in claim numbers,[41] evidence from workplace disputes lodged with ACAS suggests the number of employee grievances is broadly stable,[42] even though most workers' claims are no longer litigated.[43] The same data confirm that the fall in claims cannot be explained by the introduction of Mandatory Early Conciliation for employment disputes in early 2014: a significant proportion of disputes lodged with ACAS do not settle or proceed to tribunal, with ET fees as the most-cited factor in deterring claimants.[44]

The tenor of submissions to a governmental enquiry in late 2015 suggests that stakeholders, from the Equality and Human Rights Commission to the Tribunals Judiciary, are united in their fear that 'the introduction of fees has had a damaging effect upon access to justice.'[45]

A THE LEGAL CASE AGAINST FEES

Concerns about access to justice sit at the heart of subsequent legal challenges to the Fees Order. In this section, we set out the main elements of the (hitherto unsuccessful) judicial review proceedings, before focussing on the review standard adopted by the High Court and the Court of Appeal: the courts' approach has been fundamentally flawed with reference both to the European Union law and the European Convention on Human Rights.

B Judicial review proceedings

The tribunal fees regime has been the subject of several rounds of judicial review proceedings before domestic courts.[46] Unison's original challenge, brought in the High Court as soon as the Fees Order was laid before Parliament in July 2013, was dismissed as premature in February 2014.[47] In September of that year, the union launched further proceedings ('*Unison 2*'), adducing evidence from the scheme's first year of operation.[48] The Equality and Human Rights Commission intervened in both cases in support of Unison's claims.

[41] Ministry of Justice, Written Evidence to Courts and Tribunals Fees and Charges Inquiry, 13 October 2015, 5.
[42] ACAS, *Acas Annual Report and Accounts 2014/15* (London 2015), 34.
[43] ACAS, *Evaluation of Acas Early Conciliation 2015* (London, 2015), 65.
[44] ACAS, n 43 above, 97.
[45] Tribunals Judiciary, Written Evidence to Courts and Tribunals Fees and Charges Inquiry, 20 October 2015, at 19.
[46] *R (on the application of Unison) v Lord Chancellor* [2015] EWCA Civ 935 ('*Unison CA*'), at [2] – [10]. The fees were also challenged in the Scottish courts: *Fox Solicitors Ltd, Re Judicial Review* [2013] ScotCS CSOH_133. The Scottish Government has since announced that fees will be abolished under the forthcoming devolution settlement: Government of Scotland, *A Stronger Scotland* (Edinburgh 2015) 38.
[47] [2014] EWHC 218 (Admin), [2014] ICR 498 ('*Unison 1*').
[48] [2014] EWHC 4198 (Admin), [2015] ICR 390 ('*Unison 2 HC*').

The precise grounds of challenge varied across different proceedings, with the principle of effectiveness, or effective judicial protection, playing a central role throughout. Many employment rights in English law (from equal pay and working time protection to several grounds for unfair dismissal) are derived from EU norms.[49] Whilst Member States are generally free to determine the procedural conditions for actions vindicating such rights, a series of restrictions on this 'national procedural autonomy' have evolved in the Court of Justice's case law,[50] beginning with the condition that 'procedural requirements for domestic actions must not make it virtually impossible or excessively difficult to exercise rights conferred by [Union] law.'[51] This principle of effectiveness is today anchored in Article 19(1) TEU as well as Article 47 of the Union's Charter of Fundamental Rights (CFR), and closely mirrored in Article 6 of the European Convention of Human Rights (ECHR), as well as 'the common law principle that access to a court is a fundamental right'.[52] The employment tribunal fee system, Unison alleged, was in clear violation of these rights, as it made the vindication of workers' rights 'theoretical or illusory [rather than] practical and effective'.[53]

In the Divisional Court's decision in *Unison 2*, Elias LJ (with whom Foskett J agreed in a brief concurring judgment) embarked on an extensive analysis of the relevant EU and ECHR authorities, suggesting that 'two distinct albeit related principles' were at stake: first, whether a restriction on access to the courts, such as a fee system, was objectively justified and proportionate, and if so, whether 'its effect in practice [was] to make it virtually impossible or excessively difficult for a litigant to have access to the court'.[54] He quickly dismissed the first point, concluding that the 'imposition of a fee in order to help pay for the service is plainly in principle a legitimate aim designed to ensure that the users of the service make a contribution towards its cost'. The question thus turned to the issue of whether the fee regime 'does in practice make access impossible or exceptionally difficult.'[55]

His Lordship then set out the Divisional Court's judgment in *Unison 1*,[56] citing with approval its conclusion that

> The very use of the adverb 'excessively' in the jurisprudence suggests that the principle of effectiveness is not violated even if the imposition of fees causes difficulty and renders the prospect of launching proceedings daunting, provided that they are not so high that the prospective litigant is clearly unable to pay them.[57]

[49] A full table can be found in Annex 2 of the Court of Appeal's judgment.
[50] P Craig and G de Burca, *EU Law: Text, Cases, and Materials* (6th ed, OUP 2015) 229ff. cf M Bobek, 'Why There is No Principle of "Procedural Autonomy" of the Member States' in H-W Micklitz and B de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012).
[51] C-326/96 *Levez v TH Jennings (Harlow Pools) Ltd* [1998] ECR I-7835; [1999] 2 CMLR 363, [22].
[52] *Unison 2* HC at [24].
[53] The much-rehearsed language of the European Court of Human Rights. See e.g. *Airey v Ireland* (1979) 2 EHRR 305, at [24] and the cases cited there.
[54] *Unison 2 HC*, at [40], [43].
[55] ibid at [44].
[56] ibid at [52].
[57] *Unison 1*, at [41].

When applied to the statistical evidence presented by Unison, even the 'very dramatic change' in claim numbers could not clear that hurdle.[58] In the absence of an actual claimant, unable to pay the tribunal fees yet ineligible for fee remission, it was impossible to determine claimants' motivations: the 'figures demonstrate incontrovertibly that the fees have had a marked effect on the willingness of workers to bring a claim but they do not prove that any of them are unable, as opposed to unwilling, to do so.'[59]

The Court of Appeal dismissed all appeals arising from *Unison 1* and *2*.[60] Of the four original grounds, only three had been argued in detail: breach of the principle of effectiveness, indirect discrimination, and breach of the Lord Chancellor's public sector equality duty;[61] once more, the effectiveness principle was at the forefront of the decision.

In determining that question, Underhill LJ (with whom Moore-Bick and Davis LLJ agreed) endorsed the High Court's focus on the affordability test, with particular reference to the case law of the European Court of Human Rights. He concluded that

> although some help is to be got from the case law it does not provide any clear criterion for identifying at what level a particular court fee becomes "excessive" or "disproportionate". It is necessary to go back to the underlying principle. … In my view it follows that the basic question is whether the fee payable is such that the claimant cannot realistically afford to pay it. If that seems a trite conclusion to so elaborate a discussion I must apologise. But it does add something. It means that the focus is squarely on what the claimant can afford to pay (rather than, for example, considerations of the value of the claim or the cost of the service)[62]

This question – 'whether the claimant can, in practice, pay the fee' – was to operate to the exclusion of all other considerations, including 'whether it would be a sensible use of his or her money to do so, which would depend on many imponderables, including the likelihood of success in any given case and whether the claim is being pursued for objectives which are not purely pecuniary.'[63]

In applying the affordability test to the statistical evidence, Underhill LJ noted his 'strong suspicion that so large a decline is unlikely to be accounted for entirely by cases of "won't pay" and that it must also reflect at least some cases of "can't pay"'.[64] However, he saw no safe ground for 'an inference that the decline *cannot* consist entirely of cases where potential claimants could realistically have afforded to bring proceedings but have made a choice not to.'[65] Only evidence of actual affordability

[58] *Unison* 2 HC at [57].
[59] ibid at [60].
[60] Unison was granted permission to appeal the Court of Appeal's decision by the Supreme Court on February 26, 2016; the case has not yet been listed for hearing.
[61] *Unison CA* at [29].
[62] ibid at [41].
[63] ibid at [45].
[64] ibid at [67].
[65] ibid at [68] (emphasis in the original).

'in the financial circumstances of (typical) individuals' could satisfy that requirement;[66] the effectiveness challenge to the Fees Order failed accordingly.

B Effectiveness and Access to Courts as Review Standards

The principle of Effectiveness is an elusive review standard: closely linked, in theory and practice, to the fundamental right of access to justice,[67] it appears 'hardly necessary to cite authority for so basic a proposition'.[68] Yet this seemingly clear slogan conceals a plethora of different sources and meanings, which make it difficult at first sight to establish a clear legal principle or review standard. In English law, 'the constitutional right of access to the courts should … be understood as a duty, owed by the State, not to place obstacles in the way of access to justice. That it is a constitutional duty there can be no doubt, for it is inherent in the rule of law.'[69] Despite the occasional subtle difference in specific standards or formulations,[70] there is furthermore a long history of textual cross-references and courts' drawing on both EU and ECHR jurisprudence.[71]

In EU law, the principle is usually traced back to *Rewe*,[72] where the Court of Justice held that rights 'conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules. The position would be different only if the conditions … made it impossible in practice to exercise the rights …'. The detailed development of this principle will be charted in subsequent paragraphs; today, effective legal protection is anchored in the Union's legal order through Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights. Whilst the latter provisions have become the new 'reference standard', earlier jurisprudence continues to be of direct relevance.[73]

As a well-entrenched general principle of EU law, it is unsurprising that effectiveness finds its origins in the common constitutional traditions of the member states, as well as the European Convention of Human Rights.[74] The English courts, for example, have long recognised that '[a]ccess to a court to protect one's rights is the foundation

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[66] ibid.
[67] F Jacobs, *The Right to a Fair Trial in European Law* [1999] European Human Rights Law Review 141, 142; T Cornford, 'The Meaning of Access to Justice' in E Palmer, T Cornford, A Guinchard and Y Marique (eds) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016) 27.
[68] *Unison CA* at [32].
[69] *Children's Rights Alliance for England v Secretary of State for Justice* [2013] EWCA Civ 34, [2013] HRLR 17, at [38].
[70] The Guidance notes to Art 47 CFR, for example, suggest that protection under union law 'is more extensive since it guarantees the right to an effective remedy before a court'.
[71] See e.g. Art 52(3) CFR; *Unison CA* at [32]; J Casey, 'The right to a fair trial and access to justice in employment tribunal cases' (2015) Scots Law Times 172, 173.
[72] C-33/76 *Rewe-Zenralfinanz v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, 1998.
[73] S. Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in C Paulussen et al (eds), *Fundamental Rights in International and European Law* (TMC Asser 2016).
[74] For a full account, see e.g. S Peers, 'Europe to the Rescue? EU Law, the ECHR and Legal Aid' in E Palmer, T Cornford, A Guinchard and Y Marique (eds) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016) 53.

of the rule of law'.[75] The principle is similarly a constituent element of the European Convention of Human Rights: Article 6(1) ECHR provides that '…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Whilst access to the courts is not explicitly enumerated, the Strasbourg Court determined early on that one could 'scarcely conceive of the rule of law' without such access being implicit in Article 6.[76] Similarly, whilst a financial dimension of this right is only spelt out explicitly in the context of criminal proceedings,[77] the Court has recognised its equal application to civil litigation.[78]

In *Unison 2*, Underhill LJ suggested that in order to determine whether the Fees Order had violated the principle of effective judicial protection, 'the basic question is whether the fee payable is such that the claimant cannot realistically afford to pay it'.[79] Actual affordability thus became the key issue at stake, with a forensically difficult distinction to be drawn between claimants who chose not pay the fees out of their limited budgets, and those who were unable to do so.[80]

We suggest that this approach is an inappropriately narrow gloss on the prevailing law. Upon closer inspection, a focus on claimants' inability to pay as the sole deciding factor is both a misinterpretation of prevailing ECHR jurisprudence, and in conflict with EU law's consistently strengthening emphasis on effective judicial protection.

As regards the Strasbourg jurisprudence, first, a fundamental misapprehension lies in the fact that in the court's case law on fees, claimants' inability to pay is consistently listed as *but one of* the factors to be taken into account when determining compliance with Article 6(1).[81] In *Podbielski*, for example, the ECtHR noted that a

> requirement to pay fees … cannot be regarded as a restriction … incompatible *per se* with Article 6(1) of the Convention. However, the amount of the fees assessed in the light of the particular circumstances of a given case, including the applications' 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 his right of access.[82]

At first glance, the English courts' focus on claimants' ability to pay as a central element might be understandable given the cases argued before their Lordships: on the facts of the decisions scrutinised in the Court of Appeal, all claimants were indeed

[75] *Ahmed v HM Treasury* [2010] UKSC2, [2010] 2 AC 534, *per* Lord Phillips [146], as cited by Elias LJ, *Unison 2 HC* [24].
[76] *Golder v UK* (1975) 1 EHRR 524, [34].
[77] Art 6(3)(c) ECHR.
[78] *Airey* (n 53 above) [26].
[79] *Unison CA* at [41].
[80] ibid at [68].
[81] This is also borne out in the ECHR's guidance notes on Article 6 (http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf) at para [47].
[82] *Podbielski v Poland* [1998] HRCD 1006 at [64] (our emphasis); see also *Kreuz v Poland* (2001) 11 BHRC 456 at [60].

unable to pay the fees – because they were without any income,[83] in extreme financial difficulty,[84] or already bankrupt.[85] That inability to pay is not the operative criterion, however, can be seen by reference to the Strasbourg court's decision in *Weissman*. There, a fee requirement was found to be excessive as the claimants 'were implicitly obliged to abandon the action, which deprived them of the right to have their case heard by a court',[86] even though following earlier successful restitution proceedings, the claimants were far from impecunious. Instead, one of the factors the Court focussed on in *Weissman* was 'particularly … the fact that this restriction was imposed at an initial stage of the proceedings',[87] as is the case with tribunal issue fees. Whilst inability to pay is thus a potentially important indicator in determining breach of Article 6(1), it is far from the sole criterion or 'basic question'.

The Court of Appeal's approach is similarly misguided in light of EU law, despite Underhill LJ's suggestion that the 'criterion of whether the claimant can realistically afford to pay the fee is consistent with the well-established test in Levez … provided due weight is given to the phrase "impossible in practice".'[88] The principle of effective judicial protection may be an 'unruly horse',[89] but its direction of travel has become increasingly clear. Focussing on impossibility alone is too narrow an approach even under the original *Rewe* principle, and especially so in the light of more recent case law, beginning with the Court's decision in *Simmenthal*.[90] It furthermore stands in stark contrast to the Union legal order's increasing emphasis on effective judicial protection as a fundamental right set out in Article 47 CFR.

The elevation of affordability to the central criterion, first, ignores the fact that the *Rewe* and *Levez* line of cases was never phrased in terms of practical impossibility alone, and that 'the intrusive *Simmenthal* effectiveness vision was also added and gradually expanded: from impossibility to difficulty.'[91] As Bobek has noted, the effectiveness principle today

> requires not only that the enforcement of EU law-based claims cannot be rendered *practically impossible*, but also not *excessively difficult*. Impossible means impossible. … Excessively difficult, on the other hand, relies more on subjective visions of the appropriate level of "difficulty" claimants ought (not) to be facing when vindicating their rights under EU law. Moreover, "excessively difficult" might mean something quite different to a multinational company … than to a small high street business.[92]

[83] *Kreuz* (n 82 above) at [16].
[84] *Podbielski* (n 82 above) at [11]-[45]
[85] *FC Mretebi v Georgia* (2010) 50 EHRR 31 at [28].
[86] *Weissman v Romania* (Application No. 63945/00) (Unreported) at [40].
[87] ibid [42]
[88] *Unison CA* at [41].
[89] A Arnull, 'The Principle of Effective Judicial Protection in EU law: an Unruly Horse?' (2011) ELR 51.
[90] C-106/77 *Simmenthal* [1978] ECR 629
[91] M. Bobek, 'The Effects of EU Law in the National Legal Systems' in C Barnard and S Peers (eds), *European Union Law* (OUP 2014) 140, at section 6.
[92] Bobek, n 90 above, 167.

Even where a claimant might be able to afford tribunal fees in principle (and her claim is thus not practically impossible), the level of fees might still make it excessively difficult to do so, as we demonstrate in the following section: given its context-specificity, the threshold of excessive difficulty will be particularly low in the case of unrepresented and inexperienced claimants bringing low-value claims.

In focussing on *Levez* and discarding more CJEU materials simply because 'they are not concerned with the question of court fees, and it is difficult to extract from them any clear statement … which either modifies the formulation in *Levez* or casts light on how it should be applied',[93] the Court of Appeal furthermore ignored significant recent developments towards a much higher level of scrutiny,[94] not least as a result of the Court's shift of emphasis and rhetoric to the notion of 'effective judicial protection'. Prechal and Widdershoven have traced the (rather unpredictable) line between the received notion of effectiveness, and a potentially 'more stringent' concept of effective judicial protection'.[95] They demonstrate that the Court's review standard is significantly more interventionist when applying the principle of effective judicial protection,[96] a trend likely to accelerate further as a result of its clear endorsement both in the Charter of Fundamental Rights and the Lisbon Treaty revisions.

The picture which has thus emerged from both the Strasbourg and Luxembourg jurisprudence suggests that the domestic courts' focus on affordability alone set up an inappropriately narrow review standard in scrutinising the Fees Order's impact on employment law claims. Which standard, then, should the Court of Appeal have adopted instead?

The correct approach, we suggest, was set out by the Grand Chamber of the European Court of Human Rights in *Ashingdane v United Kingdom*:

> Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access, 'by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and individuals' ... Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[97]

[93] *Unison CA* at [36], [37].
[94] Bobek, n 91 above, at section 3; citing also Tridimas, T., *The General Principles of EC Law*. 2nd Ed. Oxford University Press: Oxford, 2006, pp. 420 – 422 on 'resurgence of interventionism'.
[95] S. Prechal and R. Widdershoven, 'Redefining the Relationship between "*Rewe*-effectiveness" and Effective Judicial Protection' (2012) 4 *Review of European Administrative Law* 31, 39.
[96] S. Prechal, 'Community Law in National Court: the Lessons from Van Schijndel' (1998) 35 *Common Market Law Review* 681, 689ff.
[97] (A/93) (1985) 7 EHRR 528, at [57] (our emphasis).

This three-pronged test has become oft-cited and well-established in the relevant case law,[98] and was fully endorsed by the CJEU in *DEB v Germany*, when it noted that 'the European Court of Human Rights has similarly examined all the circumstances in order to determine whether the limitations applied to the right of access to the courts had undermined the very core of that right, whether those limitations pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved'.[99]

Whilst Elias LJ suggested in the High Court that the affordability test was identical to this approach,[100] as previous discussion has shown, that approach focussed on far too narrow an element of the existing case law. Instead, the courts should have scrutinised whether the Fees Order violated the very essence of the right to access to the courts, whether the Government's stated policy pursued a legitimate aim, and whether the fee regime as introduced in 2013 was a proportionate means of achieving that aim. It is to these questions that discussion now turns.

A THE VERY ESSENCE OF THE RIGHT

The first limb of the *Ashingdane / DEB* test to be addressed is the circumstances under which court fees violate the very essence of a claimant's right to access a court or tribunal. In *Unison 2*, the Court of Appeal had asserted that if 'the effect of the fee regime is to make potential claimants think twice about starting proceedings for small sums, that is not axiomatically a bad thing'.[101] Its approach, however, sits uneasily with well-established case law in which domestic and international courts have recognised that the amount of a fee, and the point in time when it is charged, can in and of themselves be extremely dissuasive, regardless of a claimant's ability to pay: 'Hindrance in fact can contravene the Convention just like a legal impediment'.[102] Once a fee regime leads to large numbers of meritorious claimants' abandoning their actions, the principle of effectiveness has been violated. As Lord Neuberger PSC so memorably put it, a claim dropped for financial reasons alone 'is a rank denial of justice and a blot on the rule of law.'[103]

Actual inability to afford a fee might often be a good indicator of a particular regime's violation of Article 6(1) ECHR; the threshold, however, is set significantly lower. If claimants' payoff structures are changed to such an extent that even clearly meritorious claimants stand to lose out financially, access to justice will be denied regardless of affordability. The Strasbourg court has long held that 'the level of a fee may in itself be such as to restrict the enjoyment of a Convention right';[104] indeed, in *Kreuz v Poland* it concluded that 'The fee required from the applicant was excessive'

[98] e.g. also in *Kreuz* (n 82 above) at [54] and [55].
[99] C-279/09 DEB v Bundesrepublik Deutschland EU:C:2010:811 at [47].
[100] *Unison 2 HC* [41].
[101] *Unison CA* at [45]; see also *Unison 2 HC* [61].
[102] *Golder* (n 76 above) at [26]
[103] Neuberger (n 1 above) at [44].
[104] *O-Donoghue v UK* (34848/07) at [90]; citing there also L Bingham's concerns in *R. (on the application of Baiai) v Secretary of State for the Home Department* [2008] UKHL 53; [2009] 1 A.C. 287 at [30].

where '[i]t resulted in his desisting from his claim … [which] … impaired the very essence of his right of access.'[105] The Court of Justice has similarly domestic procedures' duration and cost as relevant factors in determining their effectiveness.[106] Indeed, in *Oceano Grupo* it explicitly noted that for low-value claims, costs which exceed the amount at stake 'may deter the consumer from contesting the application'.[107]

These decisions are wholly consistent with well-established economic models of rational claimant behaviour, best understood through an analysis of the fees' impact on expected claim value: the choice whether to litigate or not is driven by a claim's expected payoffs once all cost and benefits have been taken into account.[108] At its most basic, the expected value of a claim can be modelled as:

$$Expected\ value\ of\ claim = p*(B-C_w) + (1-p)*(-C_l)$$

where p gives the probability of an Employment Tribunal's deciding in favour of the claimant, B gives the financial benefit (award) associated with the claim, and C_w / C_l give the cost of bringing successful and unsuccessful claims, respectively.[109] A rational claimant will only sue when the benefit she expects from bringing a claim exceeds her expected cost of doing so.[110]

This expected value analysis informed the Ministry of Justice's impact assessment in preparing the Fees Order,[111] and has long been at the core of the legal aid system more generally.[112] The model is also used by practitioners when advising claimants on whether to proceed with a claim or accept settlement terms,[113] and even the Employment Tribunals have appealed to the notion of expected value to rationalise claimant decisions of whether or not to bring a claim.[114] As a 'natural' framework, it can easily be expanded to address additional aspects, including the fact that

[105] *Kreuz* (n 82 above) at [66]
[106] *C-317-320/08 Roalba Alassini and others* EU:C:2008:510, [55], [57]: settlement procedure limited to 30 days, and free of charge.
[107] *Océano Grupo Editorial SA v Quintero* (C-240/98-C-244/98) [2000] ECR I-4941; [2002] CMLR 43 at [26].
[108] See, e.g., W. Landes, 'An Economic Analysis of the Courts' (1971) 14 *Journal of Law and Economics* 61; R. Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 *Journal of Legal Studies* 399*;* S. Shavell, 'Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for Allocating Costs' (1982) 11 *Journal of Legal Studies* 55; G. Priest and B. Klein, 'The Selection of Disputes for Litigation' (1984) 13 *Journal of Legal Studies* 1. For a textbook treatment, see S. Shavell, *Foundations of Economic Analysis of Law* (Cambridge: Harvard University Press, 2004).
[109] Complications arising from settlement and fee recovery will be addressed in subsequent sections.
[110] This analysis is not much changed if the possibility of settlement is also entertained. See S. Shavell, 'The Social versus the Private Incentive to Bring Suit in a Costly Legal System', (1982) 11 *Journal of Legal Studies* 333, 338.
[111] Impact Assessment, n 25 above, 26.
[112] See Ministry of Justice, Lord Chancellor's Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012 (London, 2015) at [4.2.1] ff.
[113] See e.g. D. Hoffer, 'Decision Analysis as a Mediator's Tool' (1996) 1 *Harvard Negotiation Law Review* 116.
[114] Employment Tribunals (Scotland), Written Evidence to Courts and Tribunals Fees and Charges Inquiry, 13 October 2015, 14.

uncertainty imposes costs on risk adverse claimants, and that claimants often struggle to recover damages awarded.[115]

Relying on SETA data of tribunal outcomes for successful cases, we can estimate the distribution of expected payoffs (monetary awards minus costs) for typical Type A and Type B claims. Time cost is measured as the median number of days spent on relevant cases, valued at the minimum wage rate as of 2012; the probability of award payment is taken from a recent BIS study.[116] Whilst it is not possible to observe claimants' subjective probability assessments, we rely on SETA to determine the average probability of success for each category of claim, with optimistic claimants (90% success chance) acting as a control group.[117]

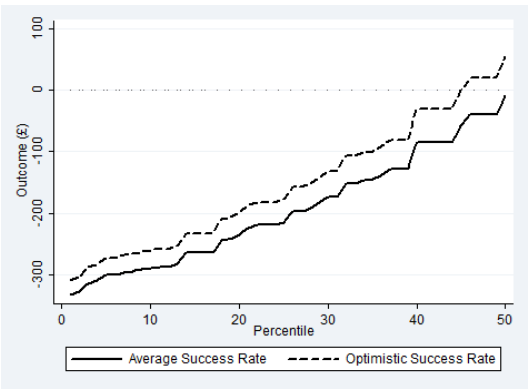
Analysed thus, the fee regime clearly infringes the principle of effectiveness. Rational claimants will only proceed with legal actions if their expected payoff is positive. As our calculations for successful single claimants in unfair dismissal and Wages Act cases demonstrate, once the expected benefits and costs of employment law claims are taken into account, not coming to tribunal is a rational response for a very significant proportion – between 35% and 50% – of meritorious claimants.

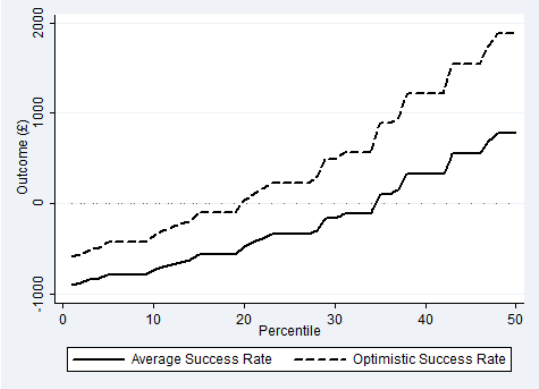
As Figure 2 illustrates, even under the most optimistic scenario, more than 20% of successful unfair dismissal claims are now associated with a negative payoff; 46% of Wages Act claims would have similarly lost the successful claimant money. This rises to 35% and over 51% respectively once the actual probabilities of success at hearing for each category of claim are used. The fees thus have a clearly predictable impact on claimants' access to employment tribunals: the prospect of a negative payoff will usually be associated with a decision not to bring a claim, even where it is evidently meritorious. As the Scottish Employment Tribunals have observed:

> It is not difficult to understand that some potential claimants may make what it is hard to see as other than a rational decision to the effect that it does not make economic sense to pursue the sum due to them when they are being asked to pay more in fees than the sum due with no guarantee that they will receive reimbursement of the fees. [118]

Figure 2. Distribution of Expected Returns for Risk-Neutral Claimants

[115] J. Davis, 'Expected Value Arbitration' (2004) 57 *Oklahoma Law Review* 47.
[116] Department for Business, Innovation and Skills, *The Payment of Tribunal Awards: 2013 Study* (London, 2014), Table 5.4, 30.
[117] A full description of the construction of these measures is given in the Online Appendix.
[118] Employment Tribunals (Scotland), n 114 above.





Wage Act Claims **Unfair Dismissal**

In reality, the drop in claims has been even more pronounced. Our deliberately conservative assumptions thus far understate the number of claims deterred: we assume, for example, that fees will always be awarded as costs to successful claimants,[119] exclude employer insolvency,[120] and ignore litigants' emotional cost as well as their natural tendency to avoid the risks and uncertainty of litigation.[121] According to the Lord Chancellor's own guidelines for legal aid funding,[122] however, actual litigants are much more easily deterred than the risk-neutral rational claimants on whom our initial analysis was premised.

The *Civil Legal Aid (Merits Criteria) Regulations 2013* set out the relevant cost-benefit calculations. A claim's prospects are first classified as very good (an 80% or more chance of obtaining a successful outcome), good (60% to 80% chance), or moderate (50% to 60% chance).[123] Claims for damages or other sums of money which are not of significant wider public interest are then subject to a cost / benefit test.[124] If 'the prospects of success of the case are very good, the [public authority] must be satisfied that the likely damages exceed likely costs'; in case of good or moderate prospects, the likely damages must exceed likely costs by a ratio of two to one and four to one, respectively.[125]

Applying these thresholds to our data, the fee regime would lead to a fall of 59% in wage claims (good prospect, payoff ratio 2:1), and a drop in 43% in unfair dismissal

[119] This is not necessarily the case: see e.g. *Look Ahead Housing and Care Ltd v Chetty* [2015] ICR 375, at [52]; Law Society, Letter to Employment Tribunal Fees Review Team, 30 September 2015: 'We have advised claimants not to pursue strong cases because there is a high chance that their fee won't be refunded, even if they are successful.'

[120] Where the employer is insolvent, and the claimant has to apply to the Redundancy Payments Service for redundancy pay, there is no employer to order a reimbursement from. Fees are not recoverable from the National Insurance Fund and thus a successful claimant will not recoup the fee. See Written Evidence from Employment Tribunals (Scotland), n 114 above.

[121] S. Busby and M. McDermont, 'Access to Justice in the Employment Tribunal: Private Disputes or Public Concerns?' in E Palmer, T Cornford, A Guinchard and Y Marique (eds) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016) 175, 189-192

[122] Ministry of Justice, Lord Chancellor's Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012 (London, 2015) at [4.2.1] ff.

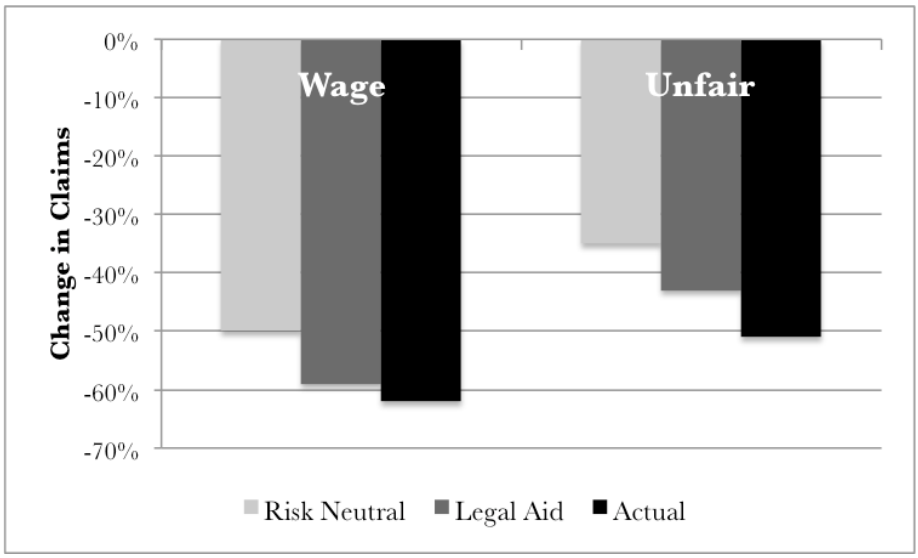
[123] SI 2013/104 (as amended), reg 5(1); additional lower categories are not relevant for present purposes.

[124] ibid reg 42(1).

[125] ibid reg 42(2)(a), (b), and (c), respectively.

cases (moderate prospects, payoff ration 4:1). Whilst the merit thresholds are of course designed to determine whether a claim should be publicly funded, it is not unreasonable to assume that an individual's choices whether to invest in litigation could be similarly motivated. Indeed, when using those thresholds in our model we see results eerily close to the actual drop in tribunal claims, as Figure 3 illustrates.

Figure 3. Estimated and Actual Changes in Claim Volume



Source: Authors' calculations from SETA data and Official Statistics

The quantitative evidence thus shows that following the introduction of the Fees Order, in addition to those claimants who cannot pay, there is now a large number of individuals with meritorious claims, yet no rational incentive to litigate: the successful legal vindication of their rights would lead to a significant financial loss, not least because the fees are 'wholly disproportionate to the likely rewards at tribunal'.[126] Applying the first limb of the legal test developed by the European courts, the fact that a significant portion of successful claims are now associated with a negative payoff will result in claimants' desisting from bringing employment law actions. The fees regime as introduced has 'reduce[d] the access left to the individual in such a way or to such an extent that the very essence of the right is impaired',[127] thus falling foul both of Article 6(1) ECHR and EU law's fundamental right to effective legal protection.

A PROPORTIONALITY

The case for tribunal fees was first laid out in *Resolving Workplace Disputes* (2011) and developed in detail in a consultation issued later that year;[128] Adrian Beecroft's now infamous *Report on Employment Law* provided further policy support for this 'radical step … to reduce the number of frivolous or vexatious claims'.[129] The Government's policy was built on two economic arguments: transferring the costs of

[126] Discrimination Law Association, Written Evidence to Courts and Tribunals Fees and Charges Inquiry, 3 November 2015.
[127] (A/93) (1985) 7 EHRR 528, at [57] (our emphasis).
[128] Fees Consultation, n 15 above.
[129] Beecroft, n 14 above, 7.

claims and appeals, first, would lead to more efficient levels of litigation as claimants had to bear an increased upfront share of their claim's total cost. Second, by thus reducing expected payoffs, early settlement would be encouraged and vexatious claims deterred.

There is widespread scepticism that the Fees Order was designed in a way capable of achieving these aims. As Brian Doyle, President of the Employment Tribunals, suggested in his evaluation of the Government's policy: 'the introduction of fees has not been successful in achieving the original objectives'.[130] The legal ramifications of this failure are significant: even if the fee regime had not impaired the very essence of the right to access a court or tribunal, its impact on claims must be shown to constitute a proportionate restriction in pursuit of legitimate aims.

Both EU law and ECHR jurisprudence have consistently held that 'a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.'[131] In applying this proportionality test, it is important to remember the heightened scrutiny which the present context calls for.[132] In *FC Mretebi v. Georgia*,[133] the European Court of Human Rights held that an access restriction of 'a purely financial nature, unrelated to the merits of the claim or its prospects of success … calls for particularly rigorous scrutiny from the point of view of the interests of justice'.[134] The classification of the right to an effective remedy as a procedural, rather than social, right in the EU's Charter of Fundamental Rights similarly diminishes the significance of public interest or budgetary arguments.[135]

As our analysis in the following sub-sections demonstrates, whilst the Fees Order might have pursued a series of potentially legitimate aims, it did so in an entirely unsuitable and disproportionate manner, incompatible both with the principle of effective legal protection, and Article 6(1) of the European Convention. The fees imposed ignore the positive externalities of employment litigation, bear little relation to the operating cost of the tribunal system, and have failed to transfer the financial burden from taxpayers to claimants. The fee structure furthermore actively discourages timely settlement, and has had no discernable impact on the prevalence of weak claims.

B Transferring Cost

[130] Employment Judge Brian Doyle, n 28 above.
[131] (A/93) (1985) 7 EHRR 528, at [57] (our emphasis).
[132] Craig and de Burca, at n 50 above, 236, citing e.g. C-271/91 *Marshall v Southampton Area Health Authority* [1993] ECR I-4367. In domestic law, see also *R (ex parte Witham) v Lord Chancellor* [1997] EWHC Admin 237, [1998] QB 575 at [27]: 'Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically - in effect by express provision – permits the executive to turn people away from the court door.'
[133] Application no. 38736/04 (Unreported).
[134] ibid [47]; citing also *Podbielski*, above n 82, and *PPU Polpure v. Poland* [2005] ECHR 543 at [65].
[135] *DEB* [40]-[42]; L Holopainen, 'Art 47(3)' in S Peers, T Hervey, J Kenner and A Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) [47.241].

Requiring cost contributions from court users is, in principle, a legitimate mechanism to ensure that 'the systems as a whole [is] appropriately funded.'[136] When calculating the expected value of a claim, a rational claimant will only consider her own ('private') costs when deciding whether or not to sue:[137] once these are paid, and damages received, is there a net positive outcome? In bringing a case to the ET, however, a claimant may also impose significant ('social') costs on third parties. Employers divert an average of four staff members' time from productive activities to build their defence, and more than two thirds of respondents will retain legal representation.[138] The Government must bear the administrative costs and judicial salaries associated with running the tribunal system, estimated at £87million in 2010/11 alone.[139] The resulting picture, as painted in *Resolving Workplace Disputes*, is one of a system that is low-cost for claimants and high-cost for employers and the state,[140] with industry and Government increasingly pushing to address this perceived asymmetry.[141] Against the backdrop of a 23% reduction in the Ministry of Justice's overall budget from 2010/11 to 2014/15,[142] the introduction of a fee-charging mechanism was identified as a key 'option available … to ensure [that] the system is resourced adequately'.[143]

The primary aim of the employment tribunal fees was thus to alleviate the Government's cost burden, both directly, though the additional income raised, and indirectly, by discouraging excessive litigation.[144] The fact that claimants only consider their own private costs when deciding whether or not to bring a case, and not those which accrue to society at large, can yield an excessive level of litigation: the benefits associated with a portion of claims might be smaller than the total costs incurred in bringing those cases to conclusion.[145] By charging fees, economic theory suggests, the divergence between private and social costs is narrowed, reducing inefficient recourse to the employment tribunal system. This is a key element in the arguments put forward in support of the fee regime: whilst noting that 'providing access to justice is not the same as providing other goods and services', *Resolving Workplace Disputes* consciously echoes official Treasury guidance on charges for access to public services in suggesting that tribunal fees would help 'to allocate use of goods or services in a rational way because it prevents waste through excessive or badly targeted consumption.'[146]

Prima facie, the Fees Order thus pursues a legitimate goal. However, in scrutinising the first limb of the Government's case, two problems quickly become apparent: by

[136] Resolving Workplace Disputes, n 15 above, 49.
[137] S. Shavell, 'The Social versus the Private Incentive to Bring Suit in a Costly Legal System' (1982) 11 *Journal of Legal Studies* 333, 338.
[138] SETA Findings, n 36 above, 45, 74.
[139] Impact Assessment, n 25 above, 7. This is split equally between judicial salaries and fees and general administration / estates: Impact Assessment, n 25 above, 8.
[140] Resolving Workplace Disputes, n 15 above, 49.
[141] See e.g. British Chambers of Commerce, *Employment Regulation – Up to the Job?* (London, 2010), 30.
[142] HM Treasury, *Spending Review 2010* (London 2010) at 10.
[143] Resolving Workplace Disputes, n 15 above, 49.
[144] Resolving Workplace Disputes, n 15 above, 50.
[145] S. Shavell, 'The Social versus the Private Incentive to Bring Suit in a Costly Legal System' 11 (1982) *Journal of Legal Studies* 333, 338.
[146] Resolving Workplace Disputes, n 15 above, 50; drawing on language in HM Treasury, *Managing Public Money* (London 2015) at Section 6.1.1. See also Fees Consultation, n 15 above, at p 11-12.

juxtaposing private benefits with public cost, the economic argument fails to acknowledge the public benefit of tribunal claims. The fees levied furthermore do not correspond to costs generated by users, and fee income has barely improved the tribunal system's financial position.

C *The public benefits of tribunal claims*

From a theoretical perspective, transferring system costs to claimants will not necessarily lead to an 'efficient' level of litigation. The economic case for transferring costs to claimants has long been acknowledged to be weak. Shavell observes that

> Two policies that are popularly suggested as cures for an improper volume of suit cannot be taken to be so in any general sense. The first policy is making those who sue pay for the state's litigation costs, on the ground that it is economically rational for a party to have to purchase the services that he uses.[147]

Just as claimants fail to internalise the costs that they cause other parties to incur, they also fail to take into account the social benefits or public goods that flow from their claim.[148] The social benefit of a suit adheres in a positive externality – its beneficial effect on other workers and employers in society more broadly.[149] When weighing up the costs and benefits associated with a claim, a claimant may therefore fail to bring a case with high social value because it is not in her own self-interest to do so.

The positive external benefits of the justice system are a public good, enjoyed by society at large. In recent written evidence, the Judicial Executive Board noted that the UK judiciary had

> never accepted the policy principle that courts and the justice system should be self-financing. Lord Scott described this approach as 'profoundly and dangerously (mistaking) the nature of the system and its constitutional function'. A justice system is a fundamental part of a democratic and civilised society committed to the rule of law. … the justice system is a public good that all society benefits from, and it warrants and requires the support of public funding.[150]

One of the principle social purposes of litigation is to serve as a credible threat against unwanted future behaviour,[151] with potential ET claims deterring exploitative and discriminatory behaviour in the workplace.[152] If employment law exists on the books yet never results in suit, employers would have little to fear when disregarding individuals' rights. Beyond the tribunal system, there are scant other enforcement mechanisms: a mere 2% of claims, for example, are displaced into the civil courts

[147] S. Shavell, 'The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System' (1997) 26 *Journal of Legal Studies* 575, 587.
[148] ibid, 578.
[149] Shavell, n 145 above, 334.
[150] Judicial Executive Board, Written Evidence to Courts and Tribunals Fees and Charges Inquiry, 20 October 2015.
[151] Additional social benefits include the elaboration of the law through its interpretation and the setting of precedent. See Shavell, n 147 above.
[152] Shavell, n 147 above, 578.

after a failed attempt at Early Conciliation.[153] Even following the much-touted strengthening of minimum wage enforcement, the number of investigations remains low,[154] and funding for ACAS, the Advisory, Conciliation, and Arbitration Service for workplace disputes, has not increased since the introduction of the fee regime.[155]

The resulting reduction of employment rights to 'paper tigers, fierce in appearance but missing in tooth and claw'[156] imposes costs on society, both through lower compliance in individual workplaces and the additional monitoring costs incurred to enforce workers' rights in other ways.[157] The Law Society suggest that reduced deterrence might even have damaging consequences on law-abiding employers, as '[d]iscouraging employees from pursuing valid claims … puts many well-run businesses at a competitive disadvantage compared to the minority who adopt a "less careful" attitude to employment law.'[158]

C *Fees, costs, and the exchequer*

In addition to these theoretical concerns, two practical design flaws make the fee regime an inappropriate mechanism for cost transfers, and have left tribunal receipts far short of expectations.[159] Government calculations had assumed that variable costs accounted for 69% of total expenditure on the employment tribunal system;[160] in reality, fixed costs which do not vary with the number of cases brought make up a much larger proportion. Despite the number of cases falling by 65% in the first year after the Fees Order,[161] tribunal expenditure thus reduced by a mere 18%.[162]

A further problem arises from the fact that the two-tiered case classification of Type A and Type B cases in the Fees Order does not correspond to the three-track scheme used by ETs in classifying case complexity and managing hearing load. Under the three-track scheme developed by the tribunals, cases are classified into Short, Standard, or Open Tracks. This three track system is a much more accurate reflection of the real cost of processing claims,[163] as highlighted by Sir Ernest Ryder, the Senior President of the Tribunals:

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[153] ACAS 2015, n 43 above, 97.
[154] 2,204 cases were closed by HMRC in 2014/15, below the average for the period 2009/10 to 2013/14. See BIS, National Minimum Wage Investigations Data for the Low Pay Commission's 2016 Report (London 2016) at Table 13.
[155] ACAS, *Acas Annual Report and Accounts 2014/15* (London, 2015), 72.
[156] B. Hepple, *Social and Labour Rights in a Global Context* (Cambridge, 2007) 238.
[157] The Center for American Progress, for example, estimates that workplace discrimination cost the US economy $64bn every year through the turnover costs associated with the 2million workers who left there job each year due to unfairness and discrimination. Center for American Progress, *The Costly Business of Discrimination* (Washington DC, 2012).
[158] Law Society, Letter to Employment Tribunal Fees Review Team, 30 September 2015.
[159] Employment Tribunals (Scotland), Written Evidence to Courts and Tribunals Fees and Charges Inquiry, 13 October 2015, at 14.
[160] 2010/11 figures - Impact Assessment, n 25 above, 8.
[161] Tribunal and Gender Recognition Certificate Statistics Quarterly April to June 2015, Table 2.2.
[162] To £71.4million; £9 million were recouped in fees. When including these figures, net impact on Government expenditures was thus a fall of around 28%: see D. Pyper and F. McGuinness, Employment Tribunal Fees, *House of Commons Briefing Paper 7081* (London, 2015), 15.
[163] Employment Judge Brian Doyle, n 28 above.

> The classification into type A and type B is too simplistic. It does not match the three-part classification that the employment tribunals use. … If fees are going to be levied in the way … proposed, it is right to say that employment tribunal judges would prefer them to match the classifications used in the tribunal, which are there for a good reason—they actually match the work that the judges recognise.[164]

Given that fee levels do not reflect existing case management structures and ignore the significant fixed cost in operating the employment tribunal system, and that ET claims generate significant societal benefits, the Government's primary economic case is fundamentally flawed. In terms of the principle of effectiveness and Article 6(1) ECHR, the Fees Order is thus a clearly unsuitable means of achieving the Government's aim of transferring the system's cost onto claimant users.

B Influencing claimant behaviour

The second strand of the Government's economic case centres on fees as an incentive for parties to behave in a reasonable and timely fashion:

> A price mechanism could help to incentivise earlier settlements, and to disincentivise unreasonable behaviour, like pursuing weak or vexatious claims. In turn, this helps to improve the overall effectiveness and efficiency of the system.[165]

This argument can be broken down into two distinct elements of the expected value model: the fee regime would encourage speedy resolution as quick settlements lower claimants' costs, and deter vexatious litigants by ensuring that the value of such claims will always be negative. Whilst this is once more a legitimate aim for the Fees Order to pursue, the means employed stand in no 'reasonable relationship of proportionality' to the desired outcomes,[166] not least because less restrictive options have long been in place.

C *Timely resolution & earlier settlements*

Given the publicity, time, and representation costs of a hearing,[167] it is typically in the financial and reputational interests of claimants and employers to settle out of court or to make use of low-cost informal dispute mechanisms to resolve their case. Indeed, as long as the claimant's estimate of expected winnings at hearing exceeds the employer's estimate of expected loss by no more than the sum of the joint costs of trial, an out-of-court settlement will be mutually beneficial;[168] this is the argument

[164] Justice Committee, House of Commons, Oral Evidence: Courts and Tribunals Fees and Charges, HC 396, Tuesday 26 January.
[165] Resolving Workplace Disputes, n 15 above, 50.
[166] C-279/09 *DEB v Bundesrepublik Deutschland* EU:C:2010:811 [47]
[167] For more information on the costs of Tribunal see SETA Findings, n 36 above.
[168] See, e.g. S Shavell, *Foundations of Economic Analysis of Law* (Cambridge: Harvard University Press, 2004), 403.

underpinning the Government's desire to ensure 'that tribunals, along with courts, are seen as an option of last resort'.[169]

Whilst the vast majority of cases settle before a hearing,[170] employer representatives have repeatedly expressed concern that ET claims are increasingly brought without prior engagement with less formal methods of dispute resolution.[171] This could be explained by a variety of reasons.[172] The early literature, for example, focused on how over-optimism about chances in court could result in the breakdown of negotiations:[173] if both parties are confident in their chance of eventual success at trial, the lowest amount that a claimant will accept as a settlement might exceed the maximum amount that an employer is willing to pay to avoid a trial. More recently, the focus has shifted to information asymmetries, *viz* differences in the information about the facts of the case available to employers and claimants, leading to settlement delay and trial as agents attempt to extract information about their likelihood of success.[174]

On either account, the Government's assertion that 'fees can influence the behaviour of those who might become involved in employment tribunal proceedings by encouraging them to resolve their dispute by other means'[175] is theoretically plausible and thus a legitimate secondary aim: given certain assumptions, imposing additional trial costs on claimants can increase the overall probability of settlement.[176] By reducing the expected payoff of going to the ET, fees raise a claimant's incentive to pursue other channels first and reduce the minimum settlement amount she will accept.[177]

In its current design, however, the fee system encourages neither of these outcomes. Indeed, recent evidence and economic models of claimant behaviour both suggest that the fee structure as implemented has had the very opposite effect, *reducing* any incentive for cases to be dealt with in a swift and informal manner.

Claimant fees alone will not necessarily incentivise timely settlement, given the system's offsetting impacts on employers' incentives to engage in negotiations. If fees are set too high, and charged at multiple stages, a claimant's threat of following through to a tribunal hearing becomes significantly less credible. In the absence of a credible threat of litigation, a rational employer has little reason to offer a settlement:

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[169] Fees Consultation, n 15 above, 12.
[170] 77% of single claimant cases that were not withdrawn or dismissed were settled privately or through ACAS in 2012: SETA Findings, n 36 above, 61. For a theoretical discussion of the likely characteristics of cases that proceed to a hearing, see G. Priest and B. Klein, "The Selection of Disputes for Litigation" (1984) *The Journal of Legal Studies* 13.
[171] Impact Assessment, n 25 above, 4.
[172] For a review of the literature see K. Spier, 'Litigation' in *The Handbook of Law and Economics* (Elsevier, 2007) A. Mitchell Polinsky & Steven Shavell, eds.
[173] R. Posner, 'An economic approach to legal procedure and judicial administration' (1973) 2 *Journal of Legal Studies*, 399.
[174] See K. Spier, 'The dynamics of pretrial negotiation' (1992) 59 *Review of Economic Studies*, 93; L. P'ng, 'Strategic behavior in suit, settlement, and trial' (1983) 14 *RAND Journal of Economics*, 539.
[175] Fees Consultation, n 15 above, 12.
[176] L. Bebchuk, 'Litigation and Settlement under Imperfect Information' (1984) *Rand Journal of Economics* 15, 404-415, 409.
[177] For a worked example, see the Online Appendix.

the claimant's pre-trial 'bargaining power depends on the defendant's believing that he will be taken to court if a settlement is not reached'.[178]

Early evidence suggests that tribunal fees have been set at such a high level that employers have very little incentive to engage in alternative dispute resolution processes or settlement bargaining. In a recent survey of employment advice organisations, the majority observed that fees had made it more difficult for claimants to settle cases early due to employers' confidence that employees would not pursue their claims further.[179] The Council of Employment Judges similarly pointed out that 'fee-paid judges reported that some employers delayed negotiating on claims which, because of litigation risk, they formerly would have settled in order to see whether the employee would pay the hearing fee'.[180] One judge even noted that 'his firm was advising employer-clients that they are at much less risk of Tribunal claims for unpaid wages, notice pay or holiday pay if they refuse to pay or simply ignore post-employment claims of this type'.[181]

This impact of the fee system is further amplified by the introduction of mandatory ACAS conciliation:[182] in all likelihood, most employers 'will hold [their] ground in the hope that the entry fee to the employment tribunal will be sufficient to put the applicant off.'[183] This counterintuitive result is perhaps the clearest possible demonstration of the disproportionate impact of the 2013 Order: rather than encouraging early settlement, the fee system has significantly reduced the incentive for employers constructively to engage in alternative forms of dispute resolution.

C *Deterring vexatious claimants*

A related potentially legitimate aim was to deter low merit or vexatious claims, which are said to 'consume valuable administrative and judicial resources before they are disposed of; resources that would otherwise be available to deal with meritorious cases'.[184]

The economic argument for fees in this context rests on the assumption that the expected value of weak claims is lower than that of strong claims. Set at the right level, fees can turn the expected payoff of a low-merit claim negative, whilst preserving a positive expected payoff for high-merit claimants.[185] Rosenberg and Shavell show that vexatious litigants might still pursue a negative value claim, however, if they can bring their action with minimal cost: to the employer, settlement

[178] B Nalebuff, 'Credible Pretrial Negotiation' (1987) *RAND Journal of Economics* 18, 198-210, 198.
[179] Trust For London, Written Evidence to Courts and Tribunals Fees and Charges Inquiry, 10 November 2015.
[180] Council of Employment Judges, n 33 above.
[181] Council of Employment Judges, n 33 above.
[182] Enterprise and Regulatory Reform Act 2013, section 7.
[183] HC Deb 8 July 2013 c80 (B Donaghy).
[184] Fees Consultation, n 15 above, 14, 15. While the consultation document also states that 'it is not an objective of this policy to deter claims through the introduction of fees' (Fees Consultation, n 15 above, 14), the impact of the policy on the volume of unmeritorious claims is referred to repeatedly in other motivating documents (e.g. Resolving Workplace Disputes, n 15 above, 50), and included in the terms of review: Ministry of Justice, *Terms of Reference: Review of the introduction of Employment Tribunal Fees* (London, 2015), 1.
[185] For a worked example, see the Online Appendix.

might be cheaper than the monetary and reputational consequences of going to trial.[186] Under this model, fees imposed on claimants reduce such cost asymmetries at an early point in proceedings, thus deterring vexatious litigation.[187]

In reality, however, tribunal fees have failed even to achieve their goal of 'sharply reduc[ing] the number of unjustified claims'.[188] Indeed, the aim itself is questionable: drawing on different proxies for the prevalence of vexatious claims before 2013 and changes in their numbers since, we find little evidence that the tribunal system was overrun by unmeritorious claimants in the first place. More importantly, finally, fees appear to have had little, if any, impact in deterring the small proportion of vexatious claims which exist.

The definition of a weak or unmeritorious case is notoriously elusive,[189] not least because the quality of a claim can rarely be determined until there has been at least some rudimentary case management.[190] Official statistics and survey evidence from the period leading up to 2013 nonetheless suggest that the system was far from overrun by vexatious claims.

The number of cost awards made in favour of employers,[191] an unambiguous indicator of the number of vexatious claims that make it to a hearing, is negligible: in 2012/13, such awards were imposed on a mere 0.4% of all claims disposed of and fewer than 4% of claims that were unsuccessful at a tribunal hearing.[192] The low proportion of cases struck out (12%) or dismissed (3%) by employment tribunals was comparable to other tribunals,[193] with little variation in this metric over time.[194] There is, finally, little quantitative evidence for the oft-touted assertion that employers settle a significant number of vexatious claims for fear of cost or negative publicity: SETA 2013 data indicate that it is highly unlikely that many settlement offers are made simply to placate vexatious claimants, as the pattern of settlement values closely tracks tribunal awards.[195]

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[186] D. Rosenberg and S. Shavell, 'A Model in Which Suits are Bought for their Nuisance Value' (1985) 5 *International Review of Law and Economics* 3.

[187] Federation of Small Businesses, Written Evidence to Courts and Tribunals Fees and Charges Inquiry, 17 November 2015: '[I]t is often far cheaper for small employers to settle a weak or vexatious claim early than to attempt to successfully defend the business at a tribunal hearing.'

[188] Beecroft, n 14 above, 7.

[189] See, for example, R. Bone, 'Modeling Frivolous Suits' (1997) 145 *University of Pennsylvania Law Review* 519, 528.

[190] Employment Judge Brian Doyle, n 28 above.

[191] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237) rule 76.

[192] Calculations from Tribunal and Gender Recognition Certificate Statistics Quarterly April to June 2015, Table 2.2 & Table E.12. See the Online Appendix for the statistics and calculations lying behind these figures.

[193] In 2012/13, for example, 12% of claims were struck out or invalid in the First Tier Immigration and Asylum Tribunal: Tribunal and Gender Recognition Certificate Statistics Quarterly April to June 2015, Table 2.4a. Claims brought before the First Tier Immigration and Asylum Tribunal also attracts a fee, but much lower of between £140 and £80 – see form T495 at http://hmctsformfinder.justice.gov.uk/HMCTS/GetLeaflet.do?court_leaflets_id=4525

[194] For example, in 2007/08, 11% of complaints were struck out and 2% dismissed. Tribunal and Gender Recognition Certificate Statistics Quarterly April to June 2015, Table 2.3. See the Online Appendix for a summary of complaint outcomes.

[195] For detailed calculations, see the Online Appendix.

Might the prospect of costly proceedings at least deter the small remaining number of vexatious claims? Once more, there is little evidence to support the Government's case: as predicted by the findings of SETA 2013, fees have not had a significantly positive impact on the quality of the claim pool.[196] Indeed, fees might even have the opposite effect, deterring *fewer* vexatious claimants than meritorious ones: the proportion of struck out or dismissed claims, for example, rose from 15% to 25% in the year to Q1 2014/15.[197] A survey of employment judges similarly found no increase in the proportion of successful claims: 'fees have not 'weeded out' unmeritorious claims … a number of judges described an increase in unmeritorious claims because determined but misguided claimants remain undeterred by fees.'[198]

In any event, a number of less restrictive tools have long been available to 'prevent poorly conceived claims from progressing through the system'.[199] Tribunals have long had the ability to strike out claims and order parties to pay a deposit in cases deemed to have little chance of success.[200] Further, while employment tribunals deviate from the typical 'loser-pays-principle' applied in other jurisdictions,[201] costs can be awarded if a party is deemed to have 'acted vexatiously, abusively, disruptively or otherwise unreasonably'.[202]

In conclusion, then, whilst the 2013 Fees Order might have pursued some legitimate aims, the fee regime as designed constitute a disproportionate restriction on litigants' right to access to the employment tribunals as well as the effective judicial protection of their employment rights. The tribunal fee system is deeply flawed, viable neither in terms of economic theory nor practical design. Fundamental assumptions were grounded in weak or non-existent evidence; indeed, even the Government's own impact assessment noted that '[t]he structural drivers of demand for ET and EAT services generally [were] not well understood' at the time of the introduction of the fee regime.[203] It is therefore not surprising that the design of the system has failed to transfer cost in an efficient manner, has failed to encourage the timely resolution of disputes, and has failed to deter vexatious claims.

A CONCLUSION

Within a year of the introduction of tribunal fees, claim volume fell by over 70%, and low-value claims had all but disappeared. In the ensuing judicial review proceedings,

[196] Given the likely changes in the composition of the claim pool before and after the introduction of the fees, and potential macroeconomic trends, it is not possible to make a robust statement about the causal impact of fees on the quality of the claim pool without further evidence.
[197] Tribunal and Gender Recognition Certificate Statistics Quarterly April to June 2015, Table 2.3. Note that for 2014/15 overall, 67% of complaints were struck out; this however is the result of a very large multiple claim bought under the Working Time Directive.
[198] Council of Employment Judges, n 33 above.
[199] Resolving Workplace Disputes, n 15 above, 28.
[200] The power to dismiss claims at pre-hearing reviews was first granted by the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004, SI 2004//1861. The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 increased the scope and potential scale of cost and deposit orders, and introduced more opportunities for tribunals to reject or strike out claims.
[201] See n 8 above.
[202] Regulation 76(1), Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013
[203] Impact Assessment, n 25 above, 15.

the courts nonetheless upheld the Fees Order, as litigants could not demonstrate that any one claimant had been unable, as opposed to unwilling, to pay the fees. In the light of both EU law and the European Convention of Human Rights however this constituted an inappropriately narrow review standard: neither Article 6(1) ECHR nor the principle of effective judicial protection have ever been phrased in terms of practical impossibility alone. Instead, the courts ought to have enquired whether the domestic measure denied the very essence of the right to access to a court or tribunal, as well as scrutinising its proportionality against the Government's stated aims.

Drawing on rational choice theory and a wide range of empirical evidence, we have demonstrated that the regime as introduced fails on both limbs of this test. Once the expected benefits and costs of employment law claims are taken into account, first, abandoning even a claim guaranteed to succeed has become the only rational response for a very significant proportion – 35% to 50% – of claimants. Furthermore, whilst elements of the Government's stated policy constitute potentially legitimate restrictions on access to the courts, the current regime is clearly disproportionate: tribunal fees have failed to transfer costs or to influence claimant behaviour as intended. Indeed, they might have had the opposite effect, removing employers' incentives to settle cases and deterring more meritorious than vexatious claimants.

In consequence, we suggest, the 2013 Fees Order should be struck down or repealed at the earliest possibility. In the alternative, significant reform would be required to ensure that any legitimate aims be met. Present space limitations prohibit a detailed engagement with such proposals; suffice it to say that at the very least, fee levels should be reduced in line with claim values,[204] and greater scrutiny be given to the timing of fee payment over the course of employment disputes, as well as to the possibility of imposing costs on both parties at the hearing stage.[205]

None of this is to say that fundamental reforms to the employment tribunal system are not urgently required: the complexity, speed, and cost of the current set-up are problematic for workers and employers alike. The Law Society's recent report on *Making Employment Tribunals Work For All*, for example, proposed a simplified structure to deal with claims at 'a level proportionate to their complexity and value';[206] the Government has similarly hinted at a willingness to explore alternative mechanisms for the quick disposal of low-value claims.[207]

Nearly 50 years on, the Donovan Commission's guidelines remain as salient as ever: any solution proposed must facilitate the 'easily accessible, informal, speedy and inexpensive' resolution of employment disputes.[208] 'An unenforceable right or claim', as Lord Bingham reminded us, 'is a thing of little value to anyone.'[209]

[204] The Government's own 'Option 2' as proposed in 2011 could be a promising, if insufficiently fine-grained, starting point: Fees Consultation, n 15 above, 40-51.
[205] Routes to Resolution, n 12 above.
[206] The Law Society, *Making Employment Tribunals Work for All* (London, 2015), 4.
[207] Fees Consultation, n 15 above, 8. See also the proposals for an online court in LJ Briggs , *Civil Courts Structure Review: Interim Report* (London 2015) 75.
[208] Donovan Commission on Trade Unions and Employers' Associations 1965-8.
[209] T Bingham, *The Rule of Law* (Penguin 2011) 85.