Ministry of Justice

FEES REMISSIONS FOR THE COURTS AND TRIBUNALS

Response by Thompsons Solicitors

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About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 29 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

We respond with the impact of these proposals on claimants in the employment tribunal in mind. In our view, the proposals set the bar for remissions so deliberately high that people with legitimate employment tribunal claims will be deterred from pursuing them and will be denied access to justice.

Question 1 – Do you agree that there should only be one remission system in operation within HMCTS operated courts and tribunals and the UK Supreme Court? Please state the reason(s) for your answer.

There are undoubtedly good reasons for a single, consistent remissions system. Thompsons understands the advantages this will provide, such as greater degrees of consistency, economies of scale on training and systems and certainty among advisors. However, no adequate system can ever be a 'one size fits all' across such a wide range of jurisdictions. For example, a recently dismissed minimum wage earner with a three month limitation in the employment tribunal (ET) will produce different challenges for the system to someone engaged in a land ownership dispute with a 12 year limitation.

Any system which seeks to apply to all dispute types must accommodate the inevitable wide range of differences.

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

The Office for National Statistics' report *Poverty & Exclusion in the UK and EU 2005-2011* (January 2013) published findings on 'significant changes' in the ability of people in the UK to meet unexpected but necessary costs, which legitimate claims, including employment tribunal cases, would constitute. Over a third of people said they would not be able to meet such expenses.

We note that the stated aim of the government if for fees to cover 100% of the cost of providing the employment tribunal service[1], and that they are currently set at about 33% of that cost.[2] The logical inference is that the ET fees will therefore triple. We are concerned that this question fails to either refer to this fact, or addresses whether the financial thresholds identified in the consultation will be adjusted.

[1] This consultation, page 7, paragraph 8

[2] MOJ document *Employment Tribunals and Employment Appeal Tribunal Fees Stakeholder Q&A* (25 April 2013) available at http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CDYQFjAA&url=http%3A%2F%2Fwww.mojconnect.justice.gov.uk%2Fassets%2Fb%2F8%2F4%2F4%2Fdbcd9010197f2d7dd38c4b10def7517a48c4b5715219450793%2FET%2520Fees%2520-%2520Stakeholder%2520QA%252025%252004%252013.pdf&ei=NuWQUcXsLuWq0AXLsIHIDg&usg=AFQjCNGoFfiKOpKzzk-V58OnsbSC48UXiQ&sig2=YBAVLoEOwnEtCXGOhC2Bug

Thompsons has no fundamental objection to the principle, however it is concerned about its application in practice.

Most claims covered by the provisions will have a limitation period of between three and six years. Some, such as land disputes, have up to 20 years. Claimants in those cases therefore have the luxury of time in which to dispose of capital assets for market value, or as close to it as possible.

Almost all ET claims have a limitation period of just three months. We are concerned that claimants with disposable capital will find themselves unable to qualify for remissions but with insufficient time to dispose of assets for their proper value, or at all. Many savings products, including ISAs, are not able to be cashed in before the end of their term without the saver incurring a hefty penalty.

This issue links directly to that in Question 14. We envisage a situation where the paper value of an asset significantly exceeds its short-term realisable value, but it is the former which is used to assess remission eligibility. This will potentially cause real hardship.

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

No. They are far too low. An individual or couple with savings of as little as £3,000 will be expected to pay up to a third on fees. This rises to half for those with £8,000. Such amounts do not amount to "wealth", as referred to in the consultation. They are simply the result of hard-working families putting something away for leaner times. Coupled with the practical problem of liquidating assets within the three-month time limit for lodging an ET claim, this does, as said in our response to Question 2, have the potential to cause real hardship.

We are also concerned about the extent to which the limits will alter with future planned fees rises.

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

No.

We do not agree that a redundancy payment or any other termination payment should be included in the definition of disposable capital.[3] In our view it is as much a compensation payment as an unfair dismissal award or personal injury/medical negligence award is.

We do not agree that jointly held capital should be included. The consultation does not adequately explain why the capital assets of someone not involved in the dispute in question should be taken into account. That individual is under no obligation to alter their financial position to accommodate the claimant's need to fund a fee, and nor should they be.

Similarly we do not see why a partner's income or capital should be accounted for. The test is remarkable for requiring a partner to show a contrary interest before this is disapplied. Assuming that a partner's default position is to be fully supportive of a claim shows blithe disregard of the reality of such situations. A partner may take a very different view of the merits of a claim, or assess the risk of adverse costs very differently. And they may be unhappy about the stress and anxiety which a claim will undoubtedly cause.

What of an abusive relationship where a partner wields disproportionate influence and sees the disposable capital test as an opportunity to actively deny their partner access to justice? The issue of financial abuse in relationships has been in the media in recent weeks. What of a situation where one partner controls a couple's joint income to the extent that the other is denied any gain from it? Clearly, the consultation's observation that the proposed remission system "is based on an assessment of the income and disposable capital of an applicant and their partner, as both the applicant and their partner gain financially or otherwise

[3] Paragraph 11

from the use of a court or tribunal"[4] has taken absolutely no account of such issues and is an overly-crude analysis.

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

No. We are concerned that, if joint disposable capital is to be a measure, a claimant who does not have "control" over that capital will be vulnerable to being challenged on the validity of their "statement of truth". A claimant in an abusive relationship, or at least one where the power balance is not equal, may not be aware of their partner's concealment of assets and that their statement of truth is indeed untrue.

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

No. We believe it will deny access to justice for low income families, as well as having the potential to create or worsen financial hardship, for the reasons given above.

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

Thompsons generally supports the principle that those who can pay should do so. But a gross income approach is a poor measure of this. It makes no distinction between those with disposable income and those without. We note that no explanation has been given for the shift to gross monthly income, or the fact that the income threshold has been cut at the same time. A single person's lower threshold remains at about £13,000, just above the minimum wage for working 40 hours a week, while a couple's drops from £18,000 to £15,000 – just £2,000 more than a single person's. Is the government suggesting that the majority of the population is "wealthy", on this analysis?

A distinction between those with disposable income and those without is the key to ensuring that the genuinely wealthy pay.

It is not difficult to foresee situations where someone's £4,000 was already committed to paying the mortgage on the home they cannot leave due to negative equity, to court ordered child maintenance, to a car loan and other legally binding commitments. It would make a mockery of the system to say that that individual was as able to afford the fee as one without similar commitments.

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

No.

We have no difficulty with the DWP evidence of a qualifying benefit. However the other tests will be inadequate in ET cases where there are three month limitation periods. In particular:

- In cases involving dismissal or unlawful deduction of wages, pay slips will only show what the claimant *used* to earn, not what they do earn.

[4] Paragraph 35

- The same is true for tax returns for those few cases where self employed claimants have claims as workers, or where the self employed status is a sham[5]
- Income from shares inevitably shows what has been earned, and not what stands to be earned in the future.

For these reasons we are concerned that a recently unemployed claimant in an employment tribunal claim will be in a uniquely disadvantaged position in a remission system.

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

We refer to our previous answers in relation to the household means and joint assets. At the very least there must be a mechanism to allow for discretion to be exercised to allow for reductions or remissions of fees in certain circumstances, to ensure that individuals are not denied access to justice because of their domestic situation.

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

We have no observations on this Question.

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

We have no observations upon this Question.

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

No. We are concerned about the impact of the cost of providing documents on those who qualify for remissions, who will, by definition, be on low incomes. While we can understand the desire to prevent that minority of serial litigants in person who may ask for numerous documents to be copied, genuine claimants should not be deterred by the cost of this service.

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

Yes, for the reason given above.

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

No, we do not feel that two months is a sufficient length of time within which to obtain the necessary documentary evidence to support a retrospective remission application. We are concerned that it may be more than two months for people to realise they would have qualified for a fee remission.

We are also concerned that in some cases those seeking documentary evidence will sometimes be reliant

[5] E.g. Autoclenz Ltd (appellant) v. Belcher and others (respondents) [2011] IRLR 820, Supreme Court

on other organisations for the production of the material and not easily able to influence the pace of this. Although we note there would be discretion to grant exemptions, we consider that the current time limit of six months should be retained.

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

Most multiple claims will involve members of trade unions and the rules appear to be that there will be no remission in those circumstances. As a trade union only indemnifies members against the expenses which they would incur this approach is iniquitous towards trade unions.

However, we are also very concerned about the fact that the approach to multi-claimant fees in the ET is very different to that elsewhere in the system. The recently published Order refers to 'Fee groups' and not multiples and its approach does not reflect the realities of some types of mass litigation, will cause a mass of red tape, and is at odds with the impression left by the various consultations and assurances. Ratcheting up will also be of concern to respondent businesses who will have to repay them as part of settlements, or in satisfaction of a judgement.

To understand multiples, individual claimants should be thought of as like bricks in a wall. Some are added in groups, some individually, and some at different times. Together they form one wall. It is known as a wall, and treated as such. It is not thought of as a coalition of bricks. Those involved in litigation understand this and understood the fees proposals as being about the wall, and that the fees would be due from the wall as a whole.

However, the Order sets fees according to something called a 'fee group'. This is defined by the names on an ET1 and is fixed for both the issue and hearing fees. In other words, fees are payable by the various groups of bricks, or individual bricks, within the wall and not by the wall as a whole. Therefore dozens of separate fees could be payable, rather than one consolidated payment.

A practical example is the mass equal pay claims which the unions have supported over the last few years. There are large numbers of existing claimants. They are generally known by a group name such as "the Sunderland claim". It is constantly in motion as claimants join and leave it. There are often hundreds or even thousands of claimants at any one time. Each new claim is a fee group (as the Order is currently drafted) and there will be dozens of fee groups within a single multiple. Tracking them through time will be a nightmare, but must be done as the Order says that no fee means no claim.

There are massive practical problems involved for assessing who is in what fee group, who qualifies for remission and who does not, whether a further fee is payable, what size it is and so on. This whole area needs reconsidering urgently.

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

No, for all the reasons given above.

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

There are many studies which have indicated links between low incomes and groups defined as having protected characteristics by the Equality Act 2010. Two examples are the 2008 Leonard Cheshire Disability report *Disability Poverty in the UK* and the 2007 Joseph Rowntree Foundation report *Poverty and ethnicity in the UK*. It follows that the impact of reforms affecting those on the lowest incomes will have a particularly detrimental impact on such groups.

The equality statement annexed to the consultation paper's impact assessment says that 30% of those impacted by the proposals will be negatively affected, but no real data is supplied on how this will affect the various protected characteristic groups.

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

Without further equality impact data it is difficult to make any further observations.

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

We refer to our response to Question 17.

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