

## **PE1784/A**

Equality and Human Rights Commission submission of 30 March 2020

Thank you for your letter dated 10 March 2020 asking the Equality and Human Rights Commission (the Commission) for our views in relation to the above petition, which the Public Petitions Committee considered on 5 March 2020.

As you will be aware, the Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

Given our remit, the Commission has a particular interest in access to justice in general, and in particular in relation to equality and human rights law. We therefore responded to consultations on court fees in 2015<sup>1</sup>, 2016<sup>2</sup> and 2018<sup>3</sup> and it would be helpful if our response to this Petition could be considered in the context of our past and ongoing concerns on this subject. I attach a copy of our responses for your ease of reference. We will therefore firstly address the specific points raised by the petition, then the wider context of access to justice.

### **Part 1: Points raised by the petition**

The petition raises two connected points in relation to hearing fees, and the barrier the petitioner believes these create for disabled people who wish to self-litigate. In particular the petition raises the issues that:

1. there is no low-income exemption for court fees in Scotland; and
2. there is no exemption for court fees in Scotland for people in receipt of Personal Independence Payment (PIP).

### **Low income exemption**

The petition correctly states that there is no low-income exemption for court fees in Scotland. This could have the potential to disproportionately affect disabled people, as disabled people are;

- less likely to be employed as compared with non-disabled people (employment rate of 32.9% for disabled people compared with 74.1% for non-disabled people);

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<sup>1</sup>[https://webarchive.nationalarchives.gov.uk/20160206015436/http://www.equalityhumanrights.com/sites/default/files/uploads/Scotland/Scotland\\_Consultations/Court%20Fees%20Consultation.pdf](https://webarchive.nationalarchives.gov.uk/20160206015436/http://www.equalityhumanrights.com/sites/default/files/uploads/Scotland/Scotland_Consultations/Court%20Fees%20Consultation.pdf)

<sup>2</sup> [https://consult.gov.scot/courts-judicial-appointments-policy-unit/court-fees/consultation/view\\_respondent?uuld=767820135](https://consult.gov.scot/courts-judicial-appointments-policy-unit/court-fees/consultation/view_respondent?uuld=767820135)

<sup>3</sup> [https://consult.gov.scot/courts/scottish-court-fees-2018-2021/consultation/view\\_respondent?uuld=306036410](https://consult.gov.scot/courts/scottish-court-fees-2018-2021/consultation/view_respondent?uuld=306036410)

- often paid less than non-disabled people (median hourly earnings for disabled people were £9.89 compared with £11.63 for non-disabled people); and
- more likely to experience material deprivation compared with non-disabled people (31.6% compared with 10.3%).<sup>4</sup>

However there are other forms of exemption which might assist some claimants and legal aid is available in some circumstances. We note that the SPICe Briefing provides information in this regard.

## **Part 2: Wider issue of court fees and access to justice**

### **Background- the policy of full cost recovery**

The background to the impact of rising Court fees on access to justice is the policy of full cost recovery- that the Courts should be paid for by Court users.

We understand that increases to court fees in Scotland were first debated in the Scottish Parliament in the Justice 2 Committee on 4 September 2002. The Justice Committee held a full debate on the principles involved on 25<sup>th</sup> June 2008. It was stated by the Minister to be a basic principle that there should be full cost recovery, and that research showed that price sensitivity was non-existent.<sup>5</sup>

We are not aware of any specific, up to date evidence on the impact of Court fees on attitudes to litigation in Scotland. However, as the Committee will be aware, the issue of the impact of fees for Employment Tribunals was considered in *Unison v Lord Chancellor* in the Supreme Court in 2017. The UK Government had anticipated that the Fees regime would impact on demand, but the Supreme Court found that this impact had been greatly underestimated.

### **Scottish Court Fees - summary of our consultation responses**

In 2016 the Scottish Government consulted on proposals for ways of moving towards full cost recovery in the Courts. The Consultation sought views on two options for achieving full cost recovery; a flat rise of 24% in fees or a targeted rise of varying amounts.

At that stage the Commission responded and set out a number of areas of concern including:

1. The impact of full cost recovery on access to justice generally,
2. Concern that the proposals may result in a decline in the number of discrimination and human rights cases, particularly in the appeal Courts,
3. The potential disproportionate effect on individuals with protected characteristics, particularly disabled people and ethnic minorities.

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<sup>4</sup> Equality and Human Rights Commission, *Is Scotland Fairer*, 25 Oct 2018, paras 3.2, 3.31, and 4.32

<sup>5</sup> See <https://archive.parliament.scot/s3/committees/justice/or-08/ju08-1802.htm>

Following the consultation, the Court Fees (Miscellaneous Amendments) (Scotland) Order 2016 came into force in November 2016. The policy memorandum for the 2016 order states that 36 Consultation responses were received at the consultation stage and almost all stated opposition to the significant increase in court fees.

The consultation analysis summarises the responses and notes the weight of opposition to the proposals however it concludes that: *“Having fully considered the views of those who responded to the consultation, the Scottish Government has laid an Order for increasing fees in line with the second option of targeted fee increases outlined in the consultation.”*

In our 2016 response we expressed specific concern about a targeted fees approach. This approach meant that the cost of an appeal in the Inner House of the Court of Session (involving lodging an action, a motion, a record and paying a one day hearing fee for a bench of three) rose from £3763 to £7600. Whilst legal aid may be available in some cases, a claimant earning just over the legal aid income threshold (currently £26,239) would have to pay approximately three and a half months’ disposable income for Court fees alone. (There would be additional costs for solicitors and advocates)

We emphasised that the Court of Session plays an important role in appeals and Judicial Reviews, which often raise important human rights and discrimination law challenges. We expressed concern that an individual of average disposable income may be deterred from proceeding.

Where there are barriers to accessing the courts, it is not only the individual who suffers but society as a whole. The Unison case compellingly sets out the constitutional importance of access to the courts:

*“Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance. . . . Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless. . . . But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations.”<sup>6</sup>*

Our response to the Consultation on Scottish Court Fees 2018 – 21 is also attached. We invited the Scottish Government to consider the proportionality of the proposed reforms and suggested that factors to take into account include; affordability, the stage of the proceedings at which the fees must be paid, whether non-payment may

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<sup>6</sup> Unison v Lord Chancellor [2017] UKSC 51, paragraphs 66 – 72

result in the claim never being examined on its merits, and whether the fees are proportionate in amount to the sums being claimed in the proceedings.

In general terms the European Court of Human Rights has expressed greater concern about fees regimes which occur at the point of access to the Court, or a particular stage of proceedings, which prevent the case being heard.<sup>7</sup>

### **Fees for Particular Examples of Litigation**

To underline the reasons we are concerned that fees may be a barrier to access to justice it is worth considering some examples of the levels of fees charged in Scottish courts.

We attach, at appendix A, a breakdown of some of the costs involved in different types of proceedings. Please note that these represent the lower end of the spectrum for Court fees as they do not include ancillary fees for any additional hearings, motions, lodging a Record etc.

For comparison, the total fees chargeable for a single case in the employment tribunal were between £390 and £1600. Those levels were held to be a barrier to access to justice. Most of the broad figures outlined in Appendix A are substantially more than those found to be unlawful in the Employment Tribunal.

### **Discrimination and human rights cases**

We remain concerned about the impact of full cost recovery on access to justice generally and in relation to equality and human rights cases. There are very few non-employment equality and human rights cases raised in Scottish Courts. This could be because of the relatively low value of financial award payable alongside the relative complexity of arguments. There may be few lawyers willing to take on these specialist cases.

We note that some claimants in personal injury cases will, in due course, benefit from access to Qualified One Way Cost Shifting<sup>8</sup>, however QOCS is not available for “mixed” cases such as those also comprising an equality or human rights argument, where only the personal injury component would be covered.

In *Unison* the Court expressed: “*Deterring discrimination claims is thus in itself discrimination against the people, by definition people with protected characteristics, who bring them.*”

### **The European Court of Human Rights**

Finally, it might be of interest to the Committee to note that the European Court of Human Rights has considered several cases involving court fees and access to justice.<sup>9</sup> In general terms, the Court has found that the requirement to pay court fees

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<sup>7</sup> See, for example *Stankov v Bulgaria* 12<sup>th</sup> July 2007 and *Teltronic v Poland* 10<sup>th</sup> January 2006

<sup>8</sup> Civil Litigation (expenses and group proceedings) (Scotland) Act 2018

<sup>9</sup> See for example *Stankov v Bulgaria* 2007 and *Teltronic v Poland* 2006

is not automatically considered to be a breach of the right to access to a court. Relevant factors include; the ability to pay, the relative cost of the fee compared to the value of the claim, flexibility and discretion of the courts and the stage of proceedings at which the fee is required.

## **Appendix A: example cases (fees as of 1<sup>st</sup> April 2020)**

### **Petition for judicial review; Outer House**

If the petition is granted permission without the need for a hearing and is then sent to a substantive hearing which lasts one day (five hours), with no ancillary procedure such as motions, amendments, or procedural hearings, the costs would be at a bare minimum.

C1 £319

C11 £62

C12 £2130

**Total £2511**

### **Appeal from the Outer House in a judicial review petition; Inner House**

If the substantive hearing lasts one day (five hours), with no ancillary procedure whatsoever, the costs would be, at a bare minimum:

C9 £227

C12 £213

C13 £5320

**Total £5760 (a more complex four-day hearing would be £21,720)**

### **Appeal from the EAT in a mass equal pay litigation; Inner House**

As previous, further assume 100 claimants.

**Total £576,000 (£2,172,000 if a four day hearing)**

unless either

(a) an imaginary name is used to suggest they are one person, (as was done for example in the two Glasgow equal pay appeals in 2016-17) in which case the total is as last example;

(b) 80% reduction for all but first claimant (as in 'Group fees - style of motion - REVISED 2018 – Final') in which case the **total is £119,808 (£479,232 for four days).**

**Action for payment, claim for £5000, reliant on the Equality Act 2010 (Ordinary Procedure);**

**Sheriff Court**

If a two-day proof is fixed with no ancillary procedure whatsoever, the bare costs would be:

5 (initial writ) £132

24 (lodging record) £120

26 (fixing proof) £57

27 (proof) £484

**Total £793**

**Claim for £350; Sheriff Court, assuming one day hearing (Simple Procedure)**

16 (b) £106

26 (fixing proof) £57

27 (proof) £242

**Total £405**