EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT TRIBUNALS AND THE EMPLOYMENT APPEAL TRIBUNAL FEES ORDER 2013

2013 No. [DRAFT]

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THE ADDED TRIBUNALS (EMPLOYMENT TRIBUNALS AND THE EMPLOYMENT APPEAL TRIBUNAL) ORDER 2013

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1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Added Tribunals (Employment Tribunals and the Employment Appeal Tribunal) Order 2013 ("the Added Tribunals Order") provides for employment tribunals and the Employment Appeal Tribunal to be "added tribunals" to enable fees to be introduced. The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 ("the Fees Order") stipulates the fees to be paid.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Under section 42(1) of the Tribunals, Courts and Enforcement Act 2007, the Lord Chancellor may by order prescribe fees payable in respect of anything dealt with by an "added tribunal". A tribunal may become "added" if the Lord Chancellor specifies them in an order made under section 42(3) of the 2007 Act. The power to impose fees in tribunals has previously been exercised in the areas of gambling, land and immigration and asylum.

4.2 In order to facilitate the new fee regime, consequential amendments will also be required to the procedure rules used in employment tribunals ('ETs') and the Employment Appeal Tribunal ('EAT'). ET and EAT procedure rule changes will be brought forward in a separate instrument before this order comes into force.

5. Territorial Extent and Application

5.1 These instruments apply to Great Britain.

6. European Convention on Human Rights

6.1 The Justice Secretary has made the following statement regarding Human Rights:

"In my view the provisions of The Added Tribunals (Employment Tribunals and the Employment Appeal Tribunal) Order 2013 and The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 are compatible with the Convention rights."

7. Policy background

- *What is being done and why*

7.1 Currently no fee is payable by users of an ET or the EAT. Costs are met by the taxpayer and paid from the Ministry of Justice's budget. For 2010/11 the joint cost of ETs and the EAT was £87m (in 2012/13 prices), of which approximately £42m was spent on judicial and administrative costs, £14m on estates and buildings and £11m on overheads. The Government believes it is reasonable that those who use the employment tribunals system, and can afford to, should pay a fee as a contribution towards the cost of administering their claim or appeal.

7.2 The proposals are based on the key elements, that:

- fee levels will be initially set at around 33% of the full cost;
- generally the party seeking the order initially pays the fee and
- the HMCTS remissions system will be available to individuals to ensure that only those who can afford to pay a fee do so.

7.3 The Fees Order introduces two fee schemes, one for individuals presenting their claim to the Tribunal alone, and one for two or more individuals presenting their claims together as a "fee group". Each scheme is then broken down into two fee levels (defined in the Fees Order as Types A and B), depending on the type of claim and reflecting the likely greater cost of some types of claims. Those who commence in a fee group have access to the fee group structure where generally lower fees are payable if shared jointly between the claimants. One fee is payable when the claim is presented, and one in advance of hearing. Four application specific fees are also payable by the party who makes the application.

7.4 Claimants in both the individual and fee group structures will have access to the existing HMCTS fee remissions (or fee waiver) system, to ensure that only those who can afford to pay fees do so. The HMCTS remission system offers three types of remission. Remission 1 provides a full fee remission (i.e. no fee is payable) if the applicant is in receipt of certain benefits. Remission 2 provides a full remission if the applicant's gross annual income (and that of their partner if they are a couple), is calculated to be under a threshold. Remission 3 provides a full or partial fee waiver based their net monthly disposable monthly income.

7.5 Claimants who are part of a fee group are safeguarded by the fact that they will never be asked to pay more than the equivalent fee for a single claimant bringing the same type of claim.

7.6 There are only two fees payable in the EAT, one at the making of the appeal and one before the hearing to determine it. Only one fee level applies reflecting that most appeals take a similar length of time and level of resource to conclude. Individual appellants can use the HMCTS remissions system.

8. Consultation outcome

8.1 A public consultation on the introduction of fees ETs and the EAT ran from 14 December 2011 to 6 March 2012. A copy of the consultation paper entitled *"Charging Fees in Employment Tribunals and the Employment Appeal Tribunal"*, summary of responses, and the Government's official response can be found at: https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011

8.2 A total of 140 responses to the consultation paper were received. Of these, 25 responses were from unions and other organisations representing the views of employees, 29 from legal groups and solicitors, 31 from business, 25 on behalf of advisory and equality groups and 30 from other interested parties including Administrative Justice and Tribunals Council as well as private individuals. Claimant and claimant representative groups were generally opposed to the introduction of fees whereas business respondents generally supported the fee proposals. The Government identified the following significant issues, and has taken action as outlined:

- *Wider policy aims for fees*

8.3 Two fee structures were presented in the consultation and both sought to achieve the aim of transferring some of the financial burden of administering the tribunals from the taxpayer to the users. In addition the second option proposed using fees to improve certainty for business as to the likely level of award (should they lose) as well as improving the expectations of claimants by seeking a higher fee for higher value claims.

8.4 This second option had the least support from respondents with less than 20% believing that the proposal would provide an effective means of meeting these aims. Consequently the Government has not sought to implement this option or pursue these aims as part of the fee structure.

- *The number of fee levels charged and claim types*

8.5 The original fee structure proposed three levels of fees, based upon the type of claim and the likely level of cost of dealing with claims of that type. Respondents were concerned that discrimination and equal pay claims were unfairly charged the

highest fee when these claims were not necessarily more complex. The Government has merged the two higher levels into one, to address this concern.

8.6 Following feedback provided in response to the consultation, we also changed the allocation to fee levels of a small number of jurisdictions.

- *Fee for written reasons*

8.7 Following consultation responses, no separate fee for the provision of written reasons when they have been issued orally at the conclusion of the hearing is included in the fee structure.

- *Simplification of the fee group bandings*

8.8 In the light of responses suggesting a simpler fee structure, the fee group bandings were reduced from five to three.

9. Guidance

9.1 Guidance will be published so that users are aware of when a fee is payable, what fee is payable and how to apply for a fee remission. Contained within guidance will be information on:

- The types of claim, application and appeals attracting a fee
- Where to find details on which fee level the different jurisdictions have been allocated to
- When a fee will be payable and by what methods of payment
- What fees are payable by those within a multiple claim
- What fees are payable by those making an individual claim
- Web details for payment/submitting appeal online
- Details of websites where further information can be located

10. Impact

10.1 The impact on business, charities or voluntary bodies is included in the attached Impact Assessment.

10.2 The impact on the public sector is included in the attached Impact Assessment.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov website.

11. Regulating small business

11.1 The legislation applies to small businesses.

11.2 To minimise the impact of the requirements on small firms employing up to 20 people, the approach taken is that businesses will only pay fees if they choose to

make their own application in response to the claimant's action of making the claim. They will pay the issue and hearing fees only if they lose and are ordered to reimburse the fees paid by a successful claimant in addition to any other financial or non-financial award ordered by the tribunal. This approach ensures that the party who seeks the order initially pays the fees.

11.3 The basis for the final decision on what action to take to assist small business was formed following public consultation. The consultation was widely communicated to business representative organisations including the Federation of Small Businesses, who responded to the consultation. The Government believes that the finalised policy can encourage parties to resolve disputes at an early stage and think more carefully about alternative options to making a formal claim, such as informal resolution within the workplace or via conciliation.

12. Monitoring & review

12.1 The Government has committed to monitoring fee levels and the impact of the implementation of fees, so that the policy and its impacts can be reviewed and amended as appropriate. Any significant changes to the current structure will involve further consultation if appropriate. We will identify any further evidence available about the impact of the introduction of fees on the vulnerable groups identified in the consultation response, and remain aware that the impact of any proposed policy changes from MoJ or other departments will need to be considered when conducting any review. Further detail of the proposed review is contained in Annex 1 of the impact assessment to this memorandum.

13. Contact

Tom Matley at Her Majesty's Courts and Tribunal Service Tel: 0161 234 2055 or email: tom.matley@hmcts.gsi.gov.uk can answer any queries regarding the instrument.