Neutral Citation Number: [2014] EWHC 4198 (Admin)

Case No: CO/4440/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2014

Before :

LORD JUSTICE ELIAS
- and –
MR JUSTICE FOSKETT

Between :

THE QUEEN ON THE APPLICATION OF UNISON (NO. 2)	**Claimant**
- and -	
THE LORD CHANCELLOR	**Defendant**
- and –	
EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

- -

Ms Karon Monaghan QC and **Mr Mathew Purchase** (instructed by **Unison**) for the **Claimant**
Ms Susan Chan (instructed by **The Treasury Solicitor**) for the **Defendant**
Mr Michael Ford QC and **Mr Spencer Keen** for the **Intervener**

Hearing dates: 21, 22 October 2014

Approved Judgment

Lord Justice Elias :

1. Until 29 July 2013 workers could take a whole variety of claims relating to their employment to Employment Tribunals, and any appeals could be pursued before the Employment Appeal Tribunal ("EAT") free of charge. The costs associated with the provision of this legal service were borne solely by the taxpayer. From that date, and pursuant to an order made by the Lord Chancellor under section 42 of the Tribunals Courts and Enforcement Act 2007 (the Employment Tribunals and Employment Appeal Tribunal Fees Order 2013), applicants to an Employment Tribunal and appellants who wish to appeal to the EAT have to pay a fee before their applications or appeals will be accepted, unless they can bring themselves within the terms of a fee remission scheme. The effect of this scheme is to exempt some claimants entirely from the duty to pay fees whilst for others the fees are reduced.

2. In this application for judicial review the trade union Unison challenges the fee scheme on two grounds. First, the union alleges that the scheme is unlawful because it infringes the EU principle of effectiveness. The cost is said to be such that it is virtually impossible or at least exceptionally difficult for a significant number of potential applicants to afford to bring a claim. Their employment rights are, it is argued, rendered illusory. Second, it is said that the fee scheme operates in an indirectly discriminatory way with respect to women, ethnic minorities and the disabled, and that the Lord Chancellor has failed to establish that the disadvantageous treatment meted out to these groups is justified.

3. This is the second time that these complaints have been pursued before the Divisional Court. On the first occasion two additional grounds were pursued. First, it was said that the scheme infringed the EU principle of equivalence which broadly requires that procedures for pursuing rights derived from EU law should be no less favourable than the procedures applicable to similar claims of a domestic nature; and second, that it was introduced in breach of the public sector equality duty. The Divisional Court (Moses LJ and Irwin J) rejected these grounds: [2014] EWHC 218 (Admin); [2014] ICR 498. They are not now in issue before us. The court also dismissed the two claims now being advanced on the basis of the information then before it. The court considered the applications to be premature; it was not satisfied that the scheme had been running long enough to enable the claimants to make good their claim. So these arguments were not foreclosed. Lord Justice Moses, giving the judgment of the court, said this (para. 89):

> "This brings us to a fundamental difficulty with the whole of this case. Brought as it was in the belief that the lawfulness of the regime had to be challenged as a matter of urgency, and in any event within three months, the Court has been faced with judging the regime without sufficient evidence, and based only on the predictions of the rival parties throughout and after the hearing. Parliament decided, by affirmative resolution, to introduce the regime, authorised by statute, and debated and positively affirmed by both Houses of Parliament. Quite apart from the continuing obligation to fulfil the duties identified in the Equality Act, the Lord Chancellor has himself undertaken to keep the issue of the impact of this regime under review. If it turns out that over the ensuing months the fees regime as introduced is having a disparate effect on those falling within a

> protected class, the Lord Chancellor would be under a duty to take remedial measures to remove that disparate effect and cannot deny that obligation on the basis that challenges come too late. It seems to us more satisfactory to wait and see and hold the Lord Chancellor to account should his optimism as to the fairness of this regime prove unfounded. We believe both Unison and the Commission will be, and certainly should be, astute to ensure that accurate figures and evidence are obtained as to the effect of this regime.
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> No doubt the Lord Chancellor will also be doing the same, if he is successfully to resist a future challenge. In the meantime, we think that the fundamental flaw in these proceedings is that they are premature and that the evidence at this stage lacks that robustness necessary to overturn the regime. We would underline the obvious: there is no rule that forbids the introduction of a fee regime. The nature of that regime is closely dependent upon economic and social considerations and policy. The formation of such policies is itself dependent upon an accurate assessment of income and expenditure and the means of those who wish to use the Tribunal system, and in the light of the need to encourage challenges to discrimination in pursuit of the important goal of equality. This court did not find itself in any position accurately to collate the information, still less the evidence, in order to achieve a just resolution. The application is dismissed."

4. The claimant submits that it now has the relevant evidence and statistics to make good its claim on both remaining fronts.

5. The Lord Chancellor contends that the claims are still premature and that the very generalised nature of the statistics relied upon, with an absence of any concrete examples of specific individuals allegedly denied access to the tribunals, makes it impossible for the court to find in the claimant's favour.

6. We allowed the Equality and Human Rights Commission to intervene and present both written and oral argument. We are grateful to Mr Ford QC for his submissions, as indeed we are to all counsel.

The background

7. Employment Tribunals (then referred to as industrial tribunals) were set up by the Industrial Training Act 1964. Their jurisdiction has grown enormously since then and they now hear claims relating to both statutory and contractual rights in the employment related field, some of which are derived from EU law and some of which are home-grown. The overwhelming majority of claims are brought against employers, but they can also be taken against individuals and trade unions. In certain very exceptional jurisdictions employers can initiate proceedings, for example against improvement or prohibition notices issued pursuant to the Health and Safety at Work Act 1974.

8. Section 42(1) of the Tribunals, Courts and Enforcement Act 2007 conferred power on the Lord Chancellor to make an order prescribing fees in respect of anything dealt with by an "added tribunal", and by an order made pursuant to subsection (3) this includes Employment Tribunals and the Employment Appeal Tribunal: see the Added Tribunals (Employment Tribunals and Employment Appeal Tribunal) Order 2013 (SI 2013/1892)).

9. The first remission scheme was in place for only a few weeks until 7 October 2013 when a new, less generous, scheme was introduced. That is the scheme in issue in this application. This was introduced by the Courts and Tribunals Fee Remissions Order 2013 (SI 2013 No. 2302).

10. The effect of the 2013 Fees Order is that claims in the Employment Tribunal and appeals to the Employment Appeal Tribunal can only be commenced upon payment of a fee (Article 3), subject to an individual applying for and qualifying for a remission in accordance with Article 17 and Schedule 3.

11. By Article 4 there are two fee charging occasions. First, a fee is payable by a single claimant or a fee group when a claim form is presented to an Employment Tribunal; this is the "issue fee". Second, a fee is payable on a date specified in a notice accompanying the notification of the listing of a final hearing of the claim; this is the "hearing fee".

12. The 2013 Order makes provision for two types of claim, Type A claims and Type B claims. The amount of the fee depends on the type of claim. Type A claims are those listed in table 2 of Schedule 2 (Article 6) and Type B claims are all those which are not listed as Type A claims (Article 7). (Originally certain claims, including equal pay claims, were erroneously included as Type A claims but the error was corrected by the Tribunals Fees (Miscellaneous Amendments) Order 2014). All discrimination claims are now type B claims.

13. The fees for Type A claims are prescribed by Schedule 2, table 3, column 2. On issue the fee is £160 and for a hearing the fee is £230. The fees for Type B claims are higher; they are prescribed by Schedule 2, table 3, column 3. The fee on issue is £250 and the fee for a hearing is £950. Special provision is made for claims involving multiple claimants (Articles 8, 10 and 12). Fees range from £320 as an issue fee and £460 as a hearing fee for a Type A claim with 2-10 claimants, to £1,500 issue fee and £5,700 hearing fee for a type Claim B with over 200 claimants (Schedule 2, table 4). In some multiple claims, therefore, such as equal pay claims brought by a large group of women, the amount which will have to be paid by each claimant may be small but obviously the fewer claimants in the group, the larger the proportion of the fee to be borne by each.

14. There are separate fees payable in respect of particular applications, including an application to secure dismissal of a claim following withdrawal. This is the only means by which claimants may, of their own volition, finally terminate proceedings in an Employment Tribunal.

15. The fees which have to be paid in order to pursue an appeal to the EAT are higher. For an individual claimant they are £400 on issue and £1,200 following a direction by the EAT that the matter is to proceed to an oral hearing (Articles 13 and 14).

16. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and the Employment Appeal Tribunal Rules 1993 (as amended) make consequential provision in connection with the payment of fees. An Employment Tribunal shall reject a claim where it is not accompanied by a fee or a remission application: rule 11. Where a claim is accompanied by a fee but the amount paid is lower than the amount payable for the presentation of that claim, the tribunal will send the claimant a notice specifying the additional amount due, and the claim or part of it in respect of which the relevant fee has not been paid will be rejected by the Employment Tribunal, if the amount due is not paid by a date specified. If the remission application is refused in part or in full, the Employment Tribunal will send the claimant a notice and the claim will be rejected by the Employment Tribunal if the fee is not paid by the date specified (Rule 11(3)). Thus the claimant may not institute proceedings at all without payment of the fee or presentation of a remission application. There are similar rules in relation to the EAT. Appeals will be struck out unless the appropriate fees are paid: rule 17A.

17. The EAT has given guidance on recovery of fees for successful claimants in *Portnykh v Nomura International plc* [2013] UKEAT 0448/13/LA and *Horizon Security Services Ltd v Ndeze* [2014] ICR D31; [2014] IRLR 854. Rule 34A(2A) gives a discretion to the EAT to reimburse fees by way of a costs order. In *Portnykh* His Honour Judge Hand QC held that the general rule was that an unsuccessful respondent should normally pay the fees as costs, at least where the appellant is substantially successful. It would not have to be shown that the respondent had behaved unreasonably or vexatiously as is usually the requirement before costs can be awarded. In *Horizon* the unsuccessful respondent was ordered to reimburse the appellant's fees but the EAT observed that whilst that would be the usual rule, there were factors which may temper that principle such as where an appellant had been only partly successful or where the other party could show that he or she did not have the means to pay. More recently, in *Look Ahead Housing and Care Ld v Chetty* (UKEAT/0037/14) the President of the EAT, Langstaff J, without referring to either of the earlier decisions, said that the appropriate principle should be that fees could normally be claimed by a wholly successful appellant but that if there is only partial success then depending on the facts it will generally be appropriate to allow recovery of only part of the fees.

18. These cases were concerned with the recovery of fees by a successful appellant in the EAT, but rule 76(4) of the Employment Tribunal Rules mirrors rule 34A(2A) in the EAT rules and will no doubt be construed in the same way.

The remission scheme

19. The remission scheme is a general one applicable not just in the employment sphere but across all courts and tribunals. No-one will receive a remission with respect to an Employment Tribunal or EAT fee if his disposable capital exceeds £3,000. If an applicant satisfies the disposable capital test, the right to remission will depend upon income.

20. Subject to certain exemptions, disposable capital is "the value of every resource of a capital nature belonging to the party on the date on which the application for remission is made" (Schedule 3, paragraph 5). Where a resource does not consist of money, its value is calculated as the amount which that resource would realise if sold,

less 10% of the sale value and the amount of borrowing secured against that resource that would be repayable on sale (paragraph 6 of Schedule 3). For these purposes the assets of a claimant's partner are to be treated as the assets of the claimant whatever the financial arrangements between them (paragraph 14).

21. The amount of any remission is calculated by applying the gross monthly income test. Again, the income of any partner is taken into account. Paragraph 11 of Schedule 3 provides that there will full remission of fees if the income does not exceed £1085 for a single person with no children and £1245 for a couple with no children. That sum is increased by £245 for each child. For every £10 gross earned above the cap, £5 must go towards the fee.

22. There is a discretionary power conferred by paragraph16 of Schedule 3 which enables the Lord Chancellor to remit a fee if satisfied that there are exceptional circumstances which justify doing so. We have not been told of any case where that power has been exercised.

The principle of effectiveness

23. The first ground of challenge is that the principle of effectiveness has been infringed. That principle has been defined by the CJEU in the following terms:

> "The procedural requirements for domestic actions must not make it virtually impossible or excessively difficult to exercise rights conferred by [EU] law":

see *Levez v TH Jennings ECJ* [1999] ICR 521 para 22, citing a whole raft of earlier authorities.

24. This principle is closely related to the common law principle that access to a court is a fundamental right, and also to Article 6 of the ECHR which confers a right to a fair and public hearing. In *Ahmed v HM Treasury* [2010] UKSC 2, [2010] AC 534, para 146, Lord Phillips referred to the common law principle as "the foundation of the rule of law". To similar effect is the observation of the Strasbourg Court in *Golder v United Kingdom* [1975] 1 EHRR 524, para 35 in relation to Article 6 that:

> "The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the 'universally recognised' fundamental principles of law."

The claimant has not, however, sought to rely directly on these principles.

25. Many claims which can be taken before employment tribunals are derived from, and constitute the domestic implementation of, EU law. Discrimination and equal pay cases fall into that category. So the EU principle of effectiveness is engaged in relation to such claims.

26. The underlying rationale of these related principles is not difficult to comprehend. A right is rendered illusory if there is no practical mechanism for enforcing it. There is an obligation under EU law for rights conferred by EU law to be capable of enforcement in domestic courts, and to deny a right of access to the court would make

those rights worthless. Given that EU law focuses on substance rather than form, the principle is infringed if in practice the right to have access to a court to seek to establish and enforce the rights is denied. The critical issue, which is fact sensitive, is when it can be said that restrictions constitute such an interference with the right of access to a court as to render such access practically impossible or excessively difficult.

27. Sometimes the principle of effectiveness may be infringed where a substantive legal rule prohibits a particular issue being pursued in the courts at all: see *Johnston v Chief Constable of Royal Ulster Constabulary* [1987] QB 129*;* or the remedies available in domestic law may be insufficient to constitute real and effective protection of the EU right: see *Marshall v Southampton and South West Area Health Authority II* (Case C-271/91) [1993] ECR I-4367. This case is concerned with a different and in one sense more fundamental aspect of the principle, namely whether the claimant can bring his case before the court at all.

28. The claimant and the Commission submit that although the formula of "virtually impossible or excessively difficult" might suggest that a real and substantial impediment must exist before the principle of effectiveness is infringed, in practice the ECJ has adopted a much less rigorous standard. We were referred to a number of cases which whilst not directly concerned with the payment of fees, were said to support that proposition.

29. First, in *Impact v Minister for Agriculture and Food* [2008] ECR I-2483 Ireland had failed to implement into domestic law within the specified timescale a Directive designed to protect the rights of fixed-term workers. A claimant brought a claim under domestic law with respect to the period from when the Directive had been implemented into domestic law and a separate and distinct claim, relying on a directly effective EU right, with respect to an earlier period when the Directive ought to have been implemented into Irish law but had not been. The domestic claim could be pursued in a specialist employment court but the EU right had to be enforced in the ordinary court. The Advocate General considered that this bifurcation of procedures infringed the principle of effectiveness. The Court did not go that far but observed that it was certainly capable of doing so:

> "if – which is for the referring court to determine- it would result in procedural disadvantages for those individuals in terms, inter alia, of cost, duration and the rules of representation, such as to render excessively difficult the exercise of rights deriving from the Directive."(para. 51)

30. The second case relied upon was *Duarte Hueros v Autociba SA* [2014] 1 CMLR 53 which concerned Spanish laws providing consumer protection. The effect of the relevant civil law was that if a party sought a particular remedy which was not justified in the circumstances, the court could not provide an alternative remedy which had not been expressly sought, even if it would provide the appropriate relief. Moreover, the application could not be varied in the course of proceedings so as to add the further, appropriate remedy. The applicant had asked for rescission of a contract to buy a car on the grounds that it let in the water and was defective. The court held that the defect was too minor to justify rescission but that a reduction in price was the appropriate solution. However, that had not been sought in the

application and therefore the court could not grant that relief. The ECJ, following the opinion of AG Kokott, indicated that whilst the final decision whether the principle of effectiveness had been infringed was for the national court, the rule appeared to make the enforcement of the right exceptionally difficult (paras. 39-41):

> "it must be held that the Spanish legislation at issue in the main proceedings does not appear to comply with the principle of effectiveness, insofar as, in proceedings brought by consumers in cases where the goods delivered are not in conformity with the contract of sale, it makes the enforcement of the protection which Directive 1999/44 seeks to provide to those consumers excessively difficult, if not impossible."

31. The third case was *Alassini v Telecom Italia SPA* [2010] 3 C.M.L.R. 17. Italian law required with respect to certain disputes in the electronic communications field that there should be mandatory compliance with a settlement procedure before the parties could go to court. Save for one possible difficulty, both the Advocate General and the Court considered this to be an appropriate requirement and compatible with the right to an effective remedy. However, both the Advocate General and the Court started from the premise that an interference with the right of access to the court was a restriction on a fundamental right and could only be lawful if proportionate. The Court said this:

> "….. it should be borne in mind that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in arts 6 and 13 of the ECHR and which has also been reaffirmed by art.47 of the Charter of Fundamental Rights of the European Union (see *Mono Car Styling* [2009] 3 C.M.L.R. 47 at [47] and the case law cited).
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> 62 In that regard, it is common ground in the cases before the referring court that, by making the admissibility of legal proceedings concerning electronic communications services conditional upon the implementation of a mandatory attempt at settlement, the national legislation introduces an additional step for access to the courts. That condition might prejudice implementation of the principle of effective judicial protection.
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> 63 Nevertheless, it is settled case law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed …"

32. The Court accepted that it was proportionate in that case save for the requirement (which was not in fact clearly established) that the disputed procedure could only be accessed via the internet. The court observed that if that were so, it would render it in practice impossible or excessively difficult for some individuals. The court also noted

that the mandatory requirement would only be acceptable if the mediation process did not cause a substantial delay; if it involved no or at least very little extra cost; and if in exceptional circumstances of urgency interim measures were available.

33. There is only limited case law relating to the circumstances where it has been alleged that the cost of litigation had the effect of denying the claimant an effective remedy. The Strasbourg court has considered a number of such cases under Article 6 both where it is alleged that the state's failure to pay for legal representation denies an applicant an effective right, and where it is said that the court fee has that effect. The Luxembourg court will generally follow Strasbourg where essentially the same fundamental right is under consideration: see e.g. *Criminal Proceedings Against Pupino* [2005] ECR I- 5828, paras. 58-59. This is now reflected in the European Charter of Fundamental Rights article 52(3).

34. In *Airey v Ireland* (1979) 2 EHRR 305 the issue was whether a woman who was compelled to take judicial separation proceedings in the High Court in Ireland but could not afford a lawyer to represent her, was denied an effective remedy. The court held that in the unusual circumstances of that case, the principle of effectiveness was infringed even though she could have represented herself. The court said this (para. 24):

> "The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, mutatis mutandis, the judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 31, paras. 3 *in fine* and 4; the above-mentioned *Golder* judgment, p. 18, para. 35 in fine; the *Luedicke, Belkacem and Koç* judgment of 28 November 1978, Series A no. 29, pp. 17-18; para. 42; and the *Marckx* judgment of 13 June 1979, Series A no. 31, p. 15, para. 31). This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see, mutatis mutandis, the *Delcourt* judgment of 17 January 1970, Series A no. 11, p. 15, para. 25). It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily."

The court held that she would not in that case be able to present her case properly because of the formal nature of the proceedings, the complexity of the issues, the emotional strain, and the need to cross examine witnesses including experts. Accordingly, Article 6 was infringed.

35. *Podbielski and PPU Polpure v Poland* [2005] ECHR 543 was a case concerning court fees. The applicant complained that he was unable to pursue an appeal conferred under Polish law because his company was insolvent and he was unable to pay the fees. The court accepted that whilst an obligation to pay fees might well not infringe Article 6, it did so in these circumstances of the case. The court expressed the principles applicable in such cases in the following terms (paras 61-64):

"61. The "right to a court" is not absolute. It may be subject to limitations permitted by implication because the right of access by its very nature calls for regulation by the State. Guaranteeing to litigants an effective right of access to courts for the determination of their "civil rights and obligations", Article 6 (1) leaves to the State a free choice of the means to be used towards this end but, while the Contracting States enjoy a certain margin of appreciation in that respect, the ultimate decision as to the observance of the Convention's requirements rests with the Court.

62. In particular, Article 6 (1) does not compel the Contracting States to set up courts of appeal or of cassation. Nevertheless, a Contracting State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees in Article 6, regard being had to the fact that the manner of application of that provision to such courts depends on the special features of the proceedings involved and that account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see, for instance, *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, *Reports of Judgments and Decisions* 1997-VIII, p. 2955, § 33, and *Tolstoy-Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, pp. 80-81, §§ 61 et seq.; and *Kreuz (no.1)*, cited above).

63. The Court has accepted that in some cases, especially where the limitations in question related to the conditions of admissibility of an appeal, or where the interests of justice required that the applicant, in connection with his appeal, provide security for costs to be incurred by the other party to the proceedings, various limitations, including financial ones, may be placed on his or her access to a "court" or "tribunal". However, such limitations must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved (*ibid.*)

64. The requirement to pay fees to civil courts in connection with claims, or appeals, they are asked to determine cannot be regarded as a restriction on the right of access to a court that is 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 applicant's 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 and had "a ... hearing by [a] tribunal" …."

36. The court went on to say (para. 65) that:

> " …. restrictions which are of a purely financial nature and which, as in the present case, are completely unrelated to the merits of the appeal or its prospects of success, should be subject to a particularly rigorous scrutiny from the point of view of the interests of justice."

37. Here the court held that there was a breach of the Article for the following reasons:

> "66. The Court notes that, indeed, the courts at several instances heard Mr Podbielski's case and that, eventually, the fee for lodging his company's appeal of 29 November 1996 was significantly reduced (see paragraphs 28 and 33 above). Yet, in contrast to the *Tolstoy-Miloslavsky* case, the money that the applicant was obliged to secure did not serve the interests of protecting the other party against irrecoverable legal costs. Nor did it constitute a financial barrier protecting the system of justice against an unmeritorious appeal by the applicant. Indeed, the principal aim seems to have been the State's interest in deriving income from court fees in civil cases (see paragraphs 30, 35 and 54 above).
>
> 67. Moreover, it appears that the sum in question was still far too high for the company which, from at least May 1995 up to the material time (October 1997), had been on the verge of winding-up its business, had constantly incurred losses, had its assets attached and had gradually had all its bank accounts frozen (see paragraphs 24 and 27-39 above)."

38. The claimant and the Commission submit that this is the position here; the fees are, at least for some people, far too high and the only purpose of imposing them is for the state to derive an income from them.

39. In *Apostol v Georgia* [2006] ECHR 999 the applicant was unable to pay for the institution of enforcement proceedings because he did not have sufficient income to pay in advance. He was prepared to pay the fee from the judgment debt. The court reiterated the general principle in the following terms:

> "It must be recalled in this regard that the right to have access to a court 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. However, the Court must be satisfied that the limitations applied do 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 no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite*

> *and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999 I)."

The court later continued (para. 59-60):

> "The Court recalls in this regard that in order to determine whether or not a person enjoyed the right of access, the amount of the fees requested is to be assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed (*Kreuz*, cited above, para 60).
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> 60. In the present case, the impugned financial restriction was not imposed on the applicant either at first instance, or at the appellate stage of the trial, and could not therefore be considered as being related to the merits of his claim or its prospects of success – considerations which might justify restrictions on the right of access to a court (see, *a contrario*, *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316 B, pp. 80-81, paras 61 *et seq.*). The existence of the final and enforceable judgment in the applicant's favour stands, on the contrary, for the fact that the applicant's litigation had been meritorious. Consequently, the imposition of the obligation to pay expenses in order to have that judgment enforced constitutes a restriction of a purely financial nature and therefore calls for particularly rigorous scrutiny from the point of view of the interests of justice (see *Podbielski and PPU Polpure v. Poland*, no. 39199/98, paras 65, 26 July 2005)."

Applying these principles, the court held that the imposition of the fee in that case did infringe Article 6(1).

40. In my judgment, there are two distinct albeit related principles in play here, although the courts have tended to merge them. First, whilst the right of access may justifiably be subject to restrictions, they must satisfy the proportionality test. It seems to me that even if the restriction does not in fact make it excessively difficult to take a case to court, if it imposes unnecessary hurdles which serve no useful purpose or are otherwise disproportionate and hinder the exercise of the right unjustifiably, there will be a breach of the EU principle of proportionality. There is a disproportionate interference with the right rather than a denial of it. In my judgment both the *Impact* and *Allassini* judgments are best analysed in this way. In *Impact* it might have been unnecessarily burdensome to have to go through two procedures, but it seems to me inaccurate to say that it was excessively difficult for an applicant to take that step. In *Allassini* the court indicated that if the compulsory conciliation scheme had involved cost or undue delay, it might well have fallen foul of the principle of effective remedy. But again whilst such restrictions may well have been unjustified and may have imposed unreasonable burdens, it is not true to say that they would necessarily

of themselves have made access illusory or excessively difficult. They would simply have served no valid or legitimate purpose.

41. The two distinct principles are in my view brought into relief in the following passage from the judgment of the Grand Chamber in *Ashingdane v United Kingdom* [1985] 7 EHRR 528 (para. 57):

> "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."

42. I would not, therefore, accept that the authorities relied upon by the Commission demonstrate that the requirement of exceptional difficulty in the effectiveness test has been diluted; rather it is not required where the thrust of the complaint is that a restriction is unnecessary and disproportionate.

43. But even where it would otherwise be a proportionate limitation, if its effect in practice is to make it virtually impossible or excessively difficult for a litigant to have access to the court, it will infringe Article 6. There cannot be an effective denial of the right of access, however justified the restriction might otherwise be. *Airey*, *Podbielski* and *Apostol* in my view all fall into that category. They confirm that in an appropriate case cost can impose such an excessive restriction as to amount in substance to denial of the right of access to the court. It is not enough that there is a formal right of access; the cost of the litigation – in *Airey's* case it was the cost of necessary legal representation and in the other two cases the court fees - was simply too much for impecunious litigants.

44. The argument in this case is that there is no effective right of access. 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 only issue in my judgment is whether it does in practice make access impossible or exceptionally difficult. The cases on disproportionate limitation do not in my view bear on that test.

Access to the court: the context

45. The claimant, supported by the Commission, submits that that when applying that test the court should take into account two important features.

46. First, and very importantly, the elimination of all arbitrary discrimination is an extremely important objective of the Community. Article 2 of the Treaty on European Union says the Union is founded on the rights of minorities and that non-

discrimination is one of the values common to Member States; and Article 3.3 says that the Union shall combat exclusion and discrimination and promote equality between men and women. Article 21 of the Social Charter also prohibits discrimination on a range of proscribed grounds. Very many cases have reinforced this message. For example, the Court of Justice has recognised equality and non-discrimination as a fundamental value which takes priority over the economic aims of the Treaty: *Deutsche Telekom AG v Shroder* [2000] ECR 1-743; [2000] IRLR 353, paras. 56-57. So whilst the principle of effectiveness is applicable to all EU rights, it has a particular resonance where restrictions are imposed whose effect may be to deny claimants a right to vindicate equality claims. The courts should subject to particular scrutiny any requirements which restrict or hinder access to the courts in such cases.

47. Second, the claimant says that there are a number of features of employment claims generally which will militate against individuals bringing claims even in the absence of fees. These include the following: first, the claimant may well have no legal representation and be intimidated at the prospect of taking the case himself or herself; second, exceptionally, such as where the employee simply wishes to establish what the terms of his contract are by seeking a statement of written particulars, no compensation is payable; and in many other claims, such as claims under the Working Time Regulations, the compensation will typically be very low. Workers will often be reluctant to take cases where there is no consequence in cash terms, and the obligation to pay a fee will reinforce that reluctance. Third, the statistics indicate that even where a party is successful and is awarded compensation, it is often extremely difficult to enforce a money judgment. A Department of Business Innovation and Skills study of 2013 showed that in almost half the cases where money is ordered to be paid by the employer, the claimant is unable to recover it, usually because the employer has become insolvent.

48. These difficulties are compounded in discrimination cases for a variety of reasons. The worker often cannot properly assess the likelihood of success at the time he presents a claim; he will simply know that there are facts which prima facie support a discrimination claim, but the employer will not at that stage have been required to provide a response. The repeal of the legislation which imposed an obligation on the employer to respond to an equality questionnaire has, it is claimed, exacerbated that problem. Second, the hearing date is likely to be fixed very shortly after the case is presented, particularly given the dramatic fall in the volume of tribunal cases, with the result that the claimant may be committed to the full hearing fee before having had a proper opportunity to review the case in the light of the employer's response to the claim. Third the awards of compensation are not particularly high. By way of illustration we were shown the Employment and EAT Tribunals Quarterly Statistics published in March 2014. In general terms they show that the median award for sex discrimination claims was £5,900. Some 22% received less than £3000 and 39% less than £5000. The amounts were lower for race, religious and age discrimination and slightly higher for disability and sexual orientation discrimination. We were informed that the rule of thumb in legal aid cases is that for it to be made available, the compensation should be at least four times the legal aid required. That is unlikely to be satisfied it is said, in most discrimination claims.

49. The Lord Chancellor disputed the force of these points, submitting that some of them were exaggerated. Ms Chan, counsel for the Lord Chancellor, contended that there are

various voluntary agencies which will provide legal advice to those considering taking a claim; in some cases also they will provide representation, as do many trade unions for their members. There is a new enforcement system which is designed to improve the recovery rate for those awarded compensation in employment cases, although it is too soon to determine how successful it will prove to be. Ms Chan also disputes the proposition that generally the hearing fee will have to be paid before the employer has provided his response to the claim; she submits that this is rarely likely to be the case.

50. The court is not in a position to assess in any very precise way what impact these features may have in practice on those considering litigation. However, whilst the observations of Ms Monaghan QC, counsel for the claimant, were at a high level of generalisation, I would be prepared to accept that the features identified by her are likely, to a greater or lesser extent, to be present in many claims. They are likely, to some degree at least, to cause potential litigants to be cautious before resolving to take a claim, quite independently of any consideration of fees.

51. As the CJEU observed in the *Duarte Heros* case, para. 34, the effect of any restrictions must be considered in the context of the procedures as a whole, and I would accept that these features are indeed part of the relevant background. But I would accord them no greater significance than that.

The evidence

52. Before the court in the earlier application, the parties focused upon three notional individuals who, the claimant said, would not be eligible for relief from fees and yet would be unable in practice to pursue their claims. The court found it unsatisfactory having to determine the case with notional rather than actual claimants. However, it did engage with the examples given and assumed that the disposable income was as the claimant asserted it to be. Even so, it still did not find a breach of the principle. It is, in my view, instructive to consider the particular examples and to note how the Divisional Court approached the question whether the arrangements rendered access excessively difficult (paras. 36-42):

> "We turn to the outcome, examining each of the three critical scenarios in turn. In scenario 5 the disposable monthly income of the notional single parent is £441.59. The remission scheme would mean that a maximum of £470 is paid for any single fee. The ET issue fee for a Type B claim is £250 and thus the whole fee would be payable without remission. Remission would limit the ET hearing fee for a type B claim to £470. A very low number of cases proceed to the EAT. In the unlikely event of appeal the EAT issue fee is £400 and would be payable without remission. The EAT hearing fee would be capped following remission at £470.
>
> An ET claim must be issued within the relevant limitation period (three months in many cases) and must be accompanied by either the applicable fee or the completed application for remission. This means that, potentially, a claimant has up to three months from when the claim arose until they will have to

pay the issue fee, and will have longer if an application for remission is made. The ET issue fee of £250 represents 57% of the disposable monthly income, with three months to accumulate the fee. The ET hearing fee, payable in the great preponderance of cases after a further period of months, represents 106% of the disposable monthly income. For those few whose cases proceed to the EAT, the issue fee would represent 91% of disposable monthly income, and the EAT hearing fee, after remission, 106% of a disposable monthly income.

Under scenario 7 the notional ET Claimant's disposable monthly income is £608.43 and the remission scheme would mean a maximum fee at any point of £500. The ET issue fee for a Type B claim is well within that maximum at £250, representing 41% of the disposable monthly income. The ET hearing fee for a Type B claim, capped at £500, represents 82% of disposable monthly income. An EAT issue fee at £400, represents 66% of a disposable monthly income, and the EAT hearing fee, capped at £500, represents 82% of the disposable monthly income.

Finally we turn to scenario 8. In relation to this notional individual, the Claimant emphasises the considerable modesty of the income concerned, by pointing out that the net monthly income in the agreed calculation includes a top up of state benefit to the family, as set out in the calculations of Ms Endean's second statement, Annex B paragraph 67. We accept the relevance of the comment. It must be clear to all that these notional Employment Tribunal Claimants and their families are living on a very modest income. Yet, after essentials the disposable monthly income is £556.81 a month. For this claimant, the maximum fee payable is £520 in respect of any fee arising. Thus the ET issue fee of £250 for a type B claim represents 45% of disposable monthly income. The ET hearing fee for a Type B claim will be capped at £520, a sum which represents 93% of disposable monthly income. An EAT issue fee at £400 would fall to be paid in full, representing 72% of disposable monthly income. An EAT hearing fee will be capped at £520, which represents 93% of disposable monthly income for the individual.

We conclude that the combined effect of the remissions in the periods before and between the dates when fees must be paid, is that there is a sufficient opportunity even for families on very modest means, as illustrated in the three notional claimants, to accumulate funds to pay the fees. Proceedings will be expensive but not to the extent that bringing claims will be virtually impossible or excessively difficult.

> 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. *Kreuz v Poland* [2001] 11 BHRC 456 establishes, in relation to Article 6, ECHR, that it is legitimate to impose financial restrictions on access to court, but a fee equivalent to the average annual salary in Poland was excessive ([62]-[63]). In *Kijewska v Poland* [2007] ECHR 73002/01 the domestic court appears to have refused to take into account the litigant's impecuniosity.
>
> It is clear that any regime must be flexible, and have regard to the means of prospective litigants. The real difficulty lies in deciding when the level of fees imposed can properly be condemned as "excessive". The mere fact that fees impose a burden on families with limited means and that they may have to use hard-earned savings is not enough. But it is not possible to identify any test for judging when a fee regime is excessive. It will be easier to judge actual examples of those who assert they have been or will be deterred by the level of fees imposed."

53. There can be no doubt that the burden imposed on individual claimants in the hypothetical examples given was extremely onerous; but the court was not prepared to say that it was so burdensome as to render the right illusory.

54. The claimant still does not rely upon any actual instances of individuals who assert that they have been or would be unable to take claims notwithstanding that their income is too much to qualify for remission. Nor did it in its submissions focus upon hypothetical individuals as it did in the first case. Instead, the union essentially relies upon statistics to make good its claim, these being fuller than were available before the court at the earlier hearing, no doubt encouraged by the observations of Moses LJ in the comments recited at paragraph 3 above.

55. There is no doubt that the reduction in the number of cases brought is striking. The Tribunals Statistics Quarterly for October to December 2013, published on 13 March 2014 show that, comparing the period October-December 2012 with the period same period in 2013 (the Fees Order having come into force on 29 July 2013), 79% fewer claims were accepted by the ET . For equal pay claims, the figure was 83% and for sex discrimination it was 77%.

56. The Quarterly for January to March 2014, published on 12 June 2014, confirm the continuing dramatic effect of the Fees Order and suggest that the earlier statistics were not aberrant. Between January and March 2013, 57,737 claims were brought in the ET. However, for the same period in 2014, just 10,967 claims were brought. That is a drop of 46,660 claims or 81%. There is other evidence to similar effect.

57. The Lord Chancellor quibbles with the figures. In particular, it is said that they focus on both single and multiple claims; if only the former are considered it is suggested

that the reduction is more in the region of 60%. Even that is a very substantial reduction. Ms Chan further submits that some of the reduction was unsurprising and can be explained by a change in other related aspects of employment law. The aim of the fees is at least in part to encourage settlement outside the tribunal, and that has been reinforced by making conciliation by ACAS mandatory for all claimants from the 6 May 2014. This emphasis on conciliation is deliberate government policy and will, submits Ms Chan, have had some effect on the case load. So will the increase in the qualifying period for unfair dismissals from one to two years and the imposition of a cap on unfair dismissal compensation. I would accept that these factors may have played a part in the reduction, but they do not begin to explain the whole of this very dramatic change.

58. Ms Chan's basic submission, however, is that whatever the statistics say they cannot of themselves demonstrate that the principle of effectiveness has been infringed. It is not legitimate to infer that some litigants cannot pay from the fact that a significant number do not pay. Ms Chan accepts that the imposition of a fee will necessarily deter some litigants from taking their cases but contends that there are likely to be a variety of reasons for this. Some workers who in the past may have pursued a weak case, if only in the hope of securing a small settlement in their favour, will now be reluctant to do so because of the risk of having to pay fees if the case goes to the tribunal. Others will quite properly choose to spend their limited resources in other ways rather than gamble on litigation. Ms Chan also points out that the most seriously disadvantaged are covered by the remission scheme; and that in general a successful litigant can recover the fees against the unsuccessful party. So a party with a good case can pursue it with some confidence.

59. The claimant and the intervener challenge this analysis. They do not accept that the payment of fees is likely to encourage settlement. Indeed, they submit that this is less likely if the employer considers that the employee will not choose to litigate because of the fee burden: there will then be no incentive for the employer to compromise. They submit that even if one allows for the fact that there may have been some reduction because of the introduction of compulsory conciliation – which they submit on any view would be very small - that does not begin to explain the very significant reduction. It must be the case that some litigants who actively wish to take proceedings simply cannot afford to do so because they are not entitled to remission of the fee and earn too little; no other sensible inference is possible on these figures. The income level at which relief from paying fees is lost is set too low; the effect is that for many low earners the right of access to the tribunal is indeed illusory.

60. I see the force of this submission and I suspect that there may well be cases where genuinely pressing claims on a worker's income will leave too little available to fund litigation. But the difficulty with the way the argument has been advanced is that the court has no evidence at all that any individual has even asserted that he or she has been unable to bring a claim because of cost.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.

61. The question many potential claimants have to ask themselves is how to prioritise their spending: what priority should they give to paying the fees in a possible legal claim as against many competing and pressing demands on their finances? And at what point can the court say that there is in substance no choice at all? Although Ms

Monaghan would not accept that this is the task facing the court, it seems to me that in essence that is precisely what the court has to do. In that context, as Moses LJ said in the first Unison challenge, it is not enough that the fees place a burden on those with limited means. The question is not whether it is difficult for someone to be able to pay - there must be many claimants in that position - it is whether it is virtually impossible or excessively difficult for them to do so. Moreover, the other factors which I have identified as potentially inhibiting a worker from pursuing a claim may reinforce the conclusion that the risks inherent in litigation are not worth taking. These factors engender a cautious approach to litigation but do not compel the inference that it would be impossible in practice for some of these claimants to litigate.

62. In my view, the court can only properly test the argument if there are actual cases which will enable the court to review the income and expenditure of a particular individual or individuals and apply the effectiveness principle in that concrete situation, as Moses LJ emphasised in the earlier proceedings.

63. A related problem is that the relief sought is to quash the relevant regulations. But in my view the Lord Chancellor would be entitled to know in what circumstances the scheme is considered to be defective in order to remedy it. I appreciate of course that it is not for the court to draft a lawful scheme; that is for the Lord Chancellor. But here the court would be saying no more than that the inevitable inference from the statistics is that the scheme leaves an indefinable and undefined number of people with no effective way to redress wrongs. The difficulty is compounded by the fact that the Lord Chancellor has a discretion to relieve a claimant from the obligation to pay fees in exceptional circumstances. It is true that we have heard little about this discretion or when it may be exercised. But if the evidence were to suggest that the number of claimants for whom the right of access is illusory is likely to be very small, invoking the discretion might be a way of dealing with the problem whilst leaving the scheme itself intact. Quashing the scheme would then be inappropriate. Indeed, it may be that a particular claimant who asserts that his Article 6 rights are infringed by the rules should first seek to have the discretion exercised in his favour before bringing a legal challenge.

64. For these reasons, I conclude that the claimants have not shown that the principle of effectiveness has been infringed.

Indirect discrimination

65. The claimant advances this ground under a number of different statutory provisions. It alleges that the imposition of the new fees regime under the 2013 Order is indirectly discriminatory under EU law, under the Convention (Article 6 read with Article 14), and under section 19 of the Equality Act 2010 as against women, ethnic minorities, disabled people, transgendered people, gay and lesbian people, those holding particular religious or other beliefs and those falling within particular age groups. However, although the grounds were originally cast in those very broad terms, in fact the claimant's case has focused almost exclusively on discrimination against women and therefore I am only going to consider sex discrimination. The court does not have the material to determine whether there has been any other form of discrimination, although if the sex discrimination claim does not succeed, it is unlikely that any claim based on any other protected characteristic would do so.

66. Although the argument is addressed via different non-discrimination principles, it is in my view only necessary to focus on the domestic law which gives effect to EU law. It was not suggested that Convention jurisprudence would provide any fuller protection in the context of this case or yield any different result.

67. Indirect discrimination under section 19 of the Equality Act is defined as follows:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

68. Ms Monaghan sought to establish indirect discrimination by putting her case in three different ways. The first was that those subject to the fee B regime compared with those paying fee A were disproportionately female. The statistics bear this out. However, it seems to me that the logic of this argument is not that fees cannot be charged or that the scheme should be quashed, which is the relief sought; rather it is that women being indirectly discriminated against for level B claims should not have to pay more than level A fees.

69. The issue here is whether the difference in the fee is justified rather than whether any fee is justified. The rationale for the distinction between category A and B cases is that those subject to level A fees are in general likely to take less time than claims falling within category B and therefore use fewer resources. Ms Monaghan submitted that there is no direct evidence of this and that the court should not simply accept counsel's assertion to that effect. I do not accept that. In a document produced by HM Courts and Tribunals Service giving information about the fees it is expressly stated that "Type A claims tend to be more straightforward for the Tribunal to deal with, and so have lower fees." Moreover, there is clearly some rationale for the different funding arrangements for groups A and B, and in my view the explanation given is consistent both with the reason for imposing the fees in the first place and with the nature of the claims falling within the two groups. In my judgment, it is legitimate to fix the fees by reference to the service - in the sense of court resources - provided. It is true that the scheme adopts bright line rules; some level A claims will take longer than some level B claims and vice versa. But it is legitimate in circumstances like this

to regulate by reference to the cost of the service in standard cases. I would therefore reject this ground.

70. The second way in which the claim is advanced is that there is discrimination against those who are bringing discrimination claims. It is not, I think, disputed that the proportion of women who bring discrimination claims is greater than the proportion of men. It is not in fact necessary to provide statistics to establish that proposition (although we have been shown them) and indeed, the Lord Chancellor recognised this to be the case in the Equality Impact Assessment. Ms Chan floated an argument that this did not mean that there would necessarily be an adverse impact on women because there may be a greater proportion of women who could benefit from the fee remission arrangements. But we have no evidence on that and even on the Lord Chancellor's own figures, only some 8.5% of claimants can take advantage of the fee remission (and the claimant says it is more like 5%). Whatever the precise percentage, it is not realistically going to alter the basic picture.

71. But I do not think that to select a sub-group of cases within category B is a legitimate way to seek to establish indirect discrimination. It is necessary to test any potentially adverse effect of the provision, criterion or practice (PCP) by focusing on all those who are subject to it, the overall pool to whom the PCP is applied. It is not legitimate to take a self-selected group. That simply distorts the true effect of the PCP. Moreover, it yields bizarre results. If there is an adverse impact on women for discrimination claims, there must be a corresponding adverse impact on men for all non-discrimination claims (and apparently there is for unfair dismissal cases, for example). Ms Monaghan's riposte is to say that there may well be indirect discrimination against men in those cases, and that this would need to be justified too. But on that analysis, even if the PCP operated to advantage one sex overall, by a judicious selection of a particular subgroup where the claimants were predominantly of the other sex, it could be shown that the rule indirectly disadvantaged the group predominantly advantaged by the PCP as a whole. By choosing a subgroup which is in practice predominantly of one sex - say nurses or building workers - or by selecting claims typically made by one sex rather than the other, as has been done here, it would be possible to show that there was in fact indirect discrimination being practised in a whole variety of ways and each distinct type would have to be justified. I do not accept that the concept of indirect discrimination has such unacceptable and arbitrary consequences.

72. The Lord Chancellor relied upon two decisions of the Court of Appeal to demonstrate the error of this approach. The first was *University of Manchester v Jones* [1993] I.C.R. 474. In that case the University placed an advertisement for a careers adviser who would be "a graduate, preferably age 27-35 years". The claimant was age 46 and claimed indirect sex discrimination. The Tribunal had regarded the relevant pool as mature graduates only, from which it elicited the respective proportions of men and women who could comply with the condition of being age 27-35. The Court of Appeal held that this was the wrong approach. Evans L.J. said (p.501):

> " … the statutory concept, in my judgment, is that of a 'pool' or 'relevant population,' meaning those persons, male and female, who satisfy all the relevant criteria, apart from the requirement in question."

73. The relevant pool in that case therefore was all graduates with the relevant experience. The Tribunal had erred by subdividing the relevant pool into a smaller group of 'mature graduates'. This gave a distorted result of the impact of the provision in question.

74. The second case was *London Underground v Edwards* (No 1) [1995] ICR 574. This was a case where a female tube driver argued that putting tube drivers on rostered hours indirectly discriminated against women because they were more likely to be single parents. The Tribunal had considered a pool of only single parent tube drivers to see how many women out of that pool could comply with the roster. Mummery J giving judgment in the EAT, applied *University of Manchester v Jones* and held (p.582) that the Tribunal had:

> "erred in law in having regard to a "pool" which consisted of only those train operators who were single parents, a subdivision not warranted by the statutory provisions. The pool consisted of train operators, male and female, to whom the new rostering arrangements were applied."

Lord Justice Potter adopted a similar analysis in the Court of Appeal in that case ([1999] ICR 494, 505):

> "The identity of the appropriate pool will depend upon identifying that sector of the relevant workforce which is affected or potentially affected by the application of the particular requirement or condition in question and the context or circumstances in which it is sought to be applied"

75. In *Rutherford v Secretary of State for Trade and Industry (No.2)* [2006] IRLR 551, para.82 Baroness Hale observed that:

> "Indirect discrimination cannot be shown by bringing into the equation people who have no interest in the advantage or disadvantage in question."

It must equally follow that it cannot be shown by excluding those who are disadvantaged by the rule in question. The pool must be all those who have to pay category B fees in order to be allowed to bring their claims. Accordingly I would reject this argument.

76. The third way in which this argument is put focuses on the effect of the PCP on the pool as a whole. It is alleged that the PCP as applied to all class B cases discriminates against women. This was the one of the grounds on which the court on the last occasion found that there was indirect discrimination. Their finding after a careful analysis of the disputed figures was that 54% of claims in class B were brought by women and 46% by men, and that this disproportionately impacted on women because the balance in the labour force taken as a whole was 53% men and 47% women.

77. The Lord Chancellor submits that the more up to date statistics demonstrate that in fact the proportions of those caught by level B fees are in the region of 55% men and

45% women, which broadly reflects the balance of the sexes in the workforce. This therefore suggests that when the whole pool is taken and the most up to date statistics are considered, there is no discrimination at all. The claimant did not initially differ significantly from that claiming in paragraph 58 of the grounds that 46% of category B claimants were female.

78. The claimant and the Commission take issue with the reliability of these new statistics. They say that they are based on a limited sample and the methodology is far from clear. I do not accept that. The Lord Chancellor has explained how the statistics were obtained. They were the result of a survey commissioned by the Department of Business, Innovation and Skill where almost two thousand claimants, selected randomly, were interviewed. The gender figures were based on the gender as reported by the claimants. The survey was completed before the introduction of the fees, but it was possible to identify what fee would now be payable from the information given. The results are subject to sampling error, but it seems to me that they are as reliable as any of the statistics available.

79. For his part, the Lord Chancellor submits that the statistics employed by the Commission and claimant are themselves misleading not least because they do not take account of multiple claimants, and their statistics relate to jurisdictions rather than claims. In other words a female claimant who claims both unfair dismissal and sex discrimination will be counted twice although she only has to pay one fee.

80. It seems to me that all the figures which have been canvassed in these proceedings are to a greater or lesser extent unreliable. They are all derived from historical data, namely the periodic Surveys of Employment Tribunal Applications (SETA surveys).

81. Since the onus is on the claimant to show that there has been discrimination, I am not satisfied that the burden has been discharged here. Even if it has, the extent of any adverse impact is very small. That is relevant to the issue of justification.

Justification

82. In R *(Elias) v Defence Secretary* [2006] EWCA Civ 1293; [2006] 1 WLR 3213 para.165, itself a case of indirect discrimination, Mummery LJ identified the following three questions which need to be satisfied if the Lord Chancellor - the onus being on him - is to show that the discrimination is justified:

> "A three stage test is applicable to determine whether the birth link criteria are proportionate to the aim to be achieved: *see de Freitas v. Permament Secretary of Ministry of Agriculture, Fisheries and Housing* [1999] AC 69 at 80 and *R (Daly) v. Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at paragraph 27 and 28. First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

83. The evidence shows that in setting up the fee scheme the government were seeking to achieve three specific and quite distinct objectives: the first was to transfer a

proportion (one-third) of the annual cost of running ETs and the EAT to those users who benefit from it and can afford it; second, to make Tribunals more efficient and effective not least by removing unmeritorious claims; and third, to encourage alternative methods of employment dispute resolution so that litigation is not the first resort. This last objective goes hand in hand with the government's promotion of ACAS conciliation which became mandatory for all ET claimants from 6 May 2014. The government considers that it should encourage quicker, cheaper and less emotionally damaging alternatives to the judicial process.

84. Unison submits that none of these objectives can justify the adverse discriminatory impact of the policy. They deny that making workers pay to enforce their rights will facilitate conciliation because employers will know that most employees will not finally pursue their claims and thus there will be no incentive to reach a compromise, or at least not until the fee has been paid. Moreover, they submit that there are other rules available, such as requiring claimants to make a deposit in the case of weak claims, which can be used to discourage weak claims.

85. I do not accept that these aims can be dismissed so readily. As to promoting settlement, there may indeed be some employers who would react in the way Unison claim, but equally many would no doubt prefer to settle a claim early in the proceedings so as not to incur legal costs and the risk of losing a claim for which they would in all probability be liable for the fees. The introduction of compulsory conciliation is very recent and it is as yet too soon to tell how successful this may prove in settling claims. And whilst there are procedures available for deterring weak claims, it is legitimate to believe that the imposition of fees will prove a more effective discouragement.

86. The Commission advanced a different argument to the effect that there is no hard evidence to support the Lord Chancellor's assessment but as the EAT pointed out in *Constable of West Yorkshire Police and another v Homer* [2009] ICR 223 para. 48, concrete evidence is not always required. A reasonable and rational view about what effects a particular policy is likely to have will in principle suffice to justify its adoption, although the impact of the policy will have to be kept under consideration to ensure that the ends justify the means. Were it otherwise, government would be stifled in its ability to introduce new and untried measures because of the uncertainty of their impact.

87. As to the question of costs, Ms Monaghan submits that it is well established that budgetary or costs considerations cannot of themselves justify indirect discrimination: see the judgment of the Supreme Court given by Lord Hope and Baroness Hale in *Ministry of Justice v O'Brien* [2013] UKSC 6; [2013] 1 WLR 522, para. 63. Since this is the principal objective and it is flawed in law, it undermines the justification defence.

88. The current state of the authorities is that whilst cost savings cannot of themselves justify what is otherwise prima facie indirect discrimination, they may do so in combination with other reasons.The relevant authorities, both domestic and European, were considered by Rimer LJ giving the judgment of the Court of Appeal in *Woodcock v Cumbria Primary Care* [2012] EWCA Civ 330 [2011] ICR 133. He thought that the rule was somewhat artificial but was nevertheless well established, saying this (para. 66):

> "There is, it seems to me, some degree of artificiality about such an approach to the question of justification. As Elias J observed in the *Redcar & Cleveland* case, [2007] IRLR 91, at paragraph 91, 'Almost every decision taken by an employer is going to have regard to costs.' Regulation 3(1), however, says nothing of the extent to which considerations of cost may feature in the justification exercise. It provides merely that what would otherwise be discriminatory treatment may be justified if it was 'a proportionate means of achieving a legitimate aim'. The relevant question must therefore be whether the treatment complained of was such a means. Accepting, as I make clear I do, that the guidance of the Court of Justice is that an employer cannot justify discriminatory treatment 'solely' because the elimination of such treatment would involve increased costs, that guidance cannot mean more than that the saving or avoidance of costs will not, without more, amount to the achieving of a 'legitimate aim'. That is entirely unsurprising. To adopt a simple example given by Mr Short, it is hardly open to an employer to claim to be entitled to justify the discriminatory payment to A of less than B simply because it would cost more to pay A the same as B. Such treatment of A could not, without more, be a 'legitimate aim'."

89. On that analysis, the existence of other objectives - at least assuming them to be legitimate - would in principle render this objective legitimate. There are such objectives in this case which, in my view, are perfectly proper. But I would not in fact describe the first objective as costs saving. This is not a case of government refusing to correct discrimination because it would be too expensive. Rather it is more accurately characterised as requiring a contribution towards the cost of running the Tribunal Service, charging equal amounts from all who bring claims within class B. It is of course true that any indirect discrimination could be eliminated by charging no fee at all. But that would mean that what in my view must in principle be a perfectly proper and legitimate objective could not be pursued at all unless it were combined with some other legitimate objective.

90. I have no doubt that each of the objectives relied upon in this case is a legitimate one and that the scheme taken overall, particularly having regard to the arrangements designed to relieve the poorest from the obligation to pay, is justified and proportionate to any discriminatory effect. Moreover, the costs are recoverable, in general at least, if the claim succeeds.

91. The Commission floated an argument, advanced before the court in Unison no.1, that the employer should share the costs. But it cannot in principle be improper to require the party who wishes to call upon the service to pay for it, with the burden of payment shifting to the employer, in most cases at least, if the claim is successful. This is in line with how the principle works throughout the civil justice system. A sharing of the cost would not be a less discriminatory way of achieving that objective; it would be seeking to achieve a different objective.

Disposal

92. For these reasons, I would dismiss this application.

Foskett J:

93. I agree that this application must be dismissed for the reasons given by Elias LJ.

94. I do not consider that the evidence as it stands demonstrates that the new fees regime (i) results in the principle of effectiveness being breached or (ii) gives rise to indirect discrimination. If I was wrong in my analysis of the evidence concerning (ii), I agree with Elias LJ that the effect is relatively minor when assessed by reference to the objectives of the new regime to which he refers in paragraph 83.

95. I add these brief observations concerning the evidence merely by way of emphasis and also out of deference to the arguments of the claimant and the Commission because the issues they raise are undoubtedly important.

96. As Elias LJ has recorded (at paragraphs 55-56), the effect of the introduction of the new regime has been dramatic. Indeed it has been so dramatic that the intuitive response is that many workers with legitimate matters to raise before an Employment Tribunal must now be deterred from doing so because of the fees that will be demanded of them before any such claim can be advanced. For my part, I would anticipate that if the statistics upon which reliance is placed in support of this application were drilled down to some individual cases, situations would be revealed that showed an inability on the part of some people to proceed before an Employment Tribunal through lack of funds which would not have been the case before the new regime was set in place. However, that assessment has to be seen as speculative until convincing evidence to that effect is uncovered. If it is, of course, the Lord Chancellor would doubtless feel obliged to address it.

97. Elias LJ has referred to the way in which the statistics have been deployed in this application and has identified the fact that no evidence from any individual who has been affected adversely by the new regime (in the sense that it is now virtually impossible or extremely difficult to proceed through lack of funds) has been given: see paragraph 61 above. Whilst the analogy is not exact, it seems to me to be akin to trying to prove the causation of damage in an individual case by reference to statistical evidence: see the discussion at paragraph 2-28 in Clerk & Lindsell on Torts, 21st ed. There can be little doubt that the statistics relied upon in this case raise a legitimate question about the operation of the new regime, but they do not provide the answer to that question.

98. As it seems to me, before the court could begin to act it would need to be satisfied that a more than minimal number of people with arguably legitimate claims would find it virtually impossible or excessively difficult to bring such matters before an Employment Tribunal because of the fees that would require to be paid. Even then, the effect of this "national procedural provision" may have to be "analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole …": (*Duarte Hueros*, at paragraph 34).

99. I have emphasised the need to demonstrate that those dispossessed of the ability to complain to an Employment Tribunal have an arguably legitimate claim. The setting in place of a regime that merely discourages those with no arguable grievance cannot, on any analysis, constitute an interference with a right of access to the court.

100. There is nothing I would wish to add to what Elias LJ has said about the attack on the new regime based upon indirect discrimination. I respectfully agree with it.

101. As I have said, I too would dismiss this application.