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Case No: CO/8235/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2014

Before :

LORD JUSTICE MOSES
MR JUSTICE IRWIN

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Between :

The Queen on the Application of UNISON	**Claimant**
- and -	
The Lord Chancellor	**Defendant**
and	
The Equality and Human Rights Commission	**Intervener**

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Ms Karon Monaghan QC and Mr Mathew Purchase (instructed by **UNISON Legal Services**) for the **Claimant**
Ms Susan Chan (instructed by **The Treasury Solicitors**) for the **Defendant**
Mr Michael Ford QC (instructed by **Ms Rosemary Lloyd**) for the **Intervener**

dates: 22-23rd October and 4 November, 2013

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Approved Judgment

Lord Justice Moses :

1. This is a Judgment of the Court, to which we have both contributed.

2. From the introduction of the National Industrial Relations Court by the Industrial Relations Act 1971 until the Employment Tribunals and Employment Appeal Tribunal Fees Order 2013 (S.I. 2013 No. 1893) an accessible statutory scheme for giving effect to employment rights has existed at no cost to employer or employee save in very limited cases. Some 40 years since the National Industrial Court was abolished and the jurisdiction of tribunals, originally established in the Industrial Training Act 1964, was extended by the Trade Union and Labour Relations Act 1974, s.42 of the Tribunals, Courts and Enforcement Act 2007 conferred power on the Lord Chancellor to make an order prescribing fees in respect of "added tribunals", which include Employment Tribunals and the Employment Appeal Tribunal (s.42(3) of the 2007 Act and the Added Tribunals (Employment Tribunals and Employment Appeal Tribunal) Order 2013 (SI 2013/1892)).

3. A public consultation took place, not so much as to whether fees should be imposed but as to how the fee charging scheme should work. Consultation started on 14 December 2011 and ran for four months until 6 April 2012. On 13 July 2012 the Lord Chancellor responded to that consultation. On 25 April 2013 he laid a draft order before Parliament. This was approved by both houses under the affirmative resolution procedure. The Employment Tribunals and Employment Appeal Tribunal Fees Order 2013 was made on 28 July 2013 and came into force on 29 July 2013.

4. Between 29 July 2013 and 7 October 2013 a fee remission scheme was operated, identical to a remission scheme applying across civil courts of England and Wales, which was set out in Schedule 3 of the 2013 Fees Order.

5. On 7 October 2013 a new remission scheme was introduced into the civil courts and tribunals by the Courts and Tribunals Fee Remissions Order 2013 (SI 2013 No. 2302).

6. The effect of the 2013 Order is that claims in the employment tribunal and appeals to the Employment Appeal Tribunal can only be started and continued upon payment of fees (Article 3), subject only to an individual applying for and qualifying for a remission in accordance with Article 17 and Schedule 3.

7. 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, 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, "the hearing fee".

8. The 2013 Order makes provision for two types of claim, Type A claims and Type B claims (see Articles 6 and 7). 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).

9. The intervener, the Commission for Equality and Human Rights, has pointed out that the Fees Order and the Guidance on the Order persists in containing what it describes as significant errors. Certain claims are wrongly described as falling under Type A, although Mr Latham, Deputy Director of Tribunals for HM Courts and Tribunals

Service, has accepted they should be corrected. The published Guidance fails to correspond with the Order. The Guidance wrongly states that complaints as to equality clauses and for failure to inform and consult under TUPE fall within Type B, and ascribes Working Time Directive claims as falling under Type A. It is unnecessary for the purposes of these proceedings to investigate further whether these errors have been corrected, but they underline a significant feature of these claims, namely, that they are brought at the very outset of the introduction of this scheme with little opportunity to see how the scheme for payment of fees and remission will work in practice. Unison and the Commission say that if they waited it would be too late to challenge the Order, whilst the Lord Chancellor says that these claims are premature. I merely comment at this stage that the attempt to bring these proceedings as a matter of urgency has merely added to the amount of paper and controversy.

10. After Unison had issued proceedings on 28 June 2013 it issued an application for urgent interim relief. Permission to apply for judicial review was originally refused on 23 July 2013 but granted at an oral hearing on 29 July 2013. Although the Equality and Human Rights Commission sought to intervene on 9 September 2013, permission was only granted on 14 October 2013. No directions were given as to the length of any written argument nor as to the length of the written intervention. The result was an excessively detailed written argument on behalf of the claimant, peppered with footnotes and with rival arguments as to statistics. Through no fault of its own, but as a direct result of the absence of any directions from the court as to the management of these proceedings, the extensive written submissions of the Equality and Human Rights Commission arrived very shortly before the hearing, giving the Lord Chancellor no proper time to respond.

11. Unsurprisingly, the time for the hearing of the proceedings was too short. Further written arguments were prepared, and a further hearing was held on 4 November 2013. Further written arguments and documents arrived even after the close of that hearing. In short, the understandable attempt to bring these proceedings as a matter of urgency has merely led to over complicated and detailed argument and delay. It is difficult to see how this is a sensible way to litigate these important issues. Proper case management limiting the written argument and giving adequate time to identify and comment upon the most significant points might have led at least to an easier and possibly speedier resolution of the issues.

12. 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 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). There are fees payable in respect of particular applications, including an application to secure dismissal following withdrawal. This is the only means by which claimants may, of their own volition, finally terminate proceedings in an employment tribunal.

13. The fees to pursue an appeal to the EAT are, in the case of an individual claimant, higher. 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).

14. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and the Employment Appeal Tribunal Rules 1993 (as amended) make consequential provision for the payment of fees. An Employment Tribunal shall reject a claim where it is not accompanied by a fee or a remission application. 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). 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.

15. At the time these proceedings were launched there was no stated presumption that an employer would pay the costs of the issue of the proceedings or the hearing fee, in the event that a claimant was successful. By Rule 76(4) a tribunal is given the power to make a Costs Order after a tribunal fee has been paid but there is no default position in relation to a winning claimant. The Government's Guidance merely pointed out that judges would have the power to order respondents to pay fees back to the claimants where an employment judge considers it appropriate. By the time of the adjourned hearing the Government had, however, relented, and has amended the Guidance to say "the general position is that, if you are successful, the respondent will be ordered to reimburse you". Apparently, this amended Guidance will be placed on the Ministry of Justice website "as soon as possible". Consideration is being given to amending Rule 76(4) of the ET Procedure Rules and Rule 34 of the EAT Rules so as to make this expectation clear.

16. When proceedings were launched, the 2013 Order made provision for remission and a part remission of fees (Article 17 and Schedule 3). Full remission was available to those receiving certain types of benefit such as Income Support or Working Tax Credit (known as "passporting" benefits). Remission was also available depending on whether the individual was one of a couple or had children. Partial remission was also available. But on 7 October 2013 a new fee remission scheme was introduced by the Courts and Tribunals Fee Remissions Order 2013 (SI 2013/2302). This makes provision for a single remission scheme across all courts and tribunals. Schedule 3 in the 2013 Order is replaced with a new Schedule. The most significant change is that a person's "disposable capital" is now relevant in determining an entitlement to remission (paragraph 3). A gross monthly income test replaces income threshold tests (paragraph 11).

17. 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, Schedule 3). For these purposes the assets of a claimant's partner are to be treated as the assets of the claimant (paragraph 14).

18. Four challenges are mounted:-

(1) The requirement to pay fees as a condition of access to the Employment Tribunal and Employment Appeal Tribunal violates the principle of effectiveness since it will make it virtually impossible, or excessively difficult, to exercise rights conferred by EU law;

(2) the requirement violates the principle of equivalence since the requirement to pay fees or fees at the levels prescribed means that the procedures adopted for the enforcement of rights derived from EU law are less favourable than those governing similar domestic actions;

(3) that in reaching the decision to introduce the new fees regime and in making the 2013 Order the defendant acted in breach of the Public Sector Equality Duty, and

(4) that the effect of the 2013 Order is indirectly discriminatory and unlawful.

Breach of the Principle of Effectiveness

19. Unison contends that the requirement to pay fees as a condition of access to the Employment Tribunal and Employment Appeal Tribunal violates the European Union principle of effectiveness. The claimant contends that it will make it "virtually impossible, or excessively difficult" to exercise rights conferred by EU law.

20. There was no dispute but that the principle of effectiveness applied. "The procedural requirements for domestic actions must not make it virtually impossible or excessively difficult, to exercise rights conferred by EU law" (*Levez v T H Jennings* Case C326/96 [1998] ECR 1 735 paragraph 23).

21. This principle is now enshrined in Article 19 of the Treaty on the European Union: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". The question whether a domestic procedural provision does render it virtually impossible or excessively difficult to exercise an EU right, must be analysed by assessment of the procedural rules in its factual legal context (see Case 473/00 *Cofidis* [2002] ECR 1-10875 at paragraph 37).

22. It is important to consider the requirement to pay issue fees and hearing fees in the context of the particular rights which claimants seek to vindicate in the Employment Tribunals. The principle of effectiveness is especially important in the context of discrimination. It is the duty of each member state to use all available means to combat discrimination. The right to an effective remedy is now not only explicit in Article 19 but in Article 47 of the Charter of Fundamental Rights of the EU (which now has the same legal value as the Treaties). This provides that "everyone has the right to an effective remedy before a tribunal" and "legal aid shall be made available to those who lack sufficient resources in so far as is necessary to ensure effective access to justice". Each of the Directives providing protection against discrimination (Directive 2000/43, the Race Directive, and Directive 2007/78, the Framework Directive, protecting against discrimination in relation to religion, disability, age and sexual orientation) and Directive 2006/54 (the Equal Treatment Directive) provides for the need for effective protection of rights against discrimination. The scope of

that principle has been extended by the Court of Justice to measures taken by an employer which might deter workers from vindicating their claims of discrimination, in a case where an employer had retaliated against post-employment proceedings brought by an employee (*Coote v Granada Hospitality* [1999] ICR 100).

23. Protection against discrimination is a fundamental aim of the EU (see Articles 8 and 10). The EU Charter prohibits discrimination and the Court of Justice has recognised equality as a fundamental value which takes priority over the economic aims of the Treaty (*Deutsche Post* [2000] ECR 1/929 at paragraph 57). It is in that context that it is important to scrutinise rigorously the imposition of fees at an initial stage of the proceedings without regard to the merits. Greater justification is required if fees are imposed at an initial stage of the proceedings (*Weissman v Romania* Application No. 63945/00 paragraph 52 and *Podbielski v Poland* Application No. 3919/98):-

> "65. However, restrictions applied which are of a purely financial nature and which…are completely unrelated to the merits of an appeal or its prospects of success, should be subject to particularly rigorous scrutiny from the point of view of the interests of justice."

24. These were Article 6 cases, but as the Commission for Equality and Human Rights point out, the scope of the principle of effectiveness is wider than the requirements of Article 6 of the European Convention on Human Rights, even though the principle of effectiveness is related to and derived from Article 6.

25. Any consideration of the impact of fees on a discrimination case must, accordingly, take into account the importance of enabling victims to vindicate their right not to be discriminated against, as a means of ensuring that member states maintain and improve equality. Any consideration of the impact of the fees regime must also bear in mind the difficulty of proving discrimination, long recognised by the courts (see, e.g., Lord Browne-Wilkinson in *Glasgow CC v Zafar* [1998] ICR 120 at 125C-126C). There is a bias in favour of examining the merits of discrimination cases since discrimination and equality are matters of "high public interest" (Lord Steyn in *Anyanwu v Southbank Student Union* [2001] ICR 391 at paragraph 24). Thus, cases before a tribunal and the role of the judiciary are of fundamental importance in striving to ensure equal treatment (see *Ghaidan* [2004] 2 AC 557 per Baroness Hale at 131-2).

26. Despite the importance of fighting discrimination and the difficulties of proof, a claimant is now required to pay a fee to issue a claim. At that stage it is unlikely that any realistic assessment can be made of the adequacy of an employer's explanations for the treatment of an employee claimant, particularly when the claimant is not an employee but an applicant for work. Although a questionnaire procedure has existed in s.138 of the Equality Act 2010, this is to be repealed under s.166 of the Enterprise and Regulatory Reform Act 2013. There is a three month limitation period for the issue of the claim. But, although the tribunal has no discretion to issue a claim without payment of the relevant fee, if the application is filed online then an application for the remission of the fee will postpone the requirement for any payment until the availability and extent of any remission is established. In those circumstances, it may be possible to extend the period between the time when the dispute arises and the issue of the fee. However, it is hardly an attractive aspect of the

system if it encourages applications for remission in cases where remission is not likely to be achieved.

27. There will be a period following the issue fee before the hearing fee is due. There was some dispute as to the extent to which witness statements and documents will be exchanged before the hearing fee is due. However, we would expect claimants or their representatives to apply to the Employment Tribunal for directions to ensure that exchange takes place before a claimant is required to pay the hearing fee. This might provide some material on which a claimant can assess the likelihood of success. We would expect a full exchange of information to be encouraged by the Tribunal before the hearing fee is due, since the policy objective of the fee scheme is stated to be to encourage careful decision-making before cases are brought or continued.

28. There are further difficulties which must be borne in mind in assessing the impact of the new fee regime. Many discrimination claims are unlikely to achieve high reward. There was dispute as to the quantum of awards received. But we do not think the detail matters. The median awards for race discrimination between 2011 and 2012 were £5,256, £6,746 for sex discrimination and £8,928 for disability. Whatever the level of award hoped for, the real difficulty lies in the inadequacies of the system for enforcement. A Department of Business Innovation and Skills Study of 2013 exhibited by the Deputy Director for Tribunals in a witness statement served just before the final day of the hearing before this Court showed that the median award was £2,600. After enforcement, only 49% of the claimants were paid in full, with a further 16% paid in part, and 35% receiving no money at all. The proportion of awards fully paid in 2013 was lower than in 2008. Forty-six per cent of unpaid claimants incurred the further costs of enforcement action. The key conclusion of the BIS study was that there is "an even chance that individuals who receive a monetary award at an Employment Tribunal will not receive payment of their award without the use of enforcement". It notes that this was "perhaps a particular concern" in the light of the forthcoming fee regime.

29. In addition, it must be borne in mind that there are a number of types of claim which will attract no final award or very small sums when claims are successfully vindicated, for example, under the Working Time Regulations 1998. There was a dispute as to the extent to which fees might be recovered where an employer becomes insolvent. It is unnecessary to resolve that dispute. The evidence amply supports the conclusion that the ability to bring discrimination cases is a vital plank in the means of combating discrimination, but the outcome of bringing such claims is difficult to predict and the rewards are small, with an even chance of failing successfully to enforce them.

30. It is in that context that the factual evidence must be assessed. The factual evidence focussed on eight notional individual claimants. Perhaps inevitably, the evidence as to those hypothetical claimants became enmeshed in competing figures advanced by the claimant and the defendant as to the combined impact of the fees and remissions on those notional individuals. This, as we have already indicated, was profoundly unsatisfactory; conflicting information was presented late and at speed.

31. Following the adjournment to the third day of the hearing, Unison's submissions focussed on three notional individuals. Claimant no. 5 is a notional single mother, working full-time in a secretarial role in the university. She has one child and a

mortgage on her property. In relation to her, as in relation to the two other notional claimants on which Unison focussed, there was a third witness statement from Mr Ben Patrick, Legal Officer of Unison. Revised figures were met with a second witness statement from the Director for Analytical Services at the Ministry of Justice, Rebecca Endean. Her evidence as to the disposable income in the case of notional claimant no. 5 was agreed, save in respect of the amount of mortgage costs.

32. There was a dispute as to whether on a relatively low income this notional claimant would be paying the average UK mortgage cost. Miss Endean thought it would be lower than that proposed by Unison. Unison submitted that Miss Endean's approach was likely to be a significant underestimate of the actual monthly accommodation costs. But Unison was unable to find the Family Resources Survey for 2010/11, to check the basis of the Lord Chancellor's calculation. The claimant took a figure of £580 from the latest relevant Halifax press release on mortgage costs, representing the average UK mortgage payment, but suggested that this was likely to be a significant underestimate of the actual cost, particularly for those living in areas where accommodation is expensive, such as in London and the South East.

33. We regard it as inappropriate to resolve this difficult and detailed issue in relation to the case of the notional single secretary. We emphasise again that this claimant is a notional claimant. The only reliable way of determining the cost of accommodation is to look at an actual claimant. The detailed dispute as to the figures merely underlines the problems the Court faces in resolving such important issues as to whether the impact of the fees and remission is such as to render the bringing of a claim excessively difficult. The Court, on judicial review, is in a poor position to resolve such issues, particularly without cross-examination. Yet it is unlikely that any court would countenance time taken by way of cross-examination on such minute issues, where only a hypothetical case is being considered. We are, however, *de bene esse*, prepared to assume that the claimant's contentions as to accommodation costs are accurate.

34. The other two notional claimants are claimant no. 7, with a partner and one child. The claimant works full-time and is paid the national minimum wage. Her partner also works full-time and is paid the national minimum wage. They have a mortgage. Claimant no. 8 has a partner and two children. Both the claimant and her partner work full-time, receiving the national minimum wage, and they too have a mortgage. There was eventually no dispute about the figures in relation to those notional claimants. Unison, on the basis of those illustrations, says that significant parts of the working population will be financially excluded from access to the Employment Tribunal. Their disposable income, after essential expenditure, is so limited in relation to the fees they would incur that they would not be realistically able to vindicate their claims.

35. We should add that there was a dispute as to disposable monthly income. The claimants had relied upon minimum income standards "as revealed in a continuing study of the Joseph Rowntree Foundation". The defendant rejected the applicability of that study. Eventually the matter was resolved by accepting the Lord Chancellor's approach, which calculated all essential expenditure and considered the relationship between the remaining income, described as disposable monthly income, and the fees payable after remission.

36. 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.

37. 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.

38. 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.

39. 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.

40. 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.

41. 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.

42. 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.

43. The policy behind the imposition of fees was to encourage conciliation consistent with the statutory requirement introduced in the Enterprise and Regulatory Reform Act 2013, which requires an individual to contact ACAS before they file a claim. This requirement comes into effect in April 2014. In July 2013 the Ministry of Justice consultation response rejected the suggestion that issue or hearing payments should be sought from respondents, save in particular cases, and relied on:

> "100. One of the principles on which the Government is seeking to build a fee collection process is that of paying for the service before it is received…which is in line with how the civil courts operate…"

44. The Court was treated to lengthy citation on behalf of the Lord Chancellor of a Hansard report of debate when the Order was introduced, in which the Minister disavowed any intention to deter individuals from bringing a claim. She emphasised the need to reduce what she described as "an inordinate number of claims" which are "long-winded, expensive, protracted and emotionally draining disputes…certainly not in the interests of individuals or of business".

45. Whilst the intention of these provisions is not deterrence, there is already some evidence, again hotly disputed, as to the deterrent effect. Unison introduced figures from Employment Tribunal receipt statistics (Management Information July-September 2013) which showed dramatic falls in claims comparing September 2012 with September 2013. For example, a fall in all claims of 56%, of claims in the North West region of 82%, in Wales of 88%, in all Equality Act discrimination claims, including equal pay, of 78%, of sex discrimination claims of 86%, and of unfair dismissal claims of 81%. The Lord Chancellor contended that it was far too early to rely upon the accuracy of those percentages. But if they are anything like accurate then the impact of the fees regime has been dramatic.

46. Ultimately, the most fundamental submission advanced by Miss Chan on behalf of the Lord Chancellor was that the assertion that the introduction of the fees system breached the principle of effectiveness was premature. The Court should not be

concerned with hypothetical examples and detailed, fine disputes as to statistics and figures, but should wait and see how the system will work in practice and whether, indeed, it will have an effect which demonstrates a breach of the principle. We have sympathy with that approach. The Lord Chancellor has promised to keep the system under review and can only do so when he is in a position to see how it works in practice (see, e.g., pages 27 and 61 of Equality Impact Assessment 13 July 2012). Unison has been concerned that if it waits, it will be too late to challenge the regime. We do not agree. The Lord Chancellor has now, publicly and in court, announced that the claim is premature. It would thus be quite impossible for him to object to any future claim on the basis that it is too late to launch it. Far better, we suggest, to wait and see whether the fears of Unison prove to be well-founded. The hotly disputed evidence as to the dramatic fall in claims may turn out to be powerful evidence to show that the principle of effectiveness, in the fundamentally important realm of discrimination, is being breached by the present regime. If so, we would expect that to be clearly revealed, and the Lord Chancellor to change the system without any need for further litigation. If further litigation is necessary, then the Lord Chancellor would not be able to resist it on the basis that it was delayed, since it is his own contention that this claim is premature.

47. But at present, we remain unpersuaded by the hypothetical evidence that the principle is being breached. For those reasons, the first ground is dismissed.

Equivalence

48. By its second ground of challenge Unison contends that the level at which fees are set breaches the principle of equivalence. This principle requires that domestic rules of procedure for the exercise of rights derived from Community law must not be less favourable than those governing similar domestic actions (see *Rewe v Landwirtschaftskammer für Saarland* Case C33/76 [1976] ECR 1989 1997-8 paragraphs 21 and 26).

49. This complaint led to controversy as to whether Unison's choice of comparative causes of action were true comparatives or whether they were, as the Lord Chancellor contended, derived from Community principles and therefore not a proper domestic comparator "since one and the same form of action is involved" (see *Levez v T H Jennings* [1999] ICR 521 paragraphs 46-47).

50. Unison chose three actions to compare with actions in which claimants sought vindication of rights derived from Community law. First, a claim under the Human Rights Act such as a discrimination claim under Article 14 of the European Convention in the County Court, second, non-employment claims under the Equality Act 2010 and third, a claim in the First-Tier Tribunal (Health, Education and Social Care Chamber) such as a claim of disability discrimination in the provision of education under the Equality Act 2010.

51. We do not think it necessary to decide whether any one of those three are true domestic comparisons. We are prepared to assume that at least one of them is a domestic comparison. But we do not need to decide whether that is correct because, in our view, Unison has failed to demonstrate any breach of the principle of equivalence.

52. In the County Court, unlike in an Employment Tribunal, the amount of the County Court issue fee depends on the maximum amount claimed. This led to a dispute as to whether the comparison should be judged by reference to the median sums awarded in ET discrimination claims. In 2010-2011 the median award in race discrimination claims was £5,256, in sex discrimination claims £6,746, in religious and belief discrimination claims £4,267, and in age discrimination claims £6,065. Based on those figures, Unison contended that in the County Court the total fees would be £465 if the claim was allocated to a small claims track, and £975 if allocated to the fast track, compared to £1,200 in the Employment Tribunal.

53. In our view, the comparison should not be based on the median figures awarded in discrimination cases. A more appropriate domestic example would be a claim in contract for £20,000 brought in the County Court, since Employment Tribunal contract claims are limited to £25,000 and employment must have ended. Such a claim would be allocated to the fast track. In such claims there are several fee points, the court issue fee, if the claim is issued online, of £340, the track allocation fee of £220, the pre-trial checklist fee of £110, and a hearing fee of £545, totalling £1,215. This is not significantly less than the £410 amount of the fee in a Type A claim, or £1,250 in a Type B claim.

54. In our view, however, the most important feature of the difference between County Court and Employment Tribunal claims is the potential liability for costs. Subject only to the Lord Chancellor's revised view as to the recovery of fees, in Employment Tribunals parties bear their own costs, whereas in the County Court the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. This is a real disincentive to claimants of limited means, compared with Employment Tribunals.

55. Further, from April 2014 there will be a free alternative dispute resolution service, not available in the County Court.

56. In those circumstances, now that, as we emphasise, the Lord Chancellor agrees that a successful employee should expect to recover the fees they have incurred from the employer, the level of fees to be paid under the 2013 Order does not breach the principle of equivalence.

Breach of Public Sector Equality Duty

57. In its third ground of challenge, Unison contends that the Lord Chancellor breached his duty to have due regard in exercising his functions to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between those who share protected characteristics and those who do not (s.149(1)) Equality Act 2010.

58. The relevant protected characteristics are identified in s.149(7). They include disability, race, religion or belief, and sex. Due regard involves removing or minimising disadvantages suffered by persons who share such characteristics (s.149(3)(a)) and having due regard to the need to take steps to meet the needs of persons who share such characteristics, when those needs are different from the needs of those who do not share such characteristics (s.149(3)(b)). Section 149(5) requires due regard to be paid to the need to tackle prejudice and promote understanding

(s.193(5)). There has been abundant authority as to the nature and importance of this duty. The duty is an essential preliminary to public decision-making (see *R (Hurley) v Secretary of State of Business Innovation and Skills* [2012] EWHC 201 Admin per Elias LJ at paragraph 70). Courts have frequently emphasised that the duty is not a matter of "ticking boxes" but that it must be undertaken conscientiously and with rigour (see *Hurley* at paragraph 73 and *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158).

59. There is a convenient and, if we may say so, helpful, summary of the principles applicable to the s.149 duty by Wilkie J in *R (Williams) v Surrey County Council* [2012] EqLR 656 at paragraph 16. It would detract from its efficacy merely to repeat it. Of particular relevance in the instant case is his observation that the weight to be given to countervailing factors is a matter for the assessment of the public authority and not for the Court, unless that assessment can be challenged on conventional public law grounds as being outwith the range of reasonable conclusions. Whilst it is plain that the public authority must collect, collate and consider all relevant information as to the likely impact of the proposals, it is for the public authority to decide what is relevant and irrelevant, subject only to challenge on conventional public law grounds. A council, said Wilkie J, cannot be expected to speculate, investigate or explore matters *ad infinitum*. Nor, said he, echoing Davis LJ in *R (Bailey) v London Borough of Brent* [2011] EWCA Civ 1586 (paragraph 102), can a public authority be expected to make assessments with the degree of forensic analysis which a QC might deploy in court. It is also relevant to repeat that the duty to have due regard to the factors identified in s.149 continues (see *Brown* (paragraph 95, Aikens LJ's fifth general principle)).

60. Unison's challenge on this ground does not have a promising beginning. To comply with his duty under s.149, the Lord Chancellor has taken the following steps. First, there was a pre-consultation equality impact assessment dated 14 December 2011. Second, between 14 December 2011 and 6 March 2012 the Ministry of Justice undertook a public consultation on different fee-charging structures. The consultation paper was issued with 32 general questions and 12 equality impact questions. The consultation, at this stage, did not invite consideration of whether any fees should be introduced. Third, an impact assessment was issued dated 30 May 2012. Fourth, seven events were held at which 90 people from 60 organisations attended, and had the opportunity to put forward their views. Fifth, 140 written responses were received from different groups including employees, legal groups, business groups, advisory and equality groups, and from other interested parties. A detailed analysis and response to the consultation was published by the Ministry of Justice on 13 July 2012. This included consideration of potential discriminatory impacts and proposed adjustments to be made. Sixth, an equality impact assessment on charging fees in Employment and Employment Appeal Tribunals was prepared, dated 13 July 2012. Seventh, there was consultation on the new Civil Fee Remission Scheme undertaken between 18 April 2013 and 15 May 2013. The Ministry of Justice's consultation response was dated 9 September 2013, with an impact assessment. This included an equality statement containing an assessment of the new remission scheme upon different groups.

61. As a result of the remission scheme, it concluded that people with a disability were slightly less likely to be negatively affected than those without, those of a white ethnic

group were more likely to be negatively "impacted" by the proposed criteria (we use the language of the statement) than those from a BAME group and that similar proportions of men and women are likely to be "negatively impacted" by the proposed criteria. On that basis, it is not surprising to read that the Ministry concluded that:-

> "We do not consider that, for those negatively impacted, the proposals will amount to a substantial disadvantage in monetary terms. We consider that the fee remission system proposed will ensure that access to justice is maintained for those who are unable to afford to pay a fee". (paragraph 11)

62. The statement also referred to the Lord Chancellor's exceptional power to reduce or omit fees and concluded, again unsurprisingly, that the resulting "impacts" remain a proportionate means of achieving a legitimate aim.

63. These assessments are criticised as being founded on inadequate evidence, in particular, having regard to the small size of awards in discrimination claims, and their value relative to the level of fees. Certainly, it is difficult to find any specific reference to the level of awards, still less to the difficulty in enforcing them. But we may have missed some passing reference in the welter of documents produced at various stages of the hearing.

64. However, this criticism goes to consideration not of the level of fees imposed but rather as to whether fees should be imposed at all. It is difficult to make good the complaint in the context of the consultation paper dated 14 December 2011, which runs between pages 1007 and 1090 in our second lever arch file. Moreover, in the light of the Ministry of Justice's view, subsequent to the responses, the suggested problems caused by the level of fees and difficulty of enforcement were matters raised by Unison and others and can be hardly be said not to have been considered, merely because the Ministry of Justice did not think that they obviated the need for the introduction of a system of fees.

65. Unison also complains that the assessment's consideration of household income proceeded on the false basis that both partners in a couple benefit equally from household income, whereas in fact there is evidence that women do not share equally. The Ministry responds by contending that there was no alternative reliable source of information, and in particular an absence of specific evidence to show the respective proportions in which household income is distributed.

66. It seems to us that there may be substance in the complaint that the proposals fail properly to take into account the impact on women bringing discrimination claims. But that is a matter to be considered under the fourth ground. The problem with this line of challenge is that it leeches so readily into the ground of substance and not procedure, namely, that the regime amounts to indirect discrimination. It cannot, in our view, successfully be maintained that the Lord Chancellor did not consider differential impact on various groups with protected characteristics. Indeed, at one point in the consultation response (internal page 43, our page 617) he says:-

> "Eighty-two per cent of sex discrimination complaints were brought by women and equal pay complaints can only be

> brought on the grounds of sex. These more often involve bringing an equal pay claim, naming a male comparator who is doing similar work. Consequently most of these complaints were made by women. It could therefore be argued that the introduction of fees will potentially have a differential impact on those women who claim on those grounds."

There the comments end.

67. These are matters which have to be considered in relation to indirect discrimination. Having regard to the substantive grounds on which this system is challenged, it seems to us that time and energy could more properly be devoted to consideration of the substantive grounds, rather than attacks on the procedure adopted prior to the introduction of the regime. Unison had every opportunity to advance every possible ground on which the introduction of a system of the imposition of fees could be challenged. As far as we are aware, it did so. It cannot therefore be said that the Ministry disregarded those points merely because it dismissed them. There is evidence of income levels of different groups, the ethnic makeup of Tribunal users, the numbers and types of Tribunal claims accepted, the outcome of Tribunal claims broken down according to the type of claim, the old and the new proposed fee levels, the full cost of the Tribunal process and proposed fee costs, and the characteristics of discrimination claimants, all of which were set out in the evidence at Annex C to the Equality Impact Assessment. Unison cannot establish that an assessment based on that evidence is inadequate, however much it may disagree with the conclusion of those undertaking the assessment. If there are defects in the conclusions reached by the Lord Chancellor which trigger a public law remedy, then we would expect them to be found in the substantive grounds that have been brought and not by way of criticism of the lengthy and detailed review undertaken in the assessment before the fee regime was introduced.

68. It can be said that there was no assessment at all in relation to the changes to the remission scheme. The equality statement to which we have already referred, was introduced and is criticised by a senior employment rights officer in the Equality and Employment Rights Department at the TUC, Hannah Reed. She says that on the introduction of the disposable capital test, only 16.3% of all UK households will be entitled to a full remission of fees under the revised remission scheme as opposed to 23.3% under the previous scheme (paragraph 10). Further, she suggests that partial remission will be limited amongst disadvantaged groups (paragraph 13). But these are criticisms of the conclusions, not of a failure to pay due regard to the features identified in s.149. We were referred to 47 paragraphs in Mr Ben Patrick's third witness statement introduced shortly before the final day of the hearing, and to spreadsheets setting out levels of income, which we have already discussed under Ground 1. These are not challenges as to a failure to conduct proper assessments; they are challenges to the substance of the conclusions reached as a result of those assessments.

69. The essential challenge now advanced relates to the Lord Chancellor's comment in the equality impact assessment that neither the Lord Chancellor, nor the Ministry of Justice, nor any of the respondents "can predict with any certainty what the impact of the introduction of fees will be". Of course, that does not justify a failure to consider the likely impact. But that impact was fully considered, even though its conclusion

displeased the objectors. Again, as in relation to the first ground, we underline that the duty continues and the Lord Chancellor is under an obligation to assess the impact of the fee regime on the basis of evidence revealed in practice. If it turns out, as the objectors feared, that the introduction of fees has a damaging effect on the fundamental obligation of the Lord Chancellor and government to eliminate, so far as humanly possible, discrimination against those with relevant protected characteristics and advance equality of opportunity, then the Lord Chancellor will have to take such steps as are necessary by adjusting the regime. We acknowledge the genuine fear that the introduction of the fee regime will impede the vital goal of eliminating discrimination and advancing equality of opportunity. Whether that fear is well-founded may well depend on evidence yet to be obtained, as to how the regime has worked in practice. For the reasons we have given, we dismiss this ground of complaint.

Indirect Discrimination

70. By its fourth ground, Unison, supported by the Commission, contends that the imposition of a higher rate of fees in Type B cases has a disparate impact on minority groups, such as women, ethnic minorities and the disabled. This constitutes indirect discrimination in breach of ss.19 and 29 of the Equality Act and Article 14, read with Article 6 of the Convention. If established, it is a breach of the relevant Directives on discrimination, on the basis that the 2013 Order indirectly discriminates against protected groups.

71. Two issues arise: first, whether the relevant provision, criterion or practice puts persons sharing a particular characteristic at a particular disadvantage. By the time the argument ended it appeared to be agreed that the apparently neutral provision, criterion or practice of requiring claimants to pay a higher fee in Type B cases was the "PCP" which was said to disadvantage a substantially higher proportion of those within a protected class, such as women, ethnic minorities, and the disabled. But despite that measure of agreement there remained considerable controversy as to the process by which the proportion of those who are disadvantaged by the imposition of Type B fees and those who are not so disadvantaged could be identified, and similar controversy as to the accuracy of the evidential basis on which the claims were raised.

72. The second issue which arises is as to whether, if a disparate impact on minority groups is established, the Lord Chancellor could objectively justify the PCP which placed those within the protected class at a particular disadvantage.

73. There was no dispute but that the previous need to rely upon proof of an actual disadvantage and statistical analysis, exemplified in cases such as *Perera v CCSU* [1983] IRLR 166, is no longer the correct approach. Nowadays, the correct approach is to be found in the language of the relevant European Directives: Article 2 of the Race Directive 2000/43/EC 29 June 2000, Article 2 of the Framework Directive 2000/78/EC and Article 2 of the Equal Treatment Between Men and Women Directive 2004/1213/EC. Article 2(b), in identical terms to the other discrimination directives of the Equal Treatment Directive, explains the change of approach:-

> "**Article 2.1(b) Indirect Discrimination:**

> 'Where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

Baroness Hale acknowledged the change of approach in *Chief Constable of West Yorkshire Police v Homer* [2012] ICR 704, UKSC 15:-

> "…the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse…it was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply with those who could not, and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages."

74. In *Riežniece v Zemkopibas Ministrija and Another* [2013] ICR 1096 the Court of Justice considered whether the criteria used in the annual performance appraisal of public officials had an indirectly discriminatory effect on women, a higher number of whom took parental leave. The Court observed that it was for the national court to ascertain whether a much higher number of women than men did take parental leave, with the result that they were more likely to be adversely affected (paragraph 40). The Court pointed out that if more women did take parental leave then the method adopted for assessing workers must not place those who have taken parental leave in a less favourable situation than those who had not (paragraph 41).

75. The disparate impact stems from the fact that discrimination claims are type B claims, where there is a requirement to pay a higher fee than is to be paid in relation to Type A claims. This causes an intrinsic disadvantage to those falling within a protected class. Miss Chan, on behalf of the Lord Chancellor, however, says that Unison and the Commission have failed to demonstrate any substantial disadvantage. They relied upon the hypothetical or notional members of a group rather than actual individuals. We do not accept that it is necessary, as a matter of law, to identify particular individuals. As Mr Ford QC, on behalf of the Commission, pointed out, whilst the application of the actual individual was dismissed in *R v Employment Secretary ex-parte EOC* [1995] 1 AC 1 on the basis that she could have claimed in the Employment Tribunal, the EOC's claim, based on a hypothetical woman, was allowed. But we do agree that since Unison and the Commission are compelled to rely upon an analysis of statistics as to the comparative pay of men and women and others falling within protected classes, they start with the disadvantage of the shaky foundation of general statistics.

76. The rival arguments as to the statistics and as to that which was to be inferred from those statistics caused substantial and lengthy debate in the hearing, which was not

assisted by the last-minute arrival of fresh evidence and fresh figures arriving, in some cases even after the hearing had finished.

77. The Commission's claim rested upon an analysis of Type B claims based upon figures within the Ministry of Justice's own response to the consultation dated 13 July 2012, which at Table 2 (internal numbering, page 47) analysed the claims accepted by Employment Tribunals between April 2008 and March 2011 and similar figures, in addition, for 2011 to 2012 (page 476 of our first bundle, containing no internal numbering). These led to a sheet containing an analysis of Type B claims. It contains various assumptions based on the evidence, for example, that 82% of sex-related claims are brought by women, 39% of unfair dismissal claims are brought by women, and 33% of all non sex-related discrimination claims are brought by women. Based on that analysis, it is said that the Ministry of Justice's own figures show that 52% of Type B claims are brought by women, as opposed to 48% brought by men. It was contended that the figures are conservative. There was debate as to whether the Lord Chancellor was correct to include within the more expensive Type B claims redundancy (failure to inform and consult) and equal pay claims as non-discrimination claims. We do not think it necessary to resolve that debate, save that it serves to underline that the percentages ultimately reached are, in our view, not exaggerated. The upshot is that although the labour market pool consists of 53% men and 47% women, and 60% of Tribunal claims are brought by men and 40% by women, over the space of four years men have brought 46% of Type B claims, whereas women have brought 54%.

78. The evidence from Rebecca Endean, Director for Analytical Services for the Ministry of Justice, particularly in her second and third witness statements which arrived during the course of the hearing, concentrated on challenging the figures relevant to Ground 1. But, as we have indicated, there was a substantial challenge from Unison and the Commission as to the proportions of women and men bringing discrimination claims and non-discrimination claims, because Miss Endean did not include equal pay claims within the category of discrimination claims. It seems to us that equal pay claims are based on a requirement to establish sex discrimination (*Glasgow v Marshall* [2000] ICR 196) and therefore the published proportion of women and men bringing sex discrimination claims of 82% women: 18% men (source: SETA 2008) should similarly be applied to equal pay claims. That fortifies Unison and the Commission's argument that a greater proportion of women than men will bring Type B claims and therefore will incur higher costs. It is, therefore, established that women are more likely to bring claims which attract the higher level of fees.

79. This, however, is but the starting point in the claim that the imposition of a higher level of fees in Type B claims has a disparate effect on women. There was substantial detailed controversy as to the level of income of those sharing a protected characteristic and the likelihood that they would receive either whole or partial remission. In her first witness statement, Miss Endean produced charts showing eligibility under the new remissions system based on the 2010/11 Family Resources Survey. We were favoured with three separate annexes, and the last, Annex C, developed after the Lord Chancellor's skeleton argument, took account of the capital test. These showed the percentage of those eligible for remission, according to whether they were a couple, a single with two children, or a couple with two children. For example, 42% of couples with two children forming a low-to-middle income

household, would be eligible for full or partial remission of a Type B issue fee, whereas 77% of similar couples would be eligible for full or partial remission on a Type B hearing fee. The argument therefore must focus on those with a shared protected characteristic such as women who would not be eligible for remission in relation to Type B claims. Unison and the Commission, however, contend that claimants to the Employment Tribunal are overwhelmingly likely to have been in employment or to have been recently dismissed and that remission figures based on a deemed equally shared household income is of less relevance than what people in fact earn. They found their claim on the proposition that women continue to earn considerably less than men.

80. This proposition is based on the Commission's triennial review, "How Fair is Britain?", which shows that between 2006 and 2009, for example, 17% of woman earned less than 60% of the hourly median compared with 10% of men and that the gender pay gap based on hourly median rates for full-time workers in 2012 was about 10%, without taking into account the far higher proportion of female part-time workers. The BIS report, Women in the Workplace, refers to a 37.6% pay gap between the pay of part-time workers and full-time workers. The ONS annual survey of hours and earnings for 2012 showed that in April 2012 median full-time weekly earnings for men were £546, compared with £449 for women.

81. Therefore, even if the same proportions of men and women are excluded from remissions, the Commission, in its written argument, contends that women will have lower earnings from which to pay a fee. In relation to household income, the equality impact assessment acknowledged that 69% of lone households are in the bottom two quintiles for household income, the majority of which are headed by women. There then ensued an argument as to the Lord Chancellor's analysis, showing that about 32% of lone parents would be entitled to remission, now updated by Annex C.

82. We hope we have said enough to show that it is not possible in these proceedings to grapple with the complicated detail of these statistics of earnings. A lengthy hearing, probably with cross-examination of experts in this type of statistical analysis, might resolve such issues. We have not been able to do so. We merely suggest that in such a detailed controversy as this, which has lasted throughout the hearing and beyond, judicial review litigation is not a sensible way of achieving resolutions. We are prepared to accept the most general of propositions that women earn less than men but it is not possible to determine the extent to which that is so amongst those claimants bringing discrimination claims who are not eligible for whole or partial remission, and suffer a disparate impact.

83. Thus far we have focussed upon disparate impact between men and women. As the Commission pointed out, the need for the Lord Chancellor to establish objective justification will be triggered if the Fees Order discriminates on any single ground. It is not necessary for Unison or the Commission to establish that each and every protected class, or even more than one, will suffer from indirect discrimination. We do not therefore need to analyse the disparate effect on the disabled or on ethnic minorities although we would recall that where members of ethnic minorities are employed, a higher proportion of most of the identified groups earn less than 60% of the hourly median wage than white British workers, and women who are members of an ethnic minority are likely to be subject to a double disadvantage. The Commission's triennial review refers to data from the Fawcett Society in 2005

suggesting that 40% of women from ethnic minorities live in poverty, compared with 20% of white women. Perhaps we need do no more in this aspect of the claim than recall that the Ministry of Justice's response (internal numbering 43) accepted that "it could, therefore, be argued that the introduction of fees will potentially have a differential impact on those women who claim on these grounds (sex discrimination and equal pay)".

84. We conclude that we have a strong suspicion that there will be some disparate effect on those who fall within a protected class who bring Type B claims and therefore incur significantly higher fees than those bringing Type A claims. We will, accordingly, go on to consider the arguments in relation to justification. But we do so with this caveat: the extent to which the introduction of fees, if it pursues a legitimate aim, is proportionate, must be judged in part according to the impact upon those falling within a protected class. As we have indicated, it is not possible at this stage to form any clear view to the weight of the impact of the introduction of the scheme. It is, accordingly, not possible to weigh the impact with anything approaching precision. Yet weighing the extent of the impact is vital in reaching a conclusion as to objective justification.

Objective Justification

85. The Lord Chancellor must show objective justification, if it is assumed that the fees regime is indirectly discriminatory. The three questions posed by Mummery LJ in *R (Elias) v Defence Secretary* [2006] 1 WLR 3213 were, first, whether the objective is sufficiently important to justify limiting a fundamental right; second, whether the measure is rationally connected to the objective and third, whether the means chosen is no more than is necessary to accomplish that objective (see paragraph 165). The Court of Justice in *Steinicke v Bundesanstalt für Arbeit* [2003] ECR 1-9027 required that the national court should take account of the possibility of achieving the aim by other means (paragraph 58), that the broad margin of appreciation in social policy may not have the effect of frustrating the fundamental principle of equal treatment (paragraph 63), that mere generalisations are insufficient to show that the means chosen is suitable for achieving the aims (paragraph 64) and that whilst budgetary considerations may underlie a social policy goal pursued by a State, they do not themselves constitute a legitimate aim (paragraph 66).

86. The broad objectives of the introduction of a fee system are set out in the Government's response to the consultation dated 13 July 2012 (12-13). It is designed to transfer a one-third proportion of the annual cost of £84m incurred in running Employment Tribunals and the Employment Appeal Tribunal. It seeks to make tribunals "more efficient and effective", freeing up tribunal resources to focus on more meritorious claims. It denies deterrence is an objective. It is designed to encourage alternative methods of employment described as "drawn out disputes" which are "very emotionally damaging for workers and employers, as well as being financially damaging for employers". It denies that these are merely cost-based considerations. They are designed to make both employees and employers think twice before either bringing or defending a claim. As to proportionality, it observes that the Lord Chancellor has a discretion to grant remission in exceptional circumstances and that free ACAS conciliation is available. It repeats its consultation response in relation to the possibility of fees being paid at the conclusion of the case, since that is inconsistent with the Government policy of paying for a service before it

is received. To the suggestion that costs should be shared between employer and employee, it responds that that is contrary to the principle that those seeking a benefit must prove their claim, and that, in any event, sharing the hearing fee would add to complications and result in higher fees.

87. Needless to say, these justifications are a matter of substantial dispute. In particular, both Unison and the Commission urge, as they have previously urged, that the costs should be shared between employee and employer, particularly in the context of the low level of awards and the woefully inadequate enforcement system. Second, it denies that users will be more willing to settle tribunal claims. It suggests that employers will merely wait to see whether a claimant is prepared to pay a hearing fee on top of the issue fee. The arguments, are, so it is contended, no more than the generalisations condemned in *Steinicke* at paragraph 64.

88. For the reasons we have already foreshadowed, we do not find it possible to reach a conclusion as to whether the imposition of a higher rate of fees for Type B claims can be objectively justified if it has an indiscriminate effect. We repeat that we suspect that the imposition of this fee regime will have a disparate effect on those within the protected classes, but that it is not possible as yet to gauge the extent of the impact. For that reason, it is not possible, and would be wrong for this court, to reach a conclusion as to objective justification, dependent as that exercise is upon weighing the extent of the disparate impact.

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.

90. 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.

Note:

As this court has said previously, cases such as this in which a vast amount of detailed documentation was produced for a hearing at which the time was underestimated and which had to be adjourned, cried out for detailed case management before it started. There was no control over the length of the skeletons, still less the size of the font, and when the case was adjourned for an extra day's hearing, a further lever arch file had to be produced. In particular, when permission was given for the Commission to intervene, no directions were given as to the timing of the skeletons so as to avoid what happened in this case. The Commission's lengthy but important intervention with supporting evidence and documentation came *after* the Lord Chancellor had submitted his written argument in response to that of Unison.

The Lord Chancellor was given no fair opportunity to reply to that document, leading to the necessity for a further adjournment, although even then further documents and arguments were being produced right up to the end of the hearing, and after. Permission should have been given earlier and, at the time when permission was given for the Commission to intervene, detailed directions should have been given as to the way the evidence was to be presented by all the parties and the time for lodging skeleton arguments, so that the Lord Chancellor had a proper opportunity to respond and the court had time to rule on the way the evidence should be presented and the length of presentation. In addition, over a hundred authorities were produced, most of which were never looked at, at all. We hope, with considerable pessimism, that this manner of engaging in litigation of important issues will not occur again. It is easy to avoid by clear practice directions, similar to those which apply in the Court of Appeal, and by the legal teams, who have spent so much time and hard work on this case, remembering that excessively lengthy and detailed argument, even if the court is able to understand it, is unlikely to be persuasive.