

EXPLANATORY MEMORANDUM TO

THE CIVIL PROCEEDINGS, FIRST-TIER TRIBUNAL, UPPER TRIBUNAL AND EMPLOYMENT TRIBUNALS FEES (AMENDMENT) ORDER 2016

2016 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument will make a number of changes to the fees charged in the courts and tribunals.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is made under the powers contained in: section 42 of the Tribunals, Courts and Enforcement Act 2007¹, which provides the Lord Chancellor with the power to prescribe Tribunal fees subject to certain statutory requirements; section 92 of the Courts Act 2003², which provides the Lord Chancellor with the power to prescribe court fees subject to certain statutory requirements; and section 180 of the Anti-social Behaviour, Crime and Policing Act 2014³, which provides that the Lord Chancellor's power to prescribe fees (including under the powers described in this paragraph) allows him to prescribe fees (subject to certain statutory requirements) which exceed the costs of anything in respect of which they are charged.
- 3.2 The majority of fees affected by this instrument will be increased by a rate which is above the level of inflation. The Government has decided, in view of the financial circumstances and given the reductions to public spending, that such an increase is necessary in order to make sure that the courts and tribunals are adequately funded and access to justice is protected, in the long term.
- 3.3 There are, however, a number of fees charged in the Property Chamber which will be reduced from their previous levels. In relation to appeals against the penalty imposed for non-payment of employment tribunal awards and the new claim under the Posted Workers (Enforcement of Employment Rights) Regulations 2016⁴, the SI applies the Type A fee, rather than the higher default Type B fee.

Other matters of interest to the House of Commons

- 3.4 The fees amended by this instrument in relation to those charged in the Upper Tribunal (Immigration and Asylum Chamber) and in the civil and magistrates' courts

¹ http://www.legislation.gov.uk/ukpga/2007/15/pdfs/ukpga_20070015_en.pdf

² http://www.legislation.gov.uk/ukpga/2003/39/pdfs/ukpga_20030039_en.pdf

³ http://www.legislation.gov.uk/ukpga/2014/12/pdfs/ukpga_20140012_en.pdf

⁴ S.I. 2016/576

apply to both England and Wales. The fees amended in the First-tier (Property Chamber) will apply to England only and, the changes to the fees charged in the employment tribunals will apply to England, Wales and Scotland.

3.5 In the view of the Department, for the purposes of the House of Commons Standing Order 83P the subject matter of parts of this instrument would not be within the devolved legislative competence of the Scottish Parliament or the National Assembly for Wales if equivalent provision in relation to the relevant territory were included in an Act of the relevant devolved legislature.

3.6 The Department has reached this view because the Scottish Parliament cannot legislate on fees in the employment tribunals, and the National Assembly for Wales cannot legislate on fees in respect of the Residential Property Chamber.

4. Legislative Context

4.1 This instrument amends:

- the First-tier Tribunal (Property Chamber) Fees Order 2013 (S.I. 2013/1179) to replace all fees the charged in this instrument with a new fee structure, and introduce certain new fees;
- the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (S.I. 2013 No. 1893) to change the default Type B claim classification of a new appeal right that has been created in the employment tribunals to a Type A claim, and changing the default Type B claim classification of a claim being brought under the Posted Workers (Enforcement of Employment Rights) Regulations 2016 (S.I. 2016/539) to a Type A claim; and
- the Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011 (S.I. 2011/2344), the Civil Proceedings Fees Order 2008 (S.I. 2008 No. 1053 (L.5)), and the Magistrates' Courts Fees Order 2008 (S.I. 2008 No. 1052 (L.4)) to increase the fees payable in a number of circumstances by ten per cent.

5. Extent and Territorial Application

5.1 This Instrument extends to Great Britain.

5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary for the State of Justice, Dominic Raab, has made the following statement regarding Human Rights:

"The Civil Proceedings, First-tier Tribunal, Upper Tribunal and Employment Tribunals Fees (Amendment) Order 2016" is compatible with the convention rights".

7. Policy background

What is being done and why

7.1 This instrument make a number of changes to the fees charged across the courts and tribunals which includes:

- Introducing a new fee structure which will simplify the existing fees charged in the First-tier Tribunal Property Chamber, and introduce additional fees, for the first time, for certain proceedings brought to the First-tier Tribunal Property Chamber;
- Increasing the fees charged in connection with judicial review proceedings in the Upper Tribunal (Immigration and Asylum Chamber) and certain civil proceedings, and in connection with civil proceedings in the magistrates' courts;
- Changing the fee to make an appeal in the employment tribunals against a penalty for failure to pay a tribunal award from the default Type B fee to a Type A fee; and
- Changing the fee to make a claim in the employment tribunals under the Posted Workers (Enforcement of Employment Rights) Regulations 2016 from the default Type B fee to a Type A fee.

7.2 The case for revisiting the way in which fees are charged is based firmly on the need to make sure that Her Majesty's Court and Tribunal Service ("HMCTS") is funded properly to protect the vital principle of access to justice. Despite the significant economic progress that has been made over the last five years, the financial climate in which the Government is operating remains challenging. Since 2010, the Ministry of Justice has made substantial reductions to its spending but there is only so much that can be delivered through efficiency savings alone. Therefore it is right to look again at the balance between what users pay towards the overall cost of the court and tribunal service as compared with the financial burden that falls on the taxpayer.

7.3 In the Employment Tribunals, it is the default position under the Employment Tribunals and Employment Appeal Tribunal Fees Order 2013, that where a new claim or appeal right is introduced into the Tribunal for the first time, it will be regarded as a Type B claim for the purposes of fees, which attract higher fees, rather than claims/appeals regarded as Type A claims. This instrument will make an amendment to the Employment Tribunals and Employment Appeal Tribunal Fees Order 2013 so that this new claim and new appeal will be regarded as a Type A claim.

Consolidation

7.4 It is not intended that this statutory instrument will consolidate any other legislation.

8. Consultation outcome

8.1 Before laying this Order before Parliament, the Government consulted with the statutory consultees as required under 92(5) and (6) of the Courts Act 2003 (changes in Court of Appeal fees) and under section 42(5) of the Tribunal Courts and Enforcement Act 2007 (changes in Upper Tribunal fees). The statutory consultees raised no specific concerns on the draft Order, but reiterated wider concerns around the effect of higher fees on access to justice.

8.2 On 22 July 2015, the Government launched a public consultation on proposals to revise the fees currently charged within the First-tier (Property Chamber) and proposed two new sets of fees, one lower set of fees to apply to the majority of applications brought to the Tribunal and one higher set of fees to apply specifically to leasehold enfranchisement applications. The consultation also set out proposals to increase the fees, by ten percent, for a certain applications made across a wide range

of civil proceedings heard in the civil courts, the magistrates' courts and the Upper Tribunal (Immigration and Asylum Chamber). A copy of the consultation can be found at the following link:

https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation/supporting_documents/Government%20response%20to%20consultation%20on%20enhanced%20fees%20and%20consultation%20on%20further%20fees%20proposals%20web.pdf

- 8.3 The Government carefully considered all of the responses to the consultation that were received. There were a number of responses who raised that, in certain disputes heard in the Residential Property jurisdiction of the Property Chamber, the amounts that are in dispute are often small and therefore the proposed lower issue fee of £100 and a potential hearing fee of £200 would be disproportionate. For this reason the Government decided to introduce a lower single fee of £20 which will apply to those applications that the Government identified are likely to involve only small sums. No hearing fee will apply to these cases.
- 8.4 There were also submissions made by respondents during the consultation exercise that the proposed higher flat fees for leasehold enfranchisement applications would be unfair as leasehold values and, therefore, the values in dispute can vary significantly across different parts of the country. On this basis the Government decided that, in the short term, to charge the standard lower fee of £100 to issue and £200 for a hearing, in line with the fees charged for most other applications, and agreed to re-consult on a more graduated fee structure for these types of applications, in the future.
- 8.5 In relation to the proposals to increase the fees charged for a number of applications across the civil and magistrates' courts and also in judicial review proceedings, heard in the Upper Tribunal (Immigration and Asylum Chamber), a number of respondents raised that they felt the increases were unfair and could restrict access to justice. Having balanced these concerns with the need to ensure access to justice and, given the modest level of the increases and the availability of the fee remissions scheme, the Government decided to take these proposals forward.
- 8.6 A copy of the consultation response, containing all of these decisions, can be found at the following link:
- https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486536/further-fees-proposals-gov-response-consultation.pdf
- 8.7 The proposals in the employment tribunals have been considered separately to the other fees proposals which are enacted in this Instrument. Approaches to tackling the issue of non-payment of a tribunal awards was consulted on as part of the Underhill employment tribunal rules review which was put forward in response to concerns from stakeholders at the low rate of payment of tribunal awards. A copy of this consultation and the subsequent Government response can found at the following link:
- https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32696/12-1039-employment-tribunal-rules-underhill-review.pdf
- https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/141906/13-696-government-response-to-employment-tribunal-rules-review-by-mr-justice-underhill.pdf.

- 8.8 In light of further research evidence⁵, the Government decided to introduce a penalty for non-payment of a tribunal award. The actual design of the penalty was closely modelled on the existing financial penalty for aggravated breach of employment law (brought in under the Enterprise and Regulatory Reform Act 2013) following a consultation as part of the Resolving Workplace Disputes consultation. This original consultation is available at the below link.

<https://www.gov.uk/government/consultations/resolving-workplace-disputes-public-consultation>.

When seeking to introduce the new penalty for non-payment of tribunal award under the Small Business, Enterprise and Employment Act, a corresponding appeal right was also created in order to enable those who are subject to a tribunal award penalty with a route to appeal the decision. The new appeal right has been closely modelled on the current appeal route for contested notices of underpayment of the National Minimum Wage, given that each is an appeal against a notice and, as such, will be regarded as a Type A claim for the purposes of fees.

- 8.9 The Government's consultation on its implementation of the Posted Workers Enforcement Directive ran from 17 July 2015 to 24 September 2015. Among other things the Directive's purpose is to ensure that posted workers are paid at least the minimum wage. For posted workers in the construction sector a new subcontracting liability has been introduced enabling the worker to claim back unpaid wages up to the level of the minimum wage from the contractor. A posted worker will be able to choose to pursue the contractor or the subcontractor (i.e. their employer) for unpaid wages in an Employment Tribunal. This right is broadly based on the existing regime for unlawful deduction from wages claims provided in the Employment Rights Act 1996. Such claims are classified as Type A claims and attracting the corresponding fee, meaning that the tribunal costs are considerably cheaper than if they were Type B. Therefore the Government is setting the fee for posted workers' claims at the level of Type A.

9. Guidance

- 9.1 Her Majesty's Courts and Tribunal Service will update its guidance on fees payable in line with these amendments. Forms and leaflets will also be amended to reflect the changes.

10. Impact

- 10.1 Some proceedings to which these fee changes apply may involve businesses, charities, or voluntary bodies. Information is not routinely collected on these people or organisations involved in court or tribunal proceedings and therefore the potential impact cannot be calculated.
- 10.2 There is also no information which is regularly collected on public sector organisations and therefore any potential impact on this group cannot be calculated.
- 10.3 Two separate Impact Assessments are submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

⁵ BIS/IFF Research, Payment of Employment Tribunal Awards 2013 Study, 1 November 2013
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf

⁶ http://www.legislation.gov.uk/ukpga/1996/18/pdfs/ukpga_19960018_en.pdf

Overall we estimate that the fee increases will generate an additional £5 million worth of fee income per annum.

- 10.4 A separate impact assessment for amending the fee types in the Employment Tribunal has not been prepared. Since the amendments would reduce the fee charged to lodge a claim, the impact on parties involved is potentially positive in terms of lower costs.

11. Regulating small business

- 11.1 Some proceedings to which the fee increases relate will be initiated by small businesses. The Ministry of Justice has undertaken research, conducted by Ipsos Mori⁷ which stated that litigation was seen as a last option for many small businesses.
- 11.2 Users with legal representation tended to have little awareness of legal costs (including court fees) as compared to those who represented themselves, as courts fee were typically the sole costs they paid. When asked however about specific hypothetical increases to court fees, the research participants felt they were affordable and would not deter them from going to court.

12. Monitoring & review

- 12.1 Fees and the impact of any changes are constantly monitored by way of feedback from courts and tribunals and their customers and the monitoring of fee income and volumes.

13. Contact

- 13.1 Nick Rees at the Ministry of Justice Telephone: 020 3334 4731 or email: Nick.Rees@justice.gsi.gov.uk can answer any queries regarding the instrument.

⁷ “The role of court fees in affecting users’ decisions to bring cases to the civil and family courts: a qualitative study of claimants and applicants” MoJ (MoJ (2014))