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# EMPLOYMENT TRIBUNAL FEES AND THE RULE OF LAW: R (UNISON) V LORD CHANCELLOR IN THE SUPREME COURT

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## ABSTRACT

*In R (UNISON) v Lord Chancellor (Equality and Human Rights Commission Intervening) the Supreme Court held that fees for bringing claims in the employment tribunal were unlawful both under common law and as a matter of EU law. The judgment has very significant implications for any system in which the enforcement of employment or social rights is left to individual claimants, the paradigmatic model adopted in the UK. Recent government policy has ignored the public function of individual tribunal claims in delivering employment rights at the systemic level, exemplified by the theoretical assumptions and justifications which lay behind the introduction of fees. The Supreme Court's analysis of the rule of law and the common law right of access to justice is in sharp conflict with these policies. I discuss the difference between the common law principles and the parallel principles in EU law and under Article 6 of the ECHR. The article explores the consequences of the judgment for cases rejected, dismissed or not brought at all owing to fees, and its longer-term implications for impediments to access to tribunals, all the more important with Brexit on the horizon. The judgment represents an important triumph of the rule of law over the increased marketisation of legal rights.*

## 1. INTRODUCTION

Hyperbole has now become the norm for introducing accounts of significant court decisions, with 'landmark judgment' the current favourite. So when on 26 July 2017 a seven-person Supreme Court (SC) held that the Employment Tribunals and Employment Appeal Tribunal Fees Order (the 'Fees Order') was unlawful and void *ab initio*, with the consequence that all fees for employment tribunal (ET) claims and EAT appeals ceased to be payable with immediate effect and all fees paid in the past were liable to be reimbursed, commentators began struggling for words.<sup>1</sup> 'The biggest single victory in the history of employment law' was how one prominent blogger put it;<sup>2</sup> another persistent antagonist of tribunal fees, temporarily lost for words, resorted to a blog post consisting entirely of emojis.<sup>3</sup> Adding to the drama of

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<sup>1</sup> *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission Intervening)* [2017] UKSC 51, [2017] ICR 1037. The Fees Order is SI 2013/1893.

<sup>2</sup> D. Newman, 'Tribunal Fees Have Been Abolished' at <https://rangeofreasonableresponses.com/2017/07/26/employment-tribunal-fees-have-been-abolished/> (accessed 22 August 2017).

<sup>3</sup> Richard Dunstan, 'Labour Pains' at <https://labourpainsblog.com/> (accessed 22 August 2017).

Lord Reed explaining live the SC's reversal of the Court of Appeal - a result which few commentators had predicted - within hours ETs across the county began issuing notices telling claimants they no longer needed to pay any fees. The Fees Order has now disappeared from the Government's legislation website, confirming its erasure by, principally, the common law right of access to a court.

For once the extravagant acclamations were not hyperbolic. Since their introduction on 29 July 2013, tribunal fees resulted in a precipitate, consistent and sustained fall in the number of ET claims issued, as all the data show - a fall of around 67% in single cases and 72% in multiple cases, based on the official quarterly statistics.<sup>4</sup> According to estimates in the Government's own post-implementation review published shortly before the SC hearing, around 14,000 claimants each year did not issue claims because of fees.<sup>5</sup> The first set of published statistics of case receipts following the *UNISON* judgment already shows a resurgence of claims, with almost exactly a 100% increase in single claims for the months August and September 2017 compared with the year to June 2017.<sup>6</sup> The bill to the Government in reimbursing fees is estimated at £33 million,<sup>7</sup> and the effect of *UNISON* on claims dismissed or not brought because of fees is in the course of resolution. In the longer-term, the case has very significant implications for any fees regime or other impediments of access to ETs, courts or tribunals. Drawing on a conception of the rule of law which has not been clearly articulated in case-law before, the *UNISON* judgment marks a significant evolution of constitutional common law rights,<sup>8</sup> all the more important with Brexit on the horizon.

In this article, I aim to explain the importance of *UNISON*, above all in areas where

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2017).

<sup>4</sup> Based on comparing the mean cases received in the quarter to June 2013 with the mean number received in the quarters between October 2013 and June 2017: see D. Pyper, F. McGuinness and J. Brown, *Employment Tribunal Fees* (House of Commons Briefing Paper, No.7081), at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07081> (accessed 10 December 2017) and the official tribunal statistics, *Tribunal and Gender Recognition Certificate Statistics Quarterly*, at <https://www.gov.uk/government/collections/tribunals-statistics#employment-tribunal-and-employment-appeal-tribunal-statistics-gb> (accessed 14 December 2017).

<sup>5</sup> *Review of Introduction of Fees in the Employment Tribunal: Consultation on Proposals for Reform* (January 2017), Annex F at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/587649/Review-of-introduction-of-fees-in-employment-tribunals.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/587649/Review-of-introduction-of-fees-in-employment-tribunals.pdf) (accessed 22 August 2017).

<sup>6</sup> See the statistics for July to September 2017, n. 4, Table C.1. Single claims have been used as multiples are more subject to fluctuations; July 2017 has been omitted because fees ceased to be payable on 26 July. The mean for July 2016-June 2017 was 1,424, compared with 2,842 for August-September 2017, an increase of 99.52%. Wages claims increased by over 200%, though the data do not distinguish singles and multiples here: see Table C.2.

<sup>7</sup> See <http://www.parliament.uk/written-questions-answers-statements/written-question/lords/2017-10-09/HL1770> (accessed 7 December 2017)

<sup>8</sup> For useful recent accounts, see M Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68 *Current Legal Problems* 85; A. Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69 *Current Legal Problems* 67.

the responsibility for enforcement of social rights is almost exclusively left to private individuals, such as in the sphere of employment rights. To that end, in section 2 I explain the historical development of what I call privatised social justice in relation to labour rights. In section 3 I show how the ideological and empirical assumptions which underpinned recent government policy towards employment rights, and in particular ET fees, had the effect of largely immunising policies against rational arguments in the political sphere. In sections 4-6 I explore the context of the fees challenge, showing how the conception of the rule of law recognised in *UNISON* combined with the common law right of access to the courts to provide a clearer and higher level of protection than the closely related legal standards in the European Convention on Human Rights (ECHR) and in EU law. In section 7 I explore the short-term implications of the judgment, before considering in sections 8-9 its longer-term effects on fees and other barriers to adjudication, both in employment and beyond.

## 2. THE EMERGENCE OF PRIVATISED SOCIAL JUSTICE

Prior to the Redundancy Payments Act 1965, at a time dominated by collective *laissez-faire*, the little protective labour legislation that existed was mostly the subject of criminal sanctions and state enforcement. This included, of course, the early factories legislation but extended to the Truck Acts on payment of wages which were enforced by factory inspectors.<sup>9</sup> It was a criminal offence for an employer without reasonable excuse to fail to provide written terms of employment as required by the Contracts of Employment Act 1963.<sup>10</sup> The 1965 Act marked the turn in the tide, of using individual claims in ETs instead of state enforcement as the primary means of delivering labour standards. The process accelerated after the Donovan Commission proposed that all contractual or statutory disputes between employers and individual employees (except personal injury claims) should be directed to industrial tribunals, in order to ensure a hearing in a single jurisdiction which was 'easily accessible, informal, speedy and inexpensive'.<sup>11</sup>

The result is that today, in contrast to the old Truck Acts, a deduction from wages claim, along with almost all other rights conferred by the Employment Rights Act 1996 (ERA), may only be brought by a claimant in the ET 'and not otherwise',<sup>12</sup> the default means for enforcing the vastly expanded range of employment rights introduced since 1965. The paradigmatic model is threefold: first, legislation which confers a right on an individual worker or employee; second, a right which is enforced by an individual bringing a claim in the ET, usually exclusively; and, third, a remedy confined to the loss to the individual, usually but not always based

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<sup>9</sup> See e.g. the Truck Act 1831, the Truck Amendment Act 1887 and the Truck Act 1896. The history to these Acts is set out in *Bristow v City Petroleum* [1988] ICR 165, per Lord Ackner at 168-172.

<sup>10</sup> See s.5.

<sup>11</sup> *Royal Commission on Trade Unions and Employer' Associations 1965-1968* (Cmnd. 3623), paras 572-3. The Commission proposed too conciliation procedures to take place before tribunal hearings.

<sup>12</sup> See s.205(2) ERA.

principally on financial loss. In little more than a decade, by the 1980s, this model came to overshadow collective *laissez-faire*, criminal sanctions and state enforcement.

There are, of course, exceptions to the individual enforcement paradigm, and if anything they have grown in recent years. Workplace personal injury claims were always a case apart, as the Donovan Commission recognised, and now the contrast with the default norm is starker still. For as a result of changes made by the previous coalition Government eliminating the long-standing right for workers to bring civil claims for breach of safety legislation,<sup>13</sup> health and safety regulations are now enforced exclusively by criminal sanctions and inspections and enforcement by the HSE.<sup>14</sup> Another significant exception is the National Minimum Wage Act 1998 (NMWA), which uses three methods of enforcement, supplemented by a 'name and shame' policy: individual claims in the ET or ordinary courts for breach of contract or unlawful deductions; enforcement action by HMRC, which includes bringing claims to recover underpayments on behalf of the workforce, supplemented by significant financial penalties payable to the government;<sup>15</sup> and criminal prosecutions brought for refusals or wilful neglect to pay the national minimum wage.<sup>16</sup> Elsewhere the Pensions Regulator investigates possible breaches of pension law in the absence of a complaint,<sup>17</sup> and the Pensions Ombudsman addresses scheme 'maladministration'.<sup>18</sup> In recent years state-backed enforcement has been rediscovered as the principal means of addressing some of the worst kind of labour abuse, such as 'gangmasters' and modern slavery, overseen by the renamed Gangmasters and Labour Abuse Authority (GLAA) and the Anti-Slavery Commissioner respectively, and adopting techniques such as licensing and prevention orders in addition to criminal offences.<sup>19</sup> Other departures from the paradigm include the investigatory powers of the Equality and Human Rights Commission (EHRC) in relation to discrimination legislation;<sup>20</sup> legislation where trade unions or employee representatives bring a claim on behalf of the workforce as

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<sup>13</sup> By s.47(2) of the Health and Safety at Work Act 1974 (HSWA) a breach of health and safety regulations was expressly actionable, echoing the common law rule: see *Couch v Steel* (1852) 3 E & V 402 and M. Lobban, 'Workplace Injuries' in W. Cornish, S. Anderson, R. Cocks, M. Lobban, P. Polden and K. Smith, *The Oxford History of the Laws of England*, Vol X11 (Oxford: Oxford University Press, 2010).

<sup>14</sup> See s.69 of the Enterprise and Regulatory Reform Act 2013, amending s.47 HSWA. The justification was to address a 'perception of a compensation culture': see the impact assessment, *Strict Liability in Health and Safety Legislation* (11 June 2012) paras 17-18 (<http://www.parliament.uk/documents/impact-assessments/IA12-027D.pdf>; accessed 25 August 2017).

<sup>15</sup> See s.19-19H NMWA.

<sup>16</sup> See the NMWA 1998, ss 31-33.

<sup>17</sup> See especially the Pensions Act 2004.

<sup>18</sup> Pension Schemes Act 1993, s.146.

<sup>19</sup> See Gangmasters (Licensing) Act 2004, especially ss 6-11, and Modern Slavery Act 2015, especially Part 2 (prevention orders).

<sup>20</sup> See ss 20-32 Equality Act 2006, with investigations potentially leading to unlawful act notices, action plans or agreements.

a precondition of individuals recovering damages;<sup>21</sup> the power of an ET to order an equal pay audit when an individual claim succeeds;<sup>22</sup> and the recent duty of employers to report the gender pay gap<sup>23</sup> - though in the sphere of discrimination the repeal in 2015 of ETs' power to issue recommendations going beyond the individual claimant marked a strong reaffirmation of the orthodoxy.<sup>24</sup>

These exceptions illustrate the potentially diverse means of giving effect to labour rights, and how the degree of state involvement is on a spectrum, ranging from the state taking sole responsibility for investigation and bringing actions at one end, to its merely providing the forum which hears the dispute between the parties at the other, with many variations in between. The exceptions also serve to prove the rule - that the vast majority of employment rights in the UK are enforced by individual claimants bringing claims for their individual loss, with state assistance restricted to the provision of the ET in which claims are heard and of court machinery elsewhere for enforcement of judgments (for which a fee is payable<sup>25</sup>). The state has largely passed responsibility for the delivery of employment rights to private individuals, although it retains a residual role in trying to steer their actions through procedural rules or limits on remedies: a form of what I call 'privatised social justice'.

This entails two fundamental points. First, in the absence of any other methods of enforcement (or of effective collective pressure), individual ET claims are the central means by which the state ensures that labour standards in legislation are protected, not just for the individual claimant, but generally across workplaces. Exhortations without sanctions have a limited role to play in an area where employment rights conflict, or are perceived as conflicting, with employers' economic interests, property or management prerogatives: consider what would happen if contracting out of labour rights were permitted, the empirical evidence of its widespread use where contractual derogations are allowed,<sup>26</sup> or even attempts to contract out where they aren't.<sup>27</sup> Second, such a system critically depends on individuals in fact having the motivation, knowledge and practical means of bringing claims before an ET and, where it finds that their rights were infringed, obtaining an effective, deterrent

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<sup>21</sup> See s.188-192 Trade Union and Labour Relations (Consolidation) Act 1992 and regulation 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

<sup>22</sup> The Equality Act 2010 (Equal Pay Audit) Regulations 2014, SI 2014/2559.

<sup>23</sup> The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172. See too the wider duties on public sector employers in the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017, SI 2017/353.

<sup>24</sup> Equality Act 2010 s.124(3), as amended by the Deregulation Act 2015, s.2(1).

<sup>25</sup> Currently £44 for the County Court and £66 for the High Court: see the Civil Proceedings (Fees) Order 2008, SI 2008/1053, Schedule 1.

<sup>26</sup> See, for example, C. Barnard, S. Deakin and R. Hobbs, 'Opting out of the 48 Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK' (2003) 23 ILJ 223.

<sup>27</sup> As in the case of clauses in the contracts of Deliveroo cyclists, purporting to prevent them from applying to an ET: see <https://www.theguardian.com/law/2016/jul/25/deliveroo-workers-contracts-ban-access-to-employment-tribunals> (accessed 3 December 2017).

remedy. While this second element is largely encapsulated by the concept 'access to justice',<sup>28</sup> that term fails adequately to capture the system-oriented function of individual claims under the first element.

I suspect this public function of ET claimants has often received insufficient recognition in academic writing. One reason is the empirical difficulty of showing any clear causal link between legislation and changes in employer practice, in circumstances where many factors mediate the translation of law into systemic effects, such as structural changes in the economy, individual employers' market position, trade union presence and management style.<sup>29</sup> Instead, many studies drew on the reasonably reliable evidence of widespread failure to comply with labour standards, and from this inferred that the system of individual enforcement was not working and should be replaced or supplemented by methods such as agency enforcement or 'reflexive' regulation.<sup>30</sup> Curiously, however, similar studies have also highlighted the deficiencies of agency enforcement,<sup>31</sup> and claims about the benefits of reflexive methods, often linked with criticisms of the process of 'juridification', tend to draw on rather loose conceptual theories or optimistic assumptions rather than hard empirical evidence.<sup>32</sup> The risk is that, in their enthusiasm for reflexive regulation, proponents disregard its shortcomings,<sup>33</sup> assume its means-end rationality will succeed where traditional methods have failed, or overlook the

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<sup>28</sup> Despite the contested meanings of the concept: see T. Cornford 'The Meaning of Access to Justice', in E. Palmer, T. Cornford, A. Guinchard and Y. Marique (eds), *Access to Justice: Beyond the Politics of Austerity* (Oxford: Hart, 2016).

<sup>29</sup> For discussion, see L. Dickens and M. Hall, 'Legal Regulation and the Changing Workplace' in W. Brown, A. Bryson, J. Forth and K. Whitfield (eds), *The Evolution of the Modern Workplace* (Cambridge: Cambridge University Press, 2009); S. Deakin, 'Labor and Employment Laws' in P. Cane and H. Krizter, *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010).

<sup>30</sup> For valuable recent illustrations, see L. Dickens (ed.), *Making Employment Rights Effective* (Oxford: Hart, 2012).

<sup>31</sup> See, for example, S. Tombs and D. Whyte, 'Reshaping Health and Safety Enforcement: Institutionalising Impunity' in Dickens, *ibid.*

<sup>32</sup> See the criticism of C. McCrudden, 'Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper' (2007) 36 ILJ 25. For an example of preferring reflexive regulation over 'command and control', see B. Hepple, 'Agency Enforcement of Workplace Equality' in Dickens, n. 30 (though cf. the proposal for mixed strategies in enforcing equalities legislation in B. Hepple, M. Coussey, T. Choudhury, *Equality Law: A New Framework. Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Oxford: Hart, 2000), chapter 3). See too J. Clark and Lord Wedderburn, 'Juridification - A Universal Trend? The British Experience in Labor Law' in G. Teubner (ed.), *Juridification in Social Spheres* (Berlin: Walter de Gruyter, 1987).

<sup>33</sup> On the evidence of how legal regulation, rather than voluntary approaches or education, is the key driver of health and safety improvements, see C. Davis, *Making Companies Safe: What Works* (CCA, 2004); on the delay in implementing the 'single status agreement' in the public sector, see S. Deakin, C. McLaughlin and D. Chai 'Gender Inequality and Reflexive Law: the Potential of Different Regulatory Mechanisms' in Dickens, n. 30.

achievement of individual ET claims in driving changes to employers' practices, most visible in the adoption of formal procedures relevant to unfair dismissal and equal opportunities.<sup>34</sup>

The Fees Order soon turned the spotlight on this neglected issue. The immediate precipitous drop in ET claims following the introduction of fees exposed the vulnerable keystone underpinning the entire edifice of workers' rights. In these circumstances calls for alternative, supplementary or 'reflexive' methods of delivering labour rights appeared as so many utopian dreams. Instead, writers such as Busby and McDermont wrote of the urgent need to protect and reinforce the individual enforcement model itself, with a more simplified, inquisitorial system, greater assistance for unrepresented claimants and improved enforcement mechanisms.<sup>35</sup> Individuals already met many types of impediment to practical 'access to justice' in the ET, diminishing the extent to which the risk of legal claims steered employers in the right direction; but none was as plainly visible in its legal operation or factual effects as the Fees Order, and as a result none had the same potential to undermine the legitimacy of a system based on privatised social justice.

### 3. RECENT GOVERNMENT POLICY AND THE NEGLECTED PUBLIC FUNCTION OF ET CLAIMS

#### A. The Themes of Recent Policy

If the implicit premise of the academic critiques was that the system should deliver labour standards in general, recent government policy, whether New Labour, coalition or Conservative, saw things from a very different angle. It has tended to focus on the costs of ET claims to businesses and the tax-payer, with weak or unmeritorious claims the particular target and heading off claims or promoting alternative methods of dispute resolution as the possible solutions. Viewed through this normative prism, ET claims are a problem which needs shrinking, their public function left entirely in the dark. An example is the Green Paper *Routes to Resolution*<sup>36</sup> published by the New Labour Government in 2001, which highlighted the costs to employers of ET claims, proposed what later became the 'unlamented'<sup>37</sup> compulsory

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<sup>34</sup> For review of the evidence, see L. Dickens, M. Hall and S. Wood, *Review of Research into the Impact of Employment Relations Legislation* (London: DTI, 2005). On the impact of unfair dismissal, see L. Dickens, M. Jones, B. Weekes and M. Hart, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* (Oxford: Basil Blackwell, 1985).

<sup>35</sup> Busby and McDermont, 'Access to Justice in the Employment Tribunal' in E. Palmer (eds), n. 28.

<sup>36</sup> At <http://webarchive.nationalarchives.gov.uk/20060214180434/http://www.dti.gov.uk/er/individual/resolution.pdf> (accessed 29 August 2017).

<sup>37</sup> Per Underhill P, now Underhill LJ, in *Brett v Hampshire* UKEAT/500/08, para. 8.



pre-claim grievance procedures, raised the possibility (later abandoned) of introducing ET fees, but overlooked any benefits of ET claims as a means of promoting labour standards.<sup>38</sup> Thus the associated regulatory impact assessment assumed benefits for employers, the taxpayer and claimants in a reduction in the number of ET hearings but allocated zero costs to any possible detrimental effects on labour standards.<sup>39</sup>

Ignored within this framework were repeated findings in government-sponsored research of the very small proportion of employees who brought ET claims compared with the very large number who had problems relating to employment rights,<sup>40</sup> suggesting, if anything, too few not too many ET claims and the need to improve workers' practical ability to bring claims. For instance, the Gibbons Review in 2007<sup>41</sup> cited the research showing widespread problems at work in relation to employment rights,<sup>42</sup> and referred in passing to the relatively low level of cases which reached ETs in the UK,<sup>43</sup> but gave no attention to whether there was any possible link between these results because its sole focus was on reducing the costs of disputes. Similarly ignored were the findings of research in 2009 commissioned by the Ministry of Justice (MoJ) that only about half of claimants who won at the ET were in fact paid their award.<sup>44</sup>

The theme became more pronounced in the extensive programme of ET reform of the previous coalition Government. The Foreword to the consultation paper in which that Government proposed numerous changes and announced (without any prior consultation) the introduction of ET fees, *Resolving Workplace Disputes*, set the tone in its first sentence: 'Disputes in the workplace cost time and money'.<sup>45</sup> Emphasising

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<sup>38</sup> See B. Hepple and G. Morris, 'The Employment Act 2002 and the Crisis of Individual Employment Rights' (2002) 31 ILJ 245 and P. Davies and M. Freedland, *Towards a Flexible Labour Market* (Oxford: Oxford University Press, 2007), 67-70.

<sup>39</sup> *Routes to Resolution*, n. 36, 43.

<sup>40</sup> See J. Casebourne et al, J. Regan, F. Neathey and S. Tuohy, *Employment Rights at Work - Survey of Employees 2005* (DTI, 2005), finding that 42% of employees had a problem at work in the past five years, only 3% of whom brought an ET case as a result (4-5); N. Meager, C. Tyers, S. Perryman, J. Rick and R. Willison, *Awareness, Knowledge and Exercise of Individual Employment Rights* (DTI, 2002), chapter 10; R. Fevre, T. Nichols, G. Prior and I. Rutherford, *Fair Treatment at Work Report: Findings from the 2008 Survey* (BIS, 2009), finding 29% of employees had a problem in the last five years with employment rights (63) but only 3% brought an ET claim to try and resolve it (135-6).

<sup>41</sup> M. Gibbons, *Better Dispute Resolution* (DTI, 2007), at <http://webarchive.nationalarchives.gov.uk/20090609022048/http://www.berr.gov.uk/files/file38516.pdf> (accessed 29 August 2008).

<sup>42</sup> *Ibid.*, 12, citing Casebourne et al, n.40.

<sup>43</sup> *Better Dispute Resolution*, n. 41, 14.

<sup>44</sup> L. Adams, A. Moore, K. Gore and J. Browne, *Research into Enforcement of Employment Tribunal Awards in England and Wales* (Ministry of Justice Research Series 9/09, 2009).

<sup>45</sup> *Resolving Workplace Disputes: A Consultation* (BIS, 2011), 3, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31435/11-511-](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31435/11-511-)

that economic growth was the Government's overriding priority, the document made clear the aim was to minimise disputes reaching ETs, in part by reducing claimants' 'unrealistic expectations of receiving large amounts of money.'<sup>46</sup> Evidence cited to support the case for reform included the 236,100 claims submitted to ETs in 2009-10, said to be an increase of 56% over the preceding year.<sup>47</sup> The document failed to mention that this increase was overwhelmingly due to multiple claims, and in particular one very large multiple for underpaid annual leave in the airline sector where claims were reissued every three months for limitation reasons, as explained in the official statistics.<sup>48</sup> In fact single claims, which are less volatile than multiples, had only increased by 14% over the previous year,<sup>49</sup> hardly surprising in the context of the recession with an increase in dismissals and redundancies. But, untroubled by the detail, the Government also emphasised concerns raised by businesses about the costs of ET claims and the problem of weak claims.<sup>50</sup>

Among a wide range of proposals in *Resolving Workplace Disputes* designed to reduce the number and cost of ET claims, only one gave any consideration to improving the systemic delivery of labour rights: a proposal that employers found to have infringed employment rights should pay a financial penalty to the state *pour encourager les autres*.<sup>51</sup> Following objections from businesses and in the Government-commissioned Beecroft report<sup>52</sup>, the proposal was watered down to a discretionary penalty which an ET could only award where a breach had 'aggravating features', its original objective soon forgotten.<sup>53</sup> In the event, enacted as s.12A of the Employment Tribunals Act 1996, the redrafted provision turned out to be almost completely irrelevant in practice, with a total of just 18 penalty orders made (of which a grand total of 12 were paid) over three years after it came into force.<sup>54</sup> Apart from this minor aberration, what shone out was the consistency and continuity of the policies

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resolving-workplace-disputes-consultation.pdf (accessed 10 December 2017).

<sup>46</sup> Ibid., 4.

<sup>47</sup> Ibid., 15, 49

<sup>48</sup> *Employment Tribunal and EAT Statistics 2009-10: 1 April 2009-31 March 2010*, 3, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218501/tribs-et-eat-annual-stats-april09-march10.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218501/tribs-et-eat-annual-stats-april09-march10.pdf) (accessed 14 December 2017).

<sup>49</sup> Ibid., 2.

<sup>50</sup> *Resolving Workplace Disputes*, n. 45, 15.

<sup>51</sup> Ibid., 52-3.

<sup>52</sup> A Beecroft, *Report on Employment Law* (24 October 2011) at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31583/12-825-report-on-employment-law-beecroft.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31583/12-825-report-on-employment-law-beecroft.pdf) (accessed 3 December 2017).

<sup>53</sup> *Resolving Workplace Disputes: Government Response to the Consultation* (BIS, 2011), 36-7, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32181/11-1365-resolving-workplace-disputes-government-response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32181/11-1365-resolving-workplace-disputes-government-response.pdf) (accessed 13 December 2017).

<sup>54</sup> Answer to Written Question 2414 from Caroline Lucas MP in House of Commons, 3 July 2017, at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-07-03/2414/> (accessed 14 December 2017).

of both the New Labour and coalition Governments. Improving the overall delivery of labour standards in a system of privatised social justice counted almost for nothing.

## **B. The Specific Justifications for Fees**

When it turned to explain the policy reasons for introducing fees, *Resolving Workplace Disputes* provided the fullest theoretical explanation for this approach. The primary justification for fees was that users of any public service should pay for it, a transfer of costs from taxpayers to users which was 'fair' because it was intended to avoid 'excessive or badly targeted consumption'.<sup>55</sup> The secondary policy objectives were that fees would incentivise early settlements and disincentivise unreasonable behaviour, such as pursuing weak or vexatious claims. A final reason was to bring the ET and EAT into line with the other courts, a justification which amounted to little more than an assertion - you can either emphasise the isomorphism of ETs and courts or point to their differences - and which conflicted with the Donovan Commission's reasons for conferring jurisdiction for employment disputes on ETs in the first place.<sup>56</sup> The justifications were repeated in the subsequent consultation of the MoJ between December 2011 and March 2012, following the publication of *Charging Fees in the Employment Tribunal and the Employment Appeal Tribunal*.<sup>57</sup>

The objective of incentivising settlements and disincentivising unreasonable claims made predictions which, in principle, were susceptible to testing against the empirical effects of fees. But the primary objective, that users should pay fees for the service, was mostly an ideological claim which drove an ineluctable result. There were at least two fundamental problems with this approach, both connected to privatised social justice.

The first, as explained by Adams and Prassl in a highly influential article and as emphasised by counsel for UNISON in her submissions to the SC, was that the Government's approach entirely ignored the public benefit of ET claims.<sup>58</sup> The underlying economic theorising was made most explicit in the MoJ's Impact Assessment published during the consultation.<sup>59</sup> It stated:<sup>60</sup>

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<sup>55</sup> *Resolving Workplace Disputes*, n. 45, 49-50. The later Impact Assessment made clear this was the primary aim.

<sup>56</sup> *Ibid.*, 50.

<sup>57</sup> MoJ Consultation Paper CP22/2011 (14 December 2011), 11-12 (*Charging Fees*), at [https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/supporting\\_documents/chargingfeesinetandeat1.pdf](https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/supporting_documents/chargingfeesinetandeat1.pdf) (accessed 13 December 2017).

<sup>58</sup> A. Adams and J Prassl, 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees' (2017) 80(3) *Modern Law Review* 412.

<sup>59</sup> *Introducing a Fee Charging Regime in the Employment Tribunals and Employment Appeal Tribunal* (IA No. TS 007), referred to as the 'Impact Assessment', at <https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/results/et-fees-response-ia.pdf> (accessed 10 December 2017).

The ET and EAT are completely subsidised by the taxpayer at present. Their services are therefore provided free of charge to users, which means that consumption is higher than would be the case under full cost recovery. Economic theory holds that in a conventional market this higher level of consumption results in a technical 'deadweight' loss to society as the additional costs to the taxpayer.

A footnote in a tiny font made explicit what was already implicit in the last sentence:<sup>61</sup>

This assumes that there are no positive externalities from consumption. In other words ET and EAT use does not lead to gains to society that exceed the sum of the gains to consumers and producers of those services.

The theoretical exclusion of any wider benefits from ET claims was all the more striking because the consultation papers on fees placed a *negative* externality at the forefront of the justifications for fees - that is, that fear of ET claims deterred employers, and especially small businesses, from taking on workers.<sup>62</sup>

The second problem related to fixing the price and how it would affect demand from 'users'. These elements exposed the flimsy foundations of the modelling. Both in the consultation and the Impact Assessment, the Government cited MoJ research in 2007 as suggesting ET claimants would 'not be highly price sensitive to fee-charging' because, for example, the principal motivations of court users were 'getting justice' and 'getting a final decision'.<sup>63</sup> But both documents acknowledged that the actual impact could not be predicted.<sup>64</sup> Taking a relaxed attitude to this uncertainty, by the time of the Impact Assessment the Government had already fixed the final 'price' for Type A and Type B claims.<sup>65</sup> The fees were less than the calculation of the average estimated cost per case,<sup>66</sup> but counsel for the Lord Chancellor was unable to offer any explanation to the SC why fees had been set at the level they were.<sup>67</sup> Nevertheless,

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<sup>60</sup> Ibid., para. 4.88

<sup>61</sup> Ibid., footnote 50.

<sup>62</sup> *Resolving Workplace Disputes*, n. 45, 3; *Charging Fees*, n. 58, 3.

<sup>63</sup> MoJ, *Charging Fees*, n. 57, paras 16-17; Impact Assessment, n. 59, paras 4.12-4.13. Both referred to MoJ, *What's Cost Got to Do with It? The Impact of Changing Court Fees on Users* (MoJ Research Series 4/07, June 2007), available at <http://webarchive.nationalarchives.gov.uk/20100512164210/http://www.justice.gov.uk/publications/docs/changing-court-fees.pdf> (accessed 10 December 2017).

<sup>64</sup> *Charging Fees*, n. 57, para. 16; Impact Assessment, n. 59, para. 4.13.

<sup>65</sup> Impact Assessment, n. 59, para. 3.26.

<sup>66</sup> Ibid., paras 1.28-1.30.

<sup>67</sup> *UNISON*, n. 1, per Lord Reed para. 18.

the Impact Assessment used these figures and mathematical assumptions about the effect of pricing on claimant behaviour (which it conceded were not based on any reliable data) to predict a small decline in ET claims due to fees.<sup>68</sup>

Even at an early stage, these predictions looked extremely dubious. In fact, for example, the 2007 MoJ research, based on a survey of civil and family cases using a 'robust' phone survey,<sup>69</sup> had found that money claims - which includes almost all ET claims - were the most liable to be deterred by fees, so that where fees became a larger proportion of the claim 'or even larger than the claim itself, this could deter [claimants] from proceeding to court'.<sup>70</sup> But without any reliable data on the price elasticity of demand, it was not possible to measure the loss of utility suffered by those claimants who were put off by fees, as the Impact Assessment acknowledged.<sup>71</sup> By the same token, nor was there any reliable information on whether 'price' was set to maximise revenue. Compounding an already flimsy analysis, in the SC the Lord Chancellor maintained that higher fees would generate higher revenue, described by Lord Reed as an error of 'elementary economics'.<sup>72</sup>

Buried in the small print of the Impact Assessment, these two problems entailed conclusions which ought to have led to questioning the fundamental assumptions. The costs, on this model, were calculated as the actual costs to claimants of fees, plus some costs to employment lawyers and to the MoJ's administration in processing fees.<sup>73</sup> The costs to claimants were more than offset by the corresponding monetary benefits to taxpayers, respondents and the court system accruing from fees and the predicted reduction in claims.<sup>74</sup> But, according to the Impact Assessment, claimants who were deterred by fees also benefited financially owing to the various expenses in making a claim, such as the costs of legal representation, estimated at £1,300 on

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<sup>68</sup> The Impact Assessment, n. 59, used two alternative assumptions, based on no reasons: that the number of cases declined by 1% for every £1 (the 'low response scenario'; or that it declined by 5% for every pound (the 'high response scenario'): see para. 4.14 (the para. wrongly refers to 0.01% and 0.05%, when it means 1% or 5%). On the low response scenario, therefore, an issue fee of £160 would deter 1.6% of claimants and one of £250 would deter 2.5% of claimants; on the high response scenario the issue fee of £160 would deter 8% of claimants, while a fee of £250 would deter 12.5%. These low percentages should be further adjusted downwards to take account of the significant proportion of claimants granted remission, whom the Impact Assessment assumed would be unaffected by fee-charging: para. 4.18.

<sup>69</sup> *What's Cost Got to Do with It?*, n. 63, 4.

<sup>70</sup> *Ibid.*, vi.

<sup>71</sup> N. 59, para 4.19. Instead, it simply measured the total cost of fees paid by claimants, based on the assumptions of how fees would steer claimants' behaviour.

<sup>72</sup> *UNISON*, n. 1, para. 100.

<sup>73</sup> Impact Assessment, n. 59, para 4.68.

<sup>74</sup> *Ibid.*, paras 4.75-4.85 - the benefits were both the fees and the reduced demand for ET services.

average.<sup>75</sup> The modelling assumed that claimants overall *gained* from not pursuing ET claims, so that fees would assist in steering the unregenerate in accordance with their economic self-interest, saving them collectively between £2 million and £6 million each year.<sup>76</sup> Thus fees would result in the best of all possible worlds for everyone except employment lawyers. Pushed to its endpoint, the logic of these assumptions would be the abolition of ETs, for then taxpayers, respondents, the MoJ and even claimants would all save money.

This conclusion signalled a serious problem with the model's theoretical exclusion of any wider public benefit from ET claims. The model was also vulnerable to attack from another angle. Consistent with its empirical prediction of only a small drop in claims, the Impact Assessment assumed there would *in fact* be 'no significant changes in workplace behaviour beyond the reduction in demand for ET and EAT services as a result of fee-charging'.<sup>77</sup> However, if in fact the reduction in claims was higher than predicted, and if the reduced risk of an ET claim translated into lower general observance of labour standards, this would undermine both the empirical assumption that labour standards in general would not be affected by fees and the Impact Assessment's theoretical premise that there were no positive externalities in ET claims.

Despite the model's vulnerability, both theoretically and empirically, the Government stuck doggedly to its position during the consultation, perhaps because it was always the ideological cart driving the empirical horse. For example, when respondents raised the potential detrimental 'wider societal impacts' of fewer discrimination claims, alluding to the public function of ET claims, the Government's response was as follows:<sup>78</sup>

we do not accept that it is only the threat of the employment tribunal that forces businesses to abide by their legal obligations. The Government supports a wide range of guidance, advice provision and help-lines which help businesses to observe their legal responsibilities and helps employees to understand their rights. There is also independent research that highlights the potential benefits for employers from fostering a diverse workforce.

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<sup>75</sup> Ibid., para 4.73. The average gain was derived from BIS estimates 'based on various data sources' (Impact Assessment, footnote 45). It is not clear whether, for example, it took account of the compensation some of those deterred claimants might have been awarded.

<sup>76</sup> Ibid., paras 4.70-4.74.

<sup>77</sup> Ibid., para. 5.10.

<sup>78</sup> *Charging Fees in the Employment Tribunal and the Employment Appeal Tribunal: Response to Consultation* (CP 22/2011, 13 July 2012), para. 53, at <https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/results/employment-tribunal-fees-consultation-response.pdf> (accessed 13 December 2017).

The response, as if straight from the mouth of Dr Pangloss, came close to asserting that legal claims were unnecessary to make employers comply with their legal obligations. But, critically, it fitted with the assumptions and theorising in the Impact Assessment. The Government gave similar short shrift to the argument that it was unfair claimants should bear fees when, as its own research showed,<sup>79</sup> many ET awards were not paid at all, simply stating 'we expect all parties to abide by the decision of the tribunal and pay awards and fees as ordered'.<sup>80</sup> All the evidence showing that claimants would pay fees which they would not recover even if successful - in effect making them, not the state, the guarantors of the whole system - was defeated by another Panglossian riposte.

The market-based theorising which drove the introduction of fees was, therefore, largely immunised against challenges. Competing normative arguments not based on cost-benefit analyses were ruled out in advance, and in any case the principle of fees was never the subject of the consultation, which only covered the detailed means of implementation. Empirical assumptions were based on no or unreliable evidence, and counter-arguments were swiftly dismissed with assertions, not evidence, a recurrent theme of recent policy.<sup>81</sup> Once stripped of its evidential support, the principal justification amounted to little more than a clunky syllogism: users should pay for private services, ET claimants were using a service exclusively for their private purposes, and therefore they should pay for it. Within the horizon of such an ideology, the potential to influence fees through rational discourse in the political sphere was minimal.

#### 4. UNISON'S CHALLENGE AND THE POST-FEES WORLD

The Fees Order duly came into force on 29 July 2013, made under the general power in s.42(1) of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007). Its provisions, including the remission scheme and case-law on recovery of fees, are summarised by Underhill LJ in the Court of Appeal (CA).<sup>82</sup> For Type A claims, such as unpaid wages, the fees for a single claimant were £160 payable on issue of the claim and £230 payable prior to a hearing; the corresponding figures for Type B claims, such as unfair dismissal and discrimination, were £250 and £950.<sup>83</sup> Within the detail were some anomalous distinctions. For example, claims for a failure to grant

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<sup>79</sup> See L. Adams et al, n. 44. This was confirmed by later research in 2013: BIS, *Payment of Tribunal Awards: 2013 Study* (IFF Research) at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf) (accessed 14 December 2017).

<sup>80</sup> *Response to Consultation*, n. 78, para. 94.

<sup>81</sup> Hepple and Morris, n. 38, 213; Lord Wedderburn 'Freedom of Association and Philosophies of Labour Law' (1989) 18 ILJ 1 at 23.

<sup>82</sup> R (*UNISON*) v Lord Chancellor (*Equality and Human Rights Commission intervening*) (Nos. 1 and 2) [2016] ICR 1 (*UNISON, CA*), paras 11-28.

<sup>83</sup> Fees Order, articles 6, 7 and Schedule 2.

rest breaks under the Working Time Regulations, which cannot be brought as a series and typically result in no or very little financial loss,<sup>84</sup> were the most expensive (Type B), whereas claims for unpaid holiday, which usually involve some financial loss (albeit often small), were Type A.<sup>85</sup> Many other claims for detriments typically involving no or small compensation and for which sometimes awards for injury to feelings are specifically excluded were also categorised as Type B, even though they apply to workers who tend to have low pay or poor job security.<sup>86</sup> The reasons for these anomalies have never been clarified.

Soon after the Order was made, a revised remission scheme came into effect across courts and tribunals which became new Schedule 3 to the Fees Order, and which required claimants to meet for the first time a 'disposable capital' and not only a 'disposable income' test.<sup>87</sup> The 'disposable capital' level was very low - £3,000 in relation to ET fees, excluding items such as the main property and household effects but including notice pay, redundancy pay and any non-monetary resource.<sup>88</sup> This chimed with a recommendation in the controversial Beecroft report that remission criteria should include a wealth test in addition to an income test because most ET claimants have recently lost their job and income and so would otherwise qualify for remission.<sup>89</sup> The Order included a power for the Lord Chancellor to grant remission if there were 'exceptional circumstances for doing so'.<sup>90</sup>

Owing to the tight time limits on judicial review, the *UNISON* claim was issued before the Fees Order was introduced<sup>91</sup> and, in order to deal with emerging evidence, resulted in two Divisional Court hearings: the first before Moses LJ and Irwin J<sup>92</sup> and the second before Elias LJ and Foskett J.<sup>93</sup> *UNISON*, supported by the EHRC as intervener, raised arguments based on the EU principle of effectiveness (supplemented by Article 6 ECHR and the common law), the EU principle of equivalence, breach of the public sector duty in s.149 of the Equality Act 2010 (EqA),

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<sup>84</sup> See regulations 12 and 30 of the Working Time Regulations 1998 and *Santos Gomes v Higher Level Care* [2016] IRLR 678 (no damages for injury to feelings for denial of rest breaks).

<sup>85</sup> Fees Order, articles 6, 7, and Schedule 2, para. 45.

<sup>86</sup> See e.g. regulations 3(6) and 7(10) of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, SI 2002/2034; regulation 8(11) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551; regulations 13 and 18(15) of the Agency Workers Regulations 2010, SI 2010/93 (none of which are listed in Schedule 2 of the Fees Order, and hence are Type B).

<sup>87</sup> Substituted by the Courts and Tribunals Fee Remission Order, SI 2013/2032.

<sup>88</sup> Fees Order, Schedule 3, paras 3-10.

<sup>89</sup> N. 52, 7.

<sup>90</sup> Para. 9 of the revised Schedule 3.

<sup>91</sup> The claim form was issued on 28 June 2013.

<sup>92</sup> *R (UNISON) v Lord Chancellor* [2014] ICR 498.

<sup>93</sup> *R (UNISON) v Lord Chancellor (No.2)* [2015] ICR 390.



and indirect discrimination. The arguments based on equivalence and breach of the public sector duty were later dropped, and I shall not discuss them. Nor will I examine the indirect sex discrimination argument, which ultimately succeeded in the SC but for reasons which mostly echoed the claim based on the common law right of access to a court and the related principles in EU law.<sup>94</sup>

UNISON's claims were unsuccessful in both Divisional Courts, and appeals against both rulings were dismissed by the CA.<sup>95</sup> As to the argument based on effective access to the courts, Underhill LJ, with whom Davis LJ and Moore-Bick LJ agreed, decided that the issue turned essentially on Article 6 ECHR, as reflected in Article 47 of the EU Charter of Fundamental Rights.<sup>96</sup> He distilled the legal analysis under EU law on effectiveness and Article 6 ECHR to a single 'essential question...whether the claimant can, in practice, pay the fee',<sup>97</sup> entailing an examination of the financial means of actual or hypothetical individuals. Though he referred to matters such as the importance of the underlying social rights, the low level of ET awards and the poor record of enforcement of ET awards and found the decline in claims 'troubling',<sup>98</sup> none of this evidence was relevant to answering that 'essential question'. In light of that legal test, the first Divisional Court's finding that the hypothetical claimants proposed by UNISON could realistically afford fees was not obviously wrong.<sup>99</sup> Moreover, adjustment to the extra-statutory guidance on exceptional remission could rescue any problematic individuals who could not realistically afford fees.<sup>100</sup> A legal test with an exclusive focus on an individual's means thus dictated the result.

As the case progressed through the courts' hierarchy, the blurred evidential picture came into sharper focus, tending to undermine the aims or assumptions used to justify the Fees Order. Undermining the assumptions of the Impact Assessment, the 2013 Survey of Employment Tribunal Application (SETA) found that compensation and reinstatement, not 'justice' were claimants' main motivations; that a hypothetical fee of £250 would have influenced the decision to bring an ET claim of 49% of claimants, and would be most likely to affect younger claimants, unrepresented claimants and claimants in temporary jobs, on low salaries or bringing wages claims (which are of low value); but that the ultimate case outcome was *not* a significant factor after controlling for other characteristics.<sup>101</sup> SETA also supplemented evidence

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<sup>94</sup> Lady Hale in *UNISON*, n. 1, at para 130.

<sup>95</sup> *UNISON (CA)*, n.82.

<sup>96</sup> *Ibid.*, paras 32-33.

<sup>97</sup> *Ibid.*, Para. 45.

<sup>98</sup> *Ibid.*, paras 44-45, 68.

<sup>99</sup> Para. 71.

<sup>100</sup> Paras 72-4.

<sup>101</sup> BIS, *Findings from the Survey of Employment Tribunal Applications 2013* (Research Series No. 177, June 2014), 38-41, 66, Tables 3.4-3.5 (117-120), Table 5.6 (187) at

in the official statistics as to the low level awards for unfair dismissal and discrimination claims,<sup>102</sup> finding median awards of £3,500 for breach of contract, £900 for wages claims, £2,800 for redundancy payments and £1,000 for 'other' claims.<sup>103</sup> Moreover, the actual amounts recovered were much lower: a 2013 BIS survey on payment of tribunal awards found that only 41% of awards were paid in full without enforcement and, even after taking account of enforcement, still 35% of claimants were paid nothing, said to be a 'particular concern' in light of fees.<sup>104</sup>

Later data confirmed that actual claimants were nowhere near as resistant to the effect of fees as the Impact Assessment and consultation documents predicted. The effect of fees on the number of claims issued is well documented in the official statistics and has been fully explained by others.<sup>105</sup> While the precise decline became hazier once it became compulsory to notify ACAS of a claim in May 2014,<sup>106</sup> the continuing deterrent effect of fees was underlined by ACAS-sponsored research, based on actual workers who used pre-claim conciliation. Of those claimants who did not settle their claim in conciliation and decided not to bring an ET claim, the most common reason given was fees (26%); of that sub-group, 68% said it was because they could not afford the fee, 19% said it was more than they were prepared to pay and 9% said the fee equalled the money owed.<sup>107</sup> As for those claimants who brought claims which were dismissed because they did not pay the hearing fee - something not recorded in the official statistics - a later study found a fifth of those who subsequently withdrew the claim did so because of the hearing fee.<sup>108</sup> In addition, the number of claimants who obtained remission was far lower than predicted.<sup>109</sup> Yet the success rate of claims if anything declined,<sup>110</sup> confirming the

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<https://www.gov.uk/government/publications/survey-of-employment-tribunal-applications-2013> (accessed 1 September 2017).

<sup>102</sup> For the figures across time, see the statistics for April-June 2017, n. 4, Table E.4. Since fees were introduced the median awards have increased, but this may well be a result of fees deterring claims for lower amounts.

<sup>103</sup> SETA, 190, Table 5.9. The 'other' category meant claims which were not one of the listed kind.

<sup>104</sup> BIS (n.79) 42, 48.

<sup>105</sup> See Pyper, McGuinness and Brown (n. 4), Adams and Prassl (n. 58).

<sup>106</sup> Conciliation was introduced by ss 7-9 of the Enterprise and Regulatory Reform Act 2013, introducing a new ss 18A-B to the Employment Tribunals Act 1996. For discussion, see Pyper, McGuinness and Brown (n.4), 13-14.

<sup>107</sup> M. Downer, C.Harding, S.Ghezelayagh, E. Fu and M. Gkiza, *Research Paper: Evaluation of ACAS Early Conciliation 2015* (Ref: 04/15), 98-99, at <http://m.acas.org.uk/media/pdf/5/4/Evaluation-of-Acas-Early-Conciliation-2015.pdf> (accessed 22 August 2017).

<sup>108</sup> M. Downer, C.Harding, S.Ghezelayagh, E. Fu, W. Pitt and A. Thomas, *Research Paper: Evaluation of ACAS Conciliation in Employment Tribunal Applications 2016* (Ref: 04/16), 66-67, at <http://www.acas.org.uk/media/pdf/2/t/Evaluation-of-Acas-conciliation-in-Employment-Tribunal-applications-2016.pdf> (accessed 22 August 2017).

<sup>109</sup> In 2014/15, 4,080 single claimants were granted full or partial remission from the issue fee;

preliminary findings of SETA that fees would tend to deter as a function of factors unrelated to the merits of the claim. The House of Commons' Justice Committee similarly highlighted evidence from employment judges and others that single, small monetary claims for wages and the like, which often succeeded, had declined disproportionately.<sup>111</sup>

None of this evidence, however, necessarily undermined the logic of the CA's analysis. Indeed, subsequent adjustments to the extra-statutory guidance on exceptional remission, made to address the CA's minor criticisms of the gap between the previous guidance and the CA's test of realistic affordability,<sup>112</sup> appeared to strengthen the Lord Chancellor's hand on appeal: if an individual could not afford the fee but fell outside the strict remission criteria, exceptional remission could come to the rescue. Nor did it deflect the Government from its position, exemplified by the long-awaited post-implementation Review, eventually published in January 2017 after being promised three years earlier in the course of the first judicial review.<sup>113</sup> The Foreword by Sir Oliver Heald explained that 'the introduction of fees has broadly met its objectives', pointing to the money raised by fees and the facts that more people were using ACAS conciliation and 'many people' still issued ET claims.<sup>114</sup> In that light, the proposed changes to the fees regime were very minor: some tinkering with the thresholds of gross monthly income for remission to bring them in line with the national living wage, but leaving the capital thresholds untouched, and exempting from fees those very few claims against the Secretary of State where an employer cannot pay certain payments owing to insolvency.<sup>115</sup>

But the broad brush strokes of the Foreword could not hide the detail in the Review. The sums raised by fees were much lower than predicted, principally because the fall

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the figure for 2015/16 was 5,219 and for 2016/17, 5,719: see Table EFT.1 to the April-June 2017 statistics, n. 4. Contrast the estimates in the Impact Assessment, n. 59, based on the previous remission system, that 23.9% of the pre-fees population of claimants - estimated at around 45,000 single claimants (para. 4.12) - would obtain full remission, with a further very significant percentage obtaining partial remission (paras 4.17-4.18).

<sup>110</sup> See Table ET.3 to the April-June 2017 official statistics, n. 4.

<sup>111</sup> *Court and Tribunal Fees: Second Report of Session 2016-17* (HC 167; 20 June 2016), 28-30 <https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news-parliament-20151/courts-and-tribunals-fees-report-published-16-17/> (accessed 10 December 2017).

<sup>112</sup> See HM Courts and Tribunals Service Form EX160A, *Help with Fees*, 16-17 (the wording was amended in October 2016), at <https://formfinder.hmctsformfinder.justice.gov.uk/ex160a-eng.pdf> (accessed 13 December 2017).

<sup>113</sup> N. 5.

<sup>114</sup> *Ibid.*, 3.

<sup>115</sup> *Ibid.*, paras 351-8. Oddly, the provisions did nothing to redress the unfairness where a claimant brought proceedings against an insolvent employer in the first place in order to activate the claim against the Secretary of State, and had to pay a fee to do so which would inevitably be irrecoverable.

in claims was so high, and even ignoring what appear to have been some highly dubious assumptions in the calculations;<sup>116</sup> there had been no improvement in the success rate of claims post-fees, despite some attempts to massage the trends;<sup>117</sup> and it was meaningless to assert that fees had encouraged the use of ACAS conciliation when this had been compulsory since 2014.<sup>118</sup> As for access to justice, combining the findings from the research of Downer et al.<sup>119</sup> with the actual number of notifications of ET claims received by ACAS<sup>120</sup> resulted in an estimated 8,000 people who did not issue ET claims because of inability to afford fees.<sup>121</sup> Add to those the significant percentage of claimants whom fees put off presenting an ET claim for other reasons, such as the fee being more than they were prepared to pay or equalling the money owed,<sup>122</sup> and the estimated claimants who did not bring claims because of fees reached 14,000 annually.<sup>123</sup> Even this total was an underestimate of the full deterrent effect because it ignored the significant proportion of claimants who withdrew claims or had them dismissed owing to the significantly higher hearing fee.<sup>124</sup>

Despite the Government's recalcitrance in the face of the evidence, it is probably no coincidence that soon after the Fees Order was introduced the Government gave renewed attention to other means of enforcing labour rights. Perhaps embarrassed at how fees had undermined the individual enforcement paradigm yet politically and ideologically committed to them, instead of abolishing fees the Government created more exceptions to the paradigm. The consultation *Tackling Exploitation in the Labour Market*<sup>125</sup> proposed and led to the creation of a Director of Labour Market

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<sup>116</sup> Ibid., paras 136-141 and Table 5, showing a fee recovery of 13% of ET expenditure. But this is based on *gross* fees ignoring fees remitted. The actual income from fees - 'net' fee income - only contributed about 9% of the expenditure on ETs in the three years. See *UNISON*, n. 1, para. 56.

<sup>117</sup> Ibid., paras 201-206. Compare the claim of a 'trend' of increasing unsuccessful claims before fees (para. 204), with Table 8 to the Review (78) and Table ET.3 in the official statistics for July to September 2017 (n.4), showing over a longer time-frame no such trend and, if anything, an increase in the ratio of successful to unsuccessful claim in respect of hearings post-fees (it takes on average about 27 weeks for a claim to be heard: Review para. 203).

<sup>118</sup> Ibid., paras 145-152.

<sup>119</sup> Downer et al. (2015), n.107.

<sup>120</sup> See the ACAS Early Conciliation Updates at <http://www.acas.org.uk/index.aspx?articleid=5203> (accessed 14 December 2017). The figures in the Review were based on the update for April 2014 to March 2015, showing 83,423 notifications for that year (though note multiple claims are counted as a single notification).

<sup>121</sup> Review, n. 5, paras 158-165. The lower figure given in para. 162, of 2,500 each year, is wrong because it discounted the 17% of claimants who told Downer et al. that ACAS was a factor in helping them not to submit a claim - even if they ultimately withdrew because they could not afford fees: see Review para. 116 and Table 13 and Downer et al. (2015), n. 107, 97-99. The Review appears to acknowledge this: see para. 164.

<sup>122</sup> Downer et al. (2015), n. 107, 98.

<sup>123</sup> Review, Annex F and Table 14, 82-83.

<sup>124</sup> See Downer et al. (2016), n. 108, 68-69.

<sup>125</sup> BIS (October 2015) at

Enforcement and a new system of labour market enforcement undertakings and orders for certain 'trigger offences' in Part 1 of the Immigration Act 2016. The other steps included<sup>126</sup> a new regime of financial penalties where an employer failed to pay an ET order or settlement sum, enacted in s.151 of the Small Business, Enterprise and Employment Act 2015.<sup>127</sup> While no doubt providing ammunition for a quick political response whenever awkward questions were asked about the detrimental effects of fees, these provisions did little to overcome the fundamental enforcement deficit. The Immigration Act regime affects only a small range of employment rights, and the new financial penalties have resulted in recovery of a very small number of unpaid ET awards, as evidence to the Supreme Court showed.<sup>128</sup> Absent from the Government's celebration in *Tackling Exploitation* of the UK's 'strong statutory framework' of employment rights was any recognition of the problems for delivery of labour standards caused by the decline in claims resulting from fees.<sup>129</sup> Outside of the special exceptions, the consistent theme was of discouraging individual ET claims, exemplified by the abolition of the pre-claim questionnaire in discrimination claims, the increased qualifying period for unfair dismissal and the cap on the compensatory award at 12 months' pay.<sup>130</sup>

It was in that context that the case reached the Supreme Court, shortly after the *Miller* hearing,<sup>131</sup> in which judges in the court below had been attacked as 'enemies of the people' in the *Daily Mail*<sup>132</sup> and both those judges and members of the

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/471048/BIS-15-549-tackling-exploitation-in-the-labour-market.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471048/BIS-15-549-tackling-exploitation-in-the-labour-market.pdf) (accessed 14 December 2017).

<sup>126</sup> See further the increase in financial penalties payable to the Secretary of State for underpayment of the national minimum wage: see s.152 of Small Business, Enterprise and Employment Act, amending s.19A NMWA 1998 and the Impact Assessment at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/369257/bis-14-1182-power-to-set-the-minimum-wage-financial-penalty-on-a-worker.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/369257/bis-14-1182-power-to-set-the-minimum-wage-financial-penalty-on-a-worker.pdf) (accessed 11 September 2017).

<sup>127</sup> Adding a new ss 37A-Q to the Employment Tribunals Act 1996.

<sup>128</sup> See Lord Reed in *UNISON*, n. 1, at para. 37, referring to evidence that 31 unpaid awards were paid between 6 April 2016 (when the penalty regime came into effect) and 20 January 2017. In about the same period, one financial penalty was paid and about £99,000 recovered as a result of warning letters: see Answer to Written Question 58968 from Caroline Lucas MP in House of Commons, 6 January 2017, at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-01-06/58968/> (accessed 15 December 2017).

<sup>129</sup> BIS, *Tackling Exploitation in the Labour Market: Government Response* (January 2016) para. 18, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/491260/BIS-16-11-government-response-to-tackling-exploitation-in-the-labour-market.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/491260/BIS-16-11-government-response-to-tackling-exploitation-in-the-labour-market.pdf) (accessed 11 September 2017).

<sup>130</sup> By s.166 Enterprise and Regulatory Reform Act 2013, SI 2013/1949 and SI 2012/989.

<sup>131</sup> *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5.

<sup>132</sup> See <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> (accessed 21 September 2017).

Supreme Court had faced personal criticism.<sup>133</sup> The feeble response of the Lord Chancellor, Elizabeth Truss, notable for the absence of any condemnation of the press reporting,<sup>134</sup> led the then President of the Court, Lord Neuberger, to state that the attacks threatened the rule of law.<sup>135</sup> The *UNISON* case showed that the rule of law still had teeth, a nasty beast that would defend itself when cornered.

## 5. THE RULE OF LAW AND ACCESS TO COURTS

The rule of law is a protean concept, usually divided into formal and substantive conceptions.<sup>136</sup> Formal conceptions typically include in their *desiderata* of a legal system a right of access to the courts, so that the law provides a remedy as an integral aspect of the underlying individual legal right.<sup>137</sup> Substantive conceptions, on the other hand, attempt to supplement the list by adding rights derived from underlying theories of justice, typically invoked as a constraint on government powers or parliamentary sovereignty, with Dworkin usually cited as the exemplar.<sup>138</sup> The work of Trevor Allan is a sophisticated attempt to tip-toe between these positions, arguing that the rule of law implicitly entails a commitment to equal citizenship.<sup>139</sup> So far as I can tell, however, there has been limited attention in these theories to whether the rule of law entails that legal rules are in practice delivered at the systemic level, whether by state-backed sanctions, individual legal claims or other methods. In his comprehensive account of the meanings of the rule of law, for example, Lord Bingham includes a sub-rule that means are provided for resolving civil disputes without prohibitive cost; but he views this as an integral element of any individual right, unconnected with the delivery of systemic goals.<sup>140</sup> Glimpses within the theories of the need for effective legal remedies are rarely linked explicitly to the realisation of social goals.<sup>141</sup>

This systemic dimension was largely absent, too, from the case-law prior to

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<sup>133</sup> See e.g. Mailonline at <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> (accessed 15 December 2017).

<sup>134</sup> Reported in e.g. The Independent, 5 November 2016, at <https://www.independent.co.uk/news/uk/home-news/bar-council-liz-truss-brexit-ruling-decision-serious-unjustified-attacks-judiciary-judges-high-court-a7399356.html> (accessed 21 September 2017).

<sup>135</sup> <http://www.bbc.co.uk/news/uk-38986228> (accessed 21 September 2017).

<sup>136</sup> P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467; B. Tamanaha, *On the Rule of Law* (Cambridge: Cambridge University Press, 2004).

<sup>137</sup> J. Raz, 'The Rule of Law and its Virtue' in J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1987).

<sup>138</sup> R. Dworkin, *Law's Empire* (Cambridge, Mass: Harvard University Press, 1986).

<sup>139</sup> T. Allan, *Constitutional Justice* (Oxford: Oxford University Press, 2001), especially 21-29.

<sup>140</sup> T. Bingham, *The Rule of Law* (London: Penguin, 2010), 85-89, and 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 77-78.

<sup>141</sup> See e.g. Raz, n. 134, 218.

UNISON. The rule of law is mentioned in the preamble to the ECHR and in *Golder v United Kingdom* the Court referred to it in holding that a right of access to the courts was implicit in Article 6.<sup>142</sup> But while Article 6 is intended to guarantee rights that are 'practical and effective', its focus is on the right of access as a necessary means to vindicate the individual's civil right, and not any wider function of such claims.<sup>143</sup> The furthest the cases go, it seems, is some fleeting recognition that if an individual has to pay a court fee which eats into compensation, this is liable to dissuade victims in general from bringing claims.<sup>144</sup> The common law right of access to a court long-pre-dates the ECHR<sup>145</sup> and as early as *Raymond v Honey*<sup>146</sup> it began to draw on the case-law from Strasbourg, also treating the right as a necessary concomitant of individual civil rights, consistent with formal theories of the rule of law, without articulating any deeper normative justifications.<sup>147</sup>

EU law ought to be more promising, because it begins not with the individual right but with the need to ensure EU laws are effective in a Member State - that is, at the systemic level. An early expression of this viewpoint was the principle of effectiveness, the foundation of which was the duty of co-operation in, now, Article 4(3) of the Treaty on the European Union (TEU) requiring Member States to take any appropriate measures to ensure fulfilment of EU law.<sup>148</sup> Usually expressed in the mantra that national procedural rules must not make it 'practically impossible or excessively difficult' to enforce rights conferred by Community law,<sup>149</sup> this principle is supplemented by the duty owed by Member States to ensure that Directives are fully effective within their legal system,<sup>150</sup> entailing effective remedies with a real deterrent effect.<sup>151</sup> But since *Johnston*<sup>152</sup> these state-oriented duties have become inextricably entwined with the principle of effective judicial protection of an individual's legal rights, inspired by Article 6 ECHR and now enshrined in Article 47 of the EU Charter.<sup>153</sup> The failure clearly to distinguish the two sets of principles - one

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<sup>142</sup> (1979-80) 1 E.H.R.R. 524.

<sup>143</sup> See e.g. *Airey v Ireland* (1979) 2 E.H.R.R. 305.

<sup>144</sup> *Dimitrov v Bulgaria* (App. No. 30544/06, 8 January 2013).

<sup>145</sup> *In re Boaler* [1915] 1 KB 21, *Chester v Bateson* [1920] 1 KB 829.

<sup>146</sup> [1983] AC 1, per Lord Wilberforce at 10.

<sup>147</sup> See e.g. *Attorney General v Times Newspapers* [1974] AC 273 per Lord Diplock at 309; *R v Lord Chancellor ex parte Leech* [1994] QB 575, *R v Lord Chancellor ex parte Witham* [1998] QB 575.

<sup>148</sup> Case C-33/76, *Rewe* [1986] ECR 1989.

<sup>149</sup> For example, the Grand Chamber in Case C-432/05, *Unibet* [2007] ECR I-2771, para. 43.

<sup>150</sup> Treaty on Functioning of EU (TFEU), Article 288.

<sup>151</sup> Article 19 TEU, Case C-14/83, *Von Colson* [1984] ECR 1891, paras. 15, 23. See too Case C-407/14, *Camacho v Securitas Seguridad España* [2016] ICR 389.

<sup>152</sup> Case C-222/84, *Johnston v Chief Constable of the RUC* [1987] QB 129.

<sup>153</sup> See Article 52(3) of the Charter, the Explanations Relating to the Charter at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007X1214\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007X1214(01)&from=EN) (accessed 15 December 2017), S. Prechal, 'Redefining the Relationship Between "Rewe-effectiveness" and Effective Judicial Protection' (2011) 4 *Review of European Administrative Law* 31; K. Krommerdijk, 'Is There Light

looking to the Member State, the other protecting an individual right - has led to a degree of incoherence in the case-law on access to the courts, in which the ECJ sometimes uses one principle as the primary focus, sometimes the other, and sometimes both, but without explaining why.<sup>154</sup> It is very rare to find any clear explanation of the different functions, addressees (Member State or individual) or justifications of the two principles,<sup>155</sup> still less any indication that they would have led to different results. The Grand Chamber ruling in *Impact* is a good illustration, with the ECJ indiscriminately referring to the Member State's duty to ensure the Fixed-term Work Directive 1999/70 was fully effective, to the principle of effectiveness and to the principle of effective judicial protection.<sup>156</sup>

Nevertheless, prior to *UNISON* it was EU law which went furthest in drawing an express link between individual legal claims and the delivery of systemic goals. In *Cote* the ECJ held that the duty on Member States to achieve the result of the (then) equal treatment Directive would be 'deprived of an essential part of its effectiveness' if the Directive did not extend to protect ex-employees against measures taken by their former employer in retaliation for discrimination proceedings brought by the worker.<sup>157</sup> While the ECJ referred to the individual right of effective judicial protection recognised in *Johnston*, its reasoning drew on the potential detrimental effect to achieving systemic goals if individuals did not have such protection:<sup>158</sup>

Fear of such measures, where no legal remedy is available against them, might deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the Directive.

The fundamental objective, of arriving at real equality of opportunity, overrode any indications in the wording of the Directive that it did not extend to protect against victimisation of ex-employees.<sup>159</sup> Similar passing comments have been made in cases in the field of consumer protection.<sup>160</sup> But post-Lisbon the drift of the case-law

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on the Horizon? The Distinction Between "Rewe effectiveness" and the Principle of Effective Judicial Protection in Article 47 of the Charter After *Orizzonte*' (2016) 53 *Common Market Law Review* 1395.

<sup>154</sup> For example, in Case C-317/08, *Alassini* [2010] 3 CMLR 17, the ECJ looked at both effectiveness and effective judicial protection (paras 47-66), and in Case C-61/14, *Orizzonte* [2016] 1 CMLR 46, it said the effectiveness principle 'implies a requirement of judicial protection, guaranteed by Article 47'. See too Case C-279/09, *DEB* [2010] ECR I-13880, Case C-439/14, *SC Star Storage* ECLI:EU:C:2016:688.

<sup>155</sup> Cf. AG Jääskinen in *Orizzonte*, *ibid.*, paras 19-24, 33-37.

<sup>156</sup> [2008] IRLR 552, paras 40-48.

<sup>157</sup> Case C-185/97 [1999] ICR 100, para. 24.

<sup>158</sup> *Ibid.*, para. 24.

<sup>159</sup> *Ibid.*, para. 27.

<sup>160</sup> See e.g. *Océano Grupo v Murciano Quintero* [2000] ECR I-4941, paras 25-27; *Sánchez Morcillo*



concerning barriers to courts has been towards examining the issue through the lens of the individual right of access to a court in Article 47 of the Charter, modelled on Article 6 ECHR, with the consequence that the systemic dimension recognised in *Cooté* has receded into the distance.<sup>161</sup>

*UNISON* marks a new development of the principles of the previous domestic, ECtHR and ECJ cases. Lord Reed's felicitous language, already much cited, neatly undermined the premise of the Government's assumptions in the consultation:<sup>162</sup>

At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of the country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.

The analysis takes for granted that access to courts is a necessary element to vindicate an individual's right as Article 6 ECHR, *Johnston* and the domestic case-law already recognised; but in addition it encapsulates three wider elements of the rule of law, not previously articulated in such clear terms in domestic, EU or ECtHR case-law.

The first is that some cases establish points of general principle and settle issues which are unclear for those beyond the litigants concerned.<sup>163</sup> The second element goes to systemic effectiveness, already foreshadowed in his reference to 'society governed by law'. For the law to steer behaviour in general, there must in fact exist the likelihood of a remedy against those who break it - even if 'enforcement of the law is not usually necessary'.<sup>164</sup> This applies most clearly in the employment context where perceived employer interest and legal rights rarely coincide: for the 'shadow'

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*v Banco Bilbao* EU:C:2014:2099, paras 35-51.

<sup>161</sup> See the cases at n. 154. In *DEB*, for example, the question was about effectiveness (para. 26), but the ECJ answered it by reference to Article 47 of the Charter (para. 29); see similar *Orizzonte* para. 48, and *SC Star Storage*, paras 46, 49.

<sup>162</sup> *UNISON*, n. 1, para. 68.

<sup>163</sup> *Ibid.*, para. 69.

<sup>164</sup> *Ibid.*, para. 71.

of law effect to operate, the risk of legal proceedings must be sufficient to deter those employers who wish to undercut legal standards. The third element links the systemic, steering function of ET claims with Parliamentary democracy:<sup>165</sup>

When Parliament passes laws creating employment rights, for example, it does not do so merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect....It is thus claims brought before an ET which enable legislation to have the deterrent and other effects which Parliament intended.

The result is a very powerful conception of the rule of law. The unstated premise of Lord Reed's second element is that there must exist *some* means of giving practical effect to laws by means of effective sanctions, not necessarily individual claims. In the absence of effective enforcement by criminal or other means, individual ET claims alone stabilise expectations. If this element is properly characterised as a formal quality of law, it is an aspect largely overlooked by those formal theorists who focus only on the link between an individual legal right and a remedy.<sup>166</sup> The connection with Parliamentary democracy provides a strong normative underpinning for systemic effectiveness, albeit one which does not specify any particular content to the laws. These two elements, practical systemic effectiveness and Parliamentary democracy, operate synergistically, combining most powerfully where achievement of the underlying legislative goals is a matter of high social importance, such as in relation to laws combatting discrimination.<sup>167</sup>

Lord Reed's conception is therefore neither purely a formal theory nor one which specifies particular substantive rights as part of an underlying theory of justice. In *Osborn* he had already referred to theories of the rule of law.<sup>168</sup> None were cited in *UNISON* - perhaps because Reed's conception breaks with traditional analyses - but I think the work of Habermas is the most closely-related theoretical elaboration.<sup>169</sup> For Habermas, a valid legal norm requires that the state ensures 'average compliance, compelled by sanctions if necessary', so that the law steers those addressees who act strategically towards it as well as those who internalise its values.<sup>170</sup> But in addition to achieving social co-ordination, law embodies a claim to

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<sup>165</sup> *Ibid.*, para. 72.

<sup>166</sup> For example, Raz (n. 137) sees easy access to the courts as a necessary aspect of the law providing effective guidance and protection to an individual.

<sup>167</sup> As recognised in domestic law: *Anyanwu v South Bank Student Union* [2001] ICR 391 per Lord Steyn at para. 34. Cf. the cases on Article 6: where civil rights are differentiated, it is on the basis of their importance to the individual concerned and not as a function of their importance to wider social goals (see e.g. *Kniat v Poland* (App. No. 71731/01, 26 July 2005), para. 45 (discussed below)).

<sup>168</sup> *R(Osborn) v Parole Board* [2014] AC 1150, para. 71.

<sup>169</sup> J. Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 1996), J. Habermas 'On the Internal Relation Between the Rule of Law and Democracy' (1995) *European Journal of Philosophy* 12.

<sup>170</sup> *Between Facts and Norms*, *ibid.*, 448.

legitimacy. In a modern legal order, characterised by a plurality of world views and lacking a shared religion, this can only be drawn from a procedural model of democratic self-determination, in which 'citizens should always understand themselves also as authors of the law to which they are subject as addressees'.<sup>171</sup> A system which fails to ensure effective compliance with democratically-decided laws fails its citizens in both capacities.

But once you descend from the rarified heights of Habermas' writing - very long on theory but very short on empirical examples - and examine an actual legal system, things become much messier. The two strands, systemic effectiveness of laws and their democratic genesis, may exhibit tensions. For example, Parliament may enact employment rights with limited remedies for breach, with the consequence that their general deterrent effect is restricted. One familiar example in domestic law is capped damages. Here, on the UK constitutional model, the common law would be pretty powerless to act in the name of systemic effectiveness. Viewed in comparison to EU law, where the systemic orientation of the effectiveness principle has generated an overriding requirement of effective and deterrent remedies,<sup>172</sup> the common law doctrine, of no right without a remedy, appears rather feeble.<sup>173</sup>

Tensions of a different sort were present in *UNISON*. Parliament had simultaneously enacted legislation conferring rights on employees yet had also authorised, via s.42 TCEA 2007, the introduction of regulations prescribing fees which could potentially restrict systemic effectiveness by deterring claims. It is unclear how an abstract, high level theory of the rule of law would resolve these tensions, caused by a Janus-faced legislature. To address them Lord Reed ostensibly drew upon conventional tools of judicial review. But his background conception of the rule of law chimes with the limited weight given to secondary legislation on orthodox domestic principles because the Fees Order was in tension with the many employment rights enacted directly by Parliament in primary legislation; and it strengthens the common law right of access to justice, because of the triple function of ET claims in vindicating individual rights, contributing to systemic effectiveness and respecting parliamentary democracy.

## 6. THE COMMON LAW RIGHT: ITS LEGAL AND EVIDENTIAL TESTS

On one view, Lord Reed merely reaffirms the priority of the common law over the ECHR in protecting fundamental rights, as he earlier emphasised in *Osborn*,<sup>174</sup> and endorses conventional public law principles on legality, as established at the highest appellate level in cases such as *R (Daly) v Secretary of State for the Home Department*.<sup>175</sup>

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<sup>171</sup> *Ibid.*, 449.

<sup>172</sup> *Von Colson*, n. 151, para. 23;

<sup>173</sup> See *Jones v Kaney* [2011] 1 AC 298, especially Lord Nicholls at para. 51, Dyson at para. 113.

<sup>174</sup> N. 168.

<sup>175</sup> [2001] 2 AC 532 per Lord Bingham at paras 5-12.

The original principle, formulated by a divided CA in a case where a vexatious litigant triumphed over the Solicitor-General, was that a barrier to bringing proceedings, can only be prevented by clear, express words in a statute.<sup>176</sup> From this grew two supplementary principles, both of which informed Lord Reed's judgment. First, the need for authorisation by clear statutory words applies not only to absolute prohibitions but also to hindrances or impediments to effective access to courts, such as requirements to pay fees.<sup>177</sup> Second, in accordance with the development of proportionality as a common law principle, even where a statutory power authorises intrusion on the right of access, 'it is interpreted as only authorising such a degree of intrusion as is reasonably necessary to fulfil the objectives of the provision in question'.<sup>178</sup> But the strength of the principles only becomes clear in examining Lord Reed's more detailed formulation and application of them in *UNISON*.

### A. Effectively Preventing Access to Justice

The first principle requires that fees must not effectively prevent access to justice. In the absence of any express authorisation in the enabling legislation for an interference with access to ETs, Lord Reed considered that the relevant legal question was whether there was a 'real risk that persons will be effectively prevented from having access to justice', endorsing the test of Dyson LJ in the Divisional Court in *R(Hillingdon) LBC v Lord Chancellor*.<sup>179</sup>

Though Lord Reed's formulation is very similar to how the test was expressed by Underhill LJ in the CA also based on *Hillingdon* - 'the Fees Order will be unlawful if its provisions create a real risk that some claimants will be denied access to justice because they cannot realistically afford the fees'<sup>180</sup> - his application of it is radically different. Whereas Underhill LJ considered evidence from actual or 'well-constructed cases of notional individuals' was necessary, with the consequence that evidence relating to matters such as the fall in claims or the ineffectiveness of the enforcement regime bore little if any weight,<sup>181</sup> Lord Reed instead focussed on *systemic* effects based on a wide range of empirical evidence: the dramatic decline in claims; the evidence given by claimants in the ACAS-sponsored research; the income of hypothetical claimants; the limited effect in practice of the power to grant exceptional remission; and, echoing the analysis of Adams and Prassl,<sup>182</sup> the

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<sup>176</sup> See *In re Boaler*, n. 145, cited in *UNISON* at para. 76.

<sup>177</sup> *Raymond v Honey*, n XXX, per Lord Wilberforce at 12-13, Lord Bridge at 14-15.

<sup>178</sup> Lord Reed in *R (Pham) v Secretary of State for the Home Department* [2015] 1 WLR 1591, paras 118-9, *UNISON* para. 80

<sup>179</sup> *UNISON* paras 85, 87, endorsing the test of Dyson LJ in the Divisional Court [2008] EWHC 2683.

<sup>180</sup> *UNISON*, CA, n. 82, para. 52.

<sup>181</sup> *Ibid.*, paras 67-9 (see too paras 44-5, in which Underhill LJ effectively discounted systemic factors).

<sup>182</sup> N. 58.

irrationality of paying a fee to pursue claims for small amounts, reinforced by evidence about the poor record of enforcement and the impact of fees on small claims.<sup>183</sup>

On Underhill LJ's approach a court should examine whether an individual can pay the fee - not a straightforward forensic exercise given the uncertain boundary between essential and inessential expenditure<sup>184</sup> - and any remedy would presumably be restricted to adjusting the guidance on exceptional remission or giving a declaration in respect of the individual claimant. Little wonder that in the SC counsel for the Lord Chancellor placed at the forefront of their submissions an argument that the Fees Order was not inherently unlawful because of the exceptional remission gateway, relying on authorities on the high threshold for systemic challenges.<sup>185</sup> But Lord Reed's approach cuts this argument off at the root: fees 'have to be set at a level everyone can afford' - the plural is a clue - which does not require conclusive evidence but a focus on the evidence considered 'as a whole'.<sup>186</sup> The exceptional remission power, even in its modified form, was no defence because of the effect of fees and its failure *in fact* rather than in theory to remedy the effect: 'The problems which have been identified in these proceedings are not confined to exceptional circumstances: they are systemic.'<sup>187</sup>

How should we explain the fundamental switch in perspective from an individual claimant to examining system-level effects? Though Lord Reed did not explain in terms why an individual focus was inappropriate, I think the key is in his conception of the rule of law, which forms the important preamble to his analysis and in which ET claims are central to the system delivering the legal rights it promises. From that starting point, it is natural to look at whether 'everyone' has effective access to ETs and empirical evidence of the operation of the Fees Order across the system rather than seeing if there were some means, legal or factual, by which a particular individual could bring a claim. If you start with the centrality of individual claims for systemic delivery, you need panoramic vision, not a microscope; and reliable statistical and other evidence of general effects becomes more, not less, relevant than what may be the idiosyncratic circumstances of an individual claimant.

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<sup>183</sup> *UNISON*, n. 1, paras 91-98.

<sup>184</sup> For empirical evidence of what are now seen as necessities, see the report of Poverty and Social Exclusion by D. Gordon et al., *The Impoverishment of the UK* (2013) at [http://www.poverty.ac.uk/sites/default/files/attachments/The\\_Impoverishment\\_of\\_the\\_UK\\_PSE\\_UK\\_first\\_results\\_summary\\_report\\_March\\_28.pdf](http://www.poverty.ac.uk/sites/default/files/attachments/The_Impoverishment_of_the_UK_PSE_UK_first_results_summary_report_March_28.pdf) (accessed 13 December 2017).

<sup>185</sup> The argument is summarised by Lord Reed at para. 90 of *UNISON*. See too *UNISON* (CA), n. 82, at paras 72-74. The cases relied upon in the Lord Chancellor's Case included *R (Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055, *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1 WLR 2219, *R(IS) v Director of Legal Aid Casework* [2016] 1 WLR 4733, *R (MM (Lebannon)) v Secretary of State for the Home Department* [2017] 1 WLR 771.

<sup>186</sup> *UNISON*, n. 1, para. 91.

<sup>187</sup> *Ibid.*, para. 95.

## B. Quasi-Proportionality

Lord Reed's second ground for holding the Fees Order to be unlawful at common law was that the degree of intrusion went further than was justified by its objectives - the application of common law 'proportionality'. Its application enabled Lord Reed to give another lesson in elementary economics to the Lord Chancellor - higher fees do not ineluctably result in higher overall income, as any GCSE economics student knows - and once again to remind the Lord Chancellor of the lack of any rational basis or explanation for the 'price' at which fees were fixed.<sup>188</sup> Moreover, there was no evidence fees had in fact incentivised early settlements or discouraged weak or vexatious claims.<sup>189</sup> Intriguingly, and returning to the theme which informed his discussion of the rule of law, Lord Reed also indicated that the failure to consider the public benefit of claims might itself have been a further, independent ground of challenge.<sup>190</sup>

## C. EU and ECHR law

No doubt with an eye to the post-Brexit world, Lord Reed dealt with EU law as something of an afterthought. Dealing with the principle of effectiveness and effective judicial protection together under the umbrella of a right to an effective remedy in Article 47 of the EU Charter, he saw the essential question as depending on proportionality as interpreted by the ECtHR case-law, given how Article 52 of the Charter expressly contains a proportionality test and requires harmonisation with the corresponding ECHR rights.<sup>191</sup> While the answer was mostly foreshadowed by the similar principle at common law,<sup>192</sup> for good measure Lord Reed drew attention to the cases from Strasbourg which made clear that the test did not collapse, *pace* the Court of Appeal, into a single 'basic question [of] whether the fee payable is such that the claimant cannot realistically afford to pay it'.<sup>193</sup>

On the contrary, the Strasbourg cases refer to inability to pay as only one factor among several, as part of an overarching proportionality test.<sup>194</sup> While inability to afford a fee probably entails a breach of Article 6, ability to pay is not a sufficient condition for compliance with it, as the cases cited by Lord Reed show.<sup>195</sup> For example, in *Kniat v Poland*,<sup>196</sup> a woman was required to pay a fee of PLN 10,000 to

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<sup>188</sup> *Ibid.*, para. 99

<sup>189</sup> *Ibid.*, para. 101.

<sup>190</sup> *Ibid.*, para. 102.

<sup>191</sup> *Ibid.*, paras 106-108; Article 52(1)(3) and see *DEB*, n. XXX, paras 29-37.

<sup>192</sup> See the parallels drawn between the two principles in *UNISON* paras. 89 and 110.

<sup>193</sup> Underhill LJ in *UNISON (CA)*, n. 82, para. 41.

<sup>194</sup> See e.g. *Teltronic CAV v Poland*, Application No. 48140/99, 10 January 2006, paras 46-47 and the cases cited, such as *Kreuz v Poland*, n. XXX.

<sup>195</sup> *UNISON*, n. 1, paras 113-115.

<sup>196</sup> Application No. 71731/01, 26 July 2005.

bring an appeal against findings in divorce proceedings. Because she had received a lump sum of PLN 300,000 from her ex-husband, the Poznań Court of Appeal refused to grant her an exemption.<sup>197</sup> The ECtHR found the fee impaired the ‘very essence’ of the right in Article 6 because, even though she could pay it, the lump sum was her only asset, which ‘it did not seem reasonable’ she spent on fees rather than on securing her and her children’s needs after the divorce, and ‘having regard in particular to what was at stake for the applicant’.<sup>198</sup> Similarly, in *Cakir v Turkey*,<sup>199</sup> in finding that payment of a relatively small court fee to obtain a written judgment as a precondition of enforcing a judgment for unpaid wages amounted to a breach of Article 6, the ECtHR ignored whether the applicants could afford the fees; instead it relied on how the state had shifted its responsibility to organise an effective system of enforcement onto the claimants, and the absence of a reasonable relationship of proportionality between the fees and the work to be done.<sup>200</sup>

### **E. Comparing the Common Law with EU and ECHR Law**

Lord Reed’s citation of the Strasbourg cases, which influence the ECJ via Articles 47 and 52 of the Charter, should not lead us to assume a congruity between the common law and ECHR or EU law. Important differences exist, with the common law imposing a higher and more visible barrier than its European cousins, even if it is more deferential to Parliamentary supremacy than Article 47.

First, while the ECtHR usually cites the mantra that fees must not impair the ‘very essence’ of the right, and there must be a reasonable relationship of proportionality between the means employed and the aim of the state in raising fees, in practice the two tests are invariably elided.<sup>201</sup> The same applies to EU law, which increasingly views matters through the lens of Article 47 of the Charter, corresponding to Article 6 ECHR, and does not deal separately with the principle of effectiveness or whether a procedural barrier makes it ‘excessively difficult’ to bring a claim. By contrast, the *UNISON* judgment carefully formulates two independent legal principles: first, whether fees effectively prevent some persons from having access to justice; and, second, whether the intrusion is no greater than is justified by the objectives of the measure. If the latter element is analogous to proportionality under the ECHR, the former is distinctively domestic.

Second, it this first domestic principle, not proportionality, which in practice imposes the most significant barrier to impediments to access to the courts. By carefully

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<sup>197</sup> In 2000, a fee of 10,000 PLN was about £1,530 and the lump sum was worth about £45,900.

<sup>198</sup> Paras 44-46. See similarly *Kordos v Poland*, Application No. 26397/02, 26 May 2009, also cited by Lord Reed at para. 115 of *UNISON*, and *Weissman v Romania*, Application No. 63945/00, 24 May 2006.

<sup>199</sup> Application No. 25747/09, 4 June 2013.

<sup>200</sup> *Ibid.*, paras 21-22.

<sup>201</sup> See e.g. *Kreuz v Poland* 11B.H.R.C 486, paras 55, 66-7.

selecting the objectives of a fees scheme, a government can steer a path around common law proportionality without undue difficulty. But the first principle is an immovable and hence more formidable obstacle. Fees *always* have to be set at a level everyone can afford. To underline the point, Lord Reed supplements the legal question with a clearly articulated evidential test, based on a 'real risk' to which evidence of systemic effects is relevant. The 'very essence' test under the ECHR or the 'excessively difficult' test in EU law, for example, are much less specific in relation to evidence.<sup>202</sup>

It is one of the paradoxes of UNISON that much of the argument in the SC was directed to showing that the CA was wrong to adopt a test based on individual affordability because it should have examined fees through the lens of proportionality, whether under the common law, Article 6 ECHR or EU law, and where the diverse legal sources are broadly in harmony. While the SC accepted this argument, it was principally its revised formulation and application of the first common law principle, based on effective access to justice, which afforded ET claimants the protection which a system based on privatised social justice implicitly demands, and which the political process had ignored or brushed aside.

## **7. SHORT-TERM CONSEQUENCES FOR EMPLOYMENT LAW**

The short-term consequences of the judgment are still being worked through and are likely to result in further litigation, so in this section I only sketch out some of the issues which arise.

The first immediate and uncontroversial effect of the judgment was that fees were no longer payable for any ET claims, and ETs ceased to apply rules 11 and 40 of the ET Rules, providing for the rejection and dismissal of claims without the appropriate fee, from the day of the judgment.<sup>203</sup> The second consequence was that fees paid in the past fell to be reimbursed by the MoJ, based on an oral undertaking, given on behalf of the then Lord Chancellor, Chris Grayling, at the permission hearing where Lewis J refused UNISON's application for interim relief.<sup>204</sup> That it was not recorded in writing was perhaps a reflection of the Lord Chancellor's misplaced confidence in winning the legal arguments. The refund scheme has now been published, and provides for reimbursement of claimants, lead claimants and representatives who paid more than 85,000 ET fees,<sup>205</sup> as well as parties who were ordered by an ET or the

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<sup>202</sup> On the vague test in EU law, see Case C-432/05, *Unibet* [2007] ECR I-2771 para. 54.

<sup>203</sup> See the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, rules 11 (rejection of claim without fee) and rule 40 (dismissal of claim if no fee paid).

<sup>204</sup> [2013] EWHC 2656 (Admin) at para.24. See too the latest direction of the ET President, Brian Doyle, dated 18 August 2017, at <https://www.judiciary.gov.uk/wp-content/uploads/2015/03/case-management-order-no-131-president-employment-tribunals-e-and-w-re-unison-2-20170818.pdf> (accessed 2 December 2012)

<sup>205</sup> See Table ETF.1 and ETF.2 of the April-June 2017 statistics, n. XXX.



EAT to pay a fee, in each case with interest.<sup>206</sup>

As for claims rejected or dismissed in the past by ETs acting under rule 11 (issue fee) or under rule 40 (hearing fee), the thorny legal question is how a court's holding that a statutory instrument was *ultra vires* affects earlier actions of third parties (here ETs or the EAT) made on the assumption that the instrument was lawful. The issue is not resolved by assuming the later judgment means the subordinate legislation never had any legal effect.<sup>207</sup> Rather, the theoretical analysis of Forsyth, endorsed by Lord Steyn in *Boddington v British Transport Police*,<sup>208</sup> is that the answer depends upon 'whether the second actor has legal power to act notwithstanding the invalidity of the first act'.<sup>209</sup> But the empowering statute rarely provides any clear solution to the conundrum, and the cases are not always easy to reconcile.<sup>210</sup> Recent authorities have emphasised the flexibility of the exercise, based on the statutory context and the practical consequences.<sup>211</sup> In *R (Shoesmith) v Ofsted*,<sup>212</sup> for example, the majority of the Court of Appeal held that whether Haringey's dismissal of Ms Shoesmith was ineffective owing to its reliance on an unlawful direction of the Secretary of State depended on all the circumstances, including that Ms Shoesmith had put Haringey on notice that she considered the direction to be unlawful.<sup>213</sup>

While this is an 'ill-defined area' of law,<sup>214</sup> the relevant factors all point towards automatic reinstatement of claims rejected or dismissed by ETs under rules 11 or 40. First, in *UNISON* Lord Reed expressly rejected the submission of the Lord Chancellor that relief should be restricted to a declaration with only prospective effect. Instead, his language was explicit on the retrospective effect of the judgment: the Fees Order was 'unlawful ab initio and must be quashed'.<sup>215</sup> Second, the non-

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<sup>206</sup> <https://www.gov.uk/employment-tribunals/refund-tribunal-fees> (accessed 29 November 2017). It is a moot point whether interest should be compound: see *Sempra Metals v IRC* [2008] 1 AC 561 and, on EU law, *Littlewoods v Revenue and Customs Commissioners* [2017] 3 WLR 1401. For the

<sup>207</sup> On that basic rule, see Lord Phillips in *Mosell (Jamaica) Limited v Office of Utilities* [2010] UKPC 1 at para. 44.

<sup>208</sup> [1999] AC 143 at 172.

<sup>209</sup> C. Forsyth 'The Metaphysics of Nullity: Invalidity, Conceptual Reasoning and the Rule of Law' in C. Forsyth and I. Hare (eds), *The Golden Metawand and the Crooked Cord* (Oxford: Clarendon Press, 1998), 159.

<sup>210</sup> See e.g. Lord Woolf, J. Jowell, A. Le Sueur, C. Donnelly, I. Hare, *De Smith's Judicial Review* (London: Sweet & Maxwell, 2013), paras 4-062-4-069; P Craig, *Administrative Law* (8<sup>th</sup> edition, London: Sweet & Maxwell, 2012), 741-749.

<sup>211</sup> See the summary of Cranston J in *Mulvenna v Secretary of State for Communities and Local Government* [2015] EWHC 3494 (Admin), paras 64-71; *R (TN (Vietnam)) v Secretary of State for Home Department* [2017] 1 WLR 2595 per Ouseley J at paras 78-95, 112.

<sup>212</sup> [2011] ICR 1195

<sup>213</sup> Stanley Burnton LJ paras 136-137; Lord Neuberger MR paras 141-147.

<sup>214</sup> Per Maurice Kay LJ at para. 119 and Stanley Burnton LJ at para. 136 in *Shoesmith*, n. 212.

<sup>215</sup> *UNISON*, n. 1, paras 118-119.

payment of fees due under the Fees Order was a necessary and sufficient condition for the rejection or dismissal of claims under the Rules.<sup>216</sup> Third, claimants whose claims were rejected had no practicable means of challenging those decisions, so that any argument based on preserving the finality of the ET decisions bears little weight.<sup>217</sup> Fourth, ETs were on notice of a potential illegality finding from the time UNISON began its judicial review, before the Fees Order came into effect.<sup>218</sup> Fifth, it is generally harder for a public body than a private individual to invoke an exception to retrospective invalidity.<sup>219</sup> These arguments apply equally to EAT appeals rejected because a claimant did not pay a fee.<sup>220</sup> On these assumptions, ET claims and EAT appeals should simply be reinstated *tout court*, although there may be some practical issues to resolve where (for example) files have been lost.

What about claimants who never brought a claim at all because of the deterrent effect of fees? Here, the appropriate means of a claimant entering the ET jurisdiction is to bring a claim and argue that time should be extended on the basis it was not 'reasonably practicable' to bring a claim within the relevant limitation period (e.g. unfair dismissal<sup>221</sup>) or that it is 'just and equitable' to extend time (e.g. discrimination<sup>222</sup>). Prior to the SC ruling there was no practicable means of presenting a claim in the ET without paying a fee.<sup>223</sup> Each case will turn on factual issues specific to the individual claimant, such as whether it was practicable for the claimant to pay a fee, whether she applied for remission, and so on. Prejudice to the respondent and the effect of delay are relevant factors for the purpose of the 'just and equitable' exception<sup>224</sup> but are not in relation to reasonable practicability, where the focus is on why the claimant did not present the claim in time.<sup>225</sup> Both tests are wide enough to allow extensions where a claimant could not reasonably afford the fee,<sup>226</sup> and Lord Reed's observation in *UNISON* that fees, even if affordable, could make it 'futile or irrational' to bring claims for small amounts<sup>227</sup> suggests that the small size of the likely award relative to the fee can mean it was not reasonably practicable to

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<sup>216</sup> See rule 11 and rule 40.

<sup>217</sup> Cf. *Secretary of State for the Home Department v Draga* [2012] EWCA Civ 842, per Sullivan LJ paras 58-62. The possibility of individuals bringing judicial review claims, for which fees would be payable, can be safely left in the world of legal theory.

<sup>218</sup> See Lord Neuberger in *Shoemith*, n. 212, para. 144 (cf. Maurice Kay LJ at para. 119).

<sup>219</sup> *Ibid.*, per Lord Neuberger para. 143.

<sup>220</sup> See rule 17A of the EAT Rules 1993, SI 1993/2854.

<sup>221</sup> ERA s.111

<sup>222</sup> EqA 2010, s.123.

<sup>223</sup> Contrast *Biggs v Somerset* [1996] ICR 364, especially per Neill LJ at 374C-E.

<sup>224</sup> *Department of Constitutional Affairs v Jones* [2008] IRLR 128, CA.

<sup>225</sup> *Porter v Bandridge* [1978] ICR 943, CA, per Waller LJ at 948D-E.

<sup>226</sup> See, by analogy, cases where extensions have been allowed under the 'reasonably practicable' test because it was not practicable to submit a claim on grounds of illness, such as *Schultz v Esso* [1999] ICR 1202.

<sup>227</sup> *UNISON*, n. 1, para. 96.

bring a claim or that it is just and equitable to allow a late claim.<sup>228</sup> One ET has already treated the illegality of the Fees Order as a consideration relevant to reasonable practicability even where a claimant would have qualified for remission.<sup>229</sup>

Despite the Supreme Court ruling that the Fees Order was in breach of EU law, I doubt there is much scope for *Francovich*<sup>230</sup> claims for damages against the Government by claimants who never brought claims owing to fees. Where a Member State has incorrectly transposed an EU obligation - as here - the test is whether it 'manifestly and gravely disregarded the exercise of its powers'.<sup>231</sup> In the absence of clear guidance in the wording of Article 47 of the EU Charter or in the existing case-law of the ECJ that ET fees were probably unlawful, it is unlikely the breach would be sufficiently serious.<sup>232</sup>

## 8. LONGER-TERM CONSEQUENCES - EMPLOYMENT AND BEYOND

In the long term the SC judgment will operate as a significant legal constraint on any reintroduction of ET fees, most powerful in relation to secondary legislation, where the common law principles provide a means of challenge unaffected by Brexit or any reawakening of proposals, currently shelved, to repeal the Human Rights Act 1998 (HRA). Because subsequent empirical evidence of the effect of fees may illustrate a 'real risk' that persons are effectively prevented from having access to ETs, or may be relevant to proportionality, any future scheme will need to be kept under constant review, signalling an important role for academics, NGOs, unions and others in producing reliable data on its actual or predicted effects.

The existing research already highlights why ET claimants are likely to be peculiarly vulnerable to fees. In addition to the low levels of awards for most ET claims, the difficulties of estimating the prospects of success in the absence of evidence, the low levels of legal advice and guidance, and the poor record of enforcement, almost all ET claimants will have been in employment recently and so in receipt of earnings.<sup>233</sup> SETA 2013, for example, found that 98% of claimants were current or former employees of the respondent, with 78% in permanent full-time employment, the earnings of which were slightly below the then national median.<sup>234</sup> As a consequence

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<sup>228</sup> I am grateful to Dinah Rose QC for this point.

<sup>229</sup> *Benton v Give 2 Give* (Case No. 2302156/2017, 26 November 2017) at [https://assets.publishing.service.gov.uk/media/5a1e7f7fed915d6662f29355/Mrs\\_A\\_Benton\\_v\\_Give\\_2\\_Give\\_A\\_Charity\\_and\\_Company\\_\\_2302156-2017\\_Preliminary.pdf](https://assets.publishing.service.gov.uk/media/5a1e7f7fed915d6662f29355/Mrs_A_Benton_v_Give_2_Give_A_Charity_and_Company__2302156-2017_Preliminary.pdf) (accessed 11 December 2017).

<sup>230</sup> Case C-6/90, *Francovich v Italy* [1995] ICR 722.

<sup>231</sup> Case C-392/93, *R v HM Treasury ex parte British Telecommunications plc* [1996] I-ECR 1631.

<sup>232</sup> *Ibid.*, paras 43-44.

<sup>233</sup> SETA, n. 101, Table 8.4, 253.

<sup>234</sup> *Ibid.*, 86, Table 8.4.

and in light of the short limitation periods in ETs, at the time the issue fee fell due past earnings may well have meant claimants crossed the disposable capital threshold, so disqualifying them from remission just as Beecroft intended.<sup>235</sup> The evidence also shows that at that same critical time a high percentage of claimants have lost their previous job but not obtained a replacement income stream.<sup>236</sup> ET claimants are thus often in comparable circumstances to Mrs Kniat in *Kniat v Poland*,<sup>237</sup> possessing current but diminishing capital which they will reasonably want to preserve for future basic needs rather than spend on fees. This may be a further factor explaining why ET claimants turned out to be so much more price-sensitive than the Government predicted, why the numbers who qualified for remission were so low, and why they can be predicted to be especially deterred by fees in the future (absent changes to limitation periods or remission thresholds).

The alternative is a scheme enshrined in primary legislation: for example, an Act drafted in similar terms to the Fees Order, or an Act specifically conferring power to pass secondary legislation which interferes with the right of access to a court. Until Brexit, this avenue is partially blocked because of the SC's alternative ruling that the Fees Order breached Article 47 of the EU Charter, at least in relation to the long list of employment rights which are underpinned by EU law.<sup>238</sup> Article 47 has direct horizontal effect and so overrides any conflicting primary legislation, as confirmed recently by the SC.<sup>239</sup> The possibility of an Act which, pre-Brexit, expressly and unambiguously overrides EU law<sup>240</sup> can probably be left to legal theory given the Government's precarious majority and the political controversy such a measure would generate in the run-up to Brexit. Should the Government introduce a modified fees scheme which it considered could tip-toe around Article 47, it too would be open to challenge based on its empirical effects. Such a move would also raise the spectre of a possible reference to the ECJ, the Brexiteers' least favourite court, and the uncertainty of how that court would respond to a restriction on the enforcement of what for it are very fundamental social rights.<sup>241</sup>

Post-Brexit, however, the potential legal door of primary legislation will open more widely. There is already precedent for a government using primary legislation in

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<sup>235</sup> N. 52.

<sup>236</sup> Downer et al. (2015), n. 107, at 21, 29: 75% of claimants had lost their employment before the notification was sent to ACAS ; between two to five months after conciliation ended, only 63% were in paid employment.

<sup>237</sup> N. xxx, para. 43.

<sup>238</sup> For the full list, see Annex 2 to *UNISON (CA)*, n. 82.

<sup>239</sup> *Benkharbouche v Sudan* [2017] 3 WLR 957, SC at para. 78 (see too the fuller discussion in the CA, reported at [2016] QB 347, paras 76-81).

<sup>240</sup> See *Thorburn v Sunderland* [2003] QB 151 per Laws LJ at paras 63, 69.

<sup>241</sup> See *Coote*, n. 157, and AG Jääskinen in *Orizzonte*, n. 154, at para. 41, hinting at a stricter approach to fees in the realm of social policy.

order to circumvent a court ruling that subordinate legislation was ultra vires, as Mark Elliott has highlighted.<sup>242</sup> In *R v Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants*,<sup>243</sup> the Court of Appeal held that Regulations<sup>244</sup> excluding some asylum seekers from income-related benefits were unlawful because they cut down on the statutory rights of asylum seekers.<sup>245</sup> Perhaps heeding Simon Brown LJ's statement that 'Parliamentary sovereignty is not here in question: the Regulations are subordinate legislation only',<sup>246</sup> thereafter governments introduced similar provisions in primary legislation designed to achieve the same result.<sup>247</sup> The common law principles of interpretation and the duty s.3 HRA (to the extent a scheme breaches Article 6), reach their limits where a statute expressly and unequivocally takes away the right of access to a court. But such a measure may give rise to the fundamental constitutional questions about the hierarchy between the rule of law and Parliamentary sovereignty - questions which have long intrigued constitutional lawyers but whose resolution has been left hanging in recent Supreme Court cases.<sup>248</sup>

Whether the Government has the political appetite for such a measure is hard to say in light of its conflicting messages on workers' rights, the deep divisions within it and the unpredictable political environment caused by Brexit. In the turbulent weather after the referendum, the Prime Minister claimed that workers' rights would not be diminished but enhanced while she was in power.<sup>249</sup> Collateral attacks by means of procedural restrictions, however, often perform the magic trick of dissolving the conflict between those who wish to maintain workers' rights and the many within the Conservative party whose enthusiasm for labour market deregulation is undiminished and stimulated by Brexit. Initially Dominic Raab, the Minister for Courts and Justice, made a virtue out of necessity and told Parliament that the Government accepted the ruling of the Supreme Court.<sup>250</sup> More recent

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<sup>242</sup> 'Unison in the Supreme Court: Tribunal Fees, Constitutional Rights and the Rule of Law' at <https://publiclawforeveryone.com/2017/07/26/unison-in-the-supreme-court-employment-fees-constitutional-rights-and-the-rule-of-law/> (accessed 7 September 2017).

<sup>243</sup> [1997] 1 WLR 275.

<sup>244</sup> SI 1996/30.

<sup>245</sup> At 291-3 (n. 243).

<sup>246</sup> At 292C.

<sup>247</sup> The ping-pong between the courts and Parliament, which culminated in s.55 of the Nationality, Immigration and Asylum Act 2002, is set out in *R(Q) v Home Secretary* [2004] QB 36, paras 6-12.

<sup>248</sup> See e.g. *De Smith's Judicial Review*, n. 210, 15-17, *Jackson v Attorney General* [2006] 1 AC 262 and *Axa v HM Advocate* [2012] 1 AC 868 per Lord Hope para. 50.

<sup>249</sup> See Theresa May's speech to the Conservative Party conference 2 October 2016, at [www.independent.co.uk/news/uk/politics/theresa-may-conference-speech-article-50-brexiteu-a7341926.html](http://www.independent.co.uk/news/uk/politics/theresa-may-conference-speech-article-50-brexiteu-a7341926.html) (accessed 7 December 2017).

<sup>250</sup> Hansard, 5 September 2017, at <http://hansard.parliament.uk/Commons/2017-09-05/debates/87CB8B91-F524-481C-BE71-02D3C550A559/Justice> (accessed 6 September 2017)

pronouncements have been rather less contrite. Before the Justice Committee, for example, the new Lord Chancellor declined to give an assurance that ET fees would not be introduced and said that nothing in the SC judgment ruled out fees ‘as a matter of principle’, even if the Fees Order got the balance wrong.<sup>251</sup> Only the naive would think that the conflict between the Government’s policies on ETs and the principles in *UNISON* has been resolved.

## 8. CONCLUSION

The *UNISON* ruling has many potential effects not restricted to fees or litigation, and I want to end by drawing attention to two.

The first is its implications for future strategic litigation. Lord Reed’s articulation of the constitutional right draws no distinction between the kind of matters which effectively prevent access to justice. Its logic is not restricted to legal obstacles or barriers to bringing proceedings but could extend to the failure to take positive steps to assist individuals accessing or participating in the adjudicative process. Already, for example, the EAT has drawn on it to conclude that ETs have power to appoint a litigation friend for a claimant who lacks capacity and who could not effectively participate in proceedings without one.<sup>252</sup> In the absence of any clear indication that Parliament intended to impede a claimant’s common law rights of access to justice (which extends to the right to a remedy), the ET Rules were to be construed to permit such an appointment.<sup>253</sup> Though framed in negative terms, the effect is akin to a positive duty of providing assistance to someone who needs it; and whether *UNISON* will be used to drive positive duties in other areas, such as access to legal advice, is an intriguing question. Lord Reed’s approach to the evidence, and his rejection of the Lord Chancellor’s argument that owing to the exceptional power of remission the system was not inherently unfair, also signal potential future challenges to the restricted approach the courts have taken hitherto in judicial reviews based on systemic illegality in access to justice.<sup>254</sup> His recognition of how employment rights aim to protect the party with weaker bargaining power,<sup>255</sup>

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<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-ministry-of-justice/oral/72183.html> (accessed 8 December 2017). See too Dominic Raab’s comments to a fringe meeting at the Conservative Party conference in October: see <https://www.lawgazette.co.uk/news/conservatives-raab-stands-by-court-fees-after-tribunal-humiliation/5063072.article> (accessed 7 December 2012)

<sup>252</sup> *Jhuti v Royal Mail Group*, UKEAT/0061/17/RN (31 July 2017), declining to follow *Johnson v Edwardian International Hotels*, UKEAT/0588/07 (2 May 2008).

<sup>253</sup> *Ibid.* especially paras 26-28.

<sup>254</sup> For recent examples see *R (IS) v Director of Legal of Legal Aid Casework* [2016] 1 WLR 4733, *R (Howard League) v Lord Chancellor* [2017] 1 WLR 2093 at paras 48-49. In *Howard League*, for example, the CA cited exactly the cases relied on by the Lord Chancellor in its Case (n. 185).

<sup>255</sup> *UNISON*, n.1, para. 72.

confirming what the SC said in *Autoclenz*,<sup>256</sup> may spill over into other, substantive areas of employment law.<sup>257</sup>

Second, *UNISON* provides a powerful normative lens through which to scrutinise the practical realisation of employment and other social rights. While the limitations of legal doctrine and constitutional law preclude *UNISON* stretching to redress all kinds of practical impediments to enforcing employment rights, its normative claims are not so restricted. Writing in 1975, E. P. Thompson described the rule of law as an ‘unqualified human good’ with its own internal logic, based on universality and equity, which meant it in fact often operated to impose effective and non-arbitrary constraints on the exercise of power.<sup>258</sup> The conception of the rule of law in *UNISON* extends into new normative territory, beyond a negative constraint on administrative or private action. Where the delivery of social rights is left exclusively in the hands of individual claimants, impediments to effective legal claims or remedies risk failing citizens simultaneously in three capacities: as individual right-holders, as addressees of the laws, and as authors of the laws which led to those rights.

If this seems obvious now, it took the SC to spell it out to a Government which might as well be speaking a different language. From the Government’s viewpoint, court users are participants in a surrogate market, purchasing a service for their private self-interest, whereas for the SC claimants are exercising a fundamental constitutional right and are the means of delivering the public goods on which a democracy depends. There is no means of reconciling these incommensurable visions, and the conflict between them extends far deeper than the legal arena. But for the moment *UNISON* is an important triumph of a revitalised rule of law over the increased commodification of legal ‘services’ in ersatz markets, and a reminder that the coordination of social action by law necessarily embodies claims to legitimacy which are not reducible to the language of economics. If you want to see the exemplar of Lord Reed’s claim that ‘access to the courts is not...only of value to the particular individuals involved’<sup>259</sup> it is the *UNISON* case itself: its effects on access to justice and the practical achievement of social rights reach far beyond the members of the union which fought the case, embracing workers in general, especially the low-paid or those claiming low amounts, and extending into other areas of privatised social justice.

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<sup>256</sup> [2011] ICR 1157, per Lord Clarke at paras 34-35.

<sup>257</sup> See A. Bogg, ‘The Common Law Constitution at Work: R (UNISON) v Lord Chancellor’ (*Modern Law Review*, forthcoming).

<sup>258</sup> E. P. Thompson, *Whigs and Hunters*, (London: Penguin, 1990), 258-269.

<sup>259</sup> *UNISON*, n. 1, para. 69.

