

# VEXATIOUS CLAIMS

## CHALLENGING THE CASE FOR EMPLOYMENT TRIBUNAL FEES

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### ONLINE APPENDIX

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This Appendix sets out the detailed methodology underlying our arguments, and provides additional background analysis and worked examples. Our data and .do files can be downloaded from [www.abiadams.com/research/tribunalfees](http://www.abiadams.com/research/tribunalfees).

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## (1) DATA SOURCES & METHODOLOGY

Two sources underlie the statistics and quantitative results quoted in the paper.

### A) TRIBUNAL AND GENDER RECOGNITION CERTIFICATE STATISTICS QUARTERLY

The Tribunal and Gender Recognition Certificate Statistics Quarterly ('TSQ') is an official data source based on the information collected by Her Majesty's Courts and Tribunals Service ('HMCTS') in the course of administering the tribunal system. The raw data underlying our analysis, from the April to June 2015 tables, can be found at: <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2015>. For interested readers, complaint disposals by outcome are reproduced in Table A1.

**Table A1: Complaint Disposals by Outcome, 2007/08-2014/15<sup>1</sup>**

	Struck Out	Dismissed	Unsuccess. at Hearing	Success at Hearing	Success by Default	ACAS (Settled)	Withdrawn (incl. Private Settlement)
2007/08	11%	2%	7%	13%	4%	29%	33%
2008/09	7%	2%	8%	13%	4%	32%	33%
2009/10	9%	2%	6%	13%	7%	31%	32%
2010/11	11%	2%	7%	12%	6%	29%	32%
2011/12	13%	2%	7%	12%	6%	33%	27%
2012/13	12%	3%	7%	11%	6%	33%	28%
2013/14	8%	7%	5%	7%	3%	21%	48%
2014/15	67%	4%	2%	3%	1%	8%	16%

### B) SURVEY OF EMPLOYMENT TRIBUNAL APPLICATIONS 2013

The *Sixth Periodic Survey of Employment Tribunal Applications (SETA) 2013* was commissioned by the Department for Business, Innovation and Skills (BIS), ACAS, the Ministry of Justice, and HM Courts and Tribunals Service and carried out by TNS BMRB, an independent social research company. The survey is representative of single claims disposed of between 3 January 2012 and 4 January 2013 in Great Britain. We use the responses of the 1,988 claimants interviewed. We do not use the responses from the interviews with employers given our focus on claimant outcomes. Claimant responses are weighted using the analytic weights provided with the survey in order to correct for unequal probability of selection from the sample frame and for the biases caused by differences in the response rate of claimants with different observable characteristics. A full description of the sample design and weighting procedure can be found in the Technical Report published by BIS.<sup>2</sup>

<sup>1</sup> HMCTS, Tribunal and gender recognition certificate statistics quarterly: April to June 2015, Main Tables, Table 2.3.

<sup>2</sup> Department for Business, Innovation and Skills, *Technical Report: Sixth Periodic Survey of Employment Tribunal Applications 2013* (2014).

## (2) TECHNICAL RESULTS

### A) COST AWARDS

To estimate the percentage of unsuccessful claims at hearing that result in costs being awarded to the employer, we have to assume that outcomes are independent of:

- 1) How many complaints are associated with a case. This allows us to estimate the number of cases that were unsuccessful at a tribunal hearing (i.e. that were decided in favour of an employer) as:

$$\# \text{ Unsuccessful Cases} = \frac{\# \text{ Complaints} * \% \text{ Unsuccessful at hearing}}{\text{Average Complaints per Case}}$$

- 2) Whether a case involves a single claimant or multiple claimants. This allows us to estimate the number of claims that were unsuccessful at a tribunal hearing as:

$$\# \text{ Unsuccessful Claims} = \# \text{ Unsuccessful Cases} * (p + (1-p) * \text{Average Claims per Multiple Case}),$$

where  $p$  is the proportion of single claimant cases.

Costs awards as a proportion of claims that were unsuccessful at tribunal are then calculated as:

$$\% \text{ Unsuccessful Claims with Cost Awards} = \frac{\# \text{ Costs Awarded to Employer}}{\# \text{ Unsuccessful Claims}}$$

Table A2 gives the results of this calculation. We were unable to complete this calculation in 2007/08 and 2008/09 as the average number of claims per multiple claim is not provided for these years.

**Table A2: Costs Awarded to Employer, 2007/08-2012/13**

	<b>Number of awards made</b>	<b>As a % of all claims</b>	<b>As a % of claims not successful at hearing</b>
2007/08	327	0.4%	-
2008/09	272	0.3%	-
2009/10	323	0.3%	2.9%
2010/11	355	0.3%	2.3%
2011/12	494	0.4%	3.8%
2012/13 <sup>3</sup>	522	0.4%	4.0%

<sup>3</sup> Two figures are given for 2011/12 (as they are in the official statistics) due to the distorting effect of a multiple claimant case in which 800 claimants were each ordered to pay £5 in costs to the employer. Our first figure records this as one payment of £4000, while the starred figure treats this as 800 separate payments of £5.

## B) CALCULATION OF EXPECTED RETURNS

Figure 3 in the main text depicts the distribution of expected returns for successful wage and unfair dismissal claims recorded in the SETA data set given the fee regime. Building on the simplified model set out in Section III, claimants' expected payoff at tribunal can be expressed as:

$$\begin{aligned}
 \text{Expected Payoff} = & \quad \text{Probability Successful} * \text{Probability Award Paid} * (\text{Award} - \text{Time Cost}) \\
 & + \quad \text{Probability Successful} * \text{Probability Not Award Paid} * (-\text{Fee} - \text{Time Cost}) \\
 & + \quad \text{Probability Not Successful} * (-\text{Fee} - \text{Time Cost})
 \end{aligned}$$

Formally, the expected return at the  $i^{\text{th}}$  percentile of the award distribution for a case with jurisdiction  $j \in \{\text{Wages Act, Unfair Dismissal}\}$  is defined as:

$$\text{Expected return}_{ij} = p_{wj} p_{pj}(B_{ij} - C_j) + p_{wj} (1 - p_{pj})(-C_j - F_j) + (1 - p_{wj})(-C_j - F_j)$$

Where:  $B_{ij}$  is the monetary award at the  $i^{\text{th}}$  percentile of the award distribution for case type  $j$ ;  $C_j$  is the time cost, and  $F_j$  is the total fee, associated with bringing a case of type  $j$  to tribunal;  $p_{wj}$  and  $p_{pj}$  are the probabilities of winning a case of type  $j$  and receiving full payment respectively.

To construct Figure 3, we started with the distribution of monetary awards from the sample of claims that won at hearing, won by default, or that settled. We used both hearing and settlement claims due to the small sample size and due to the fact that one cannot reject equality of distribution of settlement and tribunal awards at conventional significance levels in the SETA 2013 data (see next section). As a proxy for time costs, we took the median number of days spent on a case and value this at the minimum wage rate in 2012,<sup>4</sup> assuming 7.5 hours worked per day. The fees levied are the sum of the issue and hearing fees.<sup>5</sup> The probabilities of payment were taken from BIS research on the enforcement of tribunal awards.<sup>6</sup> Two different scenarios for the probability of winning were considered: one in which the probability of success is assumed to be equivalent to the estimated probability that a case of type  $j$  wins at a hearing, wins by default, or is settled; the other assumes an optimistic assessment of one's chances of success, with  $p_{wj}=0.9$ .

**Table A3: Costs and Probabilities To Calculate Expected Return**

	<b>Unfair Dismissal</b>	<b>Discrimination</b>	<b>Wages Act</b>
$C$	£340	£580	£139
$F$	£1,200	£1,200	£390
$p_p$	0.73	0.73	0.56
$p_w$ (optimistic)	0.90	0.90	0.90
$p_w$ (from the data)	0.61	0.64	0.80

<sup>4</sup> The National Minimum Wage Rate was £6.19 in 2012 for those aged 21 years and above. See <https://www.gov.uk/national-minimum-wage-rates>

<sup>5</sup> See Table 1 for the full schedule of fees levied.

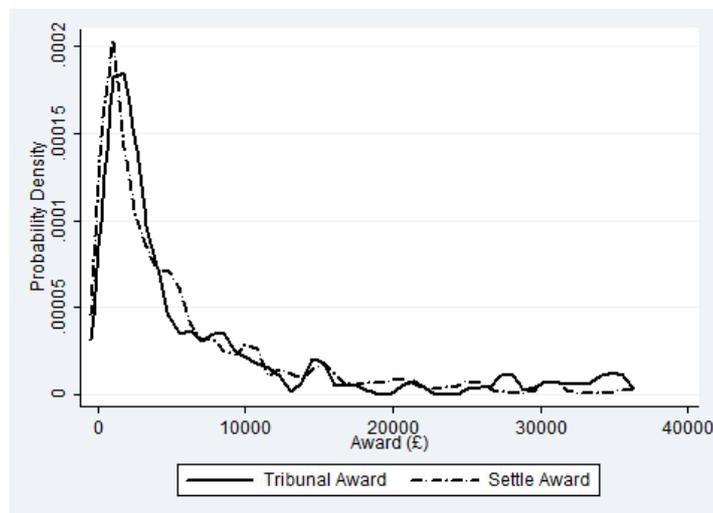
<sup>6</sup> Department for Business, Innovation and Skills, *The Payment of Tribunal Awards: 2013 Study*, Table 5.4, 30.

### (3) ADDITIONAL ANALYSIS

#### A) SETTLEMENT OF VEXATIOUS CLAIMS

There is little quantitative evidence for the oft-touted assertion that employers settle a significant number of vexatious claims for fear of cost or negative publicity: in this scenario, we would expect a large portion of settlement offers to be significantly lower than those awarded in a tribunal.<sup>7</sup> Figure A1 shows the distribution of monetary payments made to claimants at tribunal hearings and to those who settle; we cannot reject the hypothesis that the distributions are the same at conventional statistical significance levels.<sup>8</sup> It is thus highly unlikely that many settlement offers are made simply to placate vexatious claimants given that the pattern of settlement values closely tracks that of tribunal awards.

**Figure A1. Distribution of Settlement Payments and Tribunal Awards**



Source: Authors' calculations using weighted claimant responses from Survey of Employment Tribunal Applications 2013. Kernel density estimates were obtained using the Epanechnikov kernel with a bandwidth of £550.

<sup>7</sup> Note that settlement values might be lower for reasons besides placating vexatious claimants, which we are unable to control for. Claimants might be prepared to settle less than they expect to win at a hearing as doing so saves them time and the costs associated with pursuing a claim. Further, claimants who settle might be relatively risk averse again generating a tendency to lower settlement values.

<sup>8</sup> Kolmogorov Smirnov tests confirm that equality of distribution cannot be rejected at the 5% significance level.

## B) THE DETERRENCE EFFECT OF FEES

The missing deterrence effect on vexatious claims is in line with survey evidence. SETA 2013 asked claimants whether they would have persevered with their claim in the face of a £250 fee.<sup>9</sup> Their answers suggested that weak claims (claims struck out, dismissed, or unsuccessful at tribunal) were no more likely to be deterred by the fees than successful claims. Figure A2 shows the percentage of respondents who replied that the fee would have discouraged them, with the 95% confidence interval. Those with strong and weak claims were equally likely to express discouragement, suggesting that fees would have little impact on the overall quality of the claim pool.

**Figure A2: Percentage of Weak and Unsuccessful Complaints Discouraged by Fees with 95% Confidence Interval**



Source: Authors' calculations using weighted claimant responses from SETA 2013.

<sup>9</sup> Those interviewed were not subject to the fee regime.

### C) ADDITIONAL REGRESSION RESULTS

We estimated a series of multivariate logistic regression models to analyse the relationship between the characteristics of claimants, the characteristics of cases, and the likelihood of a claim being deterred by the fee. The results show how strongly a given characteristic is associated with a £250 fee influencing the decision to go to tribunal, controlling for all other factors.

The results of three models are recorded in Table A4. First, we estimate the model on the full sample of claimants. Second, we include the expected monetary payment as an explanatory variable – not all respondents gave an answer to this question, resulting in a fall in the sample size from 1,988 to 1,441. Finally, we restrict the sample to those who reported that they were hoping to achieve either money or their old job back. This excluded those who, for example, were looking for an apology, for justice, or proof that they were right. This captures the group of individuals who were more likely to go to a full tribunal hearing.<sup>10</sup> In all cases, we account for the complex weighting of observations, arising from the complex survey design. This ensures that our significance levels are correct and that the results can be generalised to the population of employment tribunal claimants.

Table A4 reports the *odds ratios* for the models. An odds ratio of *greater* than one implies that a characteristic is associated with an *increased* likelihood of being deterred by the fee. Conversely, an odds ratio of *less* than one implies that a characteristic is associated with *decreased* likelihood of being influenced by the fee. As well as the odds ratios, the star symbols in Table A1 indicate the significance of the effect; i.e. how likely it is that we could have recovered such an effect by chance, if the characteristic in fact did not have any impact on the deterrence effect of the fees.

The results reveal that younger claimants, those on lower incomes, and those pursuing cases under the wages act were most likely to report being influenced by the fee. The subset of claimants who were pursuing the claim for monetary reasons were asked about how much they expected to win in the tribunal. For this subset, lower value claims were more likely to be discouraged than high values, conditional on the merit. Those who had day-to-day representative were less likely to be deterred. Claim outcome is not significantly related to fee impact. Whether women were more or less likely to report being influenced depends upon a respondent's motivation for pursuing a claim. If an individual hoped to get their old job back or money as a result of the case, women were more likely than men to report being negatively affected by the fee.

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<sup>10</sup> SETA Findings, 64.

**Table A4: Characteristics Associated with Fees Influencing the Decision to Go to Tribunal**

	<b>Full Sample</b>	<b>Pursuing Monetary Outcome</b>	<b>Expected Outcome Recorded</b>
<b>Case Jurisdiction</b>			
Unfair Dismissal	0.847 (0.11)	0.870 (0.13)	1.180 (0.27)
Wage Act	2.051*** (0.39)	1.969*** (0.39)	1.441 (0.34)
Discrimination	0.919 (0.13)	0.955 (0.17)	1.598* (0.45)
Redundancy	1.087 (0.28)	1.045 (0.31)	0.959 (0.34)
Other	0.946 (0.16)	0.988 (0.20)	0.815 (0.20)
Breach of Contract	1.000	1.000	
<b>Salary</b>			1.955***
Less than 13,800	2.020*** (0.28)	2.167*** (0.35)	(0.43) 2.232***
13,800 – 20,800	1.842*** (0.24)	2.089*** (0.32)	(0.46) 1.846***
20,000 – 31,000	1.459*** (0.19)	1.888*** (0.30)	(0.40)
Greater than 31,000	1.000	1.000	1.120
<b>Other</b>			(0.24)
Weak Claim	1.071 (0.13)	0.988 (0.15)	0.553*** (0.09)
Day to Day help	0.537*** (0.05)	0.518*** (0.06)	1.577* (0.42)
Less than 24yrs old	1.733*** (0.34)	1.885*** (0.44)	0.702 (0.29)
Over 65yrs old	0.785 (0.21)	0.692 (0.21)	1.096 (0.18)
Woman	1.066 (0.11)	1.260* (0.15)	1.189 (0.27)
Minority	1.234 (0.16)	1.257 (0.21)	0.747*** (0.04)
Expected award <sup>§</sup>			1.180 (0.27)
N	1988	1401	1441

Source: Authors' calculations from SETA 2013.

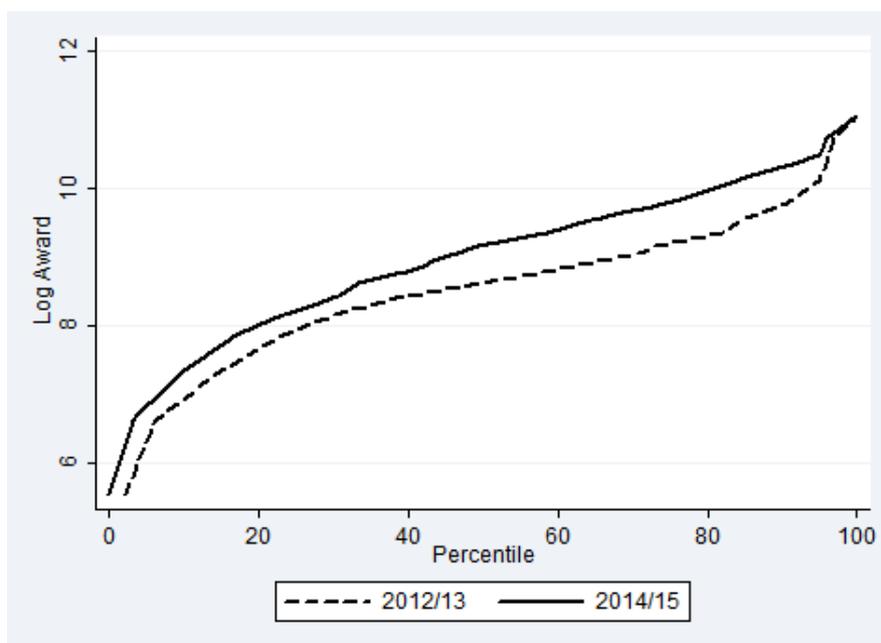
Notes: \* p<0.1, \*\* p<0.05, \*\*\* p<0.01. Exponentiated coefficients (i.e. Odds ratios) reported.

<sup>§</sup> Log value

## D) LOW-VALUE CLAIMS

We here provide further evidence that the fees have hit low-value claims hardest. In Figure A3, we graph the distribution of (the logarithm of) compensation awarded at tribunal for discrimination claims. That the solid line (2014/15 awards) lies above the dashed line (2012/13 awards) at all points shows that a smaller proportion of claims is associated with low values since the introduction of fees. Thus, it is disproportionately low value claims that disappeared between 2012/13 and 2014/14.

**Figure A3: Distribution of Compensation Awarded at Tribunal Hearings: Discrimination Cases, 2012/13 and 2014/15**



Source: Authors' calculations from Tribunal and Gender Recognition Certificate Statistics Quarterly April to June 2015, Employment Tribunal and Employment Appeals Tribunal Tables, Table E.4

#### (4) WORKED EXPECTED VALUE EXAMPLES

To illustrate the use of expect value to model the deterrence effect of fees on vexatious claims, imagine, for example, two unfair dismissal claims equal in every way expect for their merit. One claimant has a strong chance (90%) of winning their case; whereas the other believes her chance of success to be no more than 30%. The award associated with winning,  $B$ , is £4,800;<sup>11</sup> on top of the £1,200 fee, both claimants also face £420 of time and travel costs.<sup>12</sup> In this case, the expected value of the meritorious claim is £2,700, whereas the low merit claim is associated with an expected loss of £180. Fees would thus be expected to deter the low-merit (vexatious) claim, whereas the high merit claimant would proceed on the basis of her expected gain.

In the policy case, it was further claimed that fees might help to encourage settlement. To illustrate the economic argument behind this claim, imagine a claimant and an employer who both estimate their chance of winning at ET at 80%. The award at stake is £1,000 and the claimant and employer face costs of £200 and £250 respectively if the case is pursued to tribunal. Without a fee, a rational risk-neutral claimant will settle for no less than £600, while an employer will settle for no more than £450. Thus, no settlement would be able to occur and the costs of trial must be incurred. However, imposing a £200 fee on the claimant to go to tribunal would, in this example, reduce the settlement acceptable to them to £400, thereby enabling a settlement of between £400 and £450 to be agreed upon and a tribunal hearing to be avoided.

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<sup>11</sup> The median unfair dismissal award value in 2012/13: Employment Tribunal and Employment Appeals Tribunal Annual Tables: January to March 2015, Table E.4.

<sup>12</sup>  $C_w = C_l = £1,620$ . This is based off of an assumption of 9 days spent on an unfair dismissal claim, the median time reported in the Survey of Employment Tribunal Applications 2013 for this case type, valued at the national minimum wage.