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Vexatious Claims: Access to Justice, Judicial Scrutiny, and the Economics of the Rule of Law

Abi Adams & Jeremias Prassl

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Access to justice has been a fundamental principle of our constitution since King John's Magna Carta of 1215. Then came the reign of Chris Grayling. From slashing legal aid to introducing fees for employment tribunals, the Coalition Government's Lord Chancellor brought about the most drastic court reforms in recent memory, turning justice into a consumption good for those who could afford it.

The motivations behind these reforms were said to be grounded in objective, rational economic theory. In times of austerity, users of the finest justice system in the land should pay for the privilege, rather than force taxpayers to bear the burden of their frivolous pursuits. Charging claimants up to £1,200 to go before an employment tribunal would help 'to allocate use of goods or services in a rational way because it prevents waste through excessive or badly targeted consumption.'

The poorest were hardest hit, of course: but this was a price worth paying to weed out vexatious claimants, increase government revenue, and improve the overall efficiency of the system. A dramatic drop in claims was celebrated as evidence, in the words of then BIS minister Matthew Hancock MP, of discouraging the 'tens of thousands of dishonest workers [who] have been squeezing the life out of businesses with bogus employment tribunal claims for discrimination and harassment'.

In a powerful judgment handed down this summer, the Supreme Court fundamentally disagreed, quashing employment tribunal fees as an illegal barrier to justice. Most

importantly, the Justices directly engaged with the Lord Chancellor's underlying economic case – and comprehensively demolished it.

The decision in *Unison v Lord Chancellor* [2017] UKSC 51 draws on ancient legal principles as well as 'elementary economics, and plain common sense' to remind the government of the pillars of our constitution – from access to justice and the value of the rule of law to judicial vigilance in monitoring executive power. 'It may be helpful', Lord Reed suggested, 'to begin by explaining briefly the importance of the rule of law' (at [68]):

> At the heart of the concept of the rule of law is the idea that society is governed by law … Without [access to the courts], 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.

How did we get here? The backstory is reasonably straightforward: since 2013, workers seeking to challenge their employers have had to pay fees of up to £1,200 to bring claims before the employment tribunal – with no guarantee of recovery, even for successful claimants. The charges levied were out of all proportion – both as regards the median value of claims (just under £600 for unpaid wage claims), and in comparison with other areas of civil litigation. Suing a business for unpaid debts of £900 attracts court fees of £60. Going after your employer for the same amount (three weeks' work at the minimum wage) cost £390. A remission system for impecunious claimants was put in place, but with thresholds so low that it was barely used in practice.

The impact was swift and brutal. Within months, claims had fallen by nearly 80 per cent. Low-value cases disappeared completely: most workers simply gave up. Commentators including the Law Society and the Tribunals Judiciary were united in their condemnation of a fees regime which had effectively barred the vast majority of workers from asserting rights explicitly granted to them by Parliament.

It's easy to find juicy rhetoric on the significance of access to justice as a constitutional principle. Magna Carta promised to 'sell to no man … either Justice or Right.' Writing in the early 17th century, Sir Edward Coke explicated the three qualities necessary for there to be such Justice and Right: the justice system, he suggested, must be 'free (because nothing is more iniquitous than saleable justice), full (because justice ought not to limp), and speedy (because delay is in effect a denial)' (quoted at [75]).

At the same time, it's surprisingly difficult to pin down a clear legal definition of this seemingly universal principle. In earlier challenges ([2015] EWCA Civ 935), the government had succeeded in arguing that *affordability* was the key criterion: unless it's literally impossible for a claimant to pay the fees, the Court of Appeal agreed, her access to justice has not been denied. Sell your car! Buy some justice!

In the spring 2017 edition of the *Modern Law Review*, we argued that this approach sets the bar unrealistically high – as a matter of legal precedent as well as neoclassical economics. Rational Choice Theory suggests that our actions are fundamentally motivated by their eventual payoffs: multiply the odds of winning with the gains, and subtract the odds of losing

multiplied by the potential losses. There is no point in proceeding if the result is negative. Imagine a claimant who has just been dismissed because her employer has discovered that she is pregnant (a clear-cut case of unfair dismissal). Her chances of success are high – let's say 90 per cent, to be conservative. But even then, she still faces two significant hurdles: upfront fees, and the fact that nearly 50 per cent of claimants struggle to recover what they are owed.

When we plug the Ministry of Justice's own figures into this basic equation, the outcome is astonishing: 20 per cent of *successful* unfair dismissal claimants would expect to *lose money*; the figure goes up to 45 per cent for low-value cases. And it gets worse. Our model thus far is based on risk-neutral *homo economicus* making the decision whether or not to sue. Add in the financial and emotional cost of bringing claims, as well as the fact that most of us are naturally risk-averse, and the fees' deterrent effects become starker yet: even if a claimant *could* afford to pay, it would be an irrational waste of money to go ahead and sue.

The Public Economics tutorial doesn't end there. The judgment moves on to a detailed takedown of the government's broader economic case for introducing tribunal fees. First, the Lord Chancellor's repeated insistence that in raising money for the tribunal system, 'the higher the fee, the more effective it is'. Not quite. In a paragraph which reads more like a mainstream economics textbook than a Supreme Court decision, Lord Reed eloquently introduces the Laffer curve (at [100]):

> the revenue derived from the supply of services is not maximised by maximising the price. In order to obtain the maximum revenue, it is necessary to identify the optimal price, which depends on the price elasticity of demand.

Even when measured against the government's own target, in other words, the fees as introduced make little sense: rather than maximising income, demand was throttled to such an extent that income fell significantly below official predictions.

Second, the assertion that access to justice has no general (public) value. When we first wrote about tribunal fees and highlighted this point, one peer reviewer suggested that the Ministry of Justice couldn't possibly have built their entire impact assessment on so egregiously wrong an assumption. We had to go back to the original consultation documents to double-check, and there, buried in a footnote to the impact assessment, it was:

> 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 these services.

It is true that, as opposed to many a continental jurisdiction, the English justice system is inherently adversarial. It is another matter altogether to suggest that the benefits of litigation are therefore limited to the parties before the court. Decisions create precedent; the common law has developed (however haphazardly) as a result of the vagaries of private litigation. Indeed, as Lord Reed noted, the Lord Chancellor's written case before the Supreme Court alone cited over 60 cases, thus refuting 'the idea that taxpayers derive no benefit from the cases brought by other people' (at [70]).

The public benefits of litigation do not end there: one of the principle purposes of litigation is to act as a deterrent. We live in a world where other enforcement avenues for workers' rights have become marginalised to the extreme: trade union density is at an all-time low, and labour inspection so under-resourced that even an agency supplying HMRC's in-house cleaners has been accused of non-compliance with minimum wage laws. The threat of being taken before a tribunal is the only way of ensuring employment rights are complied with across the board. In the absence of credible enforcement, the Prime Minister's promises to beef up workers' rights, including the recently published Taylor Review of modern employment practices, offer little more than political window dressing. 'An unenforceable right or claim', as the late Lord Bingham reminded us, 'is a thing of little value to anyone.'

Not everyone agrees: Pimlico Plumbers' Charlie Mullins was quick to take to the airwaves to warn of a 'lose–lose situation' as vexatious litigants would return and disincentivise job creation; an editorial in *The Times* similarly warned of the dire consequences for British business. (Mr Mullins has just been granted leave to appeal to the Supreme Court against a finding that one of his workers had been misclassified as an independent contractor.) It is true that the Lord Chancellor's subsidiary goals in introducing tribunal fees included deterring vexatious litigants, and encouraging speedier settlements. Having crunched the government's numbers on employment tribunal claims before and after the 2013 fees, however, we are confident that these claims are empirically wrong.

Fees never deterred the (exceedingly small) proportion of vexatious claims in the system. If anything, their proportion went up: a claimant who is after her day in court may not be concerned by the prospect of losing money. What did happen, however, was that rogue employers could undercut competitors playing by the rules with impunity. Most of the cases deterred were low-value, straightforward claims. Nor did we see faster case settlement. The fee structure incentivised employers to hold out and see whether a worker could actually come up with the required funds.

Ignoring these fundamental economic principles, the fee regime was so badly designed that it just about managed to achieve *the opposite* of each of the Lord Chancellor's stated goals, with fatal consequences: 'Fundamentally, it was because of that failure that the system of fees introduced in 2013 was, from the outset, destined to infringe constitutional rights.' (at [102]). Quashing the fees order might have been an expensive decision for the Ministry of Justice – now forced to repay millions of pounds in illegally levied fees – but its wider value can hardly be overstated: employees will once more be able to access the 'easily accessible, speedy, informal and inexpensive' tribunal system envisaged by the Donovan Commission in 1968.

Incentives Matter. On access to justice, *Unison* should reverberate far beyond employment law. Its endorsement of rational choice theory as a constitutional yardstick will have important implications for those seeking to challenge the remaining elements of Grayling's wide-reaching (and often similarly disastrous) reforms to our civil justice system.

The Supreme Court's decision, finally, is not only remarkable for its clear and persuasive result – but also for the route which the Justices took to get there: the fees order was explicitly

found to be *unlawful under English law*. The UK constitution is by no means alone in recognising access to justice as a fundamental right. Nearly identical principles enshrined in the European Convention of Human Rights as well as EU law, however, are merely discussed as a brief afterthought. At first glance, this is a curious choice. Both systems offer a number of potential advantages over common law review: EU law is effective even against otherwise supreme acts of Parliament (David Davis is an expert on point); the Human Rights Act sets out clear review grounds and procedures.

In this regard, *Unison* may well turn out to be a much more important Brexit case than the much-vaunted *Miller* litigation. By grounding their review of executive action in the unassailable foundations of domestic constitutional law across the centuries (Magna Carta, Coke's *Institutes*, Blackstone's *Commentaries*, and so forth), the Justices are sending a clear message to the executive: fundamental rights will be protected even in a world without EU law and the European Convention.

Drawing on a series of classic common law cases, the Supreme Court reminds the government that it cannot rely on executive powers of subordinate legislation to cut down or undermine fundamental constitutional rights (at [82], quoting *Daly* [2001] UKHL 26):

> Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment.

Constitutional lawyers have long argued about the extent to which this 'principle of legality' (similarly instrumental in *Miller*) can act as a meaningful restraint on executive power. Under normal circumstances, the government of the day would be able to rely on its whips to insulate controversial policy choices against domestic judicial scrutiny: simply enact them as primary legislation. As a matter of orthodox constitutional law, even the Supreme Court cannot overturn an Act of Parliament.

But ours are not usual constitutional times. Theresa May's minority government cannot necessarily count on the numbers required to ensure safe passage of controversial legislation through the House of Commons. It is no surprise, then, that the recently introduced European Union (Withdrawal) Bill contains a large number of so-called 'Henry VIII clauses', allowing the executive to amend or even repeal Acts of Parliament without full legislative scrutiny.

This is why the Supreme Court's endorsement of the common law principle of legality is such an important constitutional shot across the government's bow. *Unison* serves as an unequivocal reminder that governmental power cannot escape scrutiny altogether. Ministers might have a choice whether to propose primary legislation, or rely on delegated powers – but at some point, controversial decisions must be accounted for, be it politically (before Parliament) or legally (before the Courts).

Expect to see a flurry of executive action as the executive begins to 'take back control' in the run-up to Brexit day. In tinkering with over forty-five years' worth of European and domestic legislation, there's a good chance that at least some citizens' rights might be curtailed in the process. The Justices will be watching.

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