Institution: University of Oxford

Unit of Assessment: 18 - Law

Title of case study: Abolishing Employment Tribunal Fees.

Period when the underpinning research was undertaken: 2014 - 2020

Details of staff conducting the underpinning research from the submitting unit:

Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Jeremias Adams-Prassl (né Prassl)	Research Fellow at St. John's College Professor of Law	1 October 2011 - 2014 1 October 2014 - Present

Period when the claimed impact occurred: 2017 – 31 July 2020

Is this case study continued from a case study submitted in 2014? N

1. Summary of the impact (indicative maximum 100 words)

Research undertaken by Professor Jeremias Adams-Prassl (henceforth Prassl) and his co-author, economist Professor Abi Adams-Prassl (henceforth Adams) of the University of Oxford Faculty of Law, was instrumental in the decision by the UK Supreme Court, in July 2017, to declare employment tribunal fees introduced by the UK government in 2013 to be unlawful and unconstitutional. Prassl's legal argument, that the fees were unlawful under both domestic and European Union (EU) law, became the focal point of the legal argument presented by UNISON in its case against the UK Government. Tribunal fees were abolished with immediate effect, affecting many thousands of potential claimants who had been deterred from bringing their cases before the courts. By September 2019, the Ministry of Justice had refunded more than GBP18,000,000 in illegally levied fees.

2. Underpinning research (indicative maximum 500 words)

As an expert in EU and English constitutional and public law, Professor Prassl was in a unique position to challenge the imposition of tribunal fees. His work on 'atypical employment', - so-called flexible working arrangements such as zero hours contracts, aimed to better understand the implications of these casual work arrangements on workers' rights and welfare. Working with Economist Abi Adams, this project sought to better understand the relationship between the economic classification of employment relationships and the categories typically identified under employment law **[R1]**. It also explored how inherently open-ended concepts such as access to justice and the rule of law could be distilled into a concrete standard of judicial review.

To address this question, Professor Prassl and co-author, economist Professor Adams, undertook a systematic content analysis of employment tribunal cases to elicit the empirical and economic reality of legal tests of employment status. The researchers identified a sharp and persistent fall in the number of employment tribunal cases from late Spring 2013, following the introduction of claimant fees in March 2013. Together, they set out to examine the extent of the adverse economic incentives created by the introduction of claimant fees and whether these could constitute a barrier to justice in the context of UK and EU law. In order to address this question, they had to develop an entirely novel interdisciplinary approach, combining constitutional legal principles with economic theory and statistical analysis.

Given a long background in analysing both the impact of austerity on justice system reforms at the domestic **[R2]** and European **[R3]** level, as well as extensive experience in comparative international analysis of labour market developments for the International Labour Organisation (ILO) **[R4]**, Prassl was able to draw on both European and international law (ECHR) in building a case for access to justice. Specifically, he built the argument that the domestic courts' focus in previous instances on claimant ability to pay the fees was a misguidedly narrow reading of remarkably consistent Luxembourg and Strasbourg jurisprudence on the basis of many decades' worth of decided cases in both courts. This provided a powerful legal analysis of why the Court of Appeal's interpretation of the law was wrong – first, in terms of what 'the essence of the right of access to justice' meant in terms of the EU and ECHR jurisprudence, and second, in terms of the proportionality analysis required to make out the government's case. In particular, Prassl managed to show that three supposedly distinct jurisdictions – the Common Law, the European Union's jurisprudence on the principle of effectiveness, and latterly Article 47 of the Charter of Fundamental Rights, and the European Court of Human Rights (ECtHR) case law on Article 6 of the EHCR – were in fact closely aligned on the question in point, thus adding further weight to the illegality analysis **[R5]**.

Subsequent work has extended this research to develop a general framework for access to justice focusing on systemic risks **[R6]** and has returned to the question of the relationship between economics and legal definitions of employment status and the implications for the organisation of work.

3. References to the research (indicative maximum of six references)

R1: A. Adams and J. Prassl (2015), 'Labour Legislation and Evidence Based Public Policy: A Case Study', in A. Blackman and A. Ludlow *ed. New Frontiers in Empirical Labour Law Research*, Hart Publishing, 2015, pp.161-178. [output type C – available on request]

R2: J. Prassl, '"All in it Together?" Labour Markets in Crisis', *Hungarian Labour Law Journal,* 1 (2014). http://hllj.hu/letolt/2014_1_a/02.pdf [output type D]

R3: J. Prassl, 'Contingent Crises, Permanent Reforms: Rationalising Labour Market Reforms in the EU', *European Labour Law Journal*, 5 (2014). https://doi.org/10.1177/201395251400500303 [output type D]

R4: Ben Jones and Jeremias Prassl, 'United Kingdom' in Minawa Ebisui (ed) *Resolving Individual Labour Disputes, A comparative Overview* (ILO: Geneva, 2016) https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_488469.pdf [output type C]

R5: *A. Adams and J. Prassl, 'Vexatious Claims? Challenging the Case for Employment Tribunal Fees', *Modern Law Review,* (2017), 412-442 and online appendix. https://doi.org/10.1111/1468-2230.12264 [output type D]

R6: A. Adams-Prassl and J. Adams-Prassl (2020), 'Systemic Unfairness, Access to Justice, and Futility: A Framework', *Oxford Journal of Legal Studies,* 40(3) pp 561-590. https://doi.org/10.1093/ojls/gqaa017 [output type D]

* Winner of the Wedderburn Prize for the best paper published in *Modern Law Review* in 2017

4. Details of the impact (indicative maximum 750 words)

In 2013, the UK coalition government introduced fees of up to GBP1,200 on claimants to employment tribunals. Within months, tribunal cases fell by more than half from 11,938 in 2013/14 Q2 (July to September) to 5,454 in 2013/14 Q3, while the number of claimants declined by more than 70% over the same period from 39,660 in 2013/14 Q2 to 10,842 in 2013/14 Q3. The negative impact persisted with a total 18,341 cases over 2013/14 as compared with 60,982 in 2012/13 **[E1a, Main Tables ET_1]**.

The trade union UNISON applied for judicial review of tribunal fees, with the Equality and Human Rights Commission (EHRC) as an "interested party" (i.e. a third party directly affected by a judicial review outcome). UNISON lost twice in the High Court and once in the Court of Appeal, prior to taking the case to the UK Supreme Court (UKSC).

In 2015, UNISON instructed Dinah Rose QC and Karon Monaghon QC to prepare a further challenge against the fees. By this time, Prassl had circulated a draft version of the research on tribunal fees **[R5]** to senior lawyers and members of the judiciary to gather feedback. Prassl, together with Professor Abigail Adams, an University of Oxford Economist, discussed their research findings with Rose, Monaghon and Prof Michael Ford QC, counsel for the EHRC. Ford states that *'the article* **[R4]** *set out a careful and powerful legal analysis of why the Court of Appeal's interpretation of the law was wrong* [and] *it was immediately clear to me that the article* [would be] *very important for the eventual appeal to the Supreme Court. Both Counsel for UNISON and I drew on its analysis for the purpose of our submissions'* **[E4, E8]**. In the run-up to the case, Adams and Prassl had repeated discussions with counsel, and provided detailed feedback on the final documentation submitted to the Supreme Court Justices. Rose, representing UNISON, stated that she was *'greatly assisted by the article* **[R4]***'* in that it presented a legal analysis that supported her key argument **[E2, E9]**.

The Supreme Court

In February 2016, the Supreme Court granted UNISON leave to appeal the Court of Appeal's decision that the fee regime was legal. The 'Vexatious Claims' paper **[R3]** was an important element of the UNISON case, and the only academic piece to be cited as evidence in Court **[E4]**. Rose directly quoted from the paper to advance the argument that the fee regime rendered it irrational for individuals to bring low-value meritorious claims, thereby denying them effective access to justice **[E6, E8]**.

It should be noted that none of the arguments developed in the 'Vexatious Claims' paper **[R5]** had been brought forward in the three previous court hearings. These prior attempts failed, according to one commentator, because *'In the lower courts, no judge had been prepared to leap the slender evidential gap between the aggregate statistics on tribunal claims to the unaffordability of the fees for individual claimants. Since the behavioural pattern might be explained on the basis that claimants were unwilling, as opposed to unable to pay, the principle of effectiveness in EU law was not breached'* **[E3]**. Hence whilst previous legal arguments had focused on the 'principle of effectiveness' in EU law, Prassl's research '*set out a careful and powerful legal analysis of why the Court of Appeal's interpretation of the law was wrong'* by arguing that the Fees were unlawful under both domestic and EU law as they had the effect of preventing access to justice **[R5, E3, E4]**. This argument became a focal point of the legal arguments presented by UNISON **[E2, pp.510-2]**.

The Supreme Court heard the case in March 2017, with counsel and the Justices repeatedly discussing the research by Adams and Prassl. The seven ruling Justices were unanimous in finding the system of tribunal fees illegal, thereby overturning the previous decisions of the High Court and Court of Appeal. The article, states Rose, *'had an influence in persuading the Court to find in our favour'* **[E2]**. Ford is similarly convinced of the importance of the article to the case, stating that *'I have no doubt that the article was a significant influence on the eventual outcome'* adding *'it is interesting to note how significant points raised in the judgment can be traced back to the article. For example, the Supreme Court placed at the forefront of its judgment how the Government had ignored the positive externalities of tribunal claims, a point highlighted in the article; just as Abi and Jeremias had argued, the Court accepted that ability to pay was only one of the relevant factors for the purpose of the right to access to a court in Article 6 of the European Convention; and one part of the judgment, in which Lord Reed explained that fees made it economically irrational for claimants to bring claims for small amounts, echoed very much the arguments in their article'* **[E4]**.

The case has been hailed as a landmark constitutional case. A House of Commons Library Briefing Paper, for example, explicitly highlights the importance of the research: '*the Court was swayed by the argument that fees restricted access to justice when set at levels that, compared to the amounts at stake, made it irrational to bring claims. While not cited in the judgment, the Court had heard argument based on an influential journal article by Oxford academics Abigail Adams and Jeremias Prassl*…' **[E7]**. Lord Reed, quoted in the UK Supreme Court's press release, recited the central argument developed by Adams and Prassl in stating that '*even where fees are affordable, they prevent access to justice where they render it futile or irrational to bring a claim*' **[E5, E10]**. Dave Prentis, general secretary of UNISON interviewed by the BBC after the judgment, stated that *'The government has been acting unlawfully, and has been proved wrong – not just on simple economics, but on constitutional law and basic fairness too*' **[E11a]**.

Extent of Impact

'The effect of the Supreme Court judgment cannot be overstated', said Michael Ford, *'Claims struck out due to fees must be reinstated, and the Government must repay all the fees paid in the past (a bill estimated at more than £30 million). More fundamentally, no longer will claimants to tribunals face a very severe impediment to access to justice: anecdotal evidence already suggests a resurgence in claims since the judgment of the Supreme Court. In the longer term, the judgment is likely to be of enormous constitutional significance in the UK and beyond'* **[E4]**.

Workers no longer face a negative expected payoff from bringing high quality cases. Dave Prentis said after the judgment *'It's a major victory for employees everywhere. Unison took the case on behalf of anyone who's ever been wronged at work, or who might be in future. Unscrupulous employers no longer have the upper hand'* **[E11b]**.

The Supreme Court decision led to a sharp rise in claims to employment tribunals, with cases more than doubling from 4459 in 2017/18 Q1 to 9208 in 2018/19 and the numbers of claimants increasing over the same period from 13766 to 52167. **[E1, Main Tables, ET_1]**. A scheme for employment tribunal fee refunds was launched in October 2017 and by June 2020, a total of over 22,500 refund payments had been made with a total value of GBP18,335,249 **[E1b, Employment Tribunal Refund Tables, EFTR_2]**.

5. Sources to corroborate the impact (indicative maximum of 10 references)

E1. Ministry of Justice:

a) Tribunals statistics quarterly: April to June 2020, (https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2020)

b) Employment Tribunal Refund Tables - https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2020

E2. Letter, Dinah Rose QC (leading counsel for *Unison*)

E3. Bogg, Alan (2018), 'The Common Law Constitution at Work: R (on the application of UNISON) v Lord Chancellor', *The Modern Law Review*

E4. Letter, Michael Ford QC (senior counsel for the Equality and Human Rights Commission)

E5. UK Supreme Court judgement - press summary

E6. Michael Ford QC – 'It's the Common Law wot won it' (July 2017), blog post on website *IER – Institute of Employment Rights.* https://www.ier.org.uk/comments/its-common-law-wot-won-it/

E7. House of Commons Library Briefing Paper (2017), 'Employment Tribunal Fees'. https://commonslibrary.parliament.uk/research-briefings/sn07081/

E8. Written submission to the UK Supreme Court on behalf of the Equality and Human Rights Commission

E9. Video of Dinah Rose discussing article with Lord Neuberger during hearing, see https://www.law.ox.ac.uk/news/2018-07-23-jeremias-prassl-and-abi-adams-win-esrc-outstanding-impact-public-policy-prize

E10. The Times, legal column 'The Brief', 'Tribunal fees 'illegal'' - http://nuk-tnl-deck-email.s3.amazonaws.com/11/bb6b07f0fd4afe38c61f232bbb693fd7.html

E11. Relevant Media

a) BBC News, July 2017, 'Employment tribunal fees unlawful, Supreme Court Rules' - https://www.bbc.co.uk/news/uk-40727400

b) The Financial Times, July 2017, 'UK Supreme Court rules against government and declares tribunal fees illegal' - https://www.ft.com/content/2b053140-1cbf-36d2-ba40-c01842963673

c) The Telegraph, July 2017, 'Government's employment tribunal fees are illegal', Supreme Court rules' - https://www.telegraph.co.uk/news/2017/07/26/governments-employment-tribunal-fees-illegal-supreme-court-rules/

d) Economist Article: https://www.economist.com/britain/2017/03/30/want-to-challenge-your-unfair-dismissal-thatll-be-ps1200