

Impact case study (REF3)

Institution: University of Oxford		
Unit of Assessment: 16 – Economics and Econometrics		
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): Abigail Adams-Prassl (nee Adams)	Role(s) (e.g. job title): Junior Research Fellow, Merton College Associate Professor, Department of Economics (Professor from Oct 2019)	Period(s) employed by submitting HEI: Oct 2013 - Sept 2015 Oct 2016 - Present
Period when the claimed impact occurred: 2016 - 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)		
<p>Research undertaken by Professor Abi Adams-Prassl (henceforth Adams) and her co-author, Professor Jeremias Adams-Prassl (henceforth Prassl) of the 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. Drawing on consumer choice theory and empirical evidence, Professor Adams showed that the introduction of tribunal fees resulted in payoffs, once fees were deducted, that were negative for the majority of successful claimants. The Supreme Court accepted the argument that this represented a powerful barrier to justice in violation of UK and EU law. 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.</p>		
2. Underpinning research (indicative maximum 500 words)		
<p>A focus of research by Professor Adams has been on the nature and consequences of 'atypical employment' - so-called flexible working arrangements such as zero hours contracts. The aim of the research is to better understand why individuals accept casual work arrangements and the implications of these arrangements for their welfare. In 2016 she was awarded an ESRC Future Research Leaders grant for a two year project on Modelling and Measuring Atypical Employment [R6]. A key component of this project involved joint work with colleagues in the Oxford Faculty of Law to better understand the relationship between the economic classification of employment relationships and the categories typically identified under employment law [R1, R2].</p> <p>To address this question, Professor Adams and co-author Professor Jeremias Prassl 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. Professor Adams and her co-author 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 economic theory and statistical analysis with constitutional legal principles.</p>		

Professor Adams' key contribution to this work was to establish the significance of the adverse economic incentives introduced by the fees for employment tribunal claimants. For this purpose, she developed an economic model of rational claimant behaviour in which the decision to submit a claim is determined by the expected pay-off, taking into account all potential costs and benefits [R3, pp. 427-428]. Drawing on a range of data sources, including individual-level data from the Survey of Employment Tribunal Applications (SETA) 2013, she demonstrated that given the relatively low monetary value of most tribunal claims, a high proportion of successful claimants would have received a net negative pay-off with the introduction of claimant fees [R3, p. 428 and Online Appendix, pp. 5-6]. Consequently, it is economically irrational for an individual to pursue a claim, even if it has a high probability of success. Adams and Prassl concluded that "litigants had responded to the fee system in a rational way: low value claims are deterred because the costs imposed by fees are disproportionate in the light of monetary compensation and the likelihood of recovery" [R3, p.419].

Subsequent work has extended this research to develop a general framework for access to justice focusing on systemic risks [R4] 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. [R5, R6].

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

R1: Adams, A., M. Freedland, M. and J. Prassl (2015), 'The Zero Hours Contract', *Giornale di diritto del lavoro e di relazioni industriali*, 529. Also published as an *Oxford Legal Studies Research Paper*, no.11/2015. SSRN: <https://ssrn.com/abstract=2507693> [output type D]

R2: Adams, A. and J. Prassl (2015). 'Labour Legislation and Evidence-Based Public Policy', in A. Blackman and A. Ludlow ed. *New Frontiers in Empirical Labour Law*, Oxford: Bloomsbury (Hart) Publishing. [Available on Request, output type C]

R3: *Adams, A and J. Prassl (2017) 'Vexatious Claims? Challenging the Case for Employment Tribunal Fees' *Modern Law Review* 412-442 and online appendix <https://doi.org/10.1111/1468-2230.12264> [output type D]

R4: Adams-Prassl, A and J. Adams-Prassl (2020), 'Systemic Unfairness, Access to Justice, and Futility: A Framework' *Oxford Journal of Legal Studies*, 40(3), 561-590. <https://doi.org/10.1093/ojls/gqaa017> [output type D]

R5: Adams, A. and J. Prassl (2018) 'Zero Hours Work in the United Kingdom', International Labor Organisation INWORK Report https://www.ilo.org/travail/info/working/WCMS_624965/lang--en/index.htm [output type N]

R6: Adams, A, J. Freedman & J. Prassl (2018) 'Rethinking Legal Taxonomies for the Gig Economy', *Oxford Review of Economic Policy*, 34(3), 475-494. <https://doi.org/10.1093/oxrep/gry006> [output type D]

Abi Adams research was supported by the ESRC Future Research Leaders Research grant 'Modelling and Measuring atypical employment', Oct 2016-Oct 2018. ES/N017099/1, <https://gtr.ukri.org/projects?ref=ES%2FN017099%2F1>

* 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 of 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 Monaghan QC to prepare a further challenge against the fees. By this time, a draft version of the research by Adams and Prassl [R3] on tribunal fees had been circulated to senior lawyers for feedback and Adams and Prassl discussed their research findings with Rose, Monaghan and Prof Michael Ford QC, EHRC’s counsel. Ford states that *‘it was immediately clear to me that the article [R3] was 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’* [R3] in that it presented an economic 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 Adams-Prassl 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 [R3] 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 Adams-Prassl paper [R3] 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]. The important contribution of the economic analysis undertaken by Adams was to provide the evidential basis for the argument that the fees restricted access to justice when set at levels that compared to the amounts at stake because this made it irrational to bring claims. This argument was highlighted in a series of hypothetical examples referred to by Lord Reed, Justice of the Supreme Court, in presenting the UKSC’s judgment [E7, pp.61-2].

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. Lord Reed specifically commented in his judgment on the lack of basic economic literacy in the Government's position' [E2]. Ford is similarly convinced of the importance of the article to the case, stating '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].

International Labour Organisation (ILO)

In the autumn of 2016, Adams and Prassl were invited to present their research and lead a discussion on claim enforcement at the UN's International Labour Organisation (ILO) in Geneva. Following this engagement, they were commissioned to produce a summary report on the

empirical evidence on the prevalence of, and working conditions under zero hours contracts, including the enforcement of labour rights [R6].

Professor Abi Adams received the 2018 ESRC Celebrating Impact Prize for Outstanding Impact in Public Policy for her research on the incentive effects of employment tribunal fees [E12].

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*, 81(3), 509-538.

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>

E12 - UKRI website – Research Led to Supreme Court ruling on removal of employment tribunal fees (June 2018) - <https://esrc.ukri.org/news-events-and-publications/impact-case-studies/research-led-to-supreme-court-ruling-on-removal-of-employment-tribunal-fees/>