

SUPREME COURT RULES TRIBUNAL FEES UNLAWFUL



Last Wednesday, the Supreme Court ruled that The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 SI 2013/1893 ('Fees Order') is unlawful under both domestic and EU law because it has the effect of preventing access to justice. Consequently, the Supreme Court has ruled that the Fees Order must be rescinded with immediate effect. All fees paid between 29 July 2013 (when they were introduced) and 26 July 2017 (when they were declared unlawful) will have to be refunded, at an estimated cost of £27 million.

Background to the Fees Order

On 29 June 2013, the Government introduced the Fees Order to require payment of a fee to bring a claim in the Employment Tribunal (ET) or the Employment Appeal Tribunal (EAT).

The Fees Order requires an issue fee to be paid when a claim form is presented to an ET, and a hearing fee prior to the hearing of the claim. The amounts depend on whether the claim is brought by a single claimant or a group, and whether the claim is classified as "type A" (generally require little work and have short hearings) or "type B" (includes unfair dismissal, equal pay and discrimination claims). For a single claimant, the fees total £390 for a type A claim and £1200 for a type B claim.

The Fees Order also makes provision for the full or partial remission of fees if a claimant's disposable capital, together with their partner's, is below a specified amount (in most cases, £3,000). A claim or appeal must be rejected unless it is accompanied by a fee or a remission application.

The stated aims of the Fees Order are to transfer part of the cost burden of the tribunals from taxpayers to users of their services, to deter unmeritorious claims, and to encourage earlier settlement.

Application for judicial review of the Fees Order

Shortly after the Fees Order was introduced, the trade union firm, UNISON, instigated proceedings for judicial review, arguing that the making of the Fees Order was not a lawful exercise of the Lord Chancellor's statutory powers and that the prescribed fees interfere unjustifiably with the right of access to justice under both the common law and EU law, frustrate the operation of Parliamentary legislation granting employment rights and discriminate unlawfully against women and other protected groups.

However, UNISON were unsuccessful in their arguments before both the High Court and the Court of Appeal. Despite evidence showing a sharp decline in the number of employment claims being brought after imposition of the Fees Order, both courts found that there was insufficient evidence that claimants had been deterred from bringing claims purely because of the introduction of fees.

What happens now?

Apart from the immediate revocation of the Fees Order and the Lord Chancellor's undertaking to repay any fees paid between 2013 and today's date, next steps are currently unclear.

In the short to medium term, the Government is likely to consult again about a new fees regime, perhaps with fees at a lower level or requiring employers to pay a fee when they lodge their ET3.

Following the decision, we expect that the Employment Tribunals Service will now be looking at how to rewrite the employment tribunal rules of procedure and how to reconfigure the online system to remove all mention of fees and the remission regime.

A greater impact on the Retail & Consumer sector?

It is expected that the Retail and Consumer sector will be hit most by this news given that:

1. it continues to be the UK's largest private sector employer, responsible for 2.9 million jobs;
2. the majority of its workers (some 1.7 million) earn close to the National Minimum Wage, and so would have found it more difficult than workers in other sectors to pay the tribunal fees - indeed, the difference between average weekly earnings across the sectors is illustrated by the recent ONS survey which reported that in May 2017, the average weekly wage earned by a retail worker was just £351, compared to £577 in the construction sector and £622 in the financial services sector; and
3. this sector has experienced ever reducing profit margins, such that retailers have had to look constantly at ways to reduce costs through streamlining and automating processes, reducing headcount and/or looking at more innovative ways of working, such as increasing the number of people on zero hour contracts. Arguably, this has, in turn, created a disgruntled workforce but one that, since the fees were introduced on 29 July 2013, could not afford to bring a claim.

So what will the future hold? Will we now see an increase in claims being brought from retail sector employees, particularly female employees and those with a disability who the Supreme Court has said have been prevented more than most from bringing a claim? Will we see a different type of claim being brought than the ones we have seen over recent years - perhaps more lower value claims again and those where individuals are not looking for compensation but, instead, want their job back or a declaration?

Whatever happens, one thing is for sure and that is the tribunal system is going to have to adapt, pretty quickly, to deal with the increase in claims. For many years, there has been a commonly held view that the ET system has been under resourced and underfunded. That was frustrating at times, but generally fine, when the number of claims was dropping. But with an inevitable increase in claims over coming weeks and months, the government is going to have to find some extra money (in addition to the £27 million it needs to find to pay back all of the ET fees) to bolster the resources it needs to process and hear the cases. A busy summer lies ahead.

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