

EMPLOYMENT LAW REFORM

2013

THE FEES REGIME IN PRACTICE

By Natasha Sethi

As part of an ongoing major overhaul to the Employment Tribunal system, this summer heralded the introduction of fees for bringing claims to an Employment Tribunal and appeals to the Employment Appeals Tribunal. Whilst employers have largely supported the government's initiative, it has been met with opposition from trade unions and employment lawyers who argue that the new regime will undermine rights conferred on employees under EU law and that it will lead to indirect discrimination against women. The enabling instrument, the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/4893 came into force on 29th July and has recently been the subject of a judicial review hearing initiated by the trade union Unison.

BACKGROUND

Following a consultation exercise launched in 2011, last year the government announced one of a number of controversial proposals to reform employment tribunal litigation, namely, the charging of fees for bringing a claim in the Employment Tribunal. This proposal formed part of wider reforms not only to encourage early resolution of workplace disputes but also to simplify the tribunal process.

The position prior to 29th July was that claimants were not required to pay a fee to present a tribunal claim. The government has, however, been concerned that this places a burden on the taxpayer. In the financial year 2010/11, 218,000 tribunal claims were presented and 2,048 appeals were made to the EAT, costing the taxpayer £84.2 million. The aim of the new rules is relieve the

financial burden on the taxpayer by transferring from them some of the cost of running the tribunal system to those who use the system.

The new rules on fees bring Employment Tribunal more in line with civil courts where claimants are required to pay an issue fee. A Ministry of Justice Q & A, published at the same time as the draft Order, addresses some of the key aspects of the new regime.

The government has already made a number of changes to employment law, including, with effect from April last year, increasing the qualifying period for unfair dismissal from one to two years. In addition to the introduction of a fee structure, there are various other changes on the horizon including early conciliation, changes to unfair dismissal compensation and new financial penalties.

THE FEE STRUCTURE

The person presenting the claim or seeking an Order initially pays the fee. Fee levels are based upon the average cost of a claim which can depend on the nature of the case, the stage in the proceedings and for multiple claims, the number of claimants. There are two categories of claim which attract different fees and fees are potentially payable at two different stages. The first is paid upon issue of the claim. The second, the hearing fee, is payable on the basis that the claim is not settled, withdrawn or otherwise dismissed, four to six weeks prior to the hearing.

Lower value claims will fall into “Type A” claims and attract Level 1 fees. Level 1 fees are generally payable for claims for sums due on termination of employment, e.g. they include claims for unpaid wages, holiday pay, payment in lieu of notice and redundancy payments. It is noteworthy that it is cheaper to bring a wages claim in the County court if the claim is under £3,000 than in an Employment Tribunal. The issue fee in the Tribunal for these types of claims is £160 and the hearing fee is £230. The claims to which these fees apply are set out in Table 2 of Schedule 2 of the fees Order.

Claims for unfair dismissal are “Type B” claims, alongside discrimination, detriment and equal pay claims, as well as whistleblowing. These cases are considered to be more complex and attract level 2 fees. The issue fee for such claims is £250; the hearing fee £950. The above fees are payable on the assumption

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that there is just one claimant and that both claim and hearing fees are paid.

For multiple claims the issue fee and hearing fees will be higher, depending on the number of claimants in the multiple claim. For example for Level 1 cases, the issue fee for 2-10 claimants is a single payment of £320 (twice the single fee) and for over 200 claimants, the fee is six times the normal fee.

Additional fees apply to specific applications to the tribunal. For example, for an application for a review in relation to a level 1 case, the fee is £100. Claims that straddle both types (eg. a claim for unfair dismissal and unpaid wages) attracts only one fee but will be at the higher level. However, no separate fee will be charged for seeking written reasons for a tribunal's decision. Preliminary hearings do not attract a hearing fee.

Other key features of the new system are:

As regards EAT fees, there is a £400 issue fee and a £1,200 hearing fee. Fees can be paid online or by post but if fees are unpaid, the claim will not be allowed to proceed. Since the end of July, mediation by a judge has cost £600, a fee payable by the employer. The tribunal now has the power to order the unsuccessful party to reimburse fees paid by the successful party.

Concerns have been raised that the introduction of fees denies workers basic access to justice and Brendan Barber, the TUC general secretary has commented that the new rules on fees “will effectively prevent the poorest and most vulnerable workers from ever being able to get justice”. To this end the Ministry of Justice consulted on changes to the remission system, which provides full or part remission to those who cannot afford to pay. This is the same remission system which already exists for court users who pay fees to use the civil court services.

Claimants are entitled to remission if they fall into one of three categories:

- Where they are in receipt of certain benefits (e.g. income support, working tax credit, income based job seeker's allowance or income-related employment and support allowance). The eligible categories of benefits are listed on form T438A.
- Where their gross annual income is below a particular figure. The thresholds are set by the Fees Order according to whether the claimant is single, in a couple and the number of his/her children.

- Where their disposable monthly income is below a particular sum, defined by the Fees Order to mean income after taxes and specified expenses (e.g. rent; child care/maintenance; and cost of living).

Evidence in respect of remission applications can come from a variety of different sources. For instance, a Claimant applying for remission is required to send a letter to the Tribunal from the job centre evidencing that they are in receipt of such benefits. A letter from the job centre will need to be sent each and every time a fee is payable and a Claimant seeks remission. The remission system also depends on whether a person is in a couple or has children or whether they earn below a certain gross annual amount.

THE LEGAL CHALLENGE

On 22nd and 23rd October, the High Court heard Unison's application for judicial review of the lawfulness of the Fees Order. Judgment on the application is yet to be handed down. Lewis J gave permission to bring the claim on all four points contended for by the union. The first two arguments relate to EU law. As regards the first ground, EU law permits domestic law to determine procedural rules governing enforcement of rights derived from EU law, so long as those rules do not make it excessively difficult or virtually impossible to enforce the rights. This is known as the principle of effectiveness, a general principle of EU law. Unison argues that the introduction of fees is unlawful because it is in breach of the principle of effectiveness. This is so, according to Unison, because the Fees Order makes it excessively difficult to exercise rights conferred by Community law. The second point taken is that domestic procedural rules governing enforcement of rights derived from EU law can only be lawful so long as those rules are no less favourable than the rules in place for enforcing rights derived from domestic law, not EU law. The union claims that the fees constitute breach of another general principle of EU law, namely, the principle of equivalence since there is no requirement to pay court fees to vindicate similar rights derived from domestic law. In particular, no fees are payable for most non-employment claims brought in the First-tier Tribunal.

As regards the third ground, it is argued that the equality impact assessment carried out did not fully assess, on the basis of all of the relevant evidence, the potential impact of the changes introduced by the rules. Finally, unison claims that the changes put certain groups, including women, at a disadvantage and that the new fees will, in some cases, be higher than the expected compensation even if a claim is successful, including cases in which claimants are entitled to partial remission. Faced with this prospect, Unison argues, no reasonable person would litigate in order to vindicate his or

her EU rights. The union relies on the government's latest statistics which show a significant drop in individual claims for employment tribunals since fees were introduced. The judgment is expected to be delivered shortly. If Unison succeeds in its application, the government has agreed to repay all fees parties have paid since July.

CONCLUSION

One of the main objectives for the introduction of fees was to deter vexatious claims or, as the government puts it “[to deal] robustly with cases with little or no prospect of success”. The new fee system is to be welcomed by businesses to the extent that it is likely to reduce such vexatious claims, at least initially. It is also likely to have an impact on settlement negotiations. For instance, there may be an inclination on the part of an employer to wait until an issue fee has been paid to assess whether the potential claimant is serious about their claim. Further, the requirement for a hearing fee to be paid 4-6 weeks in advance of the hearing may well encourage claimants to settle early enough for the employer to avoid incurring the usual legal fees in final preparations for the hearing. That being said, it is of course anticipated that most claimants wishing to settle, will demand that the cost of any Tribunal fees are added to any settlement payment.

There may well be less impact on larger value claims (such as discrimination and whistleblowing complaints) since the level of fees is comparatively low compared to the compensation sought.

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