



Repeal of Tribunal Fees...



...what does it mean? This article considers the recent Supreme Court Judgment declaring Tribunal fees unlawful and the implications for employment claims in future.

What were Tribunal Fees?

In 2013, the government introduced tribunal fees as a precondition for individuals being permitted to bring claims before the employment tribunal in the vast majority of cases. Prior to this, it had always been free to pursue a claim in the tribunal.

Claimants were required to pay issue fees of £160 for relatively straightforward "type A" claims such as unlawful deduction from wages, or £250 for more complex "type B" claims such as unfair dismissal, equal pay or discrimination claims. Hearing fees were also payable by Claimants of £230 for type A claims and £950 for type B claims. Additional fees

were payable for appeals to the Employment Appeal Tribunal. Unlike claims before the civil courts, fees were not set in proportion to the value of the claim.

The rationale behind the fees was to transfer the costs burden from the taxpayer to those who used the tribunals, incentivise earlier settlement of disputes and to discourage unmeritorious claims.

Figures produced by the Ministry of Justice show that the number of employment tribunal claims being made reduce by between 60%-70% after the introduction of fees.

The Unison challenge

The trade union Unison challenged the lawfulness of tribunal fees by way of an application for judicial review. Unison argued that the introduction of fees was in breach of EU law, as it denied access to justice for workers with legitimate claims against their employers, and also had a discriminatory effect on protected groups such as women, ethnic minorities and disabled people. It also argued that the government was in breach of the public sector equality duty.

The Unison challenge failed at the High Court and Court of appeal but the union obtained permission to appeal to the Supreme Court.

On 26 July 2017, the Supreme Court held that tribunal fees (at least in their current guise) were unlawful. It held that tribunal fees were set at a prohibitively high level which:

- Effectively prevented access to justice
- Was indirectly discriminatory under section 19 of the Equality Act 2010
- Was ultra vires (i.e. beyond the scope of the government's powers), as it frustrated the operation of Parliamentary legislation granting employment rights
- Was contrary to EU law as it imposed disproportionate limitations on the exercise of EU-derived rights

Implications of Supreme Court judgment

As a result of the Supreme Court's judgment:

- Tribunal fees are no longer payable for claims, with immediate effect; and
- All fees paid since 29 July 2013 must be reimbursed by the government.

The government is to put in place systems for reimbursing all fees paid to date, but we do not yet know how that will operate. In particular, it is unclear how the government will deal with cases where fees initially paid by a claimant were subsequently reimbursed by the respondent, whether pursuant to a tribunal Order or under a settlement agreement.

The number of employment claims being brought against employers is expected to rise significantly following the Supreme Court judgment. However, it is not expected that the number of claims being made will return to pre-fees levels due to the effect of mandatory ACAS Early Conciliation.

It remains to be seen whether the government will introduce a replacement fee regime. A different system with lower, more proportionate fees is likely to be lawful, but given the government's priority to achieve Brexit, it may be that a replacement fee system is not put in place for some time.

There is likely to be a high number of applications for permission to serve employment tribunal claims out of time in respect of individuals who were prevented from bringing a claim because they could not afford the fee, and also from individuals whose claims were struck out due to non-payment of the fee. It is unclear yet whether such claims will be accepted.

The Ministry of Justice and HM Courts and Tribunals Service are expected shortly to announce the administrative arrangements for applications for reimbursement of fees and for the reinstatement of claims rejected or dismissed for non-payment of fees.

Guidance for businesses

- It is likely that claims against businesses will increase as the tribunal system will again be free to access.
- Businesses should therefore ensure that they follow good employment practice and have comprehensive policies and procedures in place to mitigate the risk of employment claims being made or, in the event of a claim, there is less risk of that claim being successful.
- Template policies and guidance notes are available for AIG insured businesses at: <https://www.aig.co.uk/myprivateedge>
- Businesses may also wish to review their insurance cover to check whether they have employment practices liability cover.
- Businesses should conduct an audit of any claims against them that were struck out for non-payment of fees since 2013 and ensure that all relevant documents are preserved, in case individuals apply to have their claims reinstated.
- If not already destroyed, businesses should ensure that grievance and disciplinary files from the past 4 years are preserved, in case late claims are made.

This guidance note is not intended to constitute a definitive, up-to-date, or complete statement of the law, nor is any part of it intended to constitute legal advice for any specific situation. You should take specific advice when dealing with specific situations and jurisdictions outside England & Wales.

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