forbessolicitors.

# Tribunal Fees Abolished: Briefing note on the effect of *R (on the application of UNISON) v. Lord Chancellor*

## Introduction

On the 26th July 2017, the Supreme Court gave judgment in the case of *R (on the application of UNISON) v. Lord Chancellor*; confirming that the Employment Tribunal fee regime was unlawful from the outset. This decision fundamentally changes the landscape of Employment Tribunal litigation in the UK, with a potentially significant impact for all Employers.

## Tribunal Fees: Pre 26th July 2017

Tribunal fees were implemented on the 29th July 2013, implementing a 2 stage, 2 tier system which required prospective Claimants to pay a set fee at the institution of their claim. Shortly thereafter (6th April 2014), the early conciliation regime was introduced; which requires Claimants to enter into early conciliation facilitated by ACAS prior to issuing a claim.

The fees were as follows:

Type A Claims – an issue fee of £160, with a hearing fee of £230 (Total amount: £390)

Type B Claims – issue fee of £250, hearing fee £950 (Total amount: £1200)

There was also a fee to enter into judicial mediation; and if a party wished to appeal a decision to the Employment Appeals Tribunal the fee stood at £1600.

Tribunals had the power to order a losing Employer to pay the Claimant's fees at the conclusion of the case (and in most cases, this was ordered): and many settlements also included an amount at least towards the fees paid.

Interestingly, before the Supreme Court the Government could not produce any explanation as to how the fees in question had been arrived at.

3 reasons were given for the implementation of Fees:

1) Fees would transfer the cost burden from taxpayers to those that used the system;

2) A price mechanism could incentivise earlier settlements;

3) Fees could dissuade weak or vexatious claims.

## Tribunal Fees: Impact

Modelling carried out prior to the introduction of fees assumed a decrease in the number of claims of between 1 – 5% for every £100 of fee charged; with a predicted overall reduction in single claims of 8%.

The reality was that over the period fees have been charged, there was an overall decrease of between 66 – 70%. This presented a real argument to say that fees impeded an individual's right of access to justice. Although there has always been a remission system in place, in practice, remission was available in very limited circumstances.

For example, no remission was available if an individual has £3,000 or more in disposable capital: take the example of a pregnant woman being selected for redundancy on a discriminatory basis: if she had received a redundancy payment of more than £3,000 she would be unable to qualify for remission; despite being in potentially a precarious financial situation.

The decrease in claims of course led to a reduction in work for Employment Judges: and many full-time Judges took the opportunity to take early retirement. Therefore, a wealth of experience has gone from the Tribunals system: this will be sorely missed should claims return to their previous levels.

## R (on the application of UNISON) v. Lord Chancellor

This case, brought as a judicial review application by UNISON, represented the culmination of litigation brought by UNISON almost from the outset of the introduction of Tribunal fees. UNISON, of course, had a vested interest since like most trade unions they were paying fees on behalf of their members. Essentially, the argument was based on the fact that the Fee regime unlawfully denied members of the public access to justice: a right enshrined in common law at least since *Magna Carta*.

The Supreme Court agreed; and ruled that the fee regime had been unlawful from the outset. Therefore, fees could never have been lawfully levied.

The immediate effect was twofold:

1) Fees (in their present guise) could no longer be charged a pre-condition of bringing an Employment Tribunal claim;

2) Those individuals who had paid a fee must be refunded that fee.

The Judgment does not say that the levying of fees in and of itself was unlawful; rather that the manner the fee regime was implemented (and arguably the level of the fees) was unlawful. It remains open to Government to implement an alternative fee regime in the future. At the time of writing, no refund scheme has yet been set up.

## Out of time Claims

The vast majority of Employment Tribunal claims have a limitation period of 3 months. However, the Tribunal has always had the ability to accept a claim out of time; subject to certain criteria being met.

For unfair dismissal claims, a claim can be brought out of time if an individual can demonstrate that it was *'not reasonably practicable'* to bring the claim within the normal time limit. For discrimination cases, the Tribunal has a *'just and equitable'* discretion to hear an out of time claim. Discrimination cases have the easier test to pass. In both circumstances, the Claimant must act quickly once they are in a position to bring a claim.

In both situations, the Judge dealing with the issue has a fairly wide discretion, dependent on the issues as presented to them. At this stage, I have been unable to trace a decision where a claim has been allowed to bring a claim out of time due to a lack of financial resources. But this argument is certainly not inconceivable: take our previous example of the pregnant woman in receipt of the redundancy payment and therefore not eligible for remission despite significant financial challenges - can she not say in was *not reasonably practicable* for her to bring a claim due to the Tribunal fee regime? And would it not be *just and equitable* to allow her to claim?

It may be that such arguments are resolved by a series of test cases, where the Tribunal groups together a large number of cases with similar arguments and makes one decision binding on them all (and any future similar arguments). However, the issues here do not lend themselves easily to test cases: firstly, since there will be a large variance in individual financial circumstances; and secondly, appeal courts are very reluctant to interfere with matters falling within an individual Judge's discretion.

## What will happen now?

At this stage, it is difficult to predict. It could be that the Government decide to implement a new fee system; perhaps on a graded basis – dependent on the amount claimed. However, not only will that be logistically difficult; it is practically difficult since some Tribunal claims – which are still important, such as the right to appropriate rest breaks, or the right to a written statement of terms and conditions of employment – carry no financial outcome.

Another option would be to shift more of the burden for fees onto the Employer. However, that is likely to be very unpopular, and I would suggest undesirable from a political perspective.

It may be that the regime continues with no fee at all: as indeed it has existed for the vast majority of time. Time will tell.

It could be that Tribunal Judges are urged to 'sift' out unmeritorious claims prior to the Employer having to file a response. However, this also is difficult: we have a potential skills gap in Judges; and a vast majority of claims are still brought by unrepresented Claimants: meaning that the claims themselves can be hard to determine at an initial stage.

We do already have a system allowing weak claims to be struck out as disclosing no reasonable prospect of success: it may be that this can be used with greater utility – although discrimination cases in particular are very rarely dismissed on these grounds.

## What should you do now?

I would recommend an audit of record keeping for any dismissals within the last 12-18 months certainly: and perhaps before. Remember also to ensure the electronic record remains intact – cases often turn on the contents of an email inbox; or an electronic calendar.

Now would be a good time to revisit processes; and consider whether training on disciplinary and grievance issues, for example, might be timely. I would also suggest that managers are aware of what to do in the event of a call from ACAS regarding early conciliation (which remains in operation).

Finally, I would urge any Employer to carry on as normal. Our experience has not been that internal processes have been relaxed due to the decreased threat of litigation: whilst this decision does make claims more likely, it does not make them easier to win. Put simply: *Keep Calm and Carry On.*

Jonathan Holden, August 2017
Jonathan.holden@forbessolicitors.co.uk
07976 278888