

27 July 2017

Supreme Court rules employment tribunal fees are unlawful - where now?

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The Supreme Court yesterday ruled that employment tribunal fees are unlawful - a landmark judgement which is set to have a significant impact on tribunals and tribunal users.

Introduced in 2013, the Fees Order aimed to balance the cost of the employment tribunal and Employment Appeal Tribunal systems to its users, deter unmeritorious claims, and encourage settlement. Fees ranged between £390 and £1,200, with more complex cases such as discrimination, equal pay and unfair dismissal costing more for claimants because of the time and work involved in hearings.

It had been argued that the Fees Order was not a lawful exercise of the government's statutory powers because the fees interfere unjustifiably with the right of access to justice under both domestic and European law. It was also claimed that they frustrated the operation of Parliamentary legislation granting employment rights, and discriminated unlawfully against women and other protected groups who were more likely to be faced with the higher cost of bringing a discrimination case.

Those arguments had been rejected in lower courts, however, yesterday the Supreme Court unanimously upheld the appeal. The Court noted that the evidence before it showed that the effect of the Fees Order was a dramatic and persistent fall in the number of claims brought, with fees the most frequently cited reason for not submitting a claim.

Commenting on the decision, David Hoey, employment law specialist and partner at leading independent Scottish law firm BTO Solicitors said:

"This is a judgment with massive ramifications. With immediate effect it is understood that the employment tribunal is not accepting payment of fees with hard copy claim forms, and the IT system is being updated to allow claims to be submitted online without payment. It is highly likely that the removal of the fees will encourage more individuals to raise claims.

"One big issue will be what is to happen to those who have paid fees to date. Since the Fees Order had prevented access to justice as soon as it was made, most commentators believe that there will require to be some form of repayment system. The details require to be worked out, but it may be difficult to ascertain how those who paid fees will be identified.

"Other complexities include those whose fees were reimbursed by the respondent in a settlement, and whether the respondent would be able to seek repayment. There is also the potential for those who could not afford to raise a claim to argue that had the fees been set at a more reasonable level, a claim may have been raised, and with a potentially successful outcome. Such claims will be much more difficult.

"It is likely that the government will introduce a new fee system in due course, but the impact of this judgment will continue to affect employers and employees for a number of years to come. This is undoubtedly a complex matter that will have a major impact upon tribunals and tribunal users including claimants and respondents, and all parties affected by the ruling should seek appropriate legal advice if faced with any of the above issues."

