



HR Bulletin

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Employment Tribunal Fees

The most important word in the Supreme Court's ruling on Employment Tribunal fees was 'quashed'. The Court has not asked the Government to think again about the impact that Tribunal fees are having, nor suggested ways in which the scheme can be improved. Rather, the Court has ruled that the Order introducing fees was unlawful from the outset and has struck it down. That means not only that employment tribunal fees are abolished with immediate effect, but that the system operating in the four years prior to the decision was unlawful from the outset. Employment lawyers across the country are still trying to get their head around exactly what that means.

The immediate and obvious consequence is that all those who have paid fees – whether or not their claims were ultimately successful – are due a refund. Tens of thousands of claimants are entitled to their money back and the Ministry of Justice will now be working out a system for identifying who is owed what and making the payment. A complicating factor is the number of employers who will have paid costs to claimants - either as a result of a Tribunal order made when a claim was upheld or as part of a settlement. Where those costs included an element for the fee paid by the claimant, will the employer now be due a refund too? If so, who from?

More complicated still is the position of claimants who had their cases struck out because they didn't pay a fee. This includes those who brought a claim hoping to qualify for remission and whose claim was struck out when their remission application was rejected. It also includes those who, having paid the initial fee to bring the claim, failed to pay the hearing fee when required to do so and had their case struck out as a result. The Tribunal Service cannot argue that those striking out decisions were valid under the system in place at the time because the Supreme Court has ruled that the system was unlawful.

Since it was unlawful to require claimants to pay a fee, it must have been unlawful to strike out the claims of those who failed to pay.

Does that mean that abandoned cases from up to four years ago can now be resurrected? Perhaps – although I suspect that in many cases the Tribunal will be persuaded that a fair hearing is impossible given the passage of time. A fairer approach might be for the Ministry of Justice to compensate claimants for their lost chance of a successful claim – although working out what compensation would be due to them is a formidable task.

Then there is the largest group of all. Those potential claimants who were deterred from bringing a tribunal claim because they couldn't afford – or were not prepared to pay – the fee. Will the Tribunal Service accept claims brought months or years after the time limit for bringing a claim has expired? In many cases – such as unfair dismissal – the test is whether it was 'not reasonably practicable' for the claim to be presented in time. Will a Tribunal accept that this test is met in any case not pursued when there was an unlawful barrier being placed in the way of the potential claimant – or will the Tribunal want to see evidence that a claimant simply could not afford to pay the fee that was being demanded?

In discrimination cases the test is whether it is reasonable in all the circumstances to allow a late claim to proceed which presumably makes it much more likely that late claims will be allowed. Usually, however, the Tribunal considers whether a late claim would cause 'prejudice' to the employer. Will a Tribunal think it fair to reopen a case that the employer reasonably believed had been closed years before?

Whatever view is taken of late claims, those thinking of bringing them cannot take long deciding what to do. In deciding whether to allow a late claim, the Tribunal will always look at how long the claimant delayed bringing a claim once the obstacle to claiming was removed. The longer the delay, the more likely it is to be rejected. We can expect a real rush of claims in the coming weeks from claimants who have reconsidered their initial decision not to take their case to a tribunal.

In the face of all of this uncertainty, the President of the Employment Tribunals has issued a Practice Direction instructing tribunals to 'stay' all claims that rely on the Supreme Court's decision. That means that the claims will be accepted by the Tribunal but not progressed further until guidance is given from the Ministry of Justice. The President has said that this guidance is expected 'imminently'. Whatever guidance is issued however, each late claim submitted will have to be decided individually by a tribunal, taking the particular facts of the case into account.

And hovering over these issues is the great unknown question of whether there will be an immediate bounce back in the number of tribunal claims being brought. It would be astounding if the number of claims did not rise, but whether they will immediately return to their pre-fee levels is another question. It could be that the four year fee regime has done something to the culture around bringing claims and that it will take some time for claims to return to their 2013 levels. If there is a big increase, however, a key issue will be whether the Tribunal system – and to some extent Acas - have the capacity to deal with it.

We may see a dramatic increase in waiting times as the slimmed down tribunal system struggles to cope.

What does all of this mean for employers? Well apart from those caught up in potential late or resurrected claims - or those defending claims stuck in a logjam as the Tribunal Service adjusts to its new workload - the main impact is in risk management. One factor to consider when making a potentially difficult decision in relation to an employee is how likely he or she is to take the issue to a Tribunal. For the past four years the reality has been that employees who believe they have been treated unfairly were significantly less likely to bring a claim than had previously been the case, and that might have encouraged employers to take a risk on a borderline case. It is clear that the calculus will have to change now that tribunal fees have been abolished. How significant that change will be we should know by the end of the year. The next batch of Tribunal statistics will make for very interesting reading.

Keep in Touch

Twitter - @DazNewman

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In the SPOTLIGHT



#LoveyourHR

If you are a regular on social media, you may have seen the start of a movement called #loveyourhr. Like everything we do at WME, we did not want to do things by halves and we thought HR needed a bit of a facelift and a bit of momentum around loving what we do. We therefore designed our own virtual campervan which you will see driving around on twitter and LinkedIn to pick up as many people as possible from both inside and outside of HR and across the country to tell us about their experiences and share knowledge across the public sector and beyond. The beauty is it is free to view and we have attracted some great bloggers from Chief Executives to Heads of HR and everything in between. Hopefully this shared network will provide some insight into the challenges that we feel as a sector we are facing and offer strategies of how we engage the all important people side that sometimes gets forgotten. On our journey, we are quickly realising that people love HR more than we thought!

In case you are a person that likes to dip in and out of social media, we will on occasion have themed weeks chosen by our XFactor style jukebox. You may have seen CEO week this week where we launched articles from Ian Miller, Chief Executive from Wyre Forest on 'What Chief Executives want' and Angela O'Connor, Chief Executive from HR Lounge on 'feeling good in mind and body'.

We will cover these themes further as the blog gathers momentum. Also look out in a couple of weeks for Rachael Simpson from Wyre Forest who has taken on the challenge to respond to Ian's challenges as his Senior HR Adviser.

But of course there is no such thing as a free blog, we would really like people to continue the momentum so if you'd like to write for us please email hub@wmemployers.org.uk with an proposed article and a photo to include on our site. We have over 20 bloggers lined up so you will not be on your own!

Competition Time – Name the Camper Van

We don't want to keep referring to our 'campervan' on social media without a name, so can you name our camper van? The best name will receive a free space at our employment law event!

Remember **Boaty McBoatface** is taken

Good Luck!

