SQUIRE PATTON BOGGS

UK Supreme Court Rules That Employment Tribunal Fees Are Unlawful

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In a hugely significant judgment, the UK Supreme Court has ruled today that the current regime of employment tribunal (ET) fees and employment appeal tribunal (EAT) fees prevents access to justice and is unlawful.

The judgment means that with immediate effect, the fees system introduced under the Employment Tribunal and Employment Appeal Tribunal Fees Order 2013 is quashed and, in accordance with an undertaking given by the Lord Chancellor to the courts below, any fees paid since its introduction must be reimbursed.

In a unanimous decision, the Supreme Court said in *R (on the application of UNISON) v. Lord Chancellor* that the order introducing fees was unlawful under both domestic and EU law because it had the effect of preventing access to justice. Since it had that effect as soon as it was made in July 2013 it was, therefore, unlawful and must be quashed. In reaching its decision, the Supreme Court took into account the statistical evidence, which showed that the introduction of tribunal fees has resulted in a dramatic and persistent fall in the number of claims being brought, especially lower value claims.

Since the fee system came into force on 29 July 2013, individuals bringing proceedings in the ET and any party pursing an appeal in the EAT have been required to pay fees. The amount of the fee for ET claims depends on the type of claim. The issue fee for a Type A claim (for example, claims for unlawful deductions from wages and breach of contract) was £160 and the hearing fee was £230. The issue fee for a Type B claim (for example, unfair dismissal and discrimination) was £250 and the hearing fee was £950. Whilst the Lord Chancellor had some discretion (under the exceptional power of remission) to rule that fees may be waived in certain circumstances, depending on the financial resources of the individual, the Supreme Court found that this power was rarely exercised and did not resolve the systemic problem that the introduction of fees had the effect of preventing access to justice.

The Supreme Court also found that the introduction of fees was indirectly discriminatory under the Equality Act 2010 because the higher fees for Type B claims put women at a particular disadvantage, as a higher proportion of women bring Type B rather than Type A claims (in particular discrimination claims). The charging of higher fees was not a proportionate means of achieving one of the government's stated aims of transferring the cost of tribunals from tax payers to users and could not, therefore, be justified.

This judgment means that with immediate effect, fees will no longer be payable to bring claims in the ET or appeals in the EAT. The ET system will have its work cut out to make the immediate changes required as a result of this judgment. Summer holiday plans will likely need to be rescheduled.

Furthermore, because of the undertaking given by the Lord Chancellor, the government will need to work out how it is going to reimburse claimants that have paid fees since the fee system was introduced. The total figure to be reimbursed is widely reported to be in the tens of millions of pounds. Working out who is owed precisely what is likely to be a logistical nightmare.

Looking further ahead, it remains to be seen what new system (if any) the government will seek to put in place in response to this decision. The Supreme Court's judgment today makes it clear that if any fees or other restrictions are put in place in future, such restrictions must properly reflect the fundamental public importance of access to justice.

In the meantime, the abolition of ET fees with immediate effect means that employers can expect a material increase in the number of tribunal claims going forward, as we return to the ET landscape that was in place prior to 29 July 2013.

Contacts

Caroline Noblet
Partner
T +44 207 655 1473
E caroline.noblet@squirepb.com