Legal update ——— February 2014

Employment and pensions

Employment Tribunal fees here to stay, at least for the time-being!

On 29 July last year fees were introduced in the employment tribunals. The effect of this controversial measure has been a reduction in the number of claims being brought. So, are fees here to stay? For the moment, following the rejection of Unison’s application in the High Court for judicial review into the introduction of fees, the answer would appear to be yes.

Although the High Court’s decision means that fees will remain in place, the Court emphasised that it was unconvinced by the evidence at present, and would adopt a “wait and see” approach which would enable any problems that might arise to be addressed by the Lord Chancellor at a later date. It followed that there was no problem with Unison bringing a further review in future once the impact of the imposition of fees becomes more apparent.

Unison’s argument

Unison sought to argue that the introduction of fees was in breach of EU law and contrary to the principle of access to justice. The legal arguments presented by Unison for judicial review included that:

Introduction of employment tribunal fees would make it virtually impossible or excessively difficult to exercise individual rights conferred by European Community Law.

Only introducing fees for the employment tribunal and not for the First-Tier Tribunal (a similar tribunal at the equivalent level in the judicial hierarchy) breached the principle of equivalence.

There had been no proper assessment of the Public Sector Equality Duty. Unison argued that an assessment should have been made to determine the potential adverse effect of introducing fees in terms of the numbers and proportions of claims brought by individuals with protected characteristics.

Introduction of employment tribunal fees were indirectly discriminatory because the fees would have a disproportionate adverse impact on women who were likely to earn only an “average income” and therefore would not be entitled to a fee remission.

The High Court’s decision

On the first point the Court considered the impact of fee charging on a number of hypothetical claimants and concluded that there was sufficient opportunity for families with “very modest means” to put together funds to pay fees. Whilst it conceded that bringing proceedings would be expensive it did not feel that this would be to the extent “that bringing claims will be virtually impossible or excessively difficult”.

In relation to the principle of equivalence the Court considered the cost of bringing a claim in the County Court (where the amount of the issue fee depends on the maximum amount claimed) which it found to be not dissimilar to the cost of bringing a claim in the Employment Tribunal. However, the High Court highlighted what it considered to be the most important feature of the difference between County Court and Employment Tribunal claims, namely “the potential liability for costs”. In Tribunals parties bear their own costs, whereas in the County Court the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. As the Employment Tribunal noted, the County Court rule was a real disincentive to claimants of limited means.

The Court then went on to emphasise that there would shortly be a free early claim conciliation with Acas that...
would be available for all Tribunal claims. In addition it noted that the Lord Chancellor was due to issue some updated guidance making it clear that the general position is that a successful employee should be expected to recover the fees that he or she has incurred from the employer. As a result it concluded that the principle of equivalence was satisfied.

As far as the Public Sector Equality Duty was concerned the Court pointed to the consultation which had taken place over the level of fees, and also to the fact that the fee remission scheme could offset any adverse impacts arising from fees. However, the Court noted that the Duty was an ongoing one and that, if the introduction of fees was found to have a damaging effect on compliance with the Duty then the Lord Chancellor would have to take the necessary steps to adjust the regime.

Finally the Court considered whether or not the introduction of fees was indirectly discriminatory. Although it conceded that there would be likely to be some disparate effect on those who fell within a protected class (for instance women, ethnic minorities and the disabled) and who brought Type B claims (e.g. claims for discrimination which attract an issue fee for £230 and a hearing fee for £950) it was not yet possible to determine the extent of the impact. The Court noted that if disparate effect was shown then the Lord Chancellor would be under a duty to take remedial action to remove the disparate effect.

What next?
So it seems that it’s a matter of “wait and see” before the full impact of the introduction of fees can be determined. In the meantime Unison has issued a press release announcing its intention to appeal to the Court of Appeal. Either way, this is an issue which is unlikely to disappear.