



Legal update — February 2018

Employment Trends in Employment Tribunals

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Following the Supreme Court's decision in *R (on the application of UNISON) v Lord Chancellor* last July, and the immediate abolition of Employment Tribunal fees, there has, as expected, been a steady increase in new claims.

The latest tribunal quarterly statistics for the period July to September 2017 show that, since the same period in 2016, the number of claims lodged by a single applicant have increased by 64% (the highest for four years). We have learned anecdotally that month on month during the period from October to December 2017 the number of single claims has continued to increase.

Are the employment tribunals' resources proving adequate in light of the steady increase in claims? The short answer to this is no! Her Majesty's Courts & Tribunals Service (HMCTS) has plans to gear up these resources. The number of days that fee-paid judges can sit has increased and new salaried judges are being recruited.

Extra tribunal staff are also needed to deal with the backlog of claims, the lifespan of which looks set to increase, in some cases substantially. Some of the London tribunals are currently scheduling more complex claims (those longer than a day or two) for 2019 and onwards.

The refund scheme

The first stage of a refund scheme for employment tribunal fees was launched towards the end of October. It is now open to anyone who paid fees for a tribunal claim or appeal since fees were introduced in July 2013.

Anyone who paid a fee can apply for a refund online, or use one of the prescribed forms to apply by post or email. As well as having their original fee reduced, successful applicants to the scheme will also be paid interest of 0.5%, calculated from the date of the original payment up until the refund date. An applicant will need to confirm that they were not paid under a costs order covering their tribunal fees.

The refund scheme does not cover respondents who compensated a claimant for their tribunal fees under a settlement agreement. Absent any clear terms to the contrary it is unlikely that the amount paid under the agreement in respect of tribunal fees would have to be repaid.

We have heard that, so far, take up of refunds has been low. Around 6,000 applications for refunds have been made to a cost of just short of £3 million, a figure significantly lower than the £33 million budgeted for. However, there's a feeling that communication about this has been poor and it is expected that new communications will be issued by HMCTS to raise awareness.

Claims that were rejected or dismissed

No formal statements have been made as to whether a party whose claim or counter-claim was rejected for non-payment of the issue fee now has the power to reissue their claim or counter-claim.

HMCTS wrote to all affected claimants in November 2017 asking them whether they wanted their claim reinstated and giving them three months to respond. HMCTS estimates that there are approximately 7,500 such cases. So far the response rate has apparently been low.

What about out-of-time claims?

The Presidential Practice Directions published on 18 August 2017 stated that any claims or applications brought in reliance on *Unison*, other than those relating to reimbursement of fees or claims that were rejected or dismissed for non-payment of fees, would be considered judicially in the usual way. This means that any individual who was put off bringing a claim due to the fees payable, and who now wants to bring their claim, will need to submit it in the normal way and apply for an extension of time based on the usual tests.

For unfair dismissal claims and most other employment claims the individual will have to argue that it was "not reasonably practicable" for them to have presented the claim in time. If the tribunal finds that it was "not reasonable practicable" then it will then have to go on to

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consider whether the claim was nevertheless presented "within such further period as the tribunal considers reasonable".

An individual bringing a discrimination claim will have to argue that it is "just and equitable" to extend the time limits to allow them to proceed with the claim.

In *Benton v Give 2 Give (A Charity and Firm)* the tribunal held that it had jurisdiction to hear an unfair dismissal claim where the unlawful fee scheme for bringing claims had rendered it not reasonably practicable for the employee to present the claim in time. The tribunal considered the time taken to present the claim after the time limit expired on 3 July 2017. Here the claimant heard about the Unison decision a few days after it was handed down on 26 July 2017. She then contacted a Citizens Advice Bureau which took a few days to turn around its advice.

The 20-day period between the *Unison* decision and the presentation of the claim was held to be reasonable and therefore the tribunal had jurisdiction to entertain the claim. However, the employment judge did make the point that the period of 20 days following the Unison decision was "getting towards the end of the spectrum of "a reasonable period thereafter". It was a reasonable period in this instance "given the claimant's subjective characteristics, particularly her need for assistance" but the employment judge made the point that, "A more sophisticated litigant may have been expected to act with greater alacrity".

No guidance has been issued to tribunals on this matter but it is thought that judges are likely to follow the reasoning in the *Benton* case. We have heard that, to date, very few out-of-time claims have been issued.

Could fees be reintroduced in future?

It is possible, yes. The Supreme Court in *Unison* analysed the lawfulness of the fees regime under the Fees Order. This does not mean that another alternative system would not be lawful. There's nothing in the pipeline yet, but the possibility that fees in another form will be introduced cannot be ruled out.

Impact of the abolition of fees

Employers and HR departments will need to re-assess the risk profile for dealing with employment disputes. Those that would not have brought a claim before may now do so because there are no fees. This is likely to result in an increase in resourcing of employee relations advice within many employers.

Employers will also need to assess the worth of claims that are made and may now have a greater incentive to engage with the Acas Early Conciliation (EC) system. We have heard that Acas EC notifications have had a 20 to 25% increase since the abolition of fees. It's also

possible that employees may be more bullish in early negotiations now there is no prospect of having to pay a fee.

Practicalities

Since the implementation of fees in the tribunal, and the consequent steep drop in the number of claims being issued prior to the Unison decision, it's worth remembering some of the basics of dealing with tribunal claims.

Don't miss those deadlines!

Meeting the deadlines in tribunal claims is essential if you want to avoid complicating the litigation process.

Once the Tribunal has accepted the claimant's claim it will send a copy of the ET1 through to the respondent, together with an ET3 for the respondent to complete. The respondent then has 28 days from the date that the ET1 is sent to respond to the claim.

If the ET3 is not presented within the 28 day deadline, then the tribunal has a wide discretion as to how to proceed. This ranges from entering a full default judgment for liability and remedy against the respondent to holding a hearing to decide the appropriate course of action.

It is possible to apply for an extension of time to submit an ET3 but it is imperative that any such application is made promptly.

Case management will generally be dealt with as part of a preliminary hearing, and will determine the steps that both parties need to take to prepare the claim for the final hearing. The steps will include disclosure deadlines, agreeing the content of the bundle and drafting and submitting witness statements.

The tribunal will expect you to stick to a strict timetable, something which may be even more crucial now given the recent burden placed on the tribunal system. It's likely that tribunals will timetable cases to keep them as short as possible. A measure which might be included is the increased use of "guillotines" on the length of cross-examination. In any event, efficiency is key!

A few things to bear in mind

Here are a few action points to consider to ensure that any claims you have to defend run smoothly:

- Get all the papers over to your lawyer as soon as you receive them.
- Make sure all key personnel know to send correspondence from the Tribunal to HR.
- Make sure you diarise key dates.

- Gather together all information and documentation relevant to the claim.
- Consider whether any aspects of the claimant's claim require clarification.
- Identify the relevant witnesses and ascertain their willingness to give evidence and their availability.
- Be careful what you put in writing. All documents are disclosable, whether they help your case or not.
- Consider whether any expert evidence such as a medical report may be required.

What we can offer

We pride ourselves on providing a flexible service and are happy running the claim in its entirety or just providing additional support where necessary.

We can also offer you a fixed fee "menu" of options and prices for any Employment Tribunal claims you receive. The options include drafting grounds of resistance, advising on the merits of the claim, drafting witness statements, instructing counsel and representation at the hearing. We can also help with settlement and general advice in relation to the claim.

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