

Employment Tribunal Fees – Supreme Court Judgement

Following a legal challenge, the Supreme Court has ruled that employment tribunal fees are unlawful because they price workers out of accessing justice and discriminate against women. **This means that from the 26th July, employment tribunal fees no longer apply and that all previous fees that have been paid will have to be repaid.**

Fees were first imposed in the Employment Tribunal (ET) and the Employment Appeals Tribunal (EAT) by the Coalition Government in July 2013. The principal purposes of the Fees Order were to:

1. transfer some of the costs burden of operating ETs and the EAT to those who use the system;
2. incentivising earlier settlement of claims;
3. disincentivising the bringing of weak or vexatious claims.

The Supreme Court unanimously upheld each of the arguments against employment tribunal fees. As the Supreme Court said, "Fees must be affordable not in a theoretical sense, but in the sense that they can reasonably be afforded. Where households on low to middle incomes can only afford fees by forgoing an acceptable standard of living, the fees cannot be regarded as affordable".

As the Supreme Court said, "*The Fees Order is indirectly discriminatory under the Equality Act 2010 because the higher fees for type B claims put women at a particular disadvantage because a higher proportion of women bring type B than bring type A claims.*"

At the recent General Election in June 2017, there was some cross-party support for the abolition of the Fees Order. Labour, the Liberal Democrats, the Greens and the SNP all pledged that fees should be scrapped. The Conservatives mentioned nothing in their manifesto about fees, but the Government has admitted that the fall in claims was greater than was originally envisaged when the Fees Order was implemented. The Government's voting partner, the DUP, was also silent on fees as the Fees Order did not apply to Northern Ireland.

As previously stated, the immediate effect of this decision is that fees cease to be payable in the ET and appeals to the EAT and fees paid in the past, amounting to £32 million, must be reimbursed by

the Government. It is highly likely that the number of claims in the ET and the EAT will increase, without the barrier of fees, particularly at a time of economic uncertainty.

Notwithstanding the above, there remains a number of unanswered questions:

- It's unclear how claimants who have already paid fees since July 2013 will recover their fees.
- Employers ordered to pay costs? Will the employer be refunded by the Government? Or will employers have to seek refunds from claimants once those claimants have been given their refunds?
- Claimants who paid the fee, but then settled their claims? If they receive a refund will the employer who settled be able to recover the portion of the settlement representing the fee?
- Can claimants who were considered to have been unlawfully denied access to justice be able to sue the Government for the losses caused by their inability to bring a claim? Will they be able to submit late applications to the Employment Tribunal?

Simply put, the Supreme Court in its judgment determined that where access to justice is blocked, society loses out. In the employment context, when barriers are erected to enforcing workers' rights, such rights are effectively worthless, and when employers know that claimants are unable or unwilling to bring claims, the whole system of employment protection is undermined. This ruling is one of the most important employment law judgments that enforces working people's rights in decades.

