Fall-out from *Unison*

Unfair should not mean unlawful, says Tessa Fry

The Supreme Court ruling that tribunal fees are unlawful is surprising given that most of the evidence was rejected in two cases before the High Court and subsequently the Court of Appeal. By contrast, the Supreme Court accepted almost all Unison's arguments some of which were based on hypothetical examples and assumptions, rather than actual evidence (*R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, [2017] All ER (D) 174 (Jul)).

While the Court of Appeal was sympathetic to Unison's arguments, it did not consider the evidence provided to be a safe basis for concluding that the Fees Order was unlawful. The Supreme Court, however, ruled that the Fees Order effectively prevents access to justice and is therefore unlawful. In other words, the fees are unfair, therefore they are unlawful.

There was no dispute in either court that since the fees were introduced, the number of tribunal claims had declined substantially. However, the Court of Appeal held that figures relating to the decline in claims, on their own, could not constitute a safe basis for concluding that the Tribunal Fees Order 2013 (SI 2013/1893) was unlawful. Such a decline was unlikely to be accounted for entirely by cases of 'can't pay' and some of them would be at least 'won't pay'. It further held that 'even if cases were rejected under the remission scheme, there was provision for discretion being applied in exceptional circumstances so the regime did not inherently result in claimants being unable to bring proceedings.

By contrast, the Supreme Court held that 'the fall in the number of claims since 2013 was so sharp, so substantial and so sustained as to warrant the conclusion that a significant number of people who would otherwise have brought claims have found the fees to be unaffordable'. It also accepted the notional figures in Unison's hypothetical examples by stating that 'where households on low to middle incomes could pay fees only by sacrificing ordinary and reasonable expenditure for substantial periods of time, the fees could not be regarded as affordable'. The discretionary scheme to remit fees 'in exceptional circumstances did not change this analysis'. It concluded that 'the Fees Order effectively prevents access to justice and is therefore unlawful'.

> *"If judgments are made on the basis of fairness rather than evidence then that could set a dangerous precedent"*

If the high level of tribunal fees prevents 'access to justice', then surely the same arguments apply to civil court fees which have also been increased astronomically by the government on the basis that the 'taxpayer should not have to pay for the court system'. Regardless of fees, given the removal of legal aid for most civil claims, without third party funding, court and tribunal proceedings, ie 'access to justice' are only an option for those with significant financial resources.

The introduction of fees is not the sole reason for the decline in tribunal cases. Other changes introduced in July 2013 have also had an impact. The majority of 'type B' claims in the tribunal are unfair dismissal claims, not discrimination claims. By raising the qualifying period of service from one year to two years, a large number of potential claimants are no longer eligible, particularly if employers dismiss them shortly before the two-year period. Compensation for unfair dismissal is now limited to 12 months' pay (subject to an £80,500 cap and a duty to mitigate loss). This, together with 'protected conversations' makes it easier for employers to negotiate settlements agreements, thus preventing tribunal claims.

Protected conversations do not, however, apply to discrimination claims for which there is no cap on compensation. If an unfair dismissal claim proceeds to a hearing, this will be heard by a judge sitting alone rather than the three person panel which still applies in discrimination claims, thus making such claims more legalistic (and therefore less likely to succeed). Consequently, most unfair dismissal claims are now brought as part of discrimination claims, particularly for high earners who are not deterred by fees.

Following the introduction of fees, the tribunal rules also changed to give tribunals increased powers to strike out claims at an early stage and require payment of a deposit of up to £1,000 to allow a weak claim to proceed together with a costs warning (and no refund on fees). These changes have also led to a reduction in claims. Potential claimants could no longer rely on employers settling claims early to get rid of them as applied, frequently, before July 2013. None of these points were referred to in the Court of Appeal or Supreme Court judgments.

Following the Supreme Court judgment, the government has confirmed fees will no longer apply in tribunal claims and refunds will be issued for fees paid. If fees are no longer required for tribunal cases, then there will almost certainly be an increase in claims but perhaps with the current safeguards in procedures, the system will be more balanced between employers and employees.

While the high level of tribunal fees were, undoubtedly, unfair, this should not mean they were unlawful. If judgments are made on the basis of fairness rather than evidence then that could set a dangerous precedent. NLJ

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