EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2014/33 Union attempt to have new tribunal fee regime struck out (UK)

<p>This case concerns the introduction of a new Employment Tribunal fee regime by the UK government. The trade union, Unison, opposed the regime on four grounds. They claimed it breached the principle of effectiveness, the principle of equivalence, the public sector equality duty, and that it was indirectly discriminatory. All of these grounds were dismissed – however, the Court claimed that the arguments would be better assessed if the challenge was brought later when more evidence could be considered. This leaves the way wide open for another challenge down the line.</p>

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Background

The Employment Tribunals and Employment Appeal Tribunal Fees Order 2013 was made on 28 July 2013 and came into force on 29 July 2013. This order made fees payable at two stages of a claim: when a claim form is presented to an employment tribunal (the 'issue fee') and on the listing of a final hearing of the claim (the 'hearing fee'). Claims, for the purpose of the new fees regime, are divided into two types: Type A, includes claims relating to statutory redundancy

payments, unlawful deductions from wages and breach of contract; Type B includes claims for unfair dismissal, discrimination and whistleblowing. For a single claimant, the issue fee for a Type A claim is £160 and the hearing fee is £230 whereas the issue fee for a Type B claim is £250 and the hearing fee is £950.

However, low-income claimants can apply for full or partial fee remission. The remission system is complicated and is assessed on the claimant and his or her partner's disposable capital and income. Very broadly, if a household has disposable capital of £3,000 or more the claimant will probably not be entitled to any fee remission, irrespective of his or her income. If the claimant passes the capital test, the income test is applied. The income test varies according to family size. A single person without children must have a monthly income of £1,085 or under to be eligible for full remission. According to the government, the fees are not intended to deter claimants but to transfer some of the costs of the system onto users.

Facts

Unison pleaded four grounds in its case against the imposition of the new fee regime. Their first concern was that the requirement to pay fees violates the European Union 'principle of effectiveness'. They argued that the fees would make it "virtually impossible, or excessively difficult, to exercise rights conferred by EU law". The right to an effective remedy is set out in Article 19 and Article 47 of the Charter of Fundamental Rights of the EU (which has the same legal status as the Treaties). These Articles provide that "legal aid shall be made available to those who lack sufficient resources insofar as is necessary to ensure effective access to justice". Unison argued that if fees are imposed at the initial stage of proceedings before an assessment of the merits (as is the case now) a greater level of justification is required.
In *Weissman - v - Romania* and *Podbielski – v - Poland* the European Court of Human Rights has ruled that "restrictions applied which are of a purely financial nature and which [...] are completely unrelated to the merits of an appeal or its prospects of success, should be subject to particularly rigorous scrutiny from the point of view of the interests of justice."

Here, the Court found that, though the fees were not intended as a deterrent, they did have a deterrent effect: evidence presented by Unison showed dramatic falls in claims comparing September 2012 with September 2013. There was a fall in all claims of 56%; of claims in the North West region of 82%; in Wales of 88%; in all Equality Act discrimination claims, including equal pay, of 78%; of sex discrimination claims of 86%; and of unfair dismissal claims of 81%. However, the Lord Chancellor believed it was too early to rely on these statistics.

Unison's second challenge was that the new regime violates the 'principle of equivalence'

between European and domestic law, arguing that the requirement to pay fees means that the conditions for the enforcement of rights derived from EU law are less favourable than for similar domestic claims brought in the County Court. The fees to bring a County Court claim depend upon the amount claimed. Unison sought to compare the median figure awarded in a discrimination claim (£5,256 for race discrimination, £6,746 for sex discrimination and £8,928 for disability discrimination) with the cost of bringing a county court breach of contract claim for a similar amount. However, instead, the court decided that an appropriate comparison was a claim for breach of contract worth £20,000. This type of claim could be brought in the County Court *and* in the Employment Tribunal and the total fees incurred would be similar. In addition, when considering potential liability for the other side's costs, the Court found that proceeding through the Tribunal is actually preferable. In the County Court, you may be liable to pay the other side's costs, whereas this applies more rarely in the Tribunal, where free early conciliation is also available.

Unison's third ground was that the new fees regime was in breach of the Public Sector Equality Duty. This is the duty on public bodies to have due regard in exercising their functions to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between those who share protected characteristics and those who do not (s.149(1) Equality Act 2010). This duty is one "which must be undertaken conscientiously and with rigour" and it is a continuing obligation, to be constantly monitored. Following an impact assessment and consultation, the Ministry of Justice had concluded that: "we do not consider that, for those negatively impacted, the proposals will amount to a substantial disadvantage in monetary terms. We consider that the fee remission system proposed will ensure that access to justice is maintained for those who are unable to afford to pay a fee". The Ministry therefore argued that the fee system was a proportionate means of achieving a legitimate aim.

The final ground was that the effect of the fee regime is indirectly discriminatory. Unison contended that the imposition of a higher rate of fees in Type B cases has a disparate impact on minority groups, which constitutes indirect discrimination in breach of ss.19 and 29 of the Equality Act and Article 14, read with Article 6 of the Convention. The two issues that the court needed to address were, first, whether the relevant provision, criterion or practice (PCP) puts persons sharing a particular characteristic at a particular disadvantage, and second, if a disparate impact on minority groups was established, whether the Lord Chancellor could objectively justify the PCP which placed those within the protected class at a particular disadvantage.

Judgment

The Court found, in relation to the first challenge, families on very modest means are capable

of paying the fees. Payment would not be virtually impossible or excessively difficult. On whether the fees are 'excessive', the fact that they impose a burden was not found to be enough to qualify them as 'excessive'. Unison presented only hypothetical scenarios (because the fee system had not been in place long enough to obtain real examples), which did not persuade the Court. The first ground was therefore dismissed.

Regarding the second claim, the Court found that the liability for costs in the Courts, rather than the Tribunals, was a real disincentive to claimants of limited means. They therefore found that people would be more ready to pursue a case in the Tribunal rather than the Court and this ground was therefore readily dismissed.

The problem with the third claim was that it is a procedural claim but it "leeches so readily into the ground of substance and not procedure, namely, that the regime amounts to indirect discrimination". In other words, it concerned the merits of the Lord Chancellor's decision, which was beyond the scope of the claim. The Court was satisfied that the Lord Chancellor had considered the impact on various groups with protected characteristics through the consultation procedure. However much Unison disagreed with the *conclusion* of the assessment, it could not establish that the assessment was inadequate, as many relevant factors were taken into consideration. If the fees do turn out to have a damaging effect on the fundamental obligation to eliminate discrimination, necessary steps will have to be taken. However, this will depend on future evidence, and so this claim was found to be premature. This ground was also dismissed.

In relation to the fourth and final claim, the Court had a strong suspicion that there would be a negative effect on those who bring Type B claims, and so the arguments relating to justification were considered. However, it was too early after the introduction of the scheme to assess the impact. The Court of Appeal in *R (Elias) v Defence Secretary* has said that the relevant questions are, first, whether the objective is sufficiently important to justify limiting a fundamental right; second, whether the measure is rationally connected to the objective; and third, whether the means chosen is no more than is necessary to accomplish that objective.

The broad objectives of the fee regime were given by the Government as being "to transfer a one-third proportion of the annual cost of £84m incurred in running Employment Tribunals and the Employment Appeal Tribunal". It seeks to make tribunals "more efficient and effective", so that they can focus on more meritorious claims by making employees and employers think twice before bringing or defending a claim. As to proportionality, remission and free ACAS conciliation is available. Because the effect of the changes cannot yet be adequately analysed, the Court could not conclude whether the imposition of a higher rate of fees for Type B claims could be objectively justified *if* it has an indiscriminate effect.

After hearing the case, the court made some practical suggestions for case management. Firstly, that the tribunal should issue pre-hearing directions to ensure that witness statements and other relevant documents are exchanged before the hearing fee is due, to enable claimants to assess the merits of the case. This will help to ensure the aim of the fees is met – that is, meritorious claims are pursued while those without merit are dropped at the earliest stage. (The claimant will still have to pay the issue fee before receiving this information.)

The court also said that successful claimants should be able to recover their fees from the defendant, which might encourage those with meritorious claims to pursue them. These two suggestions are already being taken up by the tribunals.

Commentary

The Court found that the "fundamental difficulty with the whole of this case" was the fact that it was brought as a matter of urgency, meaning that the court was faced with judging the fees regime with insufficient evidence, and based only on the predictions of the rival parties. (Unison had no choice in this, as judicial review proceedings must be brought without delay.) The Lord Chancellor undertook to keep the impact of the regime under review, and if any discriminatory effect is discovered, the Lord Chancellor will be under a duty to change it. Unison was also told to monitor the effects. For the moment, the Court underlined that "there is no rule that forbids the introduction of a fee regime". However, this is not the end of the matter because Unison has recently sought and been given permission to appeal this decision.

The court suggested that the government would be obliged to revise the fee regime if future statistics uphold Unison's argument that it is having a deterrent effect on claimants. It is difficult to assess at this stage exactly how far people have been dissuaded by the fees from bringing claims but the latest figures from the tribunal service seem to indicate a very large drop in claims. The first full quarter after the introduction of fees was October to December 2013. This period saw 79% fewer claims being brought than in the same quarter in 2012. It is possible that some of this apparent fall in numbers is attributable to people who have applied for remission and are still being assessed. However, it seems likely that there has also been a significant deterrent effect. If these statistics are borne out in subsequent quarters, Unison's case will be all the stronger.

Subject: Tribunal Fees, EU law, Indirect Discrimination

Parties: The Queen on the Application of UNISON – v – The Lord Chancellor

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Court: High Court of Justice, Queen's Bench Division (Administrative Court)

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