



## XpertHR Podcast

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- Ellie Gelder: Hi and welcome to this week's XpertHR podcast with me, Ellie Gelder. This week we're providing a round-up of the state of employment tribunals today. It's been just over three years since the coalition Government introduced employment tribunal fees, requiring claimants to pay a fee of up to £1,200 to bring a claim in the tribunal. Other major changes are also on the horizon, with the online publication of employment tribunal decisions from this autumn, and the Government considering suggestions for employment tribunals to be brought into the main civil courts structure.
- With me to talk us through these changes in more detail and their impact on employers is Principal Employment Law Editor, Stephen Simpson. So Stephen, as most people are aware, the introduction of fees has had a big impact on claim numbers, hasn't it? What do the latest stats tell us? [0:00:56.7]
- Stephen Simpson: So we had the latest stats from the Ministry of Justice on 8<sup>th</sup> September and we can see that the number of tribunal claims has mostly levelled off now, at a much lower rate than before tribunal fees were introduced.
- Ellie Gelder: So this is after the massive drop when tribunal fees were introduced? [0:01:10.4]
- Stephen Simpson: Yes, when they were introduced in July 2013 the number of claims dropped roughly 70%. Since then, claims have steadied, only going up or down by a few percentage points.
- Ellie Gelder: So can you give us a snapshot of the current figures, then? [0:01:21.8]
- Stephen Simpson: So I always look at the unfair dismissal claims as a good indicator. So if we compare the twelve months from April 2014 to March 2015 and the twelve months from April 2015 to March 2016, there's been a 5% increase. That's fairly steady.
- Ellie Gelder: So what about awards for unfair dismissal? [0:01:39.9]
- Stephen Simpson: So in 2014/15 the median unfair dismissal award was £6,955 but for 2015/16 that had actually gone up to £7,332. However, there's been a drastic drop in the number of unfair dismissal awards, down from 1129 to 603, so that's a 50% drop.
- Ellie Gelder: So why do you think the unfair dismissal award level has gone up? [0:02:04.4]

Stephen Simpson: So it's possible that the tribunal fees have eliminated many lower-value claims which while perfectly valid were not worth enough to justify paying the fee in the first place.

Ellie Gelder: So it looks like employers are facing fewer claims, but if they lose it's going to be more costly? [0:02:18.4]

Stephen Simpson: Yes, I think that's fair to say. So while there still can be some vexatious claims, if someone is willing to pay the fee now, they have a good reason, so awards are still going to be given for more serious examples of breaches of employment law which may have pushed the median up, I think.

Ellie Gelder: So are there any plans to review the tribunal fees regime? [0:02:34.8]

Stephen Simpson: So there was an official review of the impact of tribunal fees announced way back in June 2015, but the results still haven't been published well over a year on.

Ellie Gelder: Have there been any other reviews? [0:02:44.8]

Stephen Simpson: In June 2016 we had a Justice Committee report, which concluded that the introduction of fees has had a significant adverse impact on access to justice and that fee levels should be dropped. The committee was particularly critical of the impact of fees on women alleging maternity and pregnancy discrimination.

Ellie Gelder: So Stephen, do you think there's any chance that tribunal fees will be reduced or even abolished? [0:03:04.8]

Stephen Simpson: So I think the only hope now appears to be UNISON's challenge to tribunal fees, which has been proceeding through the courts in the last few years and is due to go to the Supreme Court later in 2016.

Ellie Gelder: So what is UNISON arguing? [0:03:16.1]

Stephen Simpson: So to quote them, they're saying that, 'Fees have made it virtually impossible or excessively difficult for some individuals to exercise their employment rights,' and that, 'The fees regime indirectly discriminates against some groups.'

Ellie Gelder: So did UNISON give any examples? [0:03:29.3]

Stephen Simpson: It said that the claimants who are required to pay the highest fees, which includes £1,200 for a discrimination claim that goes all the way to a hearing, are disproportionately female.

Ellie Gelder: And have any courts so far been convinced by those arguments? [0:03:41.9]

Stephen Simpson: No. The case was heard twice in the High Court and once in the Court of Appeal and rejected all three times.

Ellie Gelder: So why has UNISON's case failed so far? [0:03:50.1]

Stephen Simpson: So the suggestion from all the courts has been that there's not enough concrete evidence of disadvantage to any one group. So while everyone knows that certain groups are likely to be

disadvantaged, such as pregnant women and disabled workers, the courts need concrete figures to back that assumption up.

- Ellie Gelder: Okay, so do we know when the Supreme Court will hear this case? [0:04:07.6]
- Stephen Simpson: The date hasn't actually been officially set but I understand it'll be early December 2016.
- Ellie Gelder: So in relation to tribunal fees, is the position the same across the UK? [0:04:17.2]
- Stephen Simpson: So I think it's important just to flag up that the Scottish Government has already said separately that it intends to abolish tribunal fees. We don't have a concrete date for that but it will lead to a very unsatisfactory situation where employees in England and Wales effectively have fewer enforceable rights than employees in Scotland. I guess a cynical view would be that it makes Scotland a less attractive place to set up business.
- Ellie Gelder: Okay, so what other tribunal developments should employers know about? [0:04:40.8]
- Stephen Simpson: So one key development to flag up is that in June the Government announced that from this autumn there will be a website making tribunal judgements available online.
- Ellie Gelder: But tribunal cases aren't generally available online at the moment, are they? [0:04:53.1]
- Stephen Simpson: No, currently anyone wanting to search decisions has to physically go to the tribunal HQ in Bury St Edmunds for any English or Welsh decisions or Glasgow for Scottish decisions, and trawl through their system to get a hard copy. Copies of specific decisions can be ordered by mail for a fee. Only in Northern Ireland are first instance tribunal decisions available online.
- Ellie Gelder: Okay, so currently it's pretty hard to get hold of a copy of a decision. So which judgements will be available? [0:05:17.1]
- Stephen Simpson: So the Courts and Tribunals Service has said that it will publish new employment tribunal judgements from England, Wales and Scotland.
- Ellie Gelder: But what about the older cases? [0:05:24.8]
- Stephen Simpson: The Courts Service hasn't yet made a decision about that, about placing past judgements online, but given the vast numbers involved I'd suggest it's very unlikely.
- Ellie Gelder: So do we have any idea what the website will look like? [0:05:35.7]
- Stephen Simpson: So if we go by the Northern Ireland example, it will be pretty basic with fields to search for things like claimant, respondent and a few other things like claim type. It's possible there could be a page listing the newest judgements.
- Ellie Gelder: So anyone could go online and look for claimants or employers' names, then? [0:05:51.3]

Stephen Simpson: Yes. So that means that employers could face a heightened risk of adverse publicity arising from tribunal proceedings. For example, journalists could check this new site every day and report on tribunal findings that could damage the employer's reputation. All tribunal rulings are of course already commonly making the papers; perhaps we'll see reports on cases that currently go under the radar.

Ellie Gelder: So would it just be the national newspapers? [0:06:11.5]

Stephen Simpson: No, it could also be the likes of local newspapers taking interest, especially if there's a field on the new website to search by hearing location.

Ellie Gelder: So would this increased exposure make settlements more likely, do you think? [0:06:22.2]

Stephen Simpson: I think so, yes, 'cause if an employer knows that a judgement will be automatically available online, that's another thing to think about when deciding whether to settle the case. That already happens, of course, with disgruntled claimants often seeking publicity for their case, but I think this new website takes that level of risk to another level, really.

Ellie Gelder: Yes, 'cause at the moment members of the press can attend tribunal hearings, can't they, but obviously this website is going to increase the risk even more? [0:06:46.3]

Stephen Simpson: Yeah, it'll just make it even easier to find cases.

Ellie Gelder: And presumably this is going to affect those employers even where they think they've got quite a watertight defence? [0:06:54.3]

Stephen Simpson: Yes. I think it's important to say that employers should think about how a case will be viewed, even if the claimant appears to have no hope of getting any compensation. It's not uncommon for an employer to successfully defend a case but for the case to reveal a negative aspect of the business. For example, an employer could justifiably dismiss a senior employee for gross misconduct after following a perfect procedure that may create a negative impression if the senior employee's bad behaviour is laid bare for everyone to see.

Ellie Gelder: Absolutely. And what about jobseekers looking up their prospective employers? [0:07:23.1]

Stephen Simpson: So it could be that job applicants will look at their prospective employer, which may look a lot less attractive as a place to work if there are lots of tribunal decisions against it.

Ellie Gelder: And from the other side, do you think employers will be looking up job applicants? [0:07:35.5]

Stephen Simpson: You can definitely see line managers checking to see if an applicant has brought a claim against a previous employer. Claimants have successfully argued in the past that they've been victimised by their new employer or prospective employer for bringing discrimination proceedings against their former employer.

Ellie Gelder: So a word of caution there for employers thinking about that. So that's a development for the short-term. Has there been any indication on employment tribunals' long-term future? [0:07:57.9]

Stephen Simpson: Sir Lord Justice Briggs's recent civil courts structure reviews suggests that employment tribunals be brought within the main civil courts structure and rebranded the Employment and Equalities Court. So it would essentially become a civil court with specialist employment judges.

Ellie Gelder: So would that mean that the procedural rules for civil courts would have to be adopted in employment cases? [0:08:18.0]

Stephen Simpson: No. Lord Justice Briggs sees no reason why the separate employment tribunal rules of procedure couldn't be transplanted to the new environment.

Ellie Gelder: So for those of us who aren't familiar with the employment tribunal rules of procedure, why would that be important, Stephen? [0:08:30.8]

Stephen Simpson: So the report talks about the culture of tribunal cases being maintained with the tribunal rules of procedure designed to be less formal than in other courts. The creation of employment tribunals, of course, in the first place was to allow workplace disputes to be resolved in a place that's relatively less formal and intimidating than in the main court structure, such as the Magistrate's Court, the County Court and the High Court.

Ellie Gelder: Did the report identify any potential problems? [0:08:53.5]

Stephen Simpson: So the main problem flagged up is that even if it was a great idea, the proposal would require time-consuming Government restructuring and changes to primary legislation.

Ellie Gelder: Were there any other interesting suggestions? [0:09:04.4]

Stephen Simpson: I think the one that jumps out at me really is the suggestion that employment cases of particular importance could skip past the employment tribunal and go straight to appeal in the employment appeals tribunal.

Ellie Gelder: So is there a precedent for that elsewhere? [0:09:15.8]

Stephen Simpson: The report gives the example of the High Court and the County Court where civil cases of the greatest complexity and public importance can skip the County Court and go straight to the High Court.

Ellie Gelder: And are there any potential problems with that suggestion? [0:09:27.8]

Stephen Simpson: I guess the obvious one is how would it be decided which cases go straight to the EAT? Assuming there's an application process for the parties to apply to skip straight to the appeal court, the parties might use application strategically. For example, they could be used as a bargaining tool for settlements or possibly as a delaying tactic if they slow things down.

Ellie Gelder: Some problems there, then. What about the advantages? [0:09:47.8]

Stephen Simpson: I guess it could potentially speed up the resolution of cases and get a binding answer to important employment issues quicker for all employers.

Ellie Gelder: So *are* issues currently taking a long time to go to appeal at the moment? [0:09:58.6]

Stephen Simpson: Yes, we've definitely noticed in the past few years that important employment issues either aren't going to appeal, simply because there are fewer tribunal cases to appeal, or they're taking a long time to be appealed. For example, I'm sure HR professionals will have been frustrated with the amount of time it's taking to find out how they should approach their holiday pay calculations, just to give one example.

Ellie Gelder: Yeah, that's a good example. So have any courts been particularly hard-hit by the delays? [0:10:20.8]

Stephen Simpson: So the worst-hit really is the Court of Appeal, which has long delays, including employment cases. With *Lock v British Gas*, the case on commission in holiday pay was fast-tracked, it still took four months between the EAT decision and the Court of Appeal hearing, and other cases are taking three or four years from being brought in the first place to getting a Court of Appeal decision. So I think that's increasingly going to be a problem for employers in the next few years.

Ellie Gelder: That was a great roundup. Thanks, Stephen, and we'll obviously be keeping a close eye on what happens to the UNISON appeal that Stephen mentioned in relation to tribunal fees, as well as the other potential reforms to tribunals which Stephen also spoke about.

You can look at the latest employment tribunal award stats in more detail by going to our quick reference tool, where you'll be able to see awards broken down into different types of claim, for example unfair dismissal, disability discrimination and so on.

That brings us to the end of this week's XpertHR podcast, which you've been listening to with me, Ellie Gelder. We'll be back next Friday, but until then it's goodbye from us.