



XpertHR Podcast

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- Laura Merrylees: Hello and welcome to this week's podcast with me, Laura Merrylees. Today we'll be discussing last week's momentous decision of the Supreme Court to overturn the current tribunal fees regime, following a long-running challenge that had been brought by Unison on the back of fees being introduced four years ago. But what does this decision mean for employers and what can they expect in both the short and long term as a result? Well, joining me today to discuss these issues is Laurie Anstis, a Director at Boyes Turner Solicitors. Laurie, you are also a part-time employment judge, so you really have lived and breathed the impact of the regime first hand from all sides, haven't you? [0:00:53.5]
- Laurie Anstis: Yes, that's right, Laura and I've actually also been a claimant in the employment tribunal, so so far I've managed three out of the four possible things that you can be in the employment tribunal system.
- Laura Merrylees: So a great person to give their view today on this decision of last week. I mean if we go back to why the fee system was introduced and what it involved, can you just take us through what we were looking at four years ago when this came in? [0:01:15.3]
- Laurie Anstis: Yes, sure. Well it was almost exactly four years ago, at the end of July 2013, we had the fee system introduced for the first time in the employment tribunal. At the time the Government phrased this or set this out as being a contribution by the users of the system to the costs of the system in times of austerity. There was also, I think, a sort of slight sub-plot around employment tribunal fees being used to limit the vexatious claims where there was a perception that there were a lot of poor claims being brought just on the basis that it was a free service. People could bring claims even if there wasn't really anything to them. And the employment tribunal fees came in across two different types. So there was what was called Type A, which was typically for lower value claims like unpaid wages and there was Type B, which was the fees for unfair dismissal claims, discrimination claims – the claims that people typically associate with the employment tribunal. And the fees came in at two different stages. First there was a fee that you had to pay to start off your case and that was called the issue fee and then there was a fee that was due a couple of weeks before the hearing, and that was called the hearing fee.
- Now for the Type A claims the issue fee was £160 and the hearing fee was £230, so that would take you to £390 all added up. For Type B, the issue fee was £250 and the hearing fee was £950, so that

would come to over a thousand pounds for the complete set of fees there.

Laura Merrylees: So they are pretty significant fees, or certainly you would believe so given the effect then that this had on the number of claims being issued, because it really was dramatic and pretty swift, wasn't it? Within my recollection, certainly. [0:03:00.1]

Laurie Anstis: Yes, that's right. Pretty much the month following the introduction of fees we saw a massive reduction. There are a number of different ways you can look at employment tribunal statistics, but I think the consensus is that there was about a 70% reduction in employment tribunal cases following fees and that is really something that's been sustained over the four years that we've had fees. Sorry, I should have mentioned earlier that of course there was what was called fee remission available, which was, essentially, that you could get an exemption for fees if you were on a very low income. But one of the things that happened was that it had been thought that a lot of people would get fee remission. I think originally it was thought something like 75% of cases would get some sort of fee remission, but it ended up being only about 30% that got any kind of fee remission. So the vast majority of people ended up paying the full fees.

Laura Merrylees: And of course remission then become sort of part of the...or at least looking at the far lower numbers of those that were successful with having fees remitted became part of Unison's arguments before the courts, and they had had, as I mentioned in my intro, quite a long journey to get to the Supreme Court. What were the key issues that Unison put before the Supreme Court that they decided on last week? [0:04:16.7]

Laurie Anstis: The key argument really was whether the fees order, that is the statutory instrument that introduced employment tribunal fees, was against the law. And it's quite important, on a technical level, to know that this was a statutory instrument. That is, it's a kind of second best way of doing the law as against the full scale Act of Parliament. So, although statutory instruments are sort of approved by Parliament, they certainly don't have the full scale debate that you'd get with a statute or an Act of Parliament.

And the arguments that there were, was whether this fees order was against the law and specifically what Unison was arguing was that there was a constitutional right of access to justice and although the constitution of the United Kingdom isn't written down, that doesn't mean that it doesn't exist and there are some important constitutional principles, one of which is that people should have access to justice and be able to enforce their rights.

There was also a principle that specific statutory rights that are given by one Act, shouldn't be cut down or reduced by a statutory instrument under another Act. So, in other words, what Parliament has given to people cannot then be taken away by this second best form of legislation. And there were various arguments about EU law and generally around discrimination and the effect of fees on that.

Laura Merrylees: Well I think it's fair to say that the discrimination point has received a fair amount of media coverage, but as you say the constitutional point was probably the main issue that the Supreme Court had to decide on. So why did the Supreme Court come to the decision that it did overturning the fees order? [0:05:52.2]

Laurie Anstis: Well they found that because there was this constitutional right of access to justice, if you were going to impose fees to bring a claim, then those fees had to be affordable. And that had always been the argument through the earlier stages of the litigation in the High Court and the Court of Appeal. But Unison always seemed to have some difficulty with the judges in the Court of Appeal and the High Court about proving that the employment tribunal fees weren't affordable and you might say that the Court of Appeal and the High Court had been a bit fussy about exactly what evidence they wanted on that.

But the Supreme Court took a much broader approach. They said you had to take account of the likely impact of the fees on behaviour in the real world and that it was obvious that fees were having a serious effect because of the reduction in the claims. And there had been various arguments put in the Court of Appeal and the High Court by the Government that if people wanted to afford claims they could, it was just that they were spending their money on wide-screen TVs or alcohol or whatever and the Supreme Court didn't accept that argument. They actually said where people on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain an acceptable standard of living, then the fees can't be regarded as being affordable.

But they also went on – and I think this is an important point in practice – to say that the fees would also impede access to justice where it would become futile or irrational to bring a claim. So, for instance, the median award for a non-paid wages claim is about £500. People were facing having to pay £390 on a claim that was only ever going to be worth £500. And although, in theory, if they succeeded their employer would likely be asked to repay the fee to them, the Supreme Court made the point that in reality you're just not going to bother if you have to put up £390 with the hope of getting of £500 back.

Laura Merrylees: So in terms of the claims that are currently before an employment tribunal and indeed the employment appeal tribunal, what is the position now? [0:07:52.0]

Laurie Anstis: The Government is going to have to refund any issue fees that have been paid and nobody is going to face any demands for hearing fees anymore. An important part of the Supreme Court judgment was to say not just that the fees order was against the law as from the date of the judgment, but actually that it was against the law right from the very start. So at least in legal theory, we're now living in a world where that fees order has never been in place and where employment tribunal fees of any kind ought never to have been charged.

And, as you mentioned, this does also apply in the same way to fees for bringing an appeal to the employment appeal tribunal.

Laura Merrylees:

And there's an interesting argument circulating at the moment in relation to potential claimants who might have thought of bringing a claim when the fees order was in place and were deterred from doing so because of the amount of money that they had to pay upfront. You were describing there somebody bringing a claim that was relatively low value and having to pay a fairly high fee in order to do so. For those people who didn't bring their claims they would, on the face of it, by and large, be out of time, looking at a three-month time limit. What's the chance of any of those claims seeing the light of day now, in terms of trying to seek some sort of extension to the time limit? Do you think it's likely or feasible? [0:09:03.3]

Laurie Anstis:

Well it's something we've been talking about a bit in the office. I'm sure a lot of our listeners will know there are two different kinds of time limits in the employment tribunal. One is that you can get an extension of time if it wasn't reasonably practicable to bring your claim within time, and that's typically what applies in unfair dismissal cases. The other is that you can get an extension of time where it would be just and equitable to allow an extension and that's what applies in discrimination claims. It might be that you find that employment tribunals take a different view, depending on the type of claim. Certainly, historically, it's been much easier to get an extension of time on that just and equitable basis, rather than on the reasonably practicable basis.

It's going to be very interesting to think how people can actually prove that they were put off or didn't bring their claim because of fees. There will be some people, and I think this is going to be really interesting, where they did actually submit a claim, but it got rejected because they haven't paid an issue fee, or where they actually had a claim struck out because they didn't pay a hearing fee. Now it's going to be really difficult, I think, for the employment tribunals to figure out how they're going to deal with those points. If the fees order was always against the law, then those claims ought not to have been struck out and ought not to have been refused. But I don't even know really whether the employment tribunal system has records that it can look at to see what those claims were.

The other thing I probably should say is that if people are going to be asking for an extension of time because they couldn't afford the fees, then they really need to get their claims in pretty quickly and probably within the next month or so, because certainly one consideration will be if they do ask for an extension of time, whether they've brought their claim as soon as they could after learning that fees were no longer going to apply. So it's certainly not going to be any good for somebody to sit back for months and months and months before bringing their claim

Laura Merrylees:

And what about employers that had been ordered to pay a claimant's fee for having lost against that claimant in the past? What will happen in relation to those fees? [0:11:02.2]

Laurie Anstis:

The honest answer is nobody knows, Laura, but it's a really important point because the general idea was that if the claimant won their case, then the employer would be ordered to pay their fees back to them. Now we know that the Government is committed to refunding

the fees that people paid to them and within the admin of the system, there will be records of who has paid what fees and therefore who should get what back. But I am not aware that there is any real central record of where employers have been ordered to and paid back the issue fee to the individual and we may be in a situation where individuals get the windfall of having their fee reimbursed by their employer and also then getting it back from the Government.

Again, it's been something we've been talking about in the office and I think if an employer is in a situation of having been ordered to and paid a fee back to an individual, then it would be well-worth them writing in to both the tribunal and the individual saying, 'Please note that we have paid this fee to this person.' At least then there is something on the record which the tribunal may be able to do something with. But we are going to face a problem that tribunals will not necessarily have records of this and almost certainly won't have records of whether an employer has actually paid the fee. I think I'm right in saying that employment tribunals generally don't tend to keep files for very long after claims have finished, so I do wonder if they're really going to have the records on which they can make any payments.

So I think it's well worth employers, at least as a first step, writing in now to the tribunal and the claimant and just putting down a marker saying that they have paid the fee back to the individual.

Laura Merrylees:

Yes, it's a good practical step that employers can take at least. In the short-term what do you think, overall, the likely impact on employers is expected to be as a result of this decision? [0:12:49.6]

Laurie Anstis:

There's going to be a few employers who are going to be keeping their heads down, I think, and hoping that people don't try and bring late claims. As I say in a month or two we'll probably know really whether those claims are coming in because people shouldn't leave it much longer than that. There is going to be a really difficult question about what happens, especially to claims where – and I know there's been quite a few of these – people didn't pay the hearing fee and whether those claims will be resurrected. Again, we should hear with that really in the next month or two.

I would imagine there are some employers who have probably taken a few chances and a few short cuts in recent years on the basis that people were unlikely to bring claims where they had to pay a fee. Now clearly without fees we would expect the number of claims to go back up. It is difficult to say whether that's going to mean they go back up to the level they were before there were fees, but any employers who have developed some bad habits in the last four years, they are really going to have to go back and take a look at that, because they might not get away with so much as they have done in the past.

Laura Merrylees:

And in the long-term? Can we see a changed picture in the long-term as well? [0:13:54.4]

Laurie Anstis:

I think we're bound to. Of course the big question is whether the Government will introduce some sort of new or revised fee regime.

There is nothing in the judgment that stopped the Government charging any kind of fee. I think the general view at the moment is that the Government has got a bit too much on its plate with Brexit and so on to actually get round to introducing a new fee system, certainly in the short or medium-term and it might be politically quite difficult for the Government to do that given that it has emphasised a commitment to workers' rights in the run up to Brexit.

So I think at least in the short to medium-term we can't expect any replacement fee regime. There are bound to be more claims. It's going to be interesting to see how this affects early conciliation because of course early conciliation came in around the same time and was credited with at least some of the drop in claims that occurred around the time of the introduction of fees.

Employers might have to take early conciliation a bit more seriously now. I think there would be some employers who might have given early conciliation a bit of the brush-off because they would then wait and see whether the employee put their money where their mouth is on fees. That's certainly not going to be an obstacle. So employers ought not to ignore early conciliation and just say, 'Well we'll see if somebody brings the claim' because they now can without any fee.

There are a couple of topical things that I'm quite interested in. We know that the gig economy has been quite a big issue and the Taylor Report suggests that people should be able to bring employment status claims with no fee. Folks working in the gig economy sometimes have difficulties in bringing claims, because they might not be earning very much, but they might be earning enough that would mean that they wouldn't get fee remission. Well, now they can bring those claims without any fees, so it's going to be a big issue for employers in that particular sector, because they certainly can't rely on fees being a deterrent to people bringing claims, so we may well see quite a lot more claims being brought about employment status now that employees have very little or nothing to lose or perhaps I should say workers or independent contractors have very little to lose by bringing the claims.

Another thing that we've been talking about over the last couple of years are claims for back pay for holiday pay and I'm sure your listeners will be familiar with the various cases that there have been around commission, around overtime. I'm sure you'll be dealing with this separately, but there was a case earlier this week about voluntary overtime being included in holiday pay. Now for various reasons, one of which was probably employment tribunal fees, we haven't quite seen the holiday pay claims coming in in really large numbers, but I think now that there is no fee, again people have very little to lose by bringing holiday pay claims and I think in the long-term we could see the holiday pay claims really starting to become a larger issue for employers than they might have thought and it's going to be interesting to see whether unions and other advisors aim to try and get in holiday pay claims before Brexit, because of course the holiday pay claims really rely on the Working Time Directive and we know that the Government has said no change for employment rights after Brexit. But because of some of the technicalities, it's going to be well

worthwhile people bringing claims while the Directive still has effect in the UK, I think.

There was talk back a few years ago about no win no fee lawyers getting really involved in holiday pay claims and there are still quite a few obstacles in the way of that, especially the large back pay claims, but it would be quite interesting to see if with no fees we get holiday pay claims being a big issue for employers and especially sort of bulk, large scale holiday pay claims for large amounts of back pay. Certainly without fees one major obstacle to that has been removed.

Laura Merrylees:

Well it will be absolutely fascinating to see what the ramifications of the decision will be and we'll obviously keep the site updated as and when it all becomes clear. Thanks ever so much, Laurie, for joining us. That was a great insight and we'll see what comes.

But that brings us to the end of this week's podcast. Thanks very much for listening. We'll be back again next Friday, but until then it's goodbye from us. [0:17:57.6]