

July 27, 2017

In a much-anticipated judgment, the Supreme Court has ruled that the tribunal fee regime introduced in 2013 is unlawful. The Fees Order which brought in the regime will now be quashed.

The Court found that the regime prevents access to justice. The Government's aims in introducing it were to transfer some of the cost burden of the system to users, incentivise earlier settlement and deter weak or vexatious claims. Whilst the Court acknowledged those aims were legitimate, it held that fees of the level set in the Fees Order had not been shown to be necessary to achieve those aims.

The Court also held that the Fees Order imposed disproportionate limitations on the exercise of EU rights and it was therefore also unlawful under EU law. Lady Hale gave a separate judgment on the question of whether the Fees Order was indirectly discriminatory, finding that it was indirectly discriminatory to charge higher fees for Type B claims (including discrimination claims) than Type A claims.

Prior to the decision, the Lord Chancellor had confirmed that fees paid would be refunded if the regime was found to be unlawful. That will include fees which employers have had to pay when lodging a counter claim and possibly also fees they have had to reimburse as a result of a claim being upheld. It may also cover judicial mediation fees which were also introduced as part of the Fees Order. It is unclear what will happen where fees were reimbursed as part of a settlement. We will provide an update once more detail on refunds has been released.

The Tribunal has already stopped accepting payment of fees for applications made in person and the online system will be adjusted as soon as possible. A potential headache looms for employers, in that we might see a flood of claims which are out of time, but with arguments that the time limit should be extended because the reason a claim wasn't lodged in time was because the claimant couldn't afford to pay fees.

However, this decision is unlikely to be the end of the road for tribunal fees. We expect the Government will go back to the drawing board and seek to introduce a new regime which addresses the criticisms levelled at the unlawful Fees Order.

Your Key Contacts



Mark Hamilton

Partner, Edinburgh

D +44 141 271 5721

M +44 7880 787 838

mark.hamilton@dentons.com