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**Supreme Court Decision – Tribunal Fees**

**Unfair should not mean Unlawful**

The Supreme Court Decision is surprising given that most of the evidence was rejected in two cases before the High Court and subsequently the Court of Appeal. The latter, whilst sympathetic to Unison’s arguments, did not consider the evidence provided to be a safe basis for concluding that the fees order was unlawful.

By contrast, the Supreme Court seems to have accepted all Unison’s arguments some of which seem to be based on rather ‘flimsy’ evidence and assumptions, not helped by weak arguments put forward by the Government. If judgments are made on the basis of fairness rather than legal arguments, then that could set a dangerous precedent.

Further, 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’. The same applies in relation to immigration tribunal fees and immigration applications generally.

There is, of course, nothing to stop the Government bringing in new tribunal fees at reasonable levels but this would have to be debated in Parliament and, it seems unlikely there would be any political will to introduce such legislation, at present. The Government is also ‘supporting’ some workers’ rights following the Taylor Review.

The introduction of fees is not the sole reason for the decline in tribunal cases. Other changes introduced in 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 £80.5k 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.

However, protected conversations do not 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. Consequently, most unfair dismissal claims are now brought as part of discrimination claims, particularly for high earners who are not deterred by fees.

Interestingly, there was not a single reference to unfair dismissal claims in the Supreme Court judgment.

Before fees were introduced in 2013, the tribunal system seemed to favour the employee. Most cases tended to be listed for a full hearing including some unmeritorious claims which should have been dismissed at an early stage.

Given the time involved and legal costs, many employers simply paid compensation to get rid of them, thus leading to some abuse of the system.

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 £1000 to allow a weak claim to proceed together with a costs warning (and no refund on fees). Consequently, the tribunal system now seemed to favour employers.

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.

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