

Have you paid an Employment Tribunal Fee?

November 2017

Reimbursement scheme details announced

On 26 July 2017, the Supreme Court declared that fees in the Employment Tribunal ([ET](#)) and the Employment Appeal Tribunal ([EAT](#)) were unlawful. The Ministry of Justice ([MoJ](#)) and HM Courts and Tribunals Service ([HMCTS](#)) have now launched the employment tribunals fee reimbursement scheme.

The Fees Regime

Fees were introduced in the ET and EAT on 29 July 2013 by the ET and the EAT Fees Order 2013. Claims were divided into two types:

- Type A (for example, claims for statutory redundancy payments, unlawful deductions from wages and breach of contract). For a single claimant, the issue fee for a Type A claim was £160 and the hearing fee was £230; and
- Type B (for example, unfair dismissal, discrimination and whistleblowing). The issue fee for a Type B claim was £250 and the hearing fee was £950.

The landmark ruling of [R \(on the application of Unison\) v Lord Chancellor \(2017\)](#)

[Unison](#), the public-sector trade union, challenged the lawfulness of the introduction of the fee regime by way of judicial review. The claim went all the way to the Supreme Court and was heard by a seven-member panel in March 2017. In summary, the Supreme Court found that:

- the government was acting unlawfully when it introduced fees for ET cases as well as EU Laws being breached;

- claimants could not bring cases to the ET because paying the fees would render the compensation element futile;
- claimants with low incomes could not afford the fees; and
- the ET fees regime resulted in indirect discrimination against female employees.

The fees reimbursement scheme

The Supreme Court made it clear that all fees paid between 2013 and now must be refunded by the lord chancellor.

There was a phased implementation of the scheme, under which HMCTS invited approximately 1,000 eligible parties to apply for reimbursement. Full roll-out of the scheme has now been opened to others.

Successful applicants will receive interest on the fee that they paid at the rate of 0.5%, calculated from the date of the original payment up until the refund date.

Parties who paid a fee but who did not receive an invitation to take part in the initial stage can now register to apply for a reimbursement by email or by post.

Details of the scheme can be found on both the MoJ and HMCTS' websites (including details of how to apply).

The key details of the scheme are as follows:

- it will cover both EAT and ET fees;
- it will be open to both claimants and respondents who paid fees;

- it will be open to respondents who had to pay a claimant a costs order in respect of the claimant's ET or EAT fees. In this case, the respondent must evidence that a costs order was made and paid;
- it will **not** be open to respondents who compensated a claimant for their fees under a settlement agreement; and
- applicants under the scheme must sign a declaration confirming their entitlement. This will include declaring that the applicant did not receive a costs award covering their fees.

The government estimates that the total reimbursement costs, including interest, will be approximately £33 million.

What about reinstatement of claims rejected or dismissed for failure to pay fee?

The MoJ and HMCTS have not yet announced how they intend to deal with claims that were rejected or dismissed for non-payment of a fee (or failure to apply for remission). Nevertheless, we understand from HMCTS that it will be writing to affected claimants asking whether they wish for their claim to be reinstated. We are informed that HMCTS estimates that there are approximately 7,500 such claims.

It is our understanding that the MoJ and HMCTS' scheme will not cover claims that were never brought, for example because the claimant was deterred from doing so because of the fee they would have paid. This was strongly suggested by the Case Management Orders published by the Presidents of the ETs on 18 August 2017.

What does the judgement mean for Claimants?

In the short term, the employment tribunal system will be under considerable pressure. The ET and EAT will need to deal with the administrative fallout of the fees which will have a knock-on implication for business, [Acas](#) and the ET system itself – all of whom must deal with the increased volume of claims.

At the same time, employers will be more likely to settle at the Acas stage, rather than waiting to see if claimants follow through and issue a claim.

Fees in the Future?

The Supreme Court's ruling is that the fee regime established in 2013 is unlawful, not that *any* employment tribunal fees will be unlawful. The government might therefore pass regulations (or more likely issue a consultation on proposed regulations) to introduce a new system of fees which are more proportionate and affordable, and which do not have such a deterrent effect on people enforcing their legal rights. However, this seems unlikely for the time being, with the government busy on Brexit and the risk of further judicial review proceedings to challenge any new regulations.

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Note: This is not legal advice; it is intended to provide information of general interest about current legal issues.

