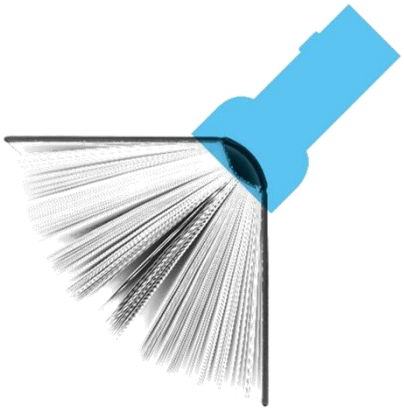
EVERSHEDS SUTHERLAND

In the spotlight

Employment litigation

January 2021



Welcome to our first employment litigation quarterly newsletter

Recent months have proved a torrid time for most organisations, and no less the employment tribunal system. Almost overnight, the pandemic resulted in face to face hearings all but ceasing and a gear step change in bringing the tribunal system online. We also have a new President of the Employment Tribunals (England and Wales), who may influence the direction and pace of future changes.

In this issue, we consider some of the impact but also the tribunals' response. We also share some tips on virtual hearings in the employment tribunal, along with highlighting some case law developments reflecting practical issues.

News

Remote hearings

The Presidents of the employment tribunals in England and Wales and Scotland have published a revised FAQs document and a new road map, detailing future proposals for listing and conducting of hearings. During the COVID-19 pandemic, arrangements will be made to contact parties/ representatives in listed cases so that an assessment can be made by an Employment Judge of the most appropriate method of conducting the hearing (for example, that could be entirely in-person, entirely by remote means, or a combination of such methods). At that time any special measures which require to be put in place in connection with the conduct of the hearing will also be considered. Parties remain at liberty to make any application to the Tribunal that they consider appropriate at any time.

Please see our Client Guide to Remote Tribunal Hearings. Several of our Employment Litigation Team have been involved in full virtual hearings before the ET and are able to share their experiences with you.

The EAT has also published a new Practice Direction concerning the use of Remote Hearings, going forwards, (either in part or in full).

Could we see a return to ET fees in 2021?

According to media reports, the Ministry of Justice has written to the Law Commission inviting it to "provide recommendations for creating a coherent system for charging and updating fees in the future". Despite the previous fee scheme being abolished in 2017, after it was found by the Supreme Court to be an obstacle to justice, resurrecting fees in some form has never left the Government agenda. The fundamental stumbling block, previously, was that the fee levels were deemed simply too high. If a revised scheme is to be introduced, therefore, the Government will need to scrutinise the Supreme Court's ruling and balance more carefully the competing objectives of a fee regime.

Rise in ET Claims at the start of the 2020

Ministry of Justice statistics published for the period of January to March 2020, reveal 10,663 single employment tribunal claims were received (up 18% on the same quarter in 2019). The most common types of complaint in this first quarter of 2020 were:

- unfair dismissal
- unauthorised deductions from wages and
- breaches of the Working Time Directive

Clearly, these statistics reflect a period prior to the onset of the COVID-19 pandemic, which will inevitably impact the number and administration of claims reported in the coming months. We can also expect data concerning the average time taken for clearance of a single claim to increase temporarily, in light of the exceptional circumstances. Already, as at the end of March 2020, the average time was revealed to be 38 weeks, which is an increase of five weeks on the 2019 figure.

These and future statistics will provide an interesting benchmark against which to assess the effect of the pandemic upon employment litigation. Whilst it seems highly likely that the principal types of claim identified will continue to predominate, post-COVID, we also anticipate new claims, relating to the operation of the Government's Job Retention Scheme and potential inequalities emerging from employer responses to lockdown and subsequent returns to work.

Recent cases of interest

In **Square Global -v- Leonard**, the High Court made clear that a legally represented party should not be left to decide themselves the relevance of documents for the purpose of disclosure. Regarding disclosure duties on the commencement of any litigation, see our Client Disclosure Guide.

In **Fottles v Bourne Leisure**, the Nottingham County Court has held that communication with an employee and their attendance at court to give evidence on their employer's behalf, is not "work" in the context of the Coronavirus Job Retention Scheme and does not breach the terms of furlough.

Eversheds Sutherland comment

- Our lawyers have attended several virtual hearings. Top recommendations by partner, Naeema Choudry, are that parties work with the Tribunal to check the functioning of IT equipment well in advance and also ensure that all witnesses are familiar with their IT functionality so that it does not inhibit giving evidence on the day of the hearing. Preparation is just as important for a virtual hearing as it is for a face to face hearing.
- Some tribunal cases are now being listed two years in advance. Jason French-Williams urges employers to adopt a strategy early on, to prepare witness statements whilst memories are fresh but also to agree future assistance from potential leavers. Also think about including provision in Settlement Agreement terms.
- We have acted for the Respondents in a couple of recent widely reported EAT cases which show the strict rules Claimants need to comply with in order to present valid claims to the Tribunal.

In the case of Patel v Specsavers Optical Group Limited the EAT found that the Claimant's failure to undertake early conciliation with the correct employer was a key factor in the rejection of his application to subsequently add that employer as a Respondent, meaning that his claim failed. In Caspall v E.On Control Solutions Limited the EAT held that the employee was not able to subsequently amend his claim forms, which had included incorrect Early Conciliation certificate numbers, causing his claims to be rejected.

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