Reforms to the Employment Tribunal Process – your views

Introduction

The employment litigation landscape is changing at a rapid pace.

To understand readers’ practical experience of the reforms to the Employment Tribunal process implemented last year and opinion on the likely impact of 2014’s planned reforms, we invited recipients of our e-briefs to tell us their thoughts on:

- the introduction of fees in the Employment Tribunal;
- the increase to qualifying service;
- mediation; and
- early conciliation and employer penalties.

In particular, we sought to understand readers’ experience of the introduction of fees for bringing Employment Tribunal claims, including whether it has reduced the number of claims.

This report includes an analysis of the results of our survey conducted between 14-31 January 2014 and is based on 180 responses.

Summary findings

Our survey responses suggest that over 40% of employers have experienced a reduction in Employment Tribunal claims.

Of our respondents:

- only 8% found the requirement to pay a hearing fee encouraged settlement;
- 44% believe the extension of the qualifying period for an employee to be able to bring an unfair dismissal claim from one to two years has led to a reduction in Employment Tribunal claims;
- 41% feel that recent changes to Tribunal Rules have enabled them to address weak and vexatious claims;
- 66% admit to taking no practical steps in preparation for employer penalties in force from April 2014;
- 73% expressed the view that mediation was always or sometimes successful, 40% having attempted mediation during the last year; and
- just less than a third saw the recently introduced £600 fee, payable by the respondent, as a barrier to judicial mediation.

It is clear that the introduction of fees is beginning to have a real impact on the number of claims employers are dealing with. With UNISON’s judicial review challenge having failed, this trend looks set to continue, for the time being at least, though future challenge and change to the fees regime is possible, if not likely. Mediation, however, clearly still has a valuable role to play in the settlement of disputes.
Detailed response summary

Employment Tribunal Fees

Last summer, seeking to transfer some of the cost of running the Employment Tribunal system from the taxpayer to users, the Government implemented a fees regime.

There are two fee levels. In broad terms, claims alleging discrimination, detriment and unfair dismissal are allocated to the higher type, “B” fees. Single claimants, raising such claims, are liable for an issue fee of £250, payable on presentation of a claim, and a hearing fee of £950, payable on a claim being listed for final hearing. Allegations of wage deductions, refusals to allow time off and other “simpler” claims, attract the lower type, “A” fee. The issue fee and hearing fee for type A claims are £160 and £230, respectively.

A remission system provides full or partial waiver of fees for those who cannot afford to pay.

A provision allowing the Tribunal to order that the unsuccessful party reimburse the fees paid by the successful party is included in the Employment Tribunal Rules.

We asked:

“In July 2013, fees were introduced for those wishing to bring an Employment Tribunal claim. Has there been a reduction in claims brought against your organisation since July?”

Respondents’ comments indicate that many organisations are experiencing a substantial reduction in claims, and that fees are acting as a significant deterrent. However, a number of comments we received suggest that the impact of fees is reduced in a unionised workforce, in which unions may support claims.
“Of respondents who indicated that there had been a reduction claims, which type of claim has reduced the most?”

Respondents believe that unfair dismissal claims have been most affected by the new regulations, though a significant number lacked a sufficient number of claims to identify any pattern.

It is perhaps not surprising that employers consider unfair dismissal claims to have reduced most. Although, historically, Tribunal statistics reveal little difference between the number of discrimination and unfair dismissal claims (15% and 18% respectively in the statistics reported in December 2013), the introduction of fees may be a greater deterrent for those bringing unfair dismissal complaints than for those bringing discrimination claims. Relevant factors are likely to be the amount of potential award, there being no financial cap on discrimination compensation. Also, perceived value for money may have a bearing as unfair dismissal claims are, generally speaking, disposed of more quickly than discrimination claims.

“Claimants must pay an issue fee and a hearing fee (unless they qualify for remission). Have any claims brought against your organisation, in respect of which a fee is payable, proceeded to hearing?”
“In any case in which a hearing fee has become payable, did the requirement to pay that fee affect the way in which the case proceeded?”

Under the current fee system, claimants must pay an issue fee and a hearing fee. The hearing fee was believed by the Government to provide a second opportunity to settle cases pre-hearing. However the study results indicate that this has not been the case, with only 8% of respondents indicating that, in their experience, the requirement to pay a hearing fee encouraged settlement. A third (33%) state that the hearing fee has made no difference at all to settlement. Of the remainder, 5% said that the hearing fee acted as a deterrent to settlement.

**Qualifying period of service**

For those recruited on or after 6 April 2012, the qualifying period for unfair dismissal protection increased to 2 years. The Government’s stated aim was to give businesses more confidence to recruit. The change was widely supported by employers as tangible evidence of the Government acting on its pledge to reduce employment red tape.

A poll conducted in 2012 revealed that employers were doubtful whether an increase in the qualifying period would encourage recruitment. However, the proposal did find favour for other reasons, 78 per cent of those polled on that occasion believing that raising the qualifying period would result in a drop in Tribunal claims. Even so, concerns remained that increasing the qualifying period might encourage new litigation, with employees seeking to raise Employment Tribunal complaints on grounds other than unfair dismissal, for which no qualifying periods applies, such as whistle-blowing and discrimination.
We asked:

“Has extending the length of the qualifying period for an employee to be able to bring a claim for unfair dismissal from one to two years reduced Employment Tribunal claims?”

131 responses

The responses to our survey suggest that the changes have had a significant impact on the number of Employment Tribunal claims.

“Has the extension to two years prompted an increase in allegations of whistle-blowing, discrimination and other grounds for which qualification does not apply?”

130 responses

Fears that increasing the qualifying period might encourage new litigation from employees seeking to circumvent the qualifying period with, for example, whistle-blowing and discrimination claims, seem largely unfounded. Even so, a not insubstantial number of respondents (20%) have noted an increase in allegations of this type. If this is representative of employer experience generally, it would represent a significant increase in claim types which have no requisite qualifying period of employment. One respondent
said, “we now see a rise in weak discrimination claims rather than weak unfair dismissal claims”.

**New Employment Tribunal Rules of Procedure**

New Rules governing Employment Tribunal practice and procedure across England, Wales and Scotland have applied to all ongoing and new cases since 29 July 2013, the same date on which the fees regime was introduced.

The new Rules include sanctions for non-payment of fees, an initial sift stage and a rule expressly permitting Tribunals to limit oral evidence and submissions at hearings.

Of these changes, the most notable for parties raising or opposing claims is the new initial sifting stage. Every case is reviewed on paper by an Employment Judge at the outset to confirm there are arguable complaints and defences within the Tribunal’s jurisdiction and to allow for case management orders. This process is conducted without the involvement of the parties but inevitably increases emphasis upon the contents of the claim and response forms.

The express requirement in the Rules is that the sift process should identify weak claims and encourage more robust case management. Claim and response forms which are inadequate or unclear are likely to be challenged by a Judge, encouraging far closer scrutiny by authors of what is included.

**We asked:**

“Aside from the introduction of fees, have you found it easier to address weak claims since the introduction of the new Tribunal Rules on July 29th, which, in part, were aimed at reducing weak and vexatious claims?”

A significant number of respondents suggest that the new Rules have helped to address weak claims. However, of those, a number commented that it is the introduction of fees, in their opinion, which has had the biggest impact on weak claims.
“Please comment on your experience of the Rules aimed to reduce weak and vexatious claims.”

Comments from respondents suggested that there may be more cases listed for strike out and/or deposit orders as a result of the sift. If this is the case, then most employers will welcome the introduction of this process, as it presents an opportunity for the Tribunal to deal robustly with weak or vexatious claims without the need for a full Hearing.

**Mediation**

The new Rules place even greater emphasis on alternative dispute resolution. For the first time the Rules place an obligation on Tribunals, wherever practicable and appropriate, to encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement.

Judicial mediation is an alternative form of dispute resolution, in which an Employment Judge assists the parties in reaching a negotiated agreement in order to resolve an existing Tribunal claim. The strategy and tactics are not rigid or prescribed, one of the advantages of judicial mediation being that it offers parties the opportunity and flexibility to agree terms that a Tribunal would not be able to offer, including non-financial measures such as an apology, a reference or outplacement counselling.

The introduction of the fees regime means that, in claims submitted on or after 29 July 2013, a fee of £600 is payable for judicial mediation.

**We asked:**

“In the last 12 months, has your organisation used mediation as a means to settle, or attempt to settle, any dispute, whether pre or post Employment Tribunal applications?”

![Survey Results Chart]

Almost 40% of the respondents to our survey indicated that they have used mediation in the last 12 months at least once. This is a significant figure.
“If not, why not?”

The main reason given for not using mediation was that it was not considered suitable. Interestingly, only 3% of respondents gave cost as a reason for not using mediation, probably because the cost of defending a claim in the Employment Tribunal is also significant.

“How successful is mediation in your experience?”

It appears mediation has mixed success. This suggests a need for selection and understanding of where mediation may work. Interestingly, recent statistics demonstrate that judicial mediation has a success rate of in England & Wales in excess of 70%.
“Do you have any comments on the effectiveness or otherwise of mediation?”

A key to success is to ensure that both parties agree to use mediation as a dispute resolution tool. Realistic expectations and open mindedness appear to be key to perceived success. Many survey respondents also suggested that mediation needs to be commenced early, before positions become entrenched.

Comments on the effectiveness of mediation include:
- “A member of staff who refused to attend any meetings or provide any contact with the company was able to put his side to the ACAS mediator and we were then able to enter into structured discussions with him.”
- “Previously, there was one correspondence to attempt to resolve with little understanding of the merits of the case, but now it appears that mediators are much more involved and willing to go between parties managing expectations and likely prospects to attempt to resolve without a full hearing. For example we have seen claimants drop cases as a result of mediation and accept a much reduced payment than their original outline of expectations”

“There is now a fee for judicial mediation of £600 payable by the respondent (for cases brought on or after 29 July). Will this fee be a barrier to using judicial mediation for you?”

![Pie chart showing survey responses](chart.png)

Over 30% of respondents indicated that the fee for judicial mediation would be a barrier to using judicial mediation, though 46% said it would not.
“If so, will it make you more likely to use other private mediators, such as ACAS?”

Over two thirds of respondents suggested that they are, as a result of the introduction of a fee for judicial mediation, more likely to use private mediators. Of course, those mediators will also have a cost, which itself will often be higher than that of judicial mediation.

“The new Tribunal Rules now specifically invite Tribunals to encourage mediation and other means of resolving their disputes by agreement. Have you seen any evidence of this in the cases you have been involved in?”

Although only 16% of respondents have seen any change, this is a significant finding, as Tribunals will not step in to suggest mediation and other means of resolving disputes unless they feel it is appropriate.
“Please give an example of where the new Tribunal Rules have increased the use of mediation if you are able.”

Responses to this question suggest there is an increased likelihood of mediation or settlement being discussed at Preliminary Hearings. Indeed, the question of whether there is a willingness to engage in judicial mediation is a matter raised on the case management agenda in most suitable cases, suitable cases being generally considered to be those listed for a longer period of time.

**Early Conciliation and employer penalties**

Early conciliation (EC) and the new discretionary power for Employment Tribunals to impose a financial penalty on employers who lose a claim (in addition to any compensation) will come into effect on 6 April 2014. These changes represent further significant reform of the Employment Tribunal System and are part of the package of measures included within the Enterprise and Regulatory Reform Act 2013.

Under EC, most prospective claimants will have to contact ACAS before they can present a claim. There will be no obligation on prospective claimants to provide information about the nature of their claim at this stage, only the prospective parties’ names and addresses. However, if a prospective claimant consents, ACAS will make contact with their employer and will seek to promote settlement for one calendar month.

The intention of EC is to increase the number of cases where parties reach an agreed settlement; to ensure the claimant and respondent benefit from contact with ACAS in terms of information and understanding, even where they do end up in Employment Tribunal; and to improve overall satisfaction with the employment dispute resolution system. Importantly for employers, issues identified during the EC System process will not restrict or bind claimants in terms of future allegations, if they go on to commence proceedings. The process will accordingly give employers an indication of the issues in dispute but may not be comprehensive.

A further reform, and one less welcome by employers, is the introduction of employer penalties. In respect of claims presented on or after 6 April, Employment Tribunals will have the power to order losing employers to pay a penalty to the Secretary of State where the employer’s breach of the rights to which the claim relates has one or more aggravating features. The value of such a penalty will be 50% of any financial award, with a minimum amount of £100 and maximum of £5,000. The penalty will be reduced by 50% if paid within 21 days.
“ACAS early conciliation (EC) will be introduced next year. Do you plan to ordinarily engage in EC?”

114 responses

Early conciliation appears to be a popular measure with over 80% of respondents suggesting that they will consider its use in some or all of the disputes they face. Clearly, there are many merits in seeking to resolve disputes at an early stage, including significant potential cost savings for all concerned.

“Is your employer preparing for the introduction of employer penalties in April 2014?”

111 responses
Which of the following activities is your organisation carrying out before the introduction of employer penalties in April 2014?

<table>
<thead>
<tr>
<th>Activity</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Communicating the change to managers</td>
<td>70.6%</td>
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<td>Reviewing settlement practice where there might be a risk of a penalty being awarded</td>
<td>55.9%</td>
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<tr>
<td>Reviewing disciplinary and grievance training needs for line managers</td>
<td>76.5%</td>
</tr>
<tr>
<td>Other</td>
<td>2.9%</td>
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</tbody>
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Only a third of organisations has taken steps to prepare for this new penalty. There may be a lack of awareness that this provision will apply from April 2014 or a degree of complacency that the little-understood “aggravating features” will not apply. Despite employers’ receiving fewer claims, none will surely wish to risk additional penalty and the adverse publicity which will inevitably follow the first penalties imposed, yet 66% of employers admit to taking no practical steps, such as reviewing disciplinary and training needs, to prepare for this change.

**Conclusion**

It is beyond doubt that the employment law landscape is changing at rapid pace. That Unison’s recent challenge was unsuccessful means that the fees regime will remain unaffected for the time being at least. However, the High Court left the door open to a fresh challenge in the future, when the impact of fees on claim levels becomes clearer. That being the case, the long term future of the fees regime is not yet secure.

Few employers will be sorry that the fees regime will remain, for the time being at least, as this means fewer Employment Tribunal claims. One thing that is becoming clear is that, by introducing fees, the Government has made significant inroads into one of the perceived weaknesses of the system, namely that it allowed weak and unmeritorious claims to proceed with impunity. Although preventing such claims was not one of the Government’s stated aims in introducing fees, the regime will continue to be welcomed by most employers if the number of claims they perceive as weak and unmeritorious is reduced.

Longer term, however, for those claims which do proceed, it seems likely employers who lose in tribunal or who choose to settle cases early will need to pick up the costs of at least some of those fees. Employers will also need to guard against blatant or reckless breach of employee rights, if they are to avoid the financial burden, not to mention potential stigma, of employer penalty. For these and the reasons outline above, the advantages of alternative dispute resolution may appear an increasingly attractive option, either through EC or mediation.