

	Fees, Fines and Fighting Back:	
	Using Con-Dem Employment Changes To Your Advantage	
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Tribunal Fees 29th July 2013

Bringing Claims

- Fees to bring ET claims were introduced on Monday 29th July 2013.
- Type A claims - unpaid wages, pay in lieu of notice, holiday pay and redundancy pay, the issue fee will be £160 and the hearing fee will be £230.
- For Type B claims (all other claims e.g. discrimination, unfair dismissal etc), the issue fee will be £250 and the hearing fee will be £950.

Tribunal Fees

Fee Remission

- The Government use the current civil courts remission system to protect claimants who cannot afford to pay the fees.
- The new scheme came into force on the 7th October 2013

Fee remission

The new scheme

- Takes account of introduction of Universal credit
- Introduces a disposable capital test. If you or your partner have £3000 disposable capital you have to contribute to fees even if you pass the income test
- There is a single less generous tapered income assessment instead of the previous remission 2 & 3 which provided for a minimum gross earnings or a minimum net earnings
- The time limit for applying for a retrospective remission has been reduced from 6 months to 3 months

Tribunal Fees

Time Limits etc.

- The Government has accepted that claims will be treated as lodged in time if accompanied by a fee or an application for remission even if the application is not processed until later or it is decided the claimant does not qualify.
- If a claim includes Type A and Type B claims the higher fee is payable
- Fees will be paid through an online service or a centralised processing centre. Local offices will not be able to accept fees or handle cash or cheques (except in emergencies?)
- Certain designated offices will accept applications by hand during office hours
- Interim relief claims in trade union activities cases

Tribunal Fees

What is Wrong

- Fees are payable in all cases without exception.
- No refund of fee even if case settles straight away.
- Discretion to tribunal to make "losing" party refund fees of "winning party".
- But some 39% of tribunal awards are not paid at all and a further 8% are only paid in part according to Government research in 2009.
- Will be another factor in negotiations and may be an obstacle to settlement.
- "Fees don't discourage unmeritorious claimants, they discourage the impecunious ones" –Sean Jones QC.

**Tribunal Fees Fighting
Back 1**

- If your union doesn't run a loan scheme for ET fees campaign until they do
- Tell the respondent fees are not a problem as it is a union backed case
- Write a "without prejudice save as to costs" letter before commencing proceedings offering to settle & pointing out they will be ordered to pay the fees in addition to any award when you win
- Apply for costs when you win & refer back to this letter
- Always apply for a remission if you qualify even if the union loan you the fee

**Tribunal Fees Fighting
Back 2**

- Refer to Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) 2013 –the Overriding Objective which states
"Dealing with a case fairly and justly includes, so far as practicable-
(a) ensuring that the parties are on an equal footing;
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
(c) avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) avoiding delay, so far as compatible with proper consideration of the issues; and
(e) saving expense
...The parties and their representatives...in particular shall co-operate generally with each other and with the tribunal"

**Tribunal Fees Fighting
Back 3**

- Refer to Rule 3 of the E T Rules which state
- "A Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement"
- Be prepared for anything at a preliminary hearing including proceeding immediately to a final hearing, thus avoiding incurring a hearing fee
- Never settle a claim without payment of fees being included in terms of settlement-ET Rule 76(4) ET may make an order that ET fee paid where claim "...is decided in whole, or in part, in favour of that party"

Tribunal Fees

Judicial reviews

- There are currently 2 legal challenges to fees
- In Scotland Fox & Partners were granted permission but refused an interim interdict (injunction) on 29th July but the case is to proceed to a full hearing in October
- In England Unison were granted permission to proceed at an oral hearing and the full hearing is due to take place in October

Tribunal Fees

The Lord Chancellor made 3 concessions in the preliminary hearing in Scotland

- Only 1 fee is due for multiple appeals in the EAT (not one fee per applicant).
- Preliminary hearings will not attract a hearing fee
- Equal Pay claims fall within "Type A" and so should pay a lower fee and it was a mistake they are in the wrong table. This will require amending legislation

Changes From April 2012 Fighting Back

Amendments to Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004

- To administratively remove automatic witness expenses.

Fighting Back

- Try to agree evidence at preliminary hearing
- Ask for an electronic hearing-Rule 46 allows any hearing to be conducted in whole or in part by electronic communication provided any party or member of the public attending can hear & see what the tribunal does
- Include expenses of claimant & witnesses in attending as part of schedule of loss

**Collective Redundancies
April 2013**

From 6th April 2013 the 90 day minimum period of consultation for redundancies of 100 or more will be replaced with a 45 day minimum.

- New non-statutory guidance has been issued by Acas to provide guidelines on principles and behaviours behind good quality consultation.

Fighting Back

- These are minimum periods. The recognised union can ask for longer –S 188 (2) *“with a view to reaching agreement”*
- Recent decision of EAT in USDAW v Ethel Austin & Woolworths [2013] UKEAT 0547/12 has held that S.188 is not compatible with Directive No.98/59 with regards to 20 or more employees at one establishment and the words *“at one establishment”* should be deleted when reading the statute.

**Enterprise and Regulatory Reform Act 29th July
2013**

Cap on Compensatory Award

- Limited the maximum potential compensatory award for unfair dismissal claims
- The cap is reduced to 12 months pay OR the statutory cap of £74,200 whichever is lower.
- This came into force on the 29th July 2013 in respect of dismissals on or after that date.

Fighting Back

- Still no cap on discrimination claims under Equality Act, or whistle blowing claims

Settlement Agreements

Settlement Agreements

- The terms *“compromise agreement”* and *“compromise contract”* are replaced with *“settlement agreement”*.
- There is an ACAS Code of Practice that has now been approved by the Government. Failure to follow the code will not make a party liable or lead to an adjustment in awards but can be taken into account by ET’s in deciding cases.
- Offers to end the employment relationship on agreed terms can now be made on a confidential basis even where there is no existing dispute
- Originally called *“Protected Conversations”* and provide an extension to the *“without prejudice”* rule
- Such discussions can’t be referred to in Tribunal evidence in unfair dismissal claims unless
 - There is *“improper behaviour”*
 - There is an automatically unfair reason for dismissal claimed e.g. whistle-blowing, TU membership breach of Equality Act etc.

Settlement Agreements Fighting Back

- Get out your smart phone & say you will record conversation in case any *“improper behaviour”*
- Suggest the conversation is only being held because you are black, gay, female etc.
- ACAS Code says parties should be given a *“reasonable period of time”* to consider the agreement- what is reasonable depends on the circumstances - recommends at least 10 calendar days to consider the formal written agreement terms and to get independent advice
- Good practice to have a face-to-face meeting which a TU rep is permitted to attend and to explain reasons for proposal

“Improper behaviour”

Examples in ACAS Code

- Harassment, bullying, threats
- Physical assault
- Discrimination
- Putting undue pressure
 - Not giving a reasonable time for response
 - e.g. saying before a disciplinary process has begun that if they don't accept the agreement they *“will”* be dismissed)
 - on the employer e.g. employee threatening to make a damaging public disclosure

The Equality Act 2010 Changes

- The third party harassment provisions-now going on 1st October 2013
- Questionnaires and tribunal's power to make wider recommendations are due to be abolished on 1st April 2014

Fighting Back

- Harassment by a third party may be still be within S.26 Equality Act if the employee complains of previous conduct but the employer but is placed back in a situation where they are harassed
- It may be direct discrimination under S.39(2)(d) subjecting to other detriment if because of their sex, or race etc.
- It may also be indirect discrimination. The failure of the employer to take reasonably practicable steps to prevent third party harassment is a discriminatory practice for purpose of S.19

The Equality Act 2010 Changes Fighting Back

When Questionnaires are abolished

- You can still ask the employers questions as part of a grievance or appeal. Any answer can still be put in evidence in the subsequent ET if the respondent's answer is equivocal or inconsistent
- Use ET Rule 31 *"The Tribunal may order any person in Great Britain to disclose documents or information to a party..."*
- Use reference to the Overriding Objective if the employer refuses.

Early Conciliation

- Due to come into force in "Early"2014
- Government have now published their response to the consultation on pre-action (now "early") conciliation.
- Required to contact ACAS before lodging claim
- Claimant or Respondent can refuse an offer of early conciliation
- Receipt of form by ACAS intended to stop the clock for limitation
- Proposed forms require only basic contact information not information about the dispute
- Main concerns are complication of time limits and how multiple claims will be handled

Early Conciliation Fighting Back

- Why not refer every grievance to ACAS for early conciliation whether the claimant contemplates ET proceedings or not. Employer may take it more serious if independent third party involved. Shows intent to take proceedings.
- If employer refuses to engage write them a without prejudice save as to costs letter saying that forcing the claimant to issue proceedings and incur a fee is otherwise unreasonable conduct for purposes of rule 76(1) (a) & their defence to the claim has no reasonable prospect of success for purposes of rule 76(1)(b).
- At any preliminary hearing suggest judicial or ACAS mediation & refer to rule 3. Write a further without prejudice save as to costs letter if the employer refuses to engage.
- When you win the case show all the letters to the ET in support of a claim for costs.

Questions?

You can keep up to date on developments in ET Fees and all matters under #ukemplaw by following me on twitter

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