Fee remission changes: adding injury to injury?

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Fees are nearly upon us. Which means employment lawyers will have to grapple with fee remission. But this too is about to change … and not necessarily for the better.

From 29 July 2013 it will, for the first time, cost money to bring a claim in the employment tribunal. The sums involved are substantial: a type B claim, such as unfair dismissal or discrimination, requires an issue fee of £250 to lodge, followed by a hearing fee of £950. There will, however, be exemptions and reductions under the fee remission scheme. At first, the approach will be almost identical to the current fee remission scheme in the civil courts.

But this is also due to change. The Government recently launched a consultation, 'Fee remissions for the courts and tribunals'. It proposes fundamental changes to the remission system throughout the justice system, which are expected to take effect this autumn.

Capital test

Currently, remissions are based on either receiving certain benefits that grant a 'passport' to remission or assessment of income.

The Government proposes to add a 'disposable capital' test. For the employment tribunals this is to be set at £3,000. Anyone whose household disposable capital is greater than this will not be entitled to any remission or reduction of fees.

A capital test is likely to have particular impact in the employment tribunals, since so many cases revolve around dismissal and because dismissal often involves lump sum payments (such as Pilon, accrued holiday pay and redundancy pay). These, particularly if combined with even modest savings, will take many claimants over the capital threshold.

I question whether claimants should be expected to use such payments – intended to support them while they search for new work – to pay tribunal fees. For many claimants it will introduce an element of capriciousness. Whether they pass the capital test will depend on whether they are dismissed on notice or given Pilon, or the amount of holiday they have taken so far in the year. Even more oddly, employees may, in the long run, benefit from an unscrupulous employer, that fails to pay money owed and allows the claimant to get under the cap.

The capital limit is set much lower than the capital limit in the civil legal aid means assessment, which, in most cases, including employment, is £8,000. So, oddly, some claimants will be poor enough to get legal help with their discrimination claim, but too rich to have their fees remitted.

There is also the danger that claimants will delay bringing a claim so they can expend their capital on living expenses. This will increase the chance of claims being brought out of time. It will also lengthen the total time both sides spend dealing with the employment problem.

The relatively low level of the capital test is also not commensurate with the low levels of employment tribunal awards. In 2011/12 the median average award for unfair dismissal was £4,560. The total fee would be £1,200. A claimant with £4,000 of household capital would expend a third of their savings in bringing a claim. The risk to reward ratio is discouraging.

Finally, in the employment context, the capital test will indirectly discriminate – in particular against older workers. They are more likely to have built up savings and to have been in employment for longer, resulting in higher Pilon and redundancy payments.

Income test

The Government proposes to replace the current three-part income test (passported benefits, gross annual income and disposable income) with a single gross monthly income test.

Claimants with a household monthly income below the threshold will receive a full remission.

The threshold depends on whether the claimant is single and whether they have children (and how many). For a single claimant with no children the limit for full remission is £1,085. For a couple with two children it is £1,735.

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Claimants whose household monthly income exceeds the threshold may receive a partial remission. For each £10 of income above the threshold a claimant must pay £5 of the fee.

What does this mean in practice? A couple, both earning the national minimum wage for a 40-hour week, will have a household monthly income of £2,187.47 (based on NMW from 1 October 2013). They are not entitled to a full fee remission. If they are childless they will have to contribute £470 to any fee. So, to bring an unfair dismissal claim, they must pay the full issue fee of £250, followed by £470 towards the hearing fee; a total fee of £720. If they have two children, they will have to contribute £225 towards any fee. So they pay £225 towards both the hearing fee and the issue fee; a total fee of £450.

The new income test raises a number of matters of principle. The impact assessment that accompanied the consultation paper estimated that 24% of litigants will be entitled to full remission, down from 32%. Some of those will be entitled to partial remission. But the overall number of claimants receiving some form of remission will drop 5%. These figures are a Government estimate relating to the justice system as a whole. The real-world impact on employment tribunals may be quite different.

Is it just to reduce free access to the tribunal in this way? Especially when fees will only just have been introduced to the tribunal? Ultimately, this is a political issue on which ELA itself has no view.

Separately, however, the proposals raise a number of practical problems. The majority of employment tribunal claims involve dismissal. This means that the claimant's monthly income will change drastically. Often there is a one-off surge as the claimant receives payments relating to dismissal. There is almost always a dramatic decline, because the claimant is left unemployed.

This means that many claimants would be well advised to delay bringing a claim so that their household income can settle at the lower level. This has the same problems as the capital test – more claims brought out of time and an extension of the end-to-end time both parties spend dealing with the dispute.

Anyone who has dealt with legal aid means testing will be aware of the difficulties of obtaining proper evidence of litigants' means – or the means of their partners. The current remission system sidesteps much of this problem by using passporting benefits. Litigants on a wide range of benefits receive a full remission. In effect, the difficulty of assessing people's financial position is outsourced to the Department for Work and Pensions.

To some extent this sort of passporting will remain under the proposed scheme, since those receiving Income-related Employment and Support Allowance, Income Support, Income-based Jobseeker's Allowance and Pension Credit guarantee credit will be deemed to fall below the income threshold. But the scope of this provision will be much smaller than the passporting in the current system. This is particularly true in the employment context, where, inevitably, most claimants are either recently dismissed or still employed. If they are on benefits, therefore, they are likely to be on contribution related benefits – where passporting will not apply.

This means that many more remission applications will involve HM Courts & Tribunals Service considering evidence of income. This will be done in a central processing location in Leicester, to which litigants will post their remission application and supporting evidence. The working party was unanimous in fearing that this system may not be able to keep the tribunals running smoothly. There seems to be a real risk of long delays.

ELA member resources

ELA's website is a mine of useful information for members and is regularly updated with the latest contributions. This includes:

- ELA contributions to government consultations at www.elaweb.org.uk/resources/type.aspx?type=3
- lecture notes from ELA training at www.elaweb.org.uk/resources/type.aspx?type=2
- discount offers on employment law publications at www.elaweb.org.uk/membership/membershipdiscounts.aspx

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Equally concerning is that the current scheme does not appear to deal well with income assessments. In 2009 the Ministry of Justice commissioned research from PricewaterhouseCoopers. In test scenarios, 30% of remission decisions were wrong. In decisions that involved consideration of income, the majority of decisions were wrong. There is a risk that we will move from a somewhat inaccurate remission system to one that is inaccurate more often than not.

Multiple claims

Multiple claims involving dozens or hundreds of litigants will make everything more complicated and more difficult.

The rules for determining the fee payable in multiple cases are already intricate to the point of convolution. When they are combined with the need to assess the income of dozens – or hundreds – of households to take account of remissions, they will require many hours of work on the behalf of litigants, lawyers and tribunal staff just to calculate the fee. It is likely that in some cases the cost of processing the remission application will exceed the value of the full fee.

Then there is the issue of joint liability for the fee. This means that remissions given to one party increase the fee payable by the other parties (subject to a rule that no party will pay more than the fee for a single case). This increases the administrative complexity – since no party can assess their own fee position in isolation.

Retrospective remissions

At present a party who pays a fee may apply for a remission within six months. The consultation proposes reducing this to two months.

This change is likely to have a particular impact in employment tribunal claims for two reasons. First, the short time limits mean that it will be difficult, particularly in complex cases, to sort out the remission position before starting the claim. Second, employment claimants are one of the groups likely to receive external support in their claim, specifically from unions. Many unions intend to operate on the basis that they will pay the fee upfront or provide a loan – on the basis that the claimant will apply for remission if appropriate. This approach has advantages for all sides, since it avoids delay – particularly in complex cases. This will be more difficult if the deadline to apply for remission is cut.

Retrospective remissions also increase the chance that a remission will be granted after the tribunal has made a decision – and potentially ordered the respondent to pay the fee in a costs award. Claimants may be faced with a moral dilemma. Do they tell the MoJ that remission is unnecessary? Or tell the respondent not to pay their costs?

Timetable

Finally, I can't resist (and don't really feel I should) a reference to the absurd timetable involved in this consultation. This was a consultation proposing significant and complex changes to a vitally important part of the justice system. It lasted a mere four weeks.

This suggests – at best – a failure to appreciate the importance of the proposals, the complexity of their effects or the time stakeholders need to give the proposals serious thought.

Paul Statham (Pattinson & Brewer) and Michael Reed co-chaired the working group that prepared ELA's response to the consultation. This article discusses the main proposals from the perspective of employment lawyers and is heavily based on that response. Michael is grateful to all the members of the group: Minal Backhouse (Backhouse Solicitors); Edward Cooper (Slater & Gordon); Scott Halborg (Halborg & Co); Louise Taft (Prolegal Ltd); Peter Wallington QC (11 KBW); Nic Webster (Leigh Day); and John Wiggins (Mary Ward Legal Centre).

KEY:

2013 Regulations	Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013
2004 Regulations	Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004
ERRA	Enterprise and Regulatory Reform Act 2013