What took them so long?

Richard Fox examines the practical and political issues arising from the Supreme Court's momentous decision that charging claimants to bring an employment tribunal complaint is unlawful

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Quite how the government managed to hold on to the Employment Tribunal Fees Order (the Fees Order) for so long may come to be one of the mysteries of our age. The Fees Order came into effect the day after it came into force on 28 July 2013. It introduced for the first time the need to pay a fee to issue an employment tribunal claim and thereafter a fee to have the case heard. For 'Type A' cases (the more standard claims), these fees were £160 and £230 respectively. For 'Type B' cases, generally speaking the more complicated claims, these fees were £250 and £950 respectively.

Right from the start, the government claimed the main purpose for introducing the new fees regime was to transfer the cost of running the tribunal service from the population as a whole to those who specifically use the system. Few people believe that: most saw it as a response to the seemingly inexorable rise in the number of claims being brought before the employment tribunal. Surely the government was hoping that by requiring litigants to pay fees rather than being able to access the system free of charge, this would reduce the number of applications.

Whatever your view, the effect of the introduction of fees was undoubtedly to decrease drastically the number of claims being brought before the tribunal. The reduction was in the order of between 66% and 70%. Such a fall must be among the most dramatic ever seen in any jurisdiction in the UK in modern times.

History of the case

Almost immediately after the introduction of the Fees Order, the public sector union, Unison, took up the challenge of seeking to have it struck down. However, its first application for judicial review failed before the Divisional Court in June 2013, the court taking the view that the application was premature and that Unison's evidence was insufficiently robust to sustain its challenge.

Unison made a second claim for judicial review and, in September 2014, a differently constituted Divisional Court also dismissed its claim. The court said it was not going to strike down the Fees Order unless the fees were so high that the prospective litigator was clearly unable to pay them.

Unison went on to the Court of Appeal. It too dismissed the claim. In its view, the test was not whether the payment of the fee was a sensible use of money. Rather, the need to pay a fee would not constitute an interference with the right of effective access to a tribunal under EU law unless it made it impossible in practice to access the tribunal.

In the meantime, the number of claims being brought to tribunal continued to run at a fraction of the pre-fees rate. Arguably, this was beginning to affect the way in which some employers managed their employment issues and assessed the consequences of taking particular actions against employees. Certainly, it became increasingly clear that lower-value claims were being rendered wholly uneconomic by the size of the fees required. Unsurprisingly, such claims were virtually disappearing from the system. To some, this seemed strange in light of

the new Prime Minister, Theresa May's, indication that the government would look after the 'just about managing' and would be protecting workers' rights post-Brexit.

Then came the decision of the Supreme Court (*R (on the application of UNISON) v Lord Chancellor* [2017]). It was released on 26 July 2017. It was rather like the moment when the child in Hans Christian Andersen's *The Emperor's New Clothes* cries out before the assembled crowd (every one of whom had hitherto been too frightened to say what everybody had seen, namely that the emperor was wearing no clothes), 'but he isn't wearing anything at all'. Lord Reed, with the approval of the other Supreme Court judges hearing the case, finally said what most commentators had been thinking right from the very start, namely that the Fees Order effectively prevented access to the employment tribunal system and should be ruled unlawful.

The Supreme Court's decision

The Supreme Court's decision is one of the most important in the field of employment law for some considerable time. It comprehensively took apart the government's case piece by piece. So much so that after you have read through the judgment, you really do wonder how it could have taken so long to come to this point.

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Lord Reed looked at each of the reasons the government had put forward to justify the introduction of the new regime and he countered them in turn.

To start with, the main purpose of the scheme was said to be to transfer the cost of the system to the litigants themselves. An impact assessment had indicated the government initially thought it would recover approximately one third of the cost of the tribunal system in this way. In the event, after taking into account fees that were remitted to ameliorate particular hardship, costs recovery came in at approximately 13%. In some of his more withering remarks, Lord Reed said he thought it flew in the face of 'elementary economics and plain common sense' to believe that, simply by increasing the level of fees, the government would recover a greater proportion of the cost of the system. He said that the government had failed to show that less onerous fees, or a more generous system of remission, would have been less effective in meeting the objective of transferring the cost burden to users.

Next was the suggestion that the introduction of fees would serve to deter 'unmeritorious' claims. But even the government's own review published earlier this year (in January 2017) showed that the proportion of successful claims had been consistently lower, and the proportion of unsuccessful claims consistently higher, since fees were introduced.

What of the suggestion that the introduction of fees would serve to encourage earlier settlement? That too was not borne out by the evidence, since the proportion of cases settled through Acas has in fact slightly decreased since fees were introduced.

As to the question of whether the Fees Order was unlawful under English (rather than European) law, Lord Reed said this:

> When Parliament passes laws creating employment rights... it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect. It does not envisage that every case of a breach of those rights will result in a claim

> before an ET [employment tribunal]. But the possibility of claims being brought by employees whose rights are infringed must exist, if employment relationships are to be based on respect for those rights. Equally, although it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail. It is thus the claims which are brought before an ET which enable legislation to have the deterrent and other effects which Parliament intended, provide authoritative guidance as to its meaning and application, and underpin alternative methods of dispute resolution.

One suspects this is a passage that is going to be quoted many times in the future. Certainly, it is seminal in the way it explains the need for an effective and practical means of enforcing employment rights, in the absence of which these rights may come to be sidelined or ignored.

Turning to whether the Fees Order was justifiable in European law terms, the judge concluded that fees were 'unaffordable by some people' and:

> ... so high as in practice to prevent even people who can afford them from pursuing claims for small amounts and non-monetary claims.

The Fees Order was therefore disproportionate and unlawful under EU law. It was accordingly quashed and, almost immediately, the government abandoned the scheme.

Where does this leave us?

First of all, we may find the fees regime does not wholly disappear in the manner of the ill-fated statutory dismissal procedures of a decade and a half ago. There is the real possibility that a new Fees Order will be introduced, but with fees set at lower and more realistic levels.

Secondly, for employers there is no need to panic. They should continue to adopt best practice and follow the helpful and readily accessible Acas codes and guidance documents before taking any significant step in managing their workforce. Even if they are challenged by employees thereafter, there is always the Acas Early Conciliation Scheme, which they can continue to use to try and resolve disputes before they reach tribunal. The rules for striking out claims that have no reasonable prospect of success will remain, plus employers can ask the tribunal to make a deposit order as a further deterrent against unmeritorious claims. This involves the judge requiring the employee to pay a deposit of up to £1,000 if they want to pursue a particular argument. The tribunal's costs regime can be employed in appropriate situations.

That being said, for employers and employees alike, there are a number of important questions that arise.

First of these is what may come of those cases that have simply disappeared from the system through the introduction of fees. For example, will claimants now come forward wanting to bring unfair dismissal claims on the basis that, although they are doing so outside the requisite time limit, it was not reasonably practicable for them to present these cases previously because of the fees regime? Similarly, in the case of discrimination claims, is it going to be just and equitable (the more benign test) to let these through after expiry of the primary limitation period given the circumstances? This could be a real problem for the government, particularly if it is unable, hastily, to make the tribunal system more efficient and provide adequate resources to meet any increased demand.

The government may also rue the day it undertook to repay all tribunals fees if the Fees Order was struck down. Just how it is going to manage that process is not yet known and one suspects finding all those individuals who have paid fees since July 2013 may be complicated. It will be interesting to see if the burden is put upon those individuals to come forward with their claim for a refund, or if the burden will be with the tribunal system to find them.

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Whatever happens, the government will now need to take stock and reconsider its position. In some ways, it is remarkable that it chose not to bow to the tide of criticism over the Fees Order. It might well have been able to save the scheme had it decided to reduce the level of fee to something more realistic. Instead, it went for broke and has now returned from the court process with nothing.

Whether or not the government chooses to reintroduce a scheme with fees set at a different level, it will surely look at the position in the context of its current reform programme, 'Transforming the Justice System'. This will focus on, among other things, rationalising the tribunal estate and allowing more interlocutory applications, and indeed final hearings, to be heard online. Technology will increasingly be brought into the system and is likely to help reduce its cost. This may, however, take more time than originally envisaged, given the blow the government suffered through the calling of the last general election and the significantly reduced majority that came about as a result. ■

R (on the application of UNISON) v Lord Chancellor
[2017] UKSC 51