

Striking a balance

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Changes to the employment tribunal process has shifted the focus to avoiding claims, explains Helen Crossland

Before 29 July 2013, any individual who had lost their job, or who alleged to have been mistreated at work, could, if eligible, bring a claim against their current or former employer before an employment tribunal free of charge. The main reason for this was that it was considered prohibitive and unfair for someone to have to incur a fee to bring a claim.

However, soaring costs of running the service and the concern that too many spurious and unmeritorious claims were being brought meant change was needed. Of the 186,000 claims brought in the 12 months preceding July 2013, for example, only a quarter proceeded to a final hearing, and of these, just 8% of unfair dismissal claims and 3% of discrimination claims succeeded. Yet in the majority of these cases, including those that were withdrawn, struck out, or which settled, the employer still incurred significant time and costs defending the claims.

In response, 2 key measures have been introduced: fees and mandatory early conciliation.

New fees

Since July 2013, any claimant wishing to pursue a claim, must pay up to ?1,200. Most complaints, including unfair/ constructive dismissal, discrimination and whistleblowing, now carry an issue fee of ?250 per claim form and a further fee of ?950 on a final hearing being listed.

Lower fees apply to 'money claims' such as unlawful deduction of wages, holiday and redundancy pay, and for group action claims against the same employer.

Fees are only reimbursed to claimants whose claims succeed and are otherwise lost. A fee remission scheme is available for individuals in receipt of state benefits, or whose gross or disposable income is below a certain limit.

It was always expected, and indeed intended, that the new fee system would deter some potential claimants from presenting claims. But the decline has been unprecedented ? between 70% and 80% each quarter since fees were introduced ? and calls from trade unions for tribunal fees to be scrapped, or much reduced, are now at fever pitch.

Early conciliation

Before April 2014, an individual could complete a claim form online and on clicking 'submit'; launch a claim in an employment tribunal. At that point, and provided the claim was not rejected for any reason, the parties were off and running and the employer would have 28

days to file a response (defence). However, after that date, a new pre-claim stage was implemented to try to dispose of claims before they are issued. Anyone now intending to bring a claim against their (former) employer must first complete an [early conciliation \(EC\) form](#), which is sent to [ACAS](#) as opposed to the employment tribunal. ACAS will then obtain details and if the claimant is willing to attempt conciliation, contact the employer to see if there is any scope to resolve the dispute.

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Employers get no prior warning of any communication, and ACAS will simply telephone the person nominated by the claimant in the EC form to discuss the potential claim. Whereas some claims will be expected, others may come as a surprise, and it is strongly advisable for employers to nominate an individual (who could be a manager or their employment lawyer) as the chosen point of contact. This will help ensure that ACAS calls that person rather than the contact named in the EC form.

Following the submission of an EC form, either party may decline to engage. If so, or if the parties commence negotiations but fail to reach an agreement, the EC period will be deemed to have ended and ACAS will issue a certificate confirming this. Only then can the would-be claimant lodge a claim in an employment tribunal. If EC results in an agreed settlement, employers should ensure that this waives all prospective claims the (former) employee could bring, and not just those that have been brought to their attention by ACAS.

To allow time for the EC process ? a set period of 1 month extendable by 2 weeks if the parties agree ? the normal limitation period for a claimant to bring a claim will, in most cases, be extended. Special rules apply in this scenario, and professional advice should be taken to calculate any new limitation date, and whether a claim brought after EC was in time.

While EC has not attracted the same consternation as tribunal fees ? seen by many as a barrier to justice ? it has proved a less effective means of reducing claims, with just 18% of claims attributed as having been resolved by way of EC.

A new approach

Fees and early conciliation have introduced a new dimension to the tribunal system and have proven highly beneficial to employers wishing to avoid the costs and risks of litigation. A claimant's resolve can be tested upfront if the employer considers the individual unlikely to invest ?1,200 to pursue a claim, and claimants generally may be more agreeable to accepting a lower settlement package.

EC in particular can be useful in encouraging a would-be claimant to walk away from a potential claim or as the case may be, to experience a taste of the battle they may face if they opt to litigate. Since EC is a confidential process, employers are safe in the knowledge that the content of any discussions is excluded from any legal proceedings that follow.

Where a claim is issued, normal service resumes with the employer having 28 days to file a response and directions being listed thereafter, including for the exchange of relevant

documents and witness statements, and the listing of a final hearing.

Also factored into the equation now is the second tribunal fee of ?950, payable by claimants on a hearing being listed, putting individuals under greater pressure to 'stick or twist'. However, the fact of fewer claims in the system is making for speedier proceedings, focusing the minds of the parties to resolve disputes before they find themselves in front of an omniscient employment judge.

The future of tribunal fees hangs in the balance, but there has been an undeniable shift in the system with the emphasis now being on resolution. This can only be beneficial for employers whose time and money is best focused on running their business.

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Further information

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- This feature is taken from the RICS *Construction journal* (February/March 2015)