Employment Tribunal fees – back from the dead?

On 29 January 2024, the Ministry of Justice opened a consultation on proposals to introduce fees in the Employment Tribunal and Employment Appeal Tribunal system. In this briefing, we remind you of what went wrong with the old fees regime and outline the new proposals.

Haven't we been here before?

Yes. Fees were charged in the Tribunal system between July 2013 and July 2017 (**the 2013 fees regime**). Under the 2013 fees regime, different fees were charged in the Employment Tribunal for different types of claims. The fees operated as follows:

- **Simple claims:** £160 to issue the claim and £230 to proceed to a hearing (£390 in total); and
- **More complex claims:** £250 to issue the claim and £950 to proceed to a hearing (£1,200 in total).

In the EAT, all appeals attracted a fee of £400 to issue the appeal and a fee of £1,200 to proceed to a hearing (£1,600 in

total).

What happened to the 2013 fees regime?

The 2013 fees regime caused a dramatic fall in the number of claims brought to the ET. Case volumes fell by 53% in the 12 months after the introduction of the regime (from 59,000 cases between July 2012-13 to 28,000 cases between July 2013-14).

In response, the trade union, UNISON, launched judicial review proceedings arguing that the 2013 fees regime:

- represented an unlawful exercise of the Lord Chancellor's powers;
- interfered with the right of access to justice; and
- frustrated employment laws and discriminated unlawfully against women and other protected groups.

On 26 July 2017, the Supreme Court upheld UNISON's challenge, ruling that the fees were unaffordable in practice and rendered non-monetary and low value claims futile – which had the effect of preventing access to justice. It also held that the regime was indirectly discriminatory against women and other individuals with protected characteristics, who were

more likely to bring more complex claims which attracted the higher fees. The Supreme Court quashed the 2013 fees regime with immediate effect and all fees paid under the system had to be refunded. The removal of fees led to a steady increase in claims from 18,000 in 2016-17 up to 33,000 in 2022-23.

What has changed and what is proposed?

The Ministry of Justice says it recognises that the 2013 fees regime *"did not strike the right balance"* between its policy aims and protecting access to justice and that lessons have been learned. In light of this, the Consultation sets out a proposal for a new fees regime. The policy aims are said to be to transfer some of the cost of the Tribunal system from taxpayers to Tribunal users and to incentivise parties to settle their disputes early through Acas, without the need for claims.

In the Employment Tribunal, the proposal is that claimants would pay a £55 "claim issue fee", which would cover the entire journey of the claim – there would be no separate hearing fee. No fees would be payable by respondent employers. There is also no intention to alter the rules on recovering costs in the Employment Tribunal, meaning that a claimant would only be able to recover the claim issue fee from a respondent in very limited circumstances.

In the EAT, the proposal is that the appellant (which could be either the claimant employee or the respondent employer) would pay a £55 "appeal fee". The fee would be payable per judgment, decision, direction or order of an ET being appealed. For example, if the Notice of Appeal included appeals against two decisions, the total fee payable would be

£110.

Will all claimants have to pay the claim issue fee?

No. The Consultation proposes that the "Help with Fees" remission which operates in the Court and Tribunal system, will be extended to claimants paying a claim issue fee and appellants paying an appeal fee. A single person with no children would be assessed as follows:

- Gross monthly earnings below £1,420 and disposable capital below £4,250 – **full fee remission**.

- Gross monthly earnings between £1,420 and £1,520 and disposable capital below £4,250 – **partial fee remission**.

- Gross monthly earnings in excess of £1,520 and disposable capital below £4,250 – **no fee remission**.

- Gross monthly earnings of any amount and disposable capital in excess of £4,250 – **no fee remission**.

Further, in cases where there are multiple claimants (e.g.in a group equal pay claim), only a single claim issue fee of £55 would be payable – it would be up to the claimants to decide how they split the cost.

What's next?

It is estimated that the new system could generate between £1.3 million to £1.7 million in fees per year, which seems like a drop in the ocean given the direct running costs of the Employment Tribunal and EAT was around £80 million in 2022-23. It is also estimated that the new system could lead to a 20% reduction in claims to the Employment Tribunal.

The Consultation closes on 25 March 2024, and the intention is that the new fees regime would be implemented by November 2024. However, we are due a General Election before then, and it is hard to imagine a Labour Government taking a fees regime forward.

Introducing Fees in the Employment Tribunals and the Employment Appeal Tribunal

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Government publishes final Statutory Code of Practice governing fire and rehire practices

Employers sometimes try to enforce contractual amendments on their workforce by using a "fire and rehire" strategy – terminating employment and offering to hire staff back on the new terms. A new Statutory Code of Practice regulating this practice will come into force later this year. In this briefing, we look at the new Code and what it means for employers.

What's the background?

Back in 2021, the Government asked Acas to investigate the use of fire and rehire practices and in November 2021, Acas released new guidance in this area. The overall message of the guidance was that fire and rehire should be used as a last resort. You can read our briefing on the Acas guidance here.

In March 2022, following the P&O Ferries scandal, where 800 employees were dismissed without consultation, the Government announced plans to introduce a new Statutory Code of Practice on the use of fire and rehire practices. The intention was that the new Code would set the standards for employers to consult meaningfully about proposed contractual changes. A

consultation on a draft Code commenced in January 2023 and closed in April 2023.

On 19 February 2024, the Government published its response to the consultation, together with a revised draft of the new Code. The Code will be laid before Parliament and, if approved, will come into force in the Summer of 2024.

What does the new Statutory Code require?

Purpose and scope

The Code underlines – as the Acas Guidance does – that firing employees who do not agree to contractual changes and offering to rehire them is a practice which should be used *"as a last resort"*. It states that the purpose of the Code is to ensure that employers take *"all reasonable steps to explore alternatives"* and to engage in *"meaningful consultation with a view to reaching an agreed outcome".*

The Code is said to apply where an employer:

- is considering making changes to one of more of its employees' contracts of employment (covering both express and implied terms); and
- envisages that, if the employee and/or their representative does not agree to some or all of the

changes, it might opt for dismissal and re-engagement in respect of that employee.

The Code applies regardless of the number of employees affected and regardless of the employer's reasons for the changes. However, it does not apply where the only reason the employer envisages it might dismiss the employee is redundancy.

General considerations for information-sharing and consultation

The Code provides that where there is a recognised trade union, the employer should provide information to, and consult with, that trade union. Where there is no recognised trade union, the employer should provide information to, and consult with, either:

- an existing body of employee representatives who could appropriately be consulted;
- representatives chosen to represent employees in consultations on the proposals; and/or
- each of the employees individually.

Employers should ensure that all affected employees are included in the consultation process, including those absent from work, for example on sick leave or maternity leave.

The Code highlights that employers must comply with other applicable legal obligations to provide information to, and consult with, employees, arising, for example, under collective redundancy consultation law or TUPE.

Information to be provided

Employers should share *"as much information regarding the proposals as reasonably possible"* with a view to enabling employees to understand the reason for the proposed changes, be able to ask questions and make counter proposals. Depending on the circumstances, this could include information about the following matters:

- what the proposed changes are (including the proposed new terms);
- who will be affected by the proposed changes;
- the business reasons for the changes;
- the anticipated timings for the introduction of the proposed changes and the rationale for those timings;

- any other options that have been considered; and
- the proposed next steps.

The Code says the information should be provided *"as early as reasonably possible"*, but it does not prescribe a timeline. It says it is *"good practice"* for the employer to provide the information in writing but, again, this is not prescribed.

Consultation process

The Code underlines that consultation should not be viewed by employers as a tick-box exercise; it should be conducted openly and in good faith, with genuine consideration given to the points put forward in response. Employers should *be "as clear as possible"* about their objectives and the nature of the proposals and consider reasonable alternative proposals.

The format and length of the consultation process is not prescribed by the Code. Rather, it is said that employers should consult *"for as long as reasonably possible"*. It is noted that a longer consultation period is likely to allow for a more meaningful consultation.

Raising the prospect of dismissal and re-engagement

The Code states that if the employer intends to fire and offer

to rehire in the event that an agreed outcome cannot be reached, the employer should be clear about that. That said, raising the prospect of dismissal can be detrimental to the consultation process and so employers should not do so "*unreasonably early*". However, no indication is given as to what would be considered unreasonably early.

Wherever the Code applies, the Code states that employers should (not must) contact Acas for advice *before* raising the prospect of fire and rehire.

Re-examination by the employer

Where agreement cannot be reached, but the employer still considers it needs to implement the changes, the employer should re-examine its proposals, taking into account any feedback from employees and/or their representatives.

The Code sets out a list of factors that employers should consider, including whether the proposals could have a greater impact on some employees than others (including those with particular protected characteristics) and whether there are any reasonable alternative ways of achieving their objectives.

If changes are agreed

If the employer and employees reach agreement on the proposed changes, the Code says it is good practice to communicate the changes in writing. Where there is a change affecting the statutory particulars of employment, the employer must provide a revised statement of particulars within one month of the

change. In practice, the majority of employers would update the employment contract by either providing a new contract or a side letter amending the original contract.

Unilateral imposition of new terms

If no agreement is reached, the Code notes that some employers would seek to impose the change unilaterally. Sometimes this is done by relying on an existing contractual term which gives them the power to impose changes. However, such clauses are not designed to cover major changes and so the Code reminds employers to consider the scope of the term and the legal limitations on using it.

If there is no such term (or the term does not extend to the change proposed), then the imposition of a contractual change will usually amount to a breach of contract. The Code outlines the risks that could flow from this, including various legal claims.

On the employee side, the Code highlights that where an employee chooses to work under the new terms under protest, he or she should make it clear to the employer in writing that this is what they are doing and set out the terms that they do not agree to.

Dismissal and re-engagement

The Code highlights that once an employer has completed a thorough information-sharing and consultation process, it might still opt to fire and offer to rehire. The Code

outlines that the need for any such dismissal to be fair in law (where the employee has the requisite service) and for employers to give notice of the dismissal.

The employer should then set out the new terms in writing (and update statements of particulars as discussed above) and should offer to re-engage the employees *"as soon as reasonably possible"*. The Code also suggests that employers should consider:

- whether employees would benefit from more time in order to make arrangements to accommodate the changes;
- whether there is any practical support it might offer such as relocation assistance or career coaching;
- introducing the changes on a phased basis (where there is more than one change);
- committing to reviewing the changes at a fixed point in the future;
- inviting feedback about the changes as the employees adapt to them; and
- what might be done to mitigate any negative impacts of employees.

What are the consequences of breaching the Code?

A breach of the Code does not, in itself, expose employers to a legal claim. However, a breach of the Code may be taken into account by a Court of Tribunal in relevant claims and may count against them.

Further, the Tribunal may:

- increase the amount of compensation awarded by up to 25% if the employer has unreasonably failed to comply with the Code; or
- decrease the amount of compensation awarded by up to 25% if the employee has unreasonably failed to comply with the Code.

The relevant claims include claims for unfair dismissal, breach of contract, discrimination, detriment and unauthorised deductions from wages.

Next steps for employers

All employers should review the new Code of Practice and keep track of the date that it will come into force. Although the

information and consultation process will vary from case to case, it would be sensible for employers to prepare a template letter covering the information outlined by the Code. This skeleton letter could then be adapted to suit different situations and would ensure that all the recommended points are covered.

It would also be sensible to consider the appropriate timelines for providing information and consulting in different cases. For example, where a proposed fire and rehire would affect just one employee, a process lasting two weeks might be sufficient. However, where fire and rehire is one option in a wider collective redundancy exercise, then it would probably make sense to track the collective redundancy consultation process timeline (i.e. at least 30 days where between 20 -99 employees are potentially redundant and 45 days where 100+ employees are potentially redundant).

In all cases where the Code applies, employers will need to take care to ensure they keep records of each stage of the process in order to demonstrate compliance with the Code in any future Tribunal proceedings and avoid the risk of an uplift to compensation.

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Draft Code of Practice on dismissal and re-engagement (February 2024)

Labour Party announces plans for new equality law

The Labour Party has said it would introduce a new equality law if it wins the next General Election which, amongst other things, would allow black, Asian and minority ethnic and disabled workers to bring equal pay claims for the first time.

It has been reported that Labour Party plans to introduce a new equality law if it wins the next General Election. The new law would:

- extend the right to claim equal pay, which currently exists as between men and women, to black, Asian and minority ethnic (**BAME**) and disabled workers;

- enact the dual discrimination protections which already exist in the Equality Act 2010, but which have not yet been brought into force; and

- require public sector bodies to report on ethnicity pay gaps.

Equal pay

Currently, if a person is discriminated against on the grounds of sex in relation to *non-contractual* terms, for example, a discretionary bonus, she or he may bring a sex discrimination claim. However, if she or he is treated less favourably in relation to *contractual* pay or other benefits (and there is an actual comparator of the opposite sex) the recourse is to bring an "equal pay" claim.

The law achieves this by implying a "sex equality clause" into the contract of employment, which works by replacing the less favourable terms with the more favourable terms of the comparator's contract. The comparator must be employed in the same employment and perform equal work (i.e. like work, work rated as equivalent or work of equal value). Establishing that work is equal work can be a time-consuming exercise, for example, if a "job evaluation study" is needed in order to compare the roles and the Tribunal process for bringing such claims is lengthy. If the work is judged not to be equal work, then the claim fails.

Equal pay claims are usually brought in an employment tribunal, which can require payment of arrears of pay up to six years, although there is no ability to make an award in respect of injury to feelings. The time limit for bringing an equal pay claim is considerably longer than for discrimination claims, standing at six months from the end of the employment contract in which the sex equality clause operates. Further, such claims may be brought as breach of contract claims in the civil courts, where the time limit is six years from the date of breach of the equality clause.

The Labour Party's proposal appears to be that a "race equality clause" and a "disability equality clause" will be implied into the contracts of affected employees, which would require them to bring claims about contractual terms where there is an actual comparator as equal pay claims.

Other than the increased time limit for bringing claims (which is significant), and the ability to bring claims in the civil courts, it is not entirely clear how this proposal improves the position for BAME and disabled workers. Equal pay claims are notoriously complex, and it is easy to see how claimants will get bogged down in questions of who the correct comparator is and whether work is of equal value. Such workers are already able to bring claims about unequal pay as race or disability discrimination claims under the Equality Act 2010, and they do not need to show that the work is "equal" to that of an actual comparator in order to succeed. Further, they are able claim uncapped compensation for lost earnings and may also claim for injury to feelings.

Dual discrimination

Enacting the dual discrimination provisions would mean that workers may complain about discrimination arising out of the combination of two protected characteristics, rather than one as is presently the case.

Just last year, there were calls to bring these provisions into force. Evidence to the Women and Equalities Committee's Inquiry into menopause in the workplace indicated that because menopause is essentially an intersectional phenomenon (i.e. in the main it affects women within a certain age bracket), the dormant dual discrimination provisions in section 14 of the

Equality Act 2010 should be enacted. The Committee took a robust approach on this issue, stating that the existing law *"does not serve or protect menopausal women"* and that section 14 is *"shelf ready"* and should be commenced immediately.

However, the Government rejected this recommendation on the basis that if section 14 were to be implemented, it would create 21 "dual protected characteristics" (this is on the basis that pregnancy and maternity and marriage and civil partnership are not covered by section 14). The Government said this would place a significant additional burden on employers and service providers.

This has not deterred the Labour Party, who consider the change will help BAME workers, as well as other groups, such as menopausal workers. It is also said that the reform could help ease backlogs in the Employment Tribunal system – presumably on the basis that a claimant would be bringing one claim rather than two.

Ethnicity pay gap reporting

It is reported that the new Act would require public sector bodies to report on their ethnicity pay gaps. On top of this, back in September 2023, the Labour Party published a Green Paper entitled *A New Deal for Working People,* which outlined plans to require private sector employers with 250 or more staff to report on their ethnicity pay gaps. The Green Paper said Labour would drive efforts to close pay gaps by forcing employers to not only report on their gender and ethnicity pay gaps, but to devise and implement plans to eradicate any such pay gaps.

It is worth remembering that the Conservative Government consulted on the introduction of mandatory ethnicity pay gap reporting for large employers in October 2018. In March 2022, it concluded that mandatory reporting should not be introduced *"at this stage"* to avoid imposing new reporting burdens on businesses as they recovered from the pandemic. However, businesses were encouraged to report voluntarily on the ethnicity pay gap within their organisations. Guidance to help employers do this was published in April 2023.

Once again, the Labour Party is not deterred by the burden of increased regulation and has committed to drive this new reporting obligation through. However, it remains to be seen how the new rules would be taken forward – will they be rolled out in the public sector first and then to the private sector at a later date? It also not yet clear what the consequences would be for failing to succeed in closing a pay gap. Gender pay reporting was introduced in 2017 under the mantra *"what gets measured gets managed".* But after years of disappointing gender pay gap results, with little movement in the right direction, it is apparent that merely requiring employers to report is not enough.

Next steps?

It remains to be seen whether these announcements will make their way into the Labour Party's election manifesto. Even if they do, a Labour Government would consult before introducing such changes, which may well result in a reshaping of some of these plans. That being the case, there are no action points at present for employers, but it is certainly one to watch.

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