Judicial review challenge to tribunal fees brought by Unison dismissed but leave to appeal given

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A challenge brought by Unison to the introduction of fees in Tribunals and Employment Appeal Tribunals has been dismissed by the High Court. The High Court considered that the case had been brought prematurely and that further evidence would be needed before it could be convinced that the fees regime should be overturned. Leave to the court of Appeal has now been granted.

The Government introduced fees in employment tribunals from 29 July 2013. Fees vary from £160 for issuing a claim and £230 for a hearing for the few claims categorised as Type A to £250 for issuing a claim and £950 for a hearing for the majority of claims which are categorised as Type B. Since the introduction of these fees, statistics from the Ministry of Justice from October to December 2013 indicated that claims made to the Tribunal had dropped by 79%.

Unison challenged the introduction of fees on the basis that: (i) they breached the EU principle of effectiveness because it made it difficult for claimants to access rights conferred by EU law; (ii) they breached the EU principle of equivalence because the exercise of EU rights were less favourable than similar domestic actions; (iii) they breached the public sector duty of equality because the Lord Chancellor ought to have had regard for the need to prevent discrimination; and (iv) those with protected characteristics were being indirectly discriminated against because their claims fell into Type B and they therefore had to pay higher fees.

After considering point (i), the High Court held that the principle of effectiveness was not breached because those on limited means could save money to pay the fees and the mere fact that this imposed a burden was not sufficient. It found that Unison did not have sufficient evidence at this stage to

bring the claim but that in due course evidence of a dramatic fall in claims could be powerful in demonstrating that the principle of effectiveness was being breached.

In relation to point (ii), the High Court held that there had been no breach of the principle of equivalence and, using a comparison to the County Courts held that there was less of a disincentive for litigants in the employment tribunal because they did not face potential liability for costs. In relation to point (iii), it found that the impact of fees had been fully considered and that Unison had failed to establish that those with protected characteristics had been affected worse but that the Lord Chancellor would be under an obligation to continue to assess the impact of the fee regime. Finally, in relation to point (iv), the High Court confessed that it was unable to grapple with the complicated detail of the statistics provided by Unison.

This decision is not the end of the matter. Given the High Court's comments on (i), that it was not satisfied on the sufficiency of the statistics presented thus far, and its comments on (iii), that the Lord Chancellor would be obliged to keep this under review, further tribunal statistics will be key to this case. Since it was heard, new tribunal statistics have been released by the Ministry of Justice which demonstrate that the number of tribunal applications between January and March 2014 fell by 58.4% as compared with the same period in 2013.

Leave has now been granted Unison to appeal this decision to the Court of Appeal. It seems to us that the appeal may well succeed.

R (Unison) v Lord Chancellor and another [2014] EWHC 218 (Admin)

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