

MASSERS

EMPLOYMENT LAW UPDATE

July 2017

Employment Tribunal Fees declared unlawful by Supreme Court

In Judicial Review proceedings brought by Unison, the Supreme Court has declared Employment Tribunal and Employment Appeal Tribunal (EAT's) Fees to be unlawful. Further, that the Fees Order that brought the regime into effect was unlawful from the outset as it had the effect of preventing access to the Tribunal system and access to justice.

The fee regime was brought into effect on 29 July 2013 by the Employment Tribunal and the Employment Appeal Tribunal Fees Order 2013. Under the Order, the Employment Tribunal Claimants and EAT's Appellants were required to pay a fee in order to bring and pursue claims and appeals, unless they qualified for fee remission.

The Fees Order has now been quashed.

The Court acknowledged the 'dramatic and persistent fall' in the number of Tribunal claims since the Fees Order came into force, representing a reduction in cases of 66% to 70%.

The Court accepted the objectives behind the Fees Order, to include incentivising earlier settlements and discouraging weak or vexatious claims. However, it found that the fees for individuals to pursue claims were unaffordable.

This is a momentous decision and means that all fees paid since 29 July 2013 must be reimbursed by the Government and fees are no longer payable for future claims.

The Government has accepted the Courts ruling and is putting in place a system to reimburse all fees paid to date.

We will let you know once we receive further details regarding the refund scheme.

Pension contributions account towards a week's pay

In the case of *University of Sunderland –v- Drossou* the Employment Appeal Tribunal (EAT) has upheld an Employment Tribunal's decision that the calculation of a week's pay under the Employment Rights Act 1996 (ERA 1996), should include employer pension contributions and therefore increasing the value of a week's pay.

Whilst the case concerns the calculation of the statutory cap for unfair dismissal compensatory award it will also apply to the calculation of compensation under TUPE and the protected award under TULRCA for failure to inform and consult.

HM Revenue & Customs (HMRC) enforces payment of the National Minimum Wage (NMW)

Investigations are ongoing by HRMC with regards to social care providers and underpayment of the National Minimum Wage in respect of "sleep-in" shifts.

The Government has recognised the difficulties posed by the sector by the accumulative financial liability for penalties and arrears of wages. As a result:

- Financial penalties faces by employers found to have underpaid workers for “sleep-in” shifts will be waived in respect of arrears of pay resulting in shifts that took place before 26 July 2017. However, employers found to have underpaid staff after that date will face financial penalties in the usual way.
- The Government is also suspending the enforcement activity in respect “sleep-in” shifts until 2 October 2017. This will apply to HMRC investigations where there may be an underpayment in respect of such shifts still applies to employers in the social care sector only.

Sex Discrimination

In the case of *Ali –v- Capita Management Ltd*, Mr Ali succeeded in a claim for sex discrimination. An Employment Tribunal decided that it is sex discrimination not to pay full salary to a father taking shared parental leave, in circumstances where a mother taking maternity leave during the same period would have received full pay.

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