Experts clash over impact of tribunal fees

Annie Makoff 2 Feb 2017 2 comments

Does 70 per cent drop in cases mean 'vexatious' claims have been weeded out, or has access to justice been denied?

The number of employment tribunal cases has dropped significantly since fees were introduced in 2013, new figures have confirmed – which has led to renewed debate over whether employees are being denied access to justice.

A much-anticipated official review, which analysed the impact of fees for the first time, reported a 70 per cent decrease in the average number of claims brought to employment tribunals since their introduction, with a 78 per cent fall in the first year alone.

The fees have been the subject of significant controversy, with fears that costs of up to £1,200 to bring a case have made many employees reluctant to take cases to court.

But the government insists that the introduction of fees has “broadly met its objectives” and encouraged more people to settle claims out of court via Acas’s free conciliation service.

While the government have since rebuffed calls to cut tribunal fees, the review has now put forward proposals to provide support for people on low incomes through a ‘Help with Fees’ scheme as well as increasing the gross monthly income threshold from £1,085 to £1,250 for single individuals who earn less than this.

But Martin Warren, partner and head of the HR practice group at Eversheds Sutherland, warned the proposed reforms “fall a long way short” of satisfying those who have called for an overhaul of the fees regime.

Some business groups and legal experts, although calling for a reduction in tribunal fees, have argued they have been successful in helping weed out ‘nuisance’ claims and have provided added protection for small employers.

Martin McTague, policy director at the Federation of Small Businesses, said: “Tribunal fees have brought down the number of claims with no merit. Before this, the balance of justice had tipped unfairly against smaller employers that struggled with a rising tide of vexatious claims. Fees must be set at a level that enables justice but prevents unreasonable claims.”

Neil Carberry, director for people and skills at the CBI, added: “Proportionate fees dissuade people from bringing weak claims. They also encourage parties to seek out-of-court alternatives to resolve their dispute and incentivise a settlement before the case goes to a full hearing. However, workers must be able to enforce their rights and a recalibrated approach with a lower fee is needed. Its objective must be the effective resolution of workplace disputes rather than cost recovery.”

Analysing the statistics published in the review, Richard Nicolle, partner at Stewarts Law, told *People Management* there was “no evidence” of an increased proportion of cases being successful as a result of the reduced number reaching hearing stage.

He said: “This is somewhat counter-intuitive, as it might have been inferred that a reduced volume of so-called ‘frivolous’ claims being brought would result in a higher proportion of meritorious claims

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progressing to hearing stage. However, it has always been the case that only a relatively small proportion of cases issued reach hearing, with the majority being settled out of court – particularly those where the claimant has a strong prospect of success."

Unions reacted with anger to the figures. Unison general secretary Dave Prentis said: "Tribunal fees should be scrapped immediately, before any more law-breaking employers escape punishment because wronged workers simply don't have the cash to take them to court.

"Unfortunately it's now much harder for people who've been treated unfairly at work to seek justice. Women have been the biggest losers; bad bosses the undoubted winners."

But according to Susan Thomas, legal director at Charles Russell Speechlys, the lack of evidence "does not support the argument" that introducing fees mean that only 'valid' claims were now being issued.

She said: "The fact the employment tribunal is in principle a 'no costs' jurisdiction meant that employees ran – and still run – very little risk of having to pay the other side's costs even if they lost. While the statistics don't mean that 70 per cent of the claims previously issued were vexatious, it's fair to say there was essentially little to discourage employees from issuing a vexatious claim."

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Gareth Chapman

7 days ago

So a recent official report shows that the number of claims being pursued through Employment Tribunals has decreased by 70% since the introduction of fees in 2013, and the arguments rage as to whether this is a good thing or not. There is an unfortunate bourgeois overtone that this reduction in cases is directly correlated to vexatious claims and that only poor people clog up the system. At the same time the voice of the worker wilfully conflates the two very distinct concepts of 'justice' and 'compensation', arguing that justice is only served once compensation has been delivered.

I wish to walk somewhere between these two views and suggest an alternative tribunal system which seeks to ensure access to justice, without encouraging vexatious claims. To do this I suggest a two-stream tribunal system, one of which would be free to access, the other continues to be subject to a fee.

A free tribunal would be for those wishing justice, those who feel they have been wronged and wish for their employer to be held to account, to ensure that the situation that brought them to that point is not repeated for other employees. This tribunal would look at the facts of the case, determine what errors in law were made, suggest improvements and issue fines to the employer in line with the findings and severity of the breaches. This tribunal however would not have the authority or ability to award compensation to the employee. In taking this route the employee would not have access to the second route, and would not be able to use the findings of the case to inform any future, compensation based, claim.

The second stream tribunal, which would be subject to fees, would have the ability, much in the same way as the current system, to award compensation if wrong doing is uncovered. If the assertion that strong claims are usually settled out of court is held to be true, only weak or

vexatious claims will be taken forward so it is only right that a fee is set which discourages these from clogging up the system. To further discourage this I would suggest that the tribunal is given additional powers to fine the employee when vexatious claims are brought forward, thus discouraging those higher earners from pursing vexatious claims through this route.

The findings and outcomes of these two tribunal streams would have equal weighting in case law and there is no reason why the same panel cannot hear both free and 'paid for' hearings with equal attention – the only difference would be in the range of outcomes that would be available.

I believe that making this clear distinction between justice and compensation will have the impact that is desired in reducing vexatious and frivolous claims, will discourage unscrupulous advisors and employees from pursing claims that have no merit on the chance that there might be some financial reward, and will force employees to make a distinction as to what they want as an outcome – enabling a frank and open discussion at an early stage with a hope of reaching agreement before taking up valuable tribunal time; surely a win-win solution?

Karl Thurogood

8 days ago

It would also be interesting to dig under these headline figures, has the success percentage remained the same or has it increased, inferring that more worthy cases are being brought?

The same could be asked of award values, % change, which again if increased could also indicate that actioned claims are more meritorious.

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