Employment practices review

From:
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To: Employment practices review
Subject: Lewis Silkin LLP response to Matthew Taylor review: access to justice and reform of Employment Tribunal fees [SILK.SSFL]

About us

Lewis Silkin is a commercial law firm with approximately 60 partners. Our main office is in London, with smaller offices in Oxford, Cardiff and Hong Kong. Our Employment, Immigration and Reward division is one of the largest and most highly rated in the UK. This response to the Review is submitted on behalf of Lewis Silkin LLP, rather than our clients, based on our experience in practice advising predominantly medium to large-sized employers across a variety of sectors.

This is Lewis Silkin's second written submission to the Review, and deals specifically with the issue of access to justice and options for the reform of Employment Tribunal fees.

Access to justice and reform of Employment Tribunal fees

The introduction of fees has clearly affected access to justice. Claims issued in the Employment Tribunal have dropped by around 70% since fees came into force. There appears to be no evidence that the claims no longer being issued are the unmeritorious ones, and the statistics on success rates for claimants at a final hearing remain very similar to the position before fees were introduced. Instead, in our experience, it is the shorter and simpler claims that appear to have dropped the most – stand-alone deduction from wages and basic unfair dismissal claims. The workload of the tribunals is now skewed towards more complex multi-day cases, involving a variety of claims being brought in a single case and higher-earning employees.

The CIPD/Lewis Silkin May 2017 report on Employment Regulation in the UK shows that employers are also concerned about the situation. Although a drop in claims would seem to be good for businesses, a system which allows unscrupulous employers to evade employment laws is unfair and allows those with bad practices to undercut good employers.

The government will not be willing to abolish fees, and it is unlikely to want to reduce them in the current climate either, as they now rely on the income from fees to part-fund the system (and probably also the associated drop in claims to limit the costs of running the system).

The government is altering the thresholds for fee remission, but not by very much, and many low earning employees (or those who have just lost their jobs) would still have to pay the full fee to bring their claim.

Below are options for the Review to consider for continuing to charge a similar level of fees while remedying access to justice:

1. Have a system which better matches the level of fee to the value of the claim. There are various options for this: (1) introduce more tiers of fees for different values of claim; (2) make the fee proportionate to the maximum value of the claim as stated by the claimant at the outset; (3) have a complete exemption from fees for claims below a certain maximum amount so that small deduction from wages claims would be free.

   In most cases the higher value claims also require more time and resources from the tribunal, so the fee paid would match the cost to the system more accurately than at the moment. In addition the higher value claims tend to involve the higher earning employees, so the system would be fairer. For example, a pizza chef claiming he was sacked due to race discrimination costs the tribunal much less than a City banker claiming he didn't get a multi-million pound bonus on account of his race.

   This option was also put forward by the House of Commons Justice Committee in their review of Court and Tribunal fees (June 2016), with suggestion of a three-tier fee structure, or the level of fee being set as a proportion of the amount claimed, with the fee waived if the amount claimed is below a determined level. The Ministry of Justice rejected this approach in their review of the introduction of fees (January 2017). However, this report also stated that they could "see the attractiveness of an approach under which fees are charged as a percentage of the value of the claim". This option was rejected due to feedback in the original consultation on fees that it would make the system difficult for claimants who had to quantify the value of their claim at the

outset. But we think this could be addressed by providing clear guidance on how to quantify the claim, and allowing claimants to increase the value of their claim upon payment of an additional fee if it transpired during the tribunal process that the claim had been under-valued.

For example: £50 for claims up to £500; £100 for claims up to £1,000; £200 for claims up to £10k; £500 for claims up to £100k; £1,000 for claims up to £500k; £2,000 for claims up to £1 million; £5,000 for claims over £1 million. This would also deter the claimant who attempts to claim large sums unrelated to the actual realistic value of the claim on account of the reputational damage to the employer caused by a public tribunal hearing.

2. Charge a fee to the losing party at the end of a case, instead of at the start (or maybe have a small fee for starting the case). This would have the advantage of targeting the fee directly at the party who is at fault. However, it has the disadvantage that the tribunal would not receive a full fee for cases that settle before the hearing. Although there would be a saving in administration of the issue and hearing fee, and remission applications, the income is still likely to be less than the current system. It may also be difficult and not cost-effective for the tribunal to enforce payment of the fee, especially from parties who cannot easily afford to pay.

3. Charge both the employee claimant and the employer respondent a fee to bring and defend the claim. The losing party would then, in most cases, be required to repay the fee to the other party by way of a costs award, as happens at the moment.

   This would enable the fee charged to claimants to be halved. This would make the fee more manageable for low-earning employees in small basic cases, but still a sufficient amount in larger cases (£600 in total) to make claimants think twice about submitting unmeritorious larger claims. Although respondents would have to pay a cost for defending a claim, even when they are not at fault, this would be repayable by the claimant if the case is defended successfully. For most employers, who tend to pay legal and other fees in defending claims, it would also be a much less financially significant sum than the current fees are for individual claimants.

   In addition, although not expressly part of the rationale for introducing fees, the need to discourage unmeritorious claims has also formed part of the government's thinking. Although it is unclear how successful this has been, the same argument could apply to employers. It is the minority of claims that are unmeritorious or vexatious – many are either justified, or at worst misguided. The same can be said of defences by employers. Many are good employers who try to do the right thing, and either successfully defend employment claims or lose due to having made mistakes. However, some employers have bad practices and make no genuine effort to comply with the law, but will still defend good claims aggressively in order to wear down the claimant and/or hope that they will not pay the hearing fee. This type of behaviour is also evidenced by the large number of tribunal awards that remain unpaid by employers. Requiring respondents to pay a fee to defend claims would help to deter those unscrupulous employers who defend unmeritorious claims and then fail to pay tribunal awards. As noted in our introduction, this would actually benefit good employers - by preventing unscrupulous employers from undercutting them by ignoring workplace rights and abusing the tribunal system.