Sarah Bowen

Barrister at Law: Call 2006

"She understands the demands placed upon solicitors and the limitations they sometimes have to work within."

Legal 500 **UK Bar 2016 – London Employment**

Sarah Bowen is an employment law specialist and is regularly instructed in actions involving complex legal issues and technical arguments. Sarah is a dynamic litigator with the ability to grasp issues quickly and provide robust and practical advice.

Sarah has extensive experience acting in cases involving dismissal, discrimination, TUPE, whistleblowing, breach of contract and redundancy. She advises a broad range of clients, including government departments, educational facilities, local authorities, civil service, high street names, large companies and SMEs.

Recent interesting cases:

EAT Discrimination*: Lamb v The Business Academy Bexley UKEAT/0226/15/JOJ:* Sarah acted on behalf of the Respondent before Simler P. The EAT provided clear guidance within the judgment as to the duties of the Tribunal in assessing the pleading of PCPs in reasonable adjustment claims and their application to the facts of the case.

EAT Jurisdictional issues: *Levers v 170 Community Project UKEAT/0255/14/RN:* Sarah successfully acted on behalf of the Respondent before Langstaff P. in defending an appeal against the Tribunal's assessment of time limits following strike out of the Claimant's claims.

East London ET 2017: Sarah was instructed on behalf of a claimant in a 5 day PHR dealing with the issue of 'relevant transfer' pursuant to TUPE. The matter concerned complex issues arising over assignment to the transferring economic entity and fragmentation within group

companies. Sarah led complex legal submissions on behalf of the claimants, which were also adopted by the Secretary of State. The matter included complex legal arguments which included seeking to persuade the Tribunal to 'pierce the corporate veil' (in so far as it considered it necessary to do so). Judgment is reserved.

East London ET 2017: Acting on behalf of a large employer (with over 70,000 employees) facing disability discrimination claims (on all bases under the Equality Act) arising from a shift and overtime policy. Sarah was involved preparatory elements of the claim (including how best to operate the policy moving forward) and was instructed to represent the respondent at the final merits hearing.

Watford ET 2016: Successfully adding a third Respondent and extending time to bring new claims under the TUPE Regulations over 3 years' post-issue.

London Central ET 2016: Sarah was instructed on behalf of the Respondent who faced allegations of pregnancy and maternity discrimination. In order to prove that the Respondent had knowledge of the pregnancy the Claimant relied on text messages which the Respondent stated were fabricated and created for the purposes of litigation. Sarah was instructed just 10 days prior to the final merits hearing but successfully guided the Respondent in obtaining expert forensic evidence, persuaded the Tribunal to admit the expert report into evidence, called the expert to give evidence and went on to win the case. In the judgment the Employment Judge concluded that the Claimant's text messages were 'created' for the purposes of misleading the Tribunal and pursuing her case.

London South ET 2016: Sarah successfully defended a complex constructive dismissal claim which was made against a large financial services company by a former senior manager.

Huntingdon ET 2015: Representing a health care sector employer who faced complex claims of disability, age and sex discrimination by a senior employee. Following cross-examination of the Claimant (4 days) all claims were withdrawn. Following withdrawal Sarah persuaded the Tribunal to award costs of £20,000 against the Claimant. In awarding costs the Employment Judge Moore stated that following cross-examination by Miss Bowen just 25 per cent of the Claimant's case stood up.

London Central ET 2015: Representing a national department store in claims of race and age discrimination spanning over several years and unfair dismissal. Sarah was able to successfully defend the discrimination allegations and persuaded the Tribunal to award just £500 in compensation for unfair dismissal on the basis of contributory conduct and a Polkey deduction. The award was considerably lower than the Respondent's prior offers to settle.

London East ET 2015: Representing an employee in the banking sector against HSBC in a claim of disability discrimination. On the first day of the hearing an application was made to amend the claim which in turn was the basis of the case succeeding. Sarah was described by Employment Judge Russell as *'valiant'* in her pursuance of the Claimant's case in the judgment.

Consultant roles:

Sarah has experience of acting as a disciplinary and appeal officer and recently acted as an independent disciplinary officer for a large international business who brought allegations of gross misconduct against their HR Director/CEO. The hearing lasted 4 days and involved complex historical allegations.

Training:

Sarah regularly provides training to clients and external bodies such as ACAS.

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The Tribunal Fees Order is unlawful and discriminatory

An overview of the Supreme Court's landmark decision in R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC 51

by Sarah Bowen (3PB Barristers)

Yesterday, the SC shocked employment practitioners by ruling that the **Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893** ("the Fees Order") is unlawful under both English and EU law.

The Fees Order has been in force since 2013 and according to recently published figures has resulted in fee payments of around £32 million.

It has been reported that from yesterday the Tribunal Offices were not accepting payments for fees and it is anticipated that the online payment system will be suspended.

What is the current process?

In contacting the ET HMCTS helpline this morning, the automated system still made reference to fee remission. However, the helpline advised that they are no longer accepting fees and that ET1's can be sent without payment. The online system was said to be suspended because they are attempting to update it in light of the decision. It is anticipated that an update will follow in due course which will include addressing how those that have paid the fees may apply for reimbursement.

However, for those seeking to issue claims imminently, you are advised to contact the Employment Tribunal helpline yourself to check their processes on fees at the point of issue (pending a public statement). In short, do not assume that the summary of my call with the helpline will apply to the circumstances of your particular case. There is likely to be some confusion at first.

Overview of the Supreme Court's decision

In a unanimous decision handed down by Lord Reed, with Lady Hayle addressing the issue of discrimination, the judgment is a forceful reminder of the purpose of the Employment Tribunal and the constitutional rights of citizens.

The Judgment of Lord Reed

UNISON, supported by the Equality and Human Rights Commission and the Independent Workers Union of GB (interveners) argued that the Fees Order interfered unjustifiably with the right of access to justice under both the common law and EU law and frustrated the operation of Parliamentary legislation granting employment rights.

Lord Reed upheld their appeal on each point for reasons set out below.

Why was the Fees Order introduced?

The Lord Chancellor argued that there were 3 reasons:

1. Fees would help to transfer some of the cost burden from general tax payers to those that used the system or caused the system to be used (identified as the principal aim).
2. A price mechanism could incentivise earlier settlements.
3. It could dis-incentivise unreasonable behaviour e.g. pursuing weak or vexatious claims.

It was accepted that these were legitimate aims.

What was the impact of the fees order?

The SC concluded that there has been a "…dramatic and persistent fall in the number of claims brought…" (para 39). The long-term reduction is 66-70 per cent. The impact was greater than had been foreseen.

It was acknowledged that some claims pursued in the ET do not involve monetary awards or are of low financial value. For example, in 2012/13 (pre-fees) 52 per cent of successful race claims resulted in awards of less than £5000. Similar figures were reported for religious discrimination and unfair dismissal. The median award for unlawful deduction of wages claims was £900 in 2013. However, prescribed fees were still obligatory but for remission.

There was a greater fall in lower value claims and those where financial remedy was not sought. This suggested that the fees were disproportionate to what was at stake in the proceedings and people deciding it was not economically worthwhile.

The impact of the remission regime was low with only 29 per cent receiving full or partial remission in 2016 and the Lord Chancellor's discretionally power to remit fees being used just 31 times (1 July 2015-30 June 2016). The remission assessment was criticised as being too restrictive.

Did the fees order achieve the 3 aims pursued?

The principal aim was transferring the cost burden to users of the ETs. It had been anticipated that the costs recovery rate would be around a third. In fact, it was only 13 per cent over the Fee Order period.

As to, deterring unmeritorious claims, the Lord Chancellor conceded that there is no basis for concluding that only stronger cases are being litigated as a result of the Fees Order.

The third aim of encouraging earlier settlements, was not achieved. The statistics before the Tribunal indicated that ACAS settlements had in fact decreased since the introduction of fees. The SC accepted the argument that some employers were delaying negotiations to see whether the Claimant would be prepared to pay the fee.

Therefore, in short, the evidence did not support the Lord Chancellor overall.

Why is the Fees Order unlawful under English Law?

The SC concluded that the Fees Order was contrary to two enshrined constitutional rights namely, the right of access to justice/access to the courts and secondly, that statutory rights are not to be cut down by subordinate legislation passed under the vires of a different act.

Taking it back to basic legal principles, consideration of these constitutional rights by the SC involved reference to ***Donoghue v Stevenson [1932] AC 562***, the Magna Carta of 1215, Sir Edward Coke, Blackstone and more recent consideration of the same in the appeal courts.

The SC concluded that the Fees Order effectively prevented access to justice. In order for the fees to be lawful they would have to be set at a level that everyone can afford, taking into consideration the availability of full or partial remission. The SC concluded that this requirement was not met. The *"sharp, substantial and sustained fall"* (para 91) in claims demonstrated that fees have prevented people from bringing claims and it warranted the conclusion that this was due to affordability (para 91).

Affordability of fees was too theoretical opposed to an assessment in a reasonable sense. It was not reasonable to assess affordability where those on low to middle incomes could only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain an acceptable standard of living. As such, the remissions regime was considered to be very restricted in scope.

The fees can prevent access to justice if they make it futile or irrational to bring a claim e.g. claims with no financial reward or of low value. This was compounded by the problem of enforcement. After 2013 only 49 per cent of Claimant's were paid in full. New provisions in 2016 have only resulted in the recovery of 31 unpaid awards between 6 April 2016 and 20 January 2017.

The SC rejected the Lord Chancellor's argument that higher fees mean more revenue, thus transferring a larger proportion of the cost from the taxpayer to the Tribunal user. There was no evidence of this being accurate and the SC concluded that it contradicted elementary economics and "plain common sense". This logic only works in the SC's view where the "optimal price" is identified. Therefore, a higher fee does not mean that the Fees Order will be more effective.

It rejected the suggestion that the Fees Order was necessary to achieve and of the aims pursued for the reasons summarised within this article.

For more detail on the findings refer to paragraphs 90-98 and 99-104 of the judgment.

Why is the Fees Order unlawful under EU law?

Twenty-four of the rights enforceable in ETs have their source in EU law.

The burden was on the Lord Chancellor to establish the proportionality of the Fees Order in pursuing their 3 aims.

For the aforementioned reasons, the measures went beyond what was reasonable necessary to meet the legitimate aims pursued (i.e. were disproportionate). As such, the Fee Order was not lawful.

The Judgment of Lady Hale

Lady Hale addressed the issues relating to discrimination namely, that the Fees Order discriminated unlawfully against women and other protected groups.

It was argued that the higher fees payable, either for Type B claims or discrimination claims were indirectly discriminatory against women (and others with protected characteristics) contrary to s19 EqA.

A higher number of women bring Type B claims than Type A claims. As such, a prima facie case of indirect discrimination was established.

In turning to the question of objective justification for the reasons already summarised above it was concluded that the Fees Order was not a proportionate means of achieving a legitimate aim.

Whilst the live argument before the SC was sex discrimination it was acknowledged that the disparate impact could also affect those with other protected characteristics e.g. disability.

Will UNISON's tremendous victory really cost £32 million to rectify?

It does appear that HMCTS will take steps to repay fees in light of the SC decision. However, within the judgment Lord Reed has expressly invited written submissions on any consequential relief which may be appropriate (para 120). Therefore, it is anticipated that there will be further directions on this in due course.

In any event, the administrative burden of rectification is likely to add to the cost. For example, any applications for repayment will need to be validated and HMCTS will need to verify whether any such Claimant has already been reimbursed by the Respondent.

Equally, it is unclear where this leaves those Respondents who were unsuccessful and ordered to pay the Claimant's fees. Surely they should also be entitled to reimbursement.

Eager employment and equalities practitioners are also beginning to debate whether claims which are on the face of it out of time could now be brought on the basis of the statutory discretions to extend time on the basis that the Fees Order made it not reasonably practicable to issue claims and/or it would be just and equitable to extend time in light of the same. In my opinion, such arguments would be difficult to sustain in light of the remissions regime. That said the SC was highly critical of that regime. In some cases the Respondent is likely to have a very compelling argument that it would be substantially prejudiced due to the passage of time. However, at h very least there is likely to be some scope for argument. Therefore, it is possible that the Fees Order debacle may in fact cost substantially more to rectify.

Is this the end of fees?

Fees under the Fee Order are unlawful and therefore have been suspended. The aims that the Lord Chancellor was trying to pursue were considered to be legitimate. It was the method employed that was unlawful:

> *"86…Fees paid by litigants can, in principle, reasonably be considered to be a justifiable way of making resources available for the justice system and so securing*

access to justice. Measures that deter the bringing of frivolous and vexatious cases can also increase the efficiency of the justice system and overall access to justice

87. The Lord Chancellor cannot, however, lawfully impose whatever fees he chooses in order to achieve those purposes…".

Therefore, it is clear that the SC has not ruled out the possibility of a fees regime being lawful and it seems extremely likely that following consultation that another attempt at enacting fees will be made.

Interestingly, the SC considered EU and domestic case law on the legality of court fees. In addition, it undertook a comparison of ET and county court fees, particularly those within the Small Claims Track (para 20) where the fee is reflected by the value of the claim and there is no penalty for bringing a complex claim. Neither point was reflected in the Fees Order.

Finally, the SC was critical of the remissions regime and the operation of the "exceptional circumstances" provision for those facing exceptional hardship (Fees Order, paragraph 16 of Sch 3). Therefore, any new fees regime will need to deal with this issue in a fairer way.

All opinions within this article are my own. Nothing stated within this article should be taken as legal advice on any particular case. Should legal advice or clarification be required please contact me or 3PB Barristers.

Sarah Bowen

Employment and Equalities Barrister

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