



# Supreme Court finds that Employment Tribunal fees are unlawful

In a strongly worded unanimous judgment, the Supreme Court has found that fees charged to bring a claim in the Employment Tribunal and Employment Appeals Tribunal are unlawful. Following the judgment, the government has taken immediate steps to stop charging these fees and has announced that they will refund fees paid since their introduction in 2013. Estimates of the cost of this refund range from £27m - £32m.

## *The decision in brief*

The Court found that the fees were unlawful because they restricted access to justice, that they were unlawful under EU law as they restricted the ability to access rights derived from EU law, and that they were indirectly discriminatory on the basis of sex.

Key to these conclusions was the Court's findings that (a) fees were unaffordable in practice for many on low and middle incomes; and (b) fees were set at a level that made bringing many claims – particularly low value claims – either futile or irrational. The Court was scathing in its criticism of attempts to rationalise the decline in claims – a reduction of around 60% - 70% – as unconnected to the introduction of fees. They found that the decline in claims was “*so substantial [and] sustained*” that the conclusion that fees were the cause was unavoidable. The Court found that the reasons for charging fees – shifting some of the burden of funding the tribunal system from general taxpayers, encouraging settlement, and discouraging unmeritorious claims – were legitimate, but the fees were set at a level that unjustifiably intruded on the right of access to justice.

## *What happens next?*

The Court's decision leaves scope for the government to introduce a new fees regime. However, the Court's judgment is very robust and will require the government to very carefully consider any new fees regime, which will inevitably require extensive research and consultation.

Parliament is currently in recess until September so immediate action to develop a new fees regime is unlikely. In addition, given that

Brexit negotiations are the primary focus of the government it may be that there is no appetite to expend limited political capital in disputes over the appropriate level of fees. The government may then simply accept that - for the time being, at least - no fees will be charged.

In the immediate term, it is likely that we will see an increase in the number of Employment Tribunal claims being brought, particularly lower value claims. This will inevitably put strain on the Employment Tribunal system, which may find that it is not adequately resourced.

“It is also possible that we will see out of time claims being brought by individuals who had been deterred by the prospect of fees. Employment Tribunals have the power to allow these claims to proceed, depending on the circumstances of the individual and the nature of the claim, so it remains to be seen how open they will be to arguments that fees prevented claims. Another area of uncertainty for tribunals arises from claims which were dismissed because the Claimant failed to pay fees. The Supreme Court’s decision means that these cases were dismissed on the basis of an unlawful fees regime and we may therefore see prospective claimants attempting to resurrect their claims, even though many will now be out of time.”

Please contact anyone in the [GQ team](#) if you wish to discuss the implications of this case.