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NEWS REPORT

Country:	United Kingdom
Title:	The Supreme Court rules on Tribunal Fees challenge; R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)
Date:	3 August 2017
Expert:	Lucy Vickers
<u>Context</u>	
Issue at stake:	Enforcement
Ground of discrimination:	All grounds
Source:	National court decision, Supreme Court, R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC 51
Field:	Employment
Applicable law:	Equality Act 2010

Content

Case: The case involved a challenge brought by Unison (a trade union) to the tribunal fees that were imposed in 2013. In 2013 Unison sought to challenge a Fees Order made pursuant to the Tribunals, Courts and Enforcement Act 2007, Sections 42(1) and 43(3), which required fees to be paid in respect of claims and appeals brought to the employment tribunals and the Employment Appeal Tribunal.¹ The fee level depends on whether the claim is type A (shorter simpler claims) or type B, including equal pay and discrimination claims. The fee in the employment tribunal for a type B claim is £1200 (EUR 1340). The imposition of fees had reduced the number of discrimination cases by around 70-80%.

UNISON argued that the making of the Fees Order was not a lawful exercise of the Lord Chancellor's statutory powers, because the prescribed fees interfere unjustifiably with the right of access to justice, and discriminate unlawfully against women and other protected groups. The Court of Appeal rejected the claim on the basis that the imposition of fees did not breach the principle of effectiveness and did not amount to unlawful discrimination.

Decision of the Court: The Supreme Court overruled the Court of Appeal.² The Fees Order was found to be unlawful under both domestic and EU law because it had the effect of preventing access to justice. The Fees Order was also unlawful because it contravenes the EU law guarantee of an effective remedy before a tribunal and imposes disproportionate limitations on the enforcement of EU employment rights.

¹ See also *European equality law review*, Issue 2015/1, pp 155-156.

² [2015] EWCA Civ 935, <http://www.bailii.org/ew/cases/EWCA/Civ/2015/935.html> accessed 26 July 2017.

It was also found to be indirectly discriminatory under the Equality Act 2010 because the higher fees charged for more complex type B claims put women at a particular disadvantage, because a higher proportion of women bring type B than bring type A claims, and the differential fees could not be justified as a proportionate means of achieving a legitimate aim.

Key points of analysis: The Supreme Court held that the fees bear no direct relation to the value of the claims made, and can therefore act as a deterrent to claims for modest amounts or non-monetary remedies. The question of whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Where low to middle income households can only afford fees by forgoing an acceptable standard of living, the fees cannot be regarded as affordable.

The Fees Order is indirectly discriminatory under the Equality Act 2010 because the higher fees for type B claims put women at a particular disadvantage, because a higher proportion of women bring type B than bring type A claims. The charging of higher fees was not a proportionate means of achieving the stated aims of the Fees Order. The aims of the order were to transfer the cost of the tribunal service from taxpayers to users and to encourage cases to settle. The higher fee for type B cases was not an effective means of transferring costs from the tax payer. Moreover, both meritorious and unmeritorious claims could be deterred by the higher price, and there was no correlation between the higher fee and the merits of the case or incentives to settle. As a result, the charging of higher fees in type B cases could not be justified, and the Fees Order was indirectly discriminatory.

Internet link source: <https://www.supremecourt.uk/cases/docs/uksc-2015-0233-judgment.pdf> accessed 26 July 2017.