



26 July 2017

## PRESS SUMMARY

**R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)**  
[2017] UKSC 51  
*On appeal from: [2015] EWCA Civ 935*

**JUSTICES:** Lord Neuberger (President), Lady Hale (Deputy President) Lord Mance, Lord Kerr, Lord Wilson, Lord Reed, Lord Hughes

### BACKGROUND TO THE APPEAL

Parliament has conferred statutory rights on employees, including through legislation giving effect to EU law. Most employment rights can only be enforced in employment tribunals (“ETs”) and the employment appeal tribunal (“EAT”). Until the coming into force of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893 (“the Fees Order”) on 29 July 2013, a claimant could bring and pursue proceedings in an ET and appeal to the EAT without paying any fees. The stated aims of the Fees Order were to transfer part of the cost burden of the tribunals from taxpayers to users of their services, to deter unmeritorious claims, and to encourage earlier settlement.

The Fees Order requires an issue fee to be paid when a claim form is presented to an ET, and a hearing fee prior to the hearing of the claim. The amounts depend on whether the claim is brought by a single claimant or a group, and whether the claim is classified as “type A” or “type B”. Type A claims are specified, and generally require little or no pre-hearing work and very short hearings. All other claims are type B, including unfair dismissal, equal pay and discrimination claims. For a single claimant, the fees total £390 for a type A claim and £1200 for a type B claim. In the EAT fees are also payable in two stages, but without distinction between different types of appeal, or between single and group appellants. The Fees Order also makes provision for the full or partial remission of fees if a claimant’s disposable capital, together with their partner’s, is below a specified amount (in most cases, £3,000). The amount of remission depends on the claimant’s gross monthly income, together with their partner’s, and the number of children they have. A fee may also be remitted if the Lord Chancellor is satisfied that there are exceptional circumstances. A claim or appeal must be rejected unless it is accompanied by a fee or a remission application.

This appeal arises out of proceedings for judicial review in which the trade union UNISON (the appellant) 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 under both the common law and EU law, frustrate the operation of Parliamentary legislation granting employment rights, and discriminate unlawfully against women and other protected groups.

### JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Reed gives the lead judgment, with which the rest of the Court agrees, dealing with all issues except for discrimination. Lady Hale gives judgment on the discrimination issue, with which the rest of the Court agrees.

## REASONS FOR THE JUDGMENT

The Fees Order is unlawful under both domestic and EU law because it has the effect of preventing access to justice. Since it had that effect as soon as it was made, it was therefore unlawful and must be quashed.

The constitutional right of access to the courts is inherent in the rule of law: it is needed to ensure that the laws created by Parliament and the courts are applied and enforced. Tribunals are more than merely the providers of a service which is only of value to those who bring claims before them [65-85]. As a matter of domestic law, the Fees Order is unlawful if there is a real risk that persons will effectively be prevented from having access to justice, or if the degree of intrusion into access to justice is greater than is justified by the purposes of the Fees Order [86-89].

While court fees for small claims are related to the value of the claim, the ET and EAT fees bear no direct relation to the amount sought and can therefore be expected to act as a deterrent to claims for modest amounts or non-monetary remedies (which together form the majority of ET claims). The recoverability of costs upon success cannot be decisive of the question of access to justice as that right is not restricted to the ability to bring successful claims [20-37]. Indeed the evidence before the Court shows that the effect of the Fees Order was a dramatic and persistent fall in the number of claims brought in ETs, with a greater fall in the number of lower value claims and claims in which a financial remedy was not sought. Fees were the most frequently cited reason for not submitting a claim. Worked examples of the impact of fees on hypothetical claimants indicated that in order to meet the fees they would have to restrict expenditure that was ordinary and reasonable for maintaining living standards [38-55].

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. Fees must be affordable not in a theoretical sense, but in the sense that they can reasonably be afforded. Where households on low to middle incomes can only afford fees by forgoing an acceptable standard of living, the fees cannot be regarded as affordable. Even where fees are affordable, they prevent access to justice where they render it futile or irrational to bring a claim, for example where in claims for modest or no financial awards no sensible claimant will bring a claim unless he can be virtually certain he will succeed, that the award will include recovery of fees, and that the award will be satisfied in full [90-98]. Further, although the stated purposes of the Fees Order are legitimate aims, it has not been shown that the Fees Order was the least intrusive means of achieving those aims [99-103]. The Fees Order is also unlawful because it contravenes the EU law guarantee of an effective remedy before a tribunal: it imposes disproportionate limitations on the enforcement of EU employment rights [105-117].

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. It had not been shown to be more effective at transferring the cost of the service from taxpayers to users, and in some type B cases (such as pregnancy dismissal) the higher fee did not correspond to a greater workload placed on the tribunal. Further, meritorious as well as unmeritorious claims might 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 [121-134].

*References in square brackets are to paragraphs in the judgment*

### **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

<http://supremecourt.uk/decided-cases/index.html>