



## Fee remission: It's the tribunal, Jim, but not as we know it

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*A means-tested remission system was introduced alongside tribunal fees in July 2013. This article assesses how remission applications are being dealt with, provides tips for practitioners making applications and considers what the future may hold.*

Since the introduction of fees, claimants and their representatives have had to get to grips with two complex and inconsistent remission systems. Employment lawyers are familiar with the widely reported 79% fall in tribunal claims following the introduction of fees. The Ministry of Justice has always maintained that access to justice will not be adversely affected because remission is available to those who cannot afford to pay. But is this the case? Or is the drop in claims largely attributable to cash-strapped claimants being priced out of access to justice despite the remission system?

### **Principles of remission**

Remission and refund were introduced in tandem with tribunal fees in July 2013. A claimant may apply for means-tested remission from the whole or part of a tribunal fee in advance of lodging a claim or within seven days of lodging. Alternatively, a claimant may pay the fee and then make a retrospective refund application based on the same means-tested eligibility criteria.

Means are assessed at the date the fee is payable. So a claimant may be granted remission from one fee but deemed ineligible for remission from another fee payable at a different date if the claimant's means have changed. The claimant's partner's means are also taken into account. Automatic eligibility is granted to claimants in receipt of certain 'passporting' means-tested benefits (ie, income support, income-based jobseeker's allowance, income-related employment and support allowance, pensions credit guarantee credit, universal credit with gross annual earnings of less than £6,000 and Scottish civil legal aid), provided the claimant's disposable capital does not exceed the threshold (see below). Claimants not in receipt of these benefits are required to prove income.

### **The new remission system**

The original July 2013 remission system was significantly revised and these revisions came into force on 7 October 2013

following a (very brief) consultation period. Key changes from the first system are:

- a new remission application form and guidance note was introduced. A remission application submitted using the old form is now automatically rejected. However, the old form remains on the MoJ website. In fact, when we Googled 'fee remission', the old form was the first search result. Even a practitioner might be forgiven for using the out-of-date form in these circumstances: there seems little hope for an unrepresented claimant grappling with the system on their own;
- a capital means test was introduced in addition to the income means test. The capital threshold ranges from £3,000 to £16,000, depending on the fee payable and the claimant's age. Capital for the purposes of remission includes redundancy pay, stocks and shares, shared assets and, of course, final salary payments and payments in lieu. Many employees leaving work will receive a lump sum of £3,000 in severance pay. This will automatically render them ineligible for remission despite the fact that they are without work;
- the income means test is now calculated on gross rather than net income. A claimant's monthly outgoings, such as rent or mortgage payment, are therefore no longer taken into account;
- the time limit to apply for a retrospective refund was reduced from six to three months.

### **Remission deadlines and limitation**

A key difference between the practical application of the remission system in the civil courts and tribunals is limitation. A civil claimant generally has three or six years to issue a claim. Most tribunal claimants are subject to the tight 'three months less one day' timetable in which to lodge a claim (subject to extension for Acas early conciliation), and the clock has often been ticking for some weeks by the time a claimant seeks legal advice or decides to litigate. The claimant must submit

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their remission application within seven days of lodging, which in practice often means within seven days of limitation.

Collating the original means documents to support a remission application is not easy. This is particularly the case in relation to:

- claimants who seek to rely on a passporting benefit but who do not have a recent original notification of entitlement from DWP (with notice dated within the previous month, the current financial year if the benefit is Pension Credit guarantee credit or 'recent' if the benefit is Scottish civil legal aid). Government departments do not produce documents in a hurry and we have seen more than one claimant forced to miss the deadline because they were awaiting proof of a passporting benefit;
- claimants who have recently applied for a passporting benefit and are awaiting a decision. Benefit decisions can take months to come through;
- claimants who have recently resigned, potentially including those who have been constructively dismissed, are sometimes not eligible for state benefits immediately. This can leave a 'means gap' where the claimant has no income but cannot prove their income status for remission application purposes.

### **Supporting evidence**

The most recent guidance (EX160A) is unspecific about evidence required in support of remission applications. In practice, we have found that tribunals sometimes require more means evidence than the guidance note stipulates, meaning that applications are being rejected for insufficient supporting evidence despite the documents set out in the guidance note having been provided.

### **System administration**

In our experience, most remission applications are taking between two and three months to reach a determination on appeal. This leaves the claimant with a choice between trying to find the fee up front and hoping a refund is granted retrospectively, or withdrawing their claim.

In contrast with the civil courts, an applicant for tribunal remission is unable to run through their application with court staff to ensure they have completed the form correctly and has provided the right evidence. The Employment Tribunal Central Office makes decisions on remissions but does not accept enquiries about applications. Enquiries may only be made through the separate general public enquiry line. This labyrinthine process gives no certainty and is difficult for a practitioner to navigate, let alone a litigant in person.

In our experience the appeals process is a frustrating one.

While an unsuccessful applicant has two opportunities to appeal, we are aware of several cases where the grounds given for rejecting applications by the Central Office have been inconsistent. A piece of evidence or source of income which is accepted at one stage may be rejected at the next stage.

### **Summary**

While, in our anecdotal experience, the majority of remission applications are successful, there has been a worrying number of inconsistent and apparently unjust decisions. Being potentially eligible for remission is one thing; being able to navigate the remission system is quite another.

In practice, many of our clients are having to make the difficult choice between not pursuing a claim and borrowing the issue fee in order to comply with an imminent limitation date, while hoping to secure a retrospective refund.

The Unison judicial review judgment made clear that a successful claimant can generally expect to be awarded tribunal fees as a head of loss at remedy stage. While this clarification is welcome, it is scant comfort to a claimant whose remission application has been rejected and whose only option is to risk borrowing the tribunal fee. The distant prospect of recovering the fee, if successful, months hence is just too much of a risk for some claimants. That risk is further increased having regard to the recent 'Payment of Tribunal Awards' study showing that over half of tribunal awards are not paid in full by losing respondents.

We recommend claimant practitioners to:

- advise clients to gather means documents together early;
- seek to submit absolutely all possibly relevant means documentation with the first application, to avoid the uncertain appeals process;
- monitor the outcome of remission and refund applications and seek to extract some general trends or principles in the approach the tribunals are taking.

### **The future**

The recently announced swingeing increase in civil court fees, in force from 22 April, may be an ominous signifier of potential future fee increases in the employment tribunals. If tribunal fees increase, claimants will be increasingly likely to assess the cost/benefit of lodging a claim with an uncertain remission application pending, and to come down on the side of least risk and decide not to lodge. We will continue to watch that space.