

Employment



Online publication of Employment Tribunal judgments: what next?

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The Ministry of Justice ('MOJ') recently launched its website of Employment Tribunal ('ET') decisions. At present, the website contains around 140 past decisions from 2015 onwards. Future ET decisions handed down in England, Wales and Scotland will be uploaded onto the website. It is unclear if any more past decisions will be uploaded onto the website.

There are significant practical implications arising from increased accessibility: a critical feature of the new website is that the content of decisions is searchable. This means that a website user can search for decisions by drop down menu or free text search, which could include the name of the employee, employer, Tribunal judge or member, or lawyer. Furthermore, decisions can appear in results generated by a generic search for a respondent business on a search engine. The more times a decision is accessed, the more visible it will become on a results page.

Increased accessibility may cause some concern for employers. The risk of adverse publicity for businesses is now much greater, as allegations about the conduct or integrity of managers become more public, thereby encouraging early settlement. Moreover, confidential commercial information which is referred to in written reasons will also become public, which could lead to an increasing number of disputes about the scope of redactions at a preliminary stage.

Employees bringing a claim could seek to draw inferences about the business from findings of fact in previous decisions, particularly those relating to discrimination claims. Statistics or patterns about a business involved in ET proceedings may also be compiled and published; there is a considerable risk that a partial view will be presented where written reasons have not been provided with a judgment.

The other side of the coin is that employers will be able to search for the claimant's employment litigation history, which may prove useful when defending a claim. Moreover, employers may also search for any decisions involving applicants or employees, although care should be taken to ensure that detrimental treatment does not follow as a result. It is possible that employers may use the search facility to create a 'blacklist' of applicants or employees who have brought claims in the ET. Such information will remain confidential to the employer unless a data subject access request is made or the information is disclosed through any subsequent litigation.

The ability to search decisions online may have unintended consequences. A party will be able to search for recent ET decisions involving the judge allocated to their case. It is possible there will be an increase in accusations of judicial bias, particularly in cases involving Litigants in Person ('LIPs'). A judge may also be mindful that their findings of fact as to the credibility of witnesses or comments as to how a case was put will be available permanently on the internet. Consequently, written reasons may become increasingly sanitised so as to limit the appearance of bias or damage to professional reputations.

Notwithstanding the above, a key advantage of greater transparency is that the publication of decisions should provide helpful examples of how ETs approach issues of fact and law. While this is helpful for all advocates, this could provide particular assistance to LIPs in presenting their case to the ET clearly, thereby making it more straightforward for employers to provide a response. Previous decisions should provide examples of quantum awarded in particular causes of action, which may help to encourage realistic expectations as to remedy.

The proposal to publish ET decisions online is seen as beneficial to the principle of open justice; however, it remains to be seen whether the changes will in fact reduce the number of claims which are determined at a final hearing.

Marianne Tutin is developing a strong and diverse practice in Employment and Discrimination Law. She has considerable experience representing clients in Employment Tribunals, including multiple-day hearings, in unfair dismissal, discrimination, harassment, victimisation, whistleblowing, redundancy, holiday pay, equal pay, and TUPE claims. She also has extensive experience of advisory work and drafting witness statements, ET1/ET3s and Notices of Appeal.

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