

Barriers to Justice in the Employment Tribunal System

Report of Pilot Research Project

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Background

The School of Law at the University of Bristol has been carrying out research to understand the barriers people meet in resolving employment problems through the Employment Tribunals (ET) system. The research has been carried out in collaboration with Bristol Citizens Advice Bureau (CAB), and focuses on those who attempt to engage with the ET system without the benefit of legal representation. The research has been funded by grants from the Society of Legal Scholars and from the Law School's Law and Policy Research Unit fund. The research was identified as a priority by both the academic researchers and CAB staff. It was intended as a pilot study to identify issues that identified areas that required more in-depth research. Here we report the interview findings under three headings: role of the CAB and workers; experiences of ACAS; and issues relating to the Employment Tribunal.

Four of the ten interviewees had experienced problems in getting payment of the agreed settlement, two of these had obtained County Court judgments (but had still not been paid); a third was considering applying to the County Court; the fourth eventually got payment with the help of Bristol CAB. However, we do not deal with this issue here as our findings are in line with those reported in the CAB briefing *Justice Denied* (October 2008).¹ In the final section we put forward proposals for future research – we welcome comments and suggestions on this.

Research Methods

Between February and June 2008 we interviewed 10 people who had sought advice from the Bristol CAB office and who had either been advised to make a claim to the ET and/or had received help in completing a form ET1. Potential

¹www.citizensadvice.org.uk/index/campaigns/policy_campaign_publications/evidence_reports/er_employment/justice_denied. ON 19 May 2009 the Ministry of Justice announced that 'High Court Enforcement Officers will take on recovery of awards granted by employment tribunals or in out-of-court settlements' (see <http://www.justice.gov.uk/news/newsrelease190509a.htm>).

research participants were contacted first by Bristol CAB volunteers, by letter then followed up with a phone call, to ask if they would be prepared to take part in the research. The CAB volunteer then arranged for interviews by a researcher from the School of Law to take place at the Bristol CAB offices for those who agreed to take part.

Interviews were loosely structured around a series of questions designed to let interviewees tell their own story of why they approached the CAB in the first place and their experiences of using the ET system. Only one person interviewed had attended a Tribunal hearing; two others had had default judgments in their favour, the rest had resolved their claim through negotiation, except for one who had cancelled the ET hearing because he had no-one to represent him and so had reached no resolution. Two people had experienced a telephone case-management discussion with an Employment Judge. Most interviewees had had some involvement from Advisory, Conciliation and Arbitration Service (ACAS) in their case.

Interview Findings

Role of CAB and workers

Interviewees were not specifically asked about their experience of the CAB. However, in relating their experience of the ET system most referred to the role of the CAB workers in a very positive way:

'They are very very helpful.'

'Citizens' Advice have been brilliant. They've helped me all the way through, they've helped me do letters, write letters asking what's going on, and everything'

One of the principle roles that the CAB workers played was one of *translation* – that is, of translating the procedures and language of the ET system into formulations that could be understood by clients. One person we interviewed had a law degree from another European country, but even he felt he could not have navigated the system without the CAB support:

'...if I didn't have any explanations before from the Bristol Citizens' Advice Bureau, it would have been complicated.'

Interviewees were most positive when they had received help in completing the ET1 and writing related letters. Those who completed the ET1 themselves found this a daunting experience. One person suggested:

'You need someone, or a facility for someone to check the forms before you put them in. When you get a passport, you go to the Post Office nowadays, and they can check your forms to make sure they're correct.'

This need for translation continued throughout people's encounters with the ET system, and critically, as discussed below, in the enforcement Tribunal decisions.

Experiences of ACAS

Interviewees did not appear to have a clear understanding of what ACAS was or its role – one person thought it was a 'company'. Those who expressed opinions about ACAS were generally critical. They had trouble getting hold of their ACAS officer. There was never any face-to-face contact, people referred were given a contact telephone number and often found they had to leave several messages before the officer would respond. One interviewee felt that ACAS only got involved when the Tribunal told them to.

Interviewees criticised ACAS officers for their lack of active support in their case. The neutrality of the mediation role meant that some saw ACAS simply as a go-between that relayed messages from one side to the other:

'she didn't do anything. She was just passing them my information, and passing from them to me their information. But it wasn't anything to do with her, and it was very clear that, she goes, "I'm doing my job. It's not, it's like, it's kind of, it's nothing to do with me"'

Interviewees all felt themselves to be in a position of minimal power compared to the employer. In this context the mediation role of ACAS often did not appear as neutral, but gave interviewees the impression that the ACAS officer was on the side of the employer:

'She was always there, but she was never 100% behind me. ... We used to get off the phone, and we used to say, "Well it sounds like she works for [the employer]. You know, what's Braintree telling her?" And she did have a lot a lot of correspondence with [the employer]...'

'She did give us quite a lot of advice. Sometimes we did feel that when we were speaking to her, that she was on their side. That's in my words, but, it's like, she was sticking up for what they were saying, and in so many ways saying it was my fault'.

The ACAS role here is to minimise the number of cases that reached the Tribunal by reaching negotiated settlements. They therefore would attempt to negotiate in instances where the claimant considered it would be fruitless.

One interviewee felt that the ACAS intervention had held up his case and meant he had not been able to submit his documents to the Tribunal in time for papers to be sent to the other side, which, he felt, prejudiced his case.

Of course, ACAS officers themselves are performing translations, translating their task in terms of performance indicators that require settlements as outcomes. This means that their focus is on negotiating monetary settlements, even though ET claimants are asked to indicate, through ticking boxes, whether the outcome they want is compensation, or compensation and their job back, and altogether more difficult negotiation. Another difficulty with the role of ACAS was what they are able to negotiate. This led one interviewee to be very unhappy even though he had obtained compensation of £5,000 through a negotiated settlement with the support of ACAS. What he also wanted was his job back. When completing the ET1 he had ticked the boxes stating he wanted both compensation *and* his job back. After obtaining the compensation settlement he assumed that ACAS would move onto negotiating about his job; there was never any discussion about this matter with ACAS, but he assumed that ACAS knew what he wanted as they would have seen the form.²

Employment Tribunal Experiences

Our interviews produced limited material on experiences of the Employment Tribunal . Only one interviewee had attended an Tribunal hearing; two others had experienced case management phone calls with a Tribunal Judge; in two further cases default judgments had been made in favour of the claimants (as the defendant employer failed to respond to the ET and/or attend a hearing). The interviews did, however, provide some interesting insights.

i) Case management discussion (by phone)

Case management discussions between the judge and the parties may be held prior to a hearing, often by a pre-arranged phone call. The purpose of such discussions is to clarify the issues of the case, decide whether orders are to be made about documents or witnesses, and decide the time and length of the full hearing.³ For one claimant, this phone interview was the most positive part of the process, as the judge was

“...100%, probably 110%, behind me, which was, that was the only time I felt, wow, this, someone believes what I’m saying. ... if it did go to court, I think I

² CAB staff confirm that it is highly unlikely that anyone will get their job back once a dispute has reached the stage of submitting a claim to the Employment Tribunal. Caseworkers would have discussed this with the client at the interview.

³Employment Tribunal website: www.employmenttribunals.gov.uk/FormsGuidance/theHearing.htm

would a had his support, because he was actually telling the other guys that he thought it was pathetic.”[Interviewee 1]

However, for **Interviewee 2** the experience was very intimidating. She felt that the circumstances were unequal; the employer was represented by a solicitor, and so she too should have had a legal representative. She was intimidated too by the language used by the employer’s solicitor:

“...she would say, “Yes, sir,” or “Yes, something,” You know like they’ve got to use, they talk a certain way, and they use certain words and stuff. Of course, I just felt like, oh my God, I’m going to lose this case!”

Given the feeling of relative powerlessness of most interviewees in the face of legally-represented employers, interviewee 2's feelings of intimidation are likely to be more common. These feelings may for many be compounded by the medium used – telephone. Professionals such as solicitors use the phone to conduct business on a daily basis, but for many of the interviewees using a phone is a more alien experience. Interviewee 2 did not have her own land-line, so had to go to her daughter's home to receive the call. Given the importance of the case management phone call in deciding whether the case progresses (in a report of such a case management call outside of this pilot study the claimant was informed by the Tribunal Chair that if he lost he was very likely to have costs awarded against him), it is important to have a better understanding of this part of the process from the perspective of claimants (see concluding section).

ii) Tribunal hearings

Knowing that the employer would have legal representation at the Tribunal in itself was sufficient to deter one interviewee, who cancelled his hearing when his solicitor said he could not continue with his case. He was asked if he considered representing himself at the Tribunal:

***Interviewee 9:** Someone told me I could come and represent myself, but I, trouble is, I think I, I said myself it looks stupid if I go and represent myself. And uh, the company got, got this solicitor, and I’d be tied into knots. So therefore, I thought no ... I’ll just cancel the whole thing, like.*

One interviewee did attend a hearing. She had started her case in Swansea, where the CAB has resources to provide support to clients throughout the whole ET process. This included dealing with all correspondence about the case, and also negotiating with ACAS on the client's behalf (and so this interviewee gave no comment on the role of ACAS in her case). However, on the day of the hearing her CAB worker had been unable to attend, and knowing this gave her considerable anxiety – she felt that she would not be

able to represent herself, so she very happy when Cardiff CAB found a pro-bono solicitor to represent her at the Tribunal hearing.

However, even with representation the hearing was not a good experience for her. Both she and her solicitor felt that the Tribunal Chair was on the side of the employer:

Interviewee 5: even this lady who represented me, she said, “You can feel what she likes my employer.” She’s like kind of, giving him advices and stuff during all this case when she’s listening. She was like, saying to him, “Alright, so here you have to take this and this document, brought by this and this law,” she was telling from him from law. She was kind of saying in her opinion what he’s done everything good, just only one bad thing was what he didn’t have right documents now, and because of that he’s losing case. So I felt kind of, wait, why do you think he’s done good if, maybe I’ve done good?

She was awarded a settlement that was reduced because the Tribunal judged that she was at fault for not making it clear to her employer that she did not want to leave her employment – the employer claimed in the ET hearing that he did not know she did not want to leave. However, the employer only made a partial payment, and then she was left not knowing how to follow this up. The papers sent to her following the Tribunal decision were unintelligible to her, which meant she had to seek advice again from CAB, this time in Bristol as she had by now moved. She brought along to the interview copies of the documents sent to her by the ET. The ‘Employment Tribunal’s Interest Order 1990’ was particularly difficult to comprehend, written in highly technical legal language. Once again, the CAB workers had to perform a translation, and supported her in obtaining the remainder of her settlement.

iii) Default judgments

For those who received default judgments the Tribunal appeared somewhat remote. **Interviewee 4** (the lawyer) had wanted the chance to state his case; he felt he might have received a higher award if he had been able to. However, the remoteness of the Tribunal also meant that following the ET decision, he had to return to the CAB to find out what to do when employer did not pay:

“it was a bit strange for me to ask for an agency, or, I mean, Bristol Citizens’ Advice, uh, informations about the Tribunal, and, be, would appreciate to go to the Tribunal directly.”

Interviewee 3 felt she had not had much contact with the ET, ‘I handed the form in, and that was, they took it from there.’ When asked whether her experience of using the ET system had been positive, she replied ‘It has been positive. I mean everybody’s been helpful all the way along,’ but given the earlier

comment about lack of contact, 'everybody' probably includes the CAB. She too did not receive any payments from the ex-employer following the ET decision and has had to go to the County Court to enforce the judgment.

Conclusion: further research

This pilot study has only been able to provide a snapshot of the experiences of those who attempt to engage with the ET system without legal representation. Employers (in most cases) are able to rely on legal support for negotiations with ACAS, in pre-hearing case management calls and at the Tribunal hearing itself. It is therefore clear that, despite the intentions of the Tribunal system that it should be informal and not require claimants to have legal representation, in the ET system the lack of legal representation creates considerable barriers at all stages. Those interviewed for this research felt themselves dis-empowered and intimidated, whether this be by the legal language used in Tribunal judgments or by employers' solicitors, or in the negotiations with ACAS where the imbalance in power led some to consider ACAS to be on the employer's side.

One possible approach to further research in this field would be to carry out a form of case-tracking, identifying ET claimants at the beginning of that process and following their cases through to conclusion. This was the intention of the researchers in applying for pilot stage research funding. The experience of the pilot research has demonstrated some of the difficulties in this approach. In order to find ten participants we started off with over a hundred CAB clients who had approached Bristol CAB for advice that were classified as employment related (either 'Dispute Resolution' or 'Employment Tribunals and appeals'). We are unsure whether it would be possible to identify sufficient appropriate research participants unless research could be carried out on a long-term basis. Researchers would experience a high drop-out rate, and it is unlikely that many (if any) research participants would take their case through to Tribunal stage.

A alternative approach would be to focus research on specific critical points in the ET system that appear from these interviews as barriers. From the data above, we would suggest there are two critical points for claimants without legal representation:

1. *The role of ACAS.* For most of the interviewees, ACAS was a particularly important actor – cases would be resolved by ACAS intervention, but claimants do not necessarily feel they have much control over the process. Alternatively (or on top of this) the performance-driven nature of ACAS's involvement means that negotiations are carried out to meet these targets, not necessarily to meet the needs of claimants. The ACAS remit of 'neutral' negotiator does not feel relevant to claimants who feel powerless. If claimants

- without legal representation are to be empowered through the ET system, perhaps the ACAS role cannot be a 'one-size-fits-all' approach?
2. *The case management phone call.* Claimants' experience of the power relations established by this process, both in relation to the use of the medium of the telephone, and to the relations between the parties involved, needs better understanding if this is to be a part of the ET system that can empower claimants.

We welcome feedback on these, and other possible suggestions for how this research into claimants' experience of utilising the Employment Tribunal system without legal representation.

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