

4

THE COSTS OF JUSTICE: BARRIERS AND CHALLENGES TO ACCESSING THE EMPLOYMENT TRIBUNAL SYSTEM

Nicole Busby*

Introduction

In its previous guise as the Industrial Tribunal, the Employment Tribunal was intended to provide an ‘easily accessible, speedy, informal and inexpensive’ route to workplace dispute resolution (Royal Commission on Trade Unions and Employers’ Associations, 1968). Whether that ideal was ever achievable is open to debate but it certainly cannot be claimed for the institution that we know today. Alongside the name change, the current specialist tribunal has undergone a series of fundamental reforms – some in recent years – which have taken it ever

* Nicole Busby is Professor of Labour Law at the University of Strathclyde. In her research she explores labour market regulation and its socioeconomic context. Her recent work focuses on the relationship between paid work and unpaid care, the constitutionalisation of labour rights and claimants’ experiences of the UK’s Employment Tribunal system.

further away from this vision. As well as being a legalistic, adversarial and often very formal arena, the service it provides to individuals who find themselves embroiled in workplace disputes is no longer free. The imposition of fees for claimants in July 2013 has been widely criticised as representing an insurmountable barrier to access to justice for many workers, making the ET unaffordable and thus preventing the effective use of a range of employment rights such as protection against unfair dismissal and discrimination and the basic right to claim unpaid wages for work already performed. However, even before the introduction of fees, many claimants found the experience of pursuing an ET claim extremely difficult, resulting in high personal and financial costs. Feelings of bewilderment and alienation are often reported by those embroiled in a highly legalistic process, particularly if self-representing. Coupled with the psychological and financial effects of an ongoing dispute with an (often former) employer, such barriers increasingly mean that many with potentially viable claims decide to walk away rather than to pursue a resolution.

I will explore in this chapter the challenges encountered by those seeking to access the ET system, with a particular focus on those claimants who do not have trade union support and who cannot easily afford to pay for legal advice and representation. The aim of the chapter is to identify the costs of justice in this context and to suggest how such costs might best be met. Some of the current difficulties arise due to certain systemic features which, despite contributing to the negative experiences of claimants, are an inherent consequence of attempting to provide legal redress in this area. However, what is largely missing from the current provision is consideration for the needs of claimants – particularly those who lack representation – and it is this aspect which will provide the focus as I explore how an improved service might be achieved. It is argued that it is only by acknowledging the many foibles of the current system and attempting to counter them through enhanced support mechanisms that access to justice will be achievable for all.

The Employment Tribunal: principles and purpose

As well as delivering a system that would be ‘easily accessible, speedy, informal and inexpensive’, the Donovan Report’s (Royal Commission on Trade Unions and Employers’ Associations, 1968) recommendations also laid the foundations for today’s unfair dismissal legislation which was implemented in Britain by the Industrial Relations Act 1971 by a Conservative government led by Edward Heath. The legal right to be protected against unfair dismissal endures but it has been reshaped through the years by political and judicial responses to the changing socioeconomic context within which the labour market operates. This illustrates a critical point about the ET which, more so than any other adjudicative body, makes decisions daily on ‘big picture’ issues of social and economic policy that, as well as inculcating the relevant legislative and common law principles, must reflect the fast-changing environment within which the exchange of labour and wages takes place. Furthermore, and perhaps most importantly, the disputes that it considers involve an activity that is of central importance to individual workers which is inextricably linked to financial and psychological wellbeing and which provides a crucial component of individual identity. Given that the ET performs such an important role with obvious implications for public health, workplace harmony and, consequently, economic prosperity, one might imagine that its successful operation would be a matter of the utmost priority for policy makers and it has certainly been the focus of much deliberation in recent years. However, despite a succession of government-commissioned reviews, there still seems to be a lack of consensus among politicians regarding the future of the ET.

Our research considered the perceptions and experiences of individuals with potential claims (see NSLC, 2016). We made contact with our research participants through their local Citizens Advice Bureaux where, without any other form of available support, they had gone for advice concerning an employment-related dispute. We followed these individuals over four years as they attempted to reach resolution in various ways. Most of our participants experienced the

tribunal system at some level: some only got as far as submitting the ET1 form to lodge their claim, others engaged with conciliation using the service provided by Acas or reached negotiated settlements through other means, and a small number ended up at a full hearing.

We collected over 150 stories which together paint an interesting and complex picture. As our findings illustrate, claimants experience the system in different ways depending on the range of resources – legal, social and financial – at their disposal. Unsurprisingly, those without access to legal advice and representation often have the most difficult journeys and do not always stay the course. With stretched and dwindling budgets, CABx are not always able to offer much more than case preparation so that, increasingly, claimants are left to represent themselves at hearings. Although the advent of fees has exacerbated the difficulties claimants face, they are by no means the sole cause of those difficulties. In fact, many of the cases we tracked predated the introduction of ET fees in July 2013. So what factors constitute the main barriers and challenges to access to justice in the ET?

The law

The complexity of employment law is well recognised within and beyond the legal profession itself. As well as a detailed understanding of the complex web of domestic legislative and common law provisions and an up-to-date knowledge of their interpretation by tribunals and courts, a specialist practitioner is required to be familiar with the highly technical area of EU employment law which is part of the UK framework. The first job of any legal adviser would be to identify the law which is relevant to the employment dispute. It is unlikely that many people without such specialist knowledge would be able to fully understand terms such as ‘constructive dismissal’, ‘breach of contract’, ‘equal pay’ or ‘discrimination’, never mind relate the relevant law to their particular situation. In this sense, law remains ‘out there’, relevant only in a very vague way to the individual claimant. Where a solicitor or advice worker is able to provide support to run the case on the claimant’s behalf, this might not matter so much. However, where

4. THE COSTS OF JUSTICE

individual claimants have to deal themselves with tribunal processes, ignorance of the law can have consequences, which may be only partly offset by judges' attempts to make hearings less formal.

Pre-hearing procedures

Although a basic awareness of the existence of certain employment rights might be high among the general population, most remain unaware of the standard path required to invoke such rights. This is not surprising – we tend to take the regular payment of our wages for granted and employment protection and anti-discrimination legislation is only relevant when we need to use it. Many of those who do need to engage in the process do so with little or no knowledge of how to go about it or of possible subsequent courses of action should their efforts fail to produce results. Despite the detailed guidance offered by the Courts and Tribunal Service itself, many participants remained unaware of its existence or talked of its inadequacy in helping them to navigate what is experienced as a complex path at a particularly stressful time. Contributory factors can be the timescales and involvement of various third parties.

Timescales

Despite the apparent simplicity of submitting an ET1 online to start a case, the timescales involved in pursuing a claim were experienced as problematic. Advisers understand the need for due process in legal matters and, in fact, some of the time limits imposed at various stages of the process are not particularly long, for example, the employer will have to respond to the ET1 within 28 days of receiving it. However, at a time of stress and with a high degree of personal investment – both emotional and financial – many participants feel that the process is defined by a sense of waiting. This can take several forms: waiting for the Acas conciliation process to reach its conclusion, waiting for the employer to act, waiting to hear back from an adviser, or for news from the Courts and Tribunal Service.

Third party involvement

From the claimant's viewpoint the case starts out as a dispute, however entrenched, with his or her employer. However, once embroiled in the claims process, the individual often has to liaise with a range of different organisations and personnel. For the unrepresented claimant this can be a cause of confusion and stress. Some of the participants in our research were unsure of their own role and what was expected of them during the process and had difficulty understanding the roles of their adviser, the Acas conciliator or the ET itself.

The role of Acas

Acas's participation can be a particular source of confusion for some claimants. Many start their claim following a call to the free Acas Helpline when they are given initial advice about their rights and how to go about invoking them. However, following the introduction of Early Conciliation (EC) in 2014, what is perceived as a shift in Acas's role during the process can be bewildering. Although Acas has always offered conciliation in employment cases, the new scheme makes it mandatory for potential claimants to contact Acas before initiating a claim. An attempt to conciliate an agreement is then made which can result in a binding settlement (a COT3 agreement) or in the issue of a certificate to the claimant, who can then lodge a claim with the ET by submitting an ET1. EC involves the assignment of a Conciliation Officer, who rightly takes a neutral and impartial stance and is unable to offer advice to the claimant, who might be embroiled in complex negotiations involving the terms of a settlement. Of course to the trained eye, EC and the Helpline service are separate Acas functions but this demarcation is not always understood by claimants. Furthermore, EC's description as 'The free, fast and less stressful alternative to an employment tribunal for resolving workplace disputes' on the notification page leads many to believe that it is an alternative to legal advice and representation. Although in some cases this may be true, a lack of knowledge about how to participate in negotiations

4. THE COSTS OF JUSTICE

and what to expect in terms of outcome can leave claimants feeling vulnerable and alone.

It is also worth considering the suitability of conciliation, particularly with regard to the more contentious types of cases. Conciliation is a neutral process which is not concerned with the quality of the outcome or settlement and the measure of success is merely that both parties agree on the outcome. It is not concerned with the justness of that agreement. There is, thus, an implicit but clear assumption that parties know their legal rights and understand the implications of the settlement.

These reservations aside, it should be noted that EC is certainly not perceived or experienced as a negative process by users. The admittedly small number of our research participants who used the scheme were happy with the service provided. Of particular note were the efforts made by Conciliation Officers to communicate the status of the negotiations at various stages.

Fees and remission

Fees for claimants were introduced on 29 July 2013. These are charged at two levels depending on the nature of the claim and are payable at two stages—on lodging the claim and before the hearing itself. The total costs for going to full hearing are: Type A claims (including unpaid wages) £390 and Type B claims (including unfair dismissal and discrimination claims) £1200. Remission – a partial or full fee waiver – is available in limited circumstances based on the worker's and/or their household's financial details. Our research project has limited data on the effect of fees on individual decision making as most of the cases we followed predated their imposition. However the overall reduction in claims nationally, which has generally been calculated as around 70%, tells us that they present a barrier to pursuing claims and the reasons for this are obvious.

Workers who have recently lost their jobs are generally not in a position to pay to take a case to the ET. This is particularly so if their previous work was low waged, they are unemployed and/or it is likely

that their future employment will also be low waged. Even those who consider or who have been advised that they have a strong case recognise that there is always the risk of losing on the day, which means that they face an often unacceptable risk of losing any fees they pay.

As well as such practical considerations, fees are likely to have an additional psychological effect on potential claimants. We discerned a sense of disaffectedness amongst some workers who felt that fees restricted their ability to pursue their claims, viewing themselves and their co-workers as having less and less power in comparison with employers. Despite having suffered a perceived wrong, some felt powerless to seek a remedy. A common observation is captured in the words of one individual:

‘Well as far as I’m concerned, for me, there is no law or legal system ... as far it is me getting justice, you know. You’ve got to pay for justice. What sort of justice is that?’ (Tom)

For many, fees were viewed as part of broader trends towards a reduction in the rights of ordinary working people. For example, the increasing use of zero hours contracts, although legal, was identified as being highly problematic for workers:

‘The ordinary working man ... there’s no rights. The laws are there but everybody’s breaking them. Zero hour contracts ... Nobody can get a mortgage on a zero hour contract. Nobody can get a car insurance on a zero hour contract’ (Mother, accompanying Laura to her CAB meeting)

The hearing

Interestingly, although only a small minority of our research participants actually went all the way to a full hearing at the ET, once reached this stage tended to be less stressful than the path to it. This is not to deny that the prospect of appearing before a judge in what was assumed would be a ‘court-like’ environment was a cause of great concern:

4. THE COSTS OF JUSTICE

almost all participants who faced the prospect were apprehensive about it. In advance of the hearing, few had a good sense of the process involved or what would be expected of them. Many were concerned about their ability to engage with unfamiliar language and concepts and worried that they would not be able to communicate what had happened to them in a meaningful and articulate manner.

Our findings indicate that ET judges generally attempt to ensure that participants do have their say and can be particularly skilful in encouraging and translating the use of everyday language into legal concepts in order for them to apply the law. However, despite such useful interventions, unrepresented claimants in particular can still experience the hearing as both bewildering and intimidating, with some unsure of the outcome even when present as judgment was given on the day.

The adversarial nature of the hearing

Claimants' perception of the ET as 'court-like' is not inaccurate. Despite its name, the ET has more in common with the civil court than with its fellow tribunals in the way in which the hearing is conducted. As a 'party to party' adversarial process the hearing can be a combative and contentious forum in which the employer – often through legal representatives – will fight to defend their position. Where this takes place before the judge, attempts will generally be made to remain polite and courteous. Even then, the experience of being cross-examined by a lawyer on the employer's behalf can be a very unpleasant experience. However, away from the judge's gaze, employers and their representatives can sometimes engage in unscrupulous game playing using intimidating tactics. For example, threats that an unsuccessful claimant will have to pay the employer's costs can be made in waiting rooms or in the lead-up to the case, and purposefully stalling in the provision of paperwork so that the claimant has less time to prepare for the hearing is not uncommon.

Enforcement of awards

In successful claims which result in the ET making a financial award, it can come as a surprise that claimants do not automatically receive their remedy. Many have to take further steps – sometimes involving court action – to enforce, which can involve further cost. The outcomes for our participants in this respect echoed the findings from research carried out in 2013 by the Department for Business, Innovation & Skills (BIS) into the payment of ET awards (BIS, 2013c). The BIS study revealed that only half (49%) of claimants were paid their award in full and a further 16% were paid in part. The comparative percentages for our participants were 63% and 6% respectively. Overall, a similar percentage received all or some of their award (65% in the BIS study compared with 69% in ours). Sometimes a letter from the claimant's solicitor or adviser can be enough to procure payment but often further reserves of perseverance and determination as well as financial outlay might be required at the end of what has already been a difficult and stressful process.

Conclusions

As I have shown in this chapter, despite the existence of a range of well-established employment rights and the provision of a specialist tribunal, there are many reasons why workers may be reluctant or unable to pursue potentially viable claims against employers. Even those who do so are often left without any sense of having achieved justice, not least because of the difficulties in enforcing awards. For many it is easier to simply walk away. However, being prevented from pursuing justice can have ongoing negative effects for workers. In particular, a worker can be left with an inexplicable 'blemish' on their employment record, such as an unexplained departure from a job with no reference available. This can be especially problematic for those in low waged and low to unskilled work. The current economic climate, together with government policies encouraging those on benefits to take up work, mean that many employers have an available pool of

4. THE COSTS OF JUSTICE

workers to choose from. The negative psychological effect of having lost one's job and facing unemployment can make it difficult for people to actively seek work. Not being able to find work may result in reliance on benefits, which in turn can have negative consequences for an individual's outlook and self-esteem.

At the time of writing the government is engaged in a review of ET fees and is also considering the future of the ET system more generally. What should those of us concerned with workers' access to justice wish for? A shopping list would have to include the abolition of fees. However, as I have shown in this chapter, even before the introduction of fees claimants faced often insurmountable barriers to the ET. To overcome such barriers would require resources to be targeted in the most effective way so as to prioritise access to justice. The complexity of employment law and its application should be acknowledged in the retention of the ET which should, perhaps, be recognised as what it is - a court rather than an 'informal' alternative. That would require appropriate arrangements for its administration including the preservation of an independent and highly specialised judiciary. Greater investment would be required for the purposes of providing good quality independent legal advice and representation for all those who cannot afford or access it by other means.

