Access to justice in employment disputes: surveying the terrain

edited by Nicole Busby, Morag McDermont, Emily Rose and Adam Sales
The project ‘New Sites of Legal Consciousness: Citizens Advice Bureaux and Employment Disputes’, which is funded by the European Research Council, examines how clients of Citizens Advice Bureaux pursue employment disputes. The focus is on how participants identify issues and make decisions as to which routes to dispute resolution they follow, whether to pursue the dispute through the Employment Tribunal, or choose other options, or take no action at all. The research, which commenced in April 2012 and will run for two and a half years, is being conducted through a partnership between the Principal Investigator Dr Morag McDermont, University of Bristol, the Co-Investigator Professor Nicole Busby, University of Strathclyde and Citizens Advice Bureaux across the UK. The researchers on this project are Dr Emily Rose and Adam Sales.

For more information on the progress of the research and other initiatives, or to get involved with discussing the research project outputs, see our website:

www.bristol.ac.uk/adviceagencyresearch

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The past two years have been dominated by some fundamental changes to the policy and legal framework within which employment tribunals (ETs or tribunals) operate. These are likely to have a profound effect on the type and volume of viable claims and the decision-making processes of would-be claimants, as well as on the nature of those cases heard by tribunals or resolved by alternative means. Such changes relate specifically to the Coalition government’s reform of employment law, including an increase to the qualifying period for unfair dismissal claims from one year to two years and the impending introduction of a fees regime for those seeking to bring claims to ETs.

Evidence or ideology?
These changes are based on a particular set of assumptions about the current system which is characterised as being ‘in crisis’ and, thus, in need of reform. This conception arises from a specific diagnosis of what is going wrong and how to fix it. However, an alternative view is expressed by the contributors in this collection and concludes that, rather than being evidence-based, the Coalition’s diagnosis is politically motivated and ideologically grounded making it unreliable with the potential to damage employment relations and restrict fundamental workers’ rights. As research to date shows, things are far from satisfactory for those unrepresented workers wishing to pursue claims. However, our research tells a very different story from the political rhetoric which has attracted so much recent press attention and it is on this story that the papers presented in this collection will focus.

On 30th November 2012 we organised a workshop at Bristol University’s Centre for Markets and Public Organisations for a group of academics, lawyers and other practitioners and end-users working across the spectrum of employment advice and dispute resolution. We aimed to explore legal and policy issues relating to the project ‘New Sites of Legal Consciousness: Citizens Advice Bureaux and Employment Disputes’, including recent and proposed legislative reform, and to identify the implications for social research methods and legal consciousness methodology. The project itself consists of a programme of interdisciplinary research exploring how workers who cannot easily afford legal advice and representation tackle employment disputes and the role of Citizens Advice Bureaux in supporting such workers.

Discussion was focused around five papers, all of which addressed relevant aspects of the debate from different perspectives, alongside presentations by the research team. What unfolded was a compelling and at times passionate consideration of the shortcomings of the present system as well as a consensus that political attempts to reform it were, at best, ill-conceived and, at worst, politically motivated. All the participants agreed that the current provisions and proposals for reform in this area are going to have a very negative effect on the ability of unrepresented workers to achieve access to justice.

The general themes and specific insights offered by our excellent speakers will be of interest to an audience far beyond this workshop. Each of our speakers has written a shortened version of the paper delivered at the workshop incorporating elements of the discussion generated and we conclude the collection by reflecting on our future research agenda and the potential for closer work between trades unions and advice agencies in this important developing field.

Employment law reforms
In the opening paper Michael Wynn locates the current employment law reforms within the context of the
European austerity agenda and argues that the financial crisis of 2008 and the subsequent sovereign debt crisis has led to an ascendance of European Union governance on fiscal policy over social policy with labour law becoming a primary target for cost-cutting. The deregulation of individual employment law, which currently forms a central tenet of the Coalition’s austerity agenda, has its roots in the neo-liberal ideology evident in the Thatcherite market reforms of the 1980s.

Against this backdrop, David Renton’s paper focuses on some of the misconceptions portrayed in popular media about the ET system as one that allows employees to reap overly generous rewards against employers for implausible claims. By analysing the legal and policy reforms – both implemented and planned – from this perspective, David argues that the reforms collectively represent a further weighting of the system in employers’ favour and concludes by asking whether the only effective path for unions will be to return to collective industrial action – a path that successive governments for the past 40 years have sought to close down.

John Hendy provides a detailed analysis of the way in which the unfair dismissal provisions of UK law have been interpreted by the courts in such a way that they now bear little resemblance to the original intention behind the Industrial Relations Act 1971 which introduced protection against unfair dismissal as a means of ensuring that the decision of an employer to dismiss was, in fact, fair or justified. The coalition government’s restriction of the right to claim unfair dismissal to those with two years’ continuous employment and the introduction of fees for those submitting claims to ETs has been justified on the grounds that the current legal regime imposes an ‘unacceptable burden’ on business. However, in asserting that this justification lacks any evidential basis, John cites the low rate of success for claimants in dismissal cases as well as the difficulties for those who do succeed in enforcing remedies which all too often amount to relatively low rates of compensation.

**Alternative dispute resolution**

The remaining two papers focus on alternative methods of resolution in employment disputes. Bryan Clark sets the scene by considering the reasons for the upsurge in both interest and use in mediation in this context. His analysis of the central characteristics of mediation concludes that, although there are obvious potential benefits including quicker resolution, a less stressful process than the ET, and more creative outcomes, mediation has been criticised by some as contrasting starkly with the aims of formal justice as attempts by parties to mete out settlements themselves can reflect a move away from the rights and obligations provided by law. Furthermore, the neutral stance of mediators does not address potential power imbalances between the parties.

In her paper Linda Dickens considers the role of the Advisory, Conciliation and Arbitration Service (Acas) conciliation which is becoming an increasingly important part of the employment dispute resolution process as evidenced by the planned introduction of ‘early conciliation’ in 2014. In critiquing the measure of ‘success’, currently quantified in terms of tribunal hearing days saved through conciliated settlements, it is noted that the quality of the settlement itself is not perceived as relevant in this assessment. The underlying assumption that the parties know their legal rights and understand the implications of any agreement reached can prove unfounded in some cases with worrying implications. Furthermore, although Acas conciliation has the potential to result in a more flexible range of remedies than those provided for by the ET, as settlements can be tailor-made to suit the parties’ specific needs, there is little evidence of this occurring in practice.

**Alternative reform agenda**

Collectively the papers represent a cohesive and compelling argument against the current law and policy reform agenda, at least for those of us concerned with the vital issue of access to justice for all workers and in particular those without adequate resources – both financial and in terms of other forms of social and economic capital – to utilise the current provisions effectively. In our concluding paper, the research team provides some insights into how the findings from the workshop will shape and influence our future research agenda as well as considering some practical steps for future action at both policy and grass-roots levels.

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Workers' access to justice in employment disputes is constantly under attack, an attack that has accelerated over the past two years. The Coalition Government's employment law reforms will fundamentally change the policy and legal framework for seeking justice through the employment tribunal system. The papers in this book examine the difficulties, challenges and possibilities of the UK's systems for resolving employment disputes: the ‘forensic lottery’ of the unfair dismissal procedures; the role for Acas and others in mediation and conciliation; the very particular crisis for employment rights in times of austerity; and the choices faced by an employment tribunal system at the crossroads. They tell a compelling story about the shortcomings of the present system for employees, the particular difficulties for those workers not represented by trade unions or lawyers, and the dangers of the current and proposed changes to employee rights and employment relations.

The papers were presented at a workshop, ‘Access to Justice in Employment Disputes’, organised by researchers at Bristol and Strathclyde universities who are investigating ways in which workers unable to afford legal representation attempt to resolve employment disputes. The barristers, academics and practitioners who took part in this workshop have all informed this research, which is part of a programme, ‘New Sites of Legal Consciousness: the role of advice agencies in the UK’. The concluding chapter examines future directions for research and collaboration between advice organisations, trade unionists and academics in supporting workers in employment disputes and making public the need for policy changes to support citizens’ rights.

The research is funded by the European Research Council and the workshop was organised with the support of the Centre for Market and Public Organisations at the University of Bristol.