

Inaccessible justice:

What happens to workers who don't pursue employment claims?

**A collaborative research project between the University of Strathclyde and
Citizens Advice Scotland**

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Research aims and background

This report details findings from a pilot study that considered the experiences of workers who faced a workplace dispute that constituted a potential claim in the Employment Tribunal (ET) but, for whatever reason, did not pursue that claim. Two specific questions were examined. Firstly, why workers with employment disputes do not pursue potential claims against their employers. Secondly, what the costs are (financial, emotional and otherwise) for these workers of not formally accessing justice.

The impetus for this work is the recent policy changes that have been introduced by the Coalition and Conservative governments to deter workers from taking claims to the ET. These include the requirement that workers must now be employed for a period of two years, instead of one, before they have the right to make a claim for unfair dismissal and the introduction of fees to take a claim to the ET. The government has largely justified these changes on the basis of the high level of costs arising from workers pursuing claims in the ET. It is claimed that such expenses are disproportionately borne by employers, in terms of time and money, and society, in terms of public expenditure and economic growth.

However, little, if anything, is known about the costs to workers of *not* pursuing justice for employment problems. Interrogating this part of the equation is critical to developing a comprehensive understanding of the real costs of the ET system. It is especially important to understand these effects for low-income workers who are likely to be disproportionately affected by recent government policy changes.

Research approach

Nine workers who had a potential ET claim but did not pursue these in the ET participated in the research.¹ Our interaction with these participants occurred over a period of between one and three years (approximately) since the time of their workplace disputes. Seven of the nine study participants had been involved in a previous research project undertaken by the research group, which investigated workers' experiences as they attempted to resolve problems they faced at work.² We drew on our existing relationship with these workers to recruit them into the present research. The other two participants were recruited by Citizens Advice Bureaux in Scotland. Employment advisors from these bureaux went through past client records to identify people who had experienced an employment dispute but, for whatever reason, did not pursue this dispute in the ET.

Each study participant took part in a face-to-face semi-structured in-depth interview that lasted between 30 minutes and 1 ½ hours. Topics covered included details of the participant's work dispute, their experiences of going to Citizens Advice Bureaux to seek advice, any other actions taken to address the dispute, why they decided not to further pursue the problem in the ET, any implications that resulted from this decision, and their current reflections on the experience and its subsequent

¹ Further detail is participants are contained in Appendix 1.

² This project was called *Citizens Advice Bureaux and Employment Disputes*. It was funded by the European Research Council. Further information can be found here: www.bristol.ac.uk/adviceagencyresearch.

effects.³ Interviews were conducted in a location of the participants' choice and included their own home, in public spaces such as a café, or in their current place of work. This data was collected during the period May 2015 to March 2016.

All interviews were audio-recorded and fully transcribed. Participants were given a £20 high street voucher to cover any expenses they may have incurred through their participation in the study.

Findings

Findings are presented in two sections, reflecting the two main questions addressed in the research. The first section details why workers abandoned their employment claims. The second section details the implications of not pursuing their employment claims.

1. Why did workers abandon their claims?

The reasons participants gave for abandoning their claims were varied. Some related to the claim itself or the relationship the participant wanted to maintain or end with the employer, while, for others, the financial cost of pursuing the claim or other broader life considerations came into play. All participants talked of their decision as one that was reasonable and pragmatic at that given time. However, this reasoning was typically underpinned, at least in part, by the difficulties of engaging with the ET process.

Difficulty in proving a legal claim

One participant had a negative experience in her workplace but found it difficult to demonstrate this in the form of a legal claim. Maureen, a 69 year old female care-worker, had worked in an elder-care home for more than 20 years and had worked under three different owners during this period. The most recent owner decided to close down one part of the care home. This was not the part that Maureen was working in. Despite this, Maureen was informed that there was no further work for her. Four other staff were similarly informed of this news; three of whom received redundancy money and the other one was given work in a different care home owned by the same employer. Maureen was not offered redundancy or alternative work.

Maureen sought advice from the Citizens Advice Bureau and, as a result, sought redundancy from her employer. The employer ignored her oral and written requests for a redundancy payment. Maureen submitted an ET1 form⁴ to the ET claiming redundancy and unfair dismissal. Acas became involved. In communications between Acas and the employer, the employer insisted that there was a job available for Maureen. The employer denied that they told Maureen there was no further work. Maureen eventually decided to abandon her claim as it was difficult to prove a claim for redundancy or of unfair dismissal. Eventually, Maureen returned to work for the same employer. She was not enthusiastic about doing so but there are few other job openings in the area in which she lives.

³ Refer to Appendix 2 for the interview schedule.

⁴ The form required by the ET to lodge a claim in their system.

Couldn't afford ET fees and alternative options ineffective

Two participants were put off pursuing their claim due to ET fees. They attempted alternative means of resolving their dispute but these proved ineffective. Mary (73 years) and Heather (55 years) are a mother and daughter who had worked as cleaners for a facilities management company for 10 and 8 years respectively. During much of this period they each worked six hours per week cleaning two branches of the same bank. Both Heather and Mary took a period of sick leave when Mary's husband died (Heather's father). During this period, the employer hired a replacement to work in the two bank branches. Heather and Mary were unaware of this and returned to work on the agreed date to find the replacement cleaning the bank offices. They complained to their manager who said that they had been replaced. The manager offered them alternative cleaning work which consisted of far fewer hours and in locations further away, which were unworkably costly to travel to.

Heather and Mary sought advice from the Citizens Advice Bureau. The solicitor working there informed them that the employer was entitled to change their hours of work. However, he suggested they send a grievance letter to the employer as the first step in taking a claim to the ET. The employer ignored the letter.

Heather and Mary also claimed that they had been underpaid by their employer over a number of years. The money owing comprised outstanding wages and holiday pay. Heather and Mary tried repeatedly to obtain this money from their employer. They talked to the staff in the employer's local office who denied knowledge of the issue or were unavailable to communicate with them. "Every time you phoned she was never in, never in so she just didnae want tae speak tae us. So we did eventually gie up wi' them we were just fed up." (Mary). Heather and Mary tried to access more senior members of the employing organisation. However, front line staff in the head office didn't listen to their claims or simply ignored them. Efforts looking online to determine names of senior management proved fruitless: "Oh aye for weeks and weeks [I searched online] and I thought there's got tae be somebody you know there's got tae be a director or something somewhere that you could maybe pass an email tae but no, I couldnae find anything." (Heather).

Heather and Mary knew that ET fees had recently been introduced. They felt that they could not afford to take their claim to the ET and so eventually abandoned it.

Couldn't afford a solicitor

The cost of ongoing legal advice proved problematic for one participant. Lesley, a head teacher at a school, had been accused of a misdemeanour by the headmaster. Lesley denied any wrongdoing but felt bullied into accepting the charge. The disciplinary sanction involved Lesley taking on another role within the school that was effectively a demotion. Lesley left the position and took up employment at another school.

Lesley engaged a private solicitor and made a claim for constructive dismissal against her employer. The solicitor's fees were covered by Lesley's home insurance cover. However, the dispute went on for some time and the home insurer contacted the solicitor to find out the chances of success. By this stage of the dispute the local authority had agreed to rescind the accusation of the misdemeanour.

But the overall outcome of the dispute was still to be determined. The insurer decided to discontinue the payment of the solicitor's fees. Lesley was happy that the solicitor had achieved some concessions from the employer but was very disappointed to leave the case at this point. Ultimately, though, she concluded that this was her best course of action.

Wanted to keep the job

One participant decided against pursuing her claim because she wanted to continue working with the employer. This was the experience of Genine, who worked for a large betting agency. Genine had taken on a role on a temporary basis which was more senior to her original position. Genine understood that the temporary role would eventually become permanent. Genine became pregnant and went on maternity leave. Her maternity pay did not reflect the higher pay of the temporary role, rather it reflected that of her original less senior position.

Genine sought assistance from the Citizens Advice Bureau who advised her that she may have a potential claim relating to discrimination on the basis of sex. Genine wrote a grievance letter to the employer's head office. She was then invited to a meeting with representatives of the employer, including her line manager. This meeting was framed by the employer as a job interview for the permanent position in the senior role that Genine had been undertaking on a temporary basis. Genine was awarded the role. The amount of her maternity pay was remedied to reflect this higher pay.

Genine recognised that the employer eventually paid her appropriately. However, it is unclear whether the employer subjected her to the interview to justify the difference in maternity pay received. Genine felt upset by how she had been treated during this period. She noted: "I could have probably went further wi' it if I wanted to, but obviously at that point in time I wanted my job rather than thinking about anything else. But if I thought about it noo I'd have probably have liked to have taen it further I think but hindsight's a good thing, eh." Genine's goal of retaining her position influenced her decision not to pursue the claim any further.

Decided to get another job

Another participant had a different reaction to her employment dispute. She felt that it spurred her on to move to another job. Alison had worked for 17 years for a franchise cleaning business. The employer accused Alison of using a company van for personal purposes. Alison strongly denied this. Alison observed her employer following her when she used to van, something which she interpreted as him checking up on her actions. She also felt that her employer bullied her about the issue. A general feeling of distrust arose between Alison and the employer.

Alison sought advice from the Citizens Advice Bureau and they suggested she write a letter of grievance to the employer. She did so, but this was ignored by the employer. At this point Alison decided to leave the job. She felt it was time to move on and spoke of finding the courage to seek out alternative employment. "My family, I think, were sick listening to me to be honest talking about him and worrying about him. 'Get out of there, get out of there' you know. But I was trying to give him the benefit of the doubt and I probably would be lying if I didnae say there was a bit of fear there of moving from that job because that was all I'd known for 17 years you know so."

Dealing with the birth of a child

An employment dispute can arise at a time when there are many other things going on in a worker's life. This was the experience of Kim, a woman in her late 20s, who worked as an Area Resource Coordinator for an employer operating in the care industry. Kim was employed on a zero hours contract, but typically worked 40 hours per week. Kim became pregnant. At about the same time, she was involved in a house fire and had to vacate her home. Kim sought some reasonable adjustments to her work role due to her pregnancy, including her release from on-call duties. The following week, her employer scheduled her for only eight hours work instead of the usual 40. Even fewer hours were offered in subsequent weeks. Kim felt that the reason for this reduction in her hours was due to her becoming pregnant.

Kim sought advice from the Citizens Advice Bureau. A grievance letter regarding the employer's treatment of Kim's pregnancy was sent to the employer and a grievance meeting subsequently held. Kim was informed that she would hear back about the outcome of the meeting in about 10 days' time. However, she was only informed of the outcome of the meeting after a period of more than two months, which coincided with the birth of Kim's baby. Kim was given only five days to respond to the employer's decision that had gone against Kim. Kim felt that the employer had waited until she had her baby so that she would not be in a position to respond. Kim noted of her experience: "I felt let down by the whole system ... if I'd looked into it or had time to just talk to Citizens Advice, I probably did have the right to ask for longer maybe even just on grounds of just having a baby maybe that would have given, entitled me to deter it for a month or something like that. But at the time I was just, I felt really deflated by it and that was draining in itself so I didn't even think like I should go and ask somebody what my rights are here just it was like that's it." At this point Kim abandoned her claim.

2. What are the implications of not pursuing the claim?

The study participants who did not pursue their employment claims suffered a range of negative implications. However, many of these can also potentially be experienced by workers who do pursue their claims in the ET or otherwise achieve some form of resolution.⁵ These implications include financial difficulties, the need to take on work of lesser skill value and/or pay, high levels of emotional and psychological stress, and a change in attitude towards employers as well as a worker's own behaviour at work.

At least two of our participants spoke of suffering negative financial implications. Rachel, a woman in her early 50s who had worked in a charity but had to leave her job due to severe bullying, found that

⁵ See for example: Emily Rose, Morag McDermont, Nicole Busby, Adam Sales and Eleanor Kirk, *Enforcement of Employment Tribunal Awards* (Universities of Bristol and Strathclyde: 2014), see http://www.bristol.ac.uk/media-library/sites/law/documents/new-sites-publications/Enforcement%20report_final.pdf; Emily Rose, Morag McDermont, Nicole Busby, Adam Sales and Eleanor Kirk, *Employment Tribunal Fees: Effects on Clients of Citizens Advice Bureaux* (Universities of Bristol and Strathclyde: 2015), see <http://www.bristol.ac.uk/media-library/sites/law/documents/Fees%20report%205.8.15.pdf>; Nicole Busby and Morag McDermont 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' 42(2) *Industrial Law Journal* (2012) 166

she had to take on roles as a cleaner and also as a care-giver to ensure an income stream. These positions paid far less than she had earned in her role working in the charity. As a result, Rachel had to dramatically increase her hours of work to manage financially. She observed: "I was working every weekend because the wages, my wages had dropped so much I had to work every hour that I could get to earn a decent wage, so I was working Monday right through. I never had any weekends off ... I was working all the time." This participant did actually win an award in the ET. However, the charity had no money with which to pay the award and so Rachel abandoned any hope of receiving this.

Helen provides another example of someone who experienced negative financial implications. Helen was dismissed from her role working in a care home because she posted a message about her work on Facebook. Helen reported that the act was accidental and that she did not intend for the message to be public. Helen made a claim in the ET for outstanding wages and holiday pay. However, near the time of the hearing the employer threatened her with their legal costs. Moreover, the Citizens Advice Bureau solicitor advising Helen suggested that Helen withdraw her claim. Helen was not completely sure of the reason for this. But, without the support from the solicitor, felt she had no option but to withdraw. Helen suffered depression from this experience. It took her a year until she was able to re-enter the labour market. She received social security benefits during much of this period, although there were periods when she did not have an income stream. This took its toll financially and she was still in rent arrears at the time of the interview, nearly three years on: "I'm still paying back rent and whatever you know. ... Because obviously you've got tae when you actually sign back on tae the unemployment it takes a while before you actually get your money so I couldnae pay rent arrears because they don't backdate rent arrears or anything like that."

Most of the participants experienced emotional and psychological stress. This arose largely from experiencing the workplace dispute itself and making efforts to resolve this. It is arguable that not being able to resolve the dispute could exacerbate the dispute. Rachel, the former charity worker who experienced workplace bullying discussed above, spoke of the experience of suffering bullying and being pushed out of her role as "the worst time of my life, even my marriage split up was a doddle compared to that and I just had to keep going."

Two participants spoke specifically about how their experiences had affected their view of employers and also how they acted as an employee in subsequent workplaces. Lesley, the principal maths teacher described above had been accused of a misdemeanour that she vehemently denied, thought that she had become savvier about how employers operate and that she was far more wary of her vulnerability with respect to them. She reported: "... I have learned through this process. I've got a better understanding of how organisations like this work and it's made me more aware, shall we say, of the fact that you're a number and the fact that you can also be used as a pawn in a game ... I was obviously very naïve before and I'm not as naïve any more, you know, and I realise that people are disposable." In terms of practical behavioural change Lesley felt that she is now a quieter employee who is more likely to keep her thoughts to herself instead of sharing them with management. "I mean that's another thing I've learned, keep your mouth shut with a lot of these things, you know, just sort of I don't mean don't stick up for people but really don't, do not put yourself forward which is a terrible thing but that is the reality."

Similarly, Helen, the care worker dismissed for posting a work related message on Facebook, suggested that she had become more submissive as a worker as a means of protecting herself. When asked whether she was more vigilant in subsequent workplaces regarding her contractual obligations, she replied: "I would say so because you are watching your Ps and Qs, you're watching who you're speaking to. I don't know I just, I don't know, I'm no' as outgoing as I used to be ... I'm thinking of number one now, don't go there do you know I don't want tae, I'm coming out tae do my job, I'm no' out tae make friends and if you do say something it might get all out of proportion ..."

It does seem possible to elicit from our findings some implications for participants that are specific to not pursuing their dispute. These are detailed below.

Accepting lesser justice or no justice

Helen, the care worker dismissed for posting a work related message on Facebook, found it difficult to accept that she could not go to the ET and have her side of the story heard by an authority that would make a judgement on the matter. Helen explained: "I really wish that it had actually went to a tribunal, you know, because then I would have had my say and it wouldn't have been all her say ... I felt I was, that was unfair as well, very unfair that I never even got to put my case across." Helen talked of the importance of being listened to and of being treated fairly. She felt that going to the ET would have enabled her to move forward to some extent. Indeed, at the time of her interview she was still angered by what she considered to be unpaid wages and holiday pay owing to her. During her period of depression she tried to forget about what had happened to her, but noted: "... it's still at the back of your mind ... I'm raging at her because she's never ever paid me what she owed me." It seemed that Helen's lack of understanding of why her solicitor suggested she withdraw the claim from the ET exacerbated her negative feelings.

Lesley, the maths teacher accused of a misdemeanour described above, had difficulty coming to terms with what happened to her and the unsatisfactory outcome. She observed: "There's a part of me that thinks 'but hang on, this is outrageous because it should never have happened in the first place.' I've had to sort of face reality that sometimes you can't always get the justice that you, you know, that you really want." Lesley did get the employer to retract their accusation of inappropriate behaviour but she did not get to take them to the ET as she had hoped. Accepting this situation took time for Leslie.

Fear regarding reputation

When a worker does not pursue a claim, there is always the potential that others will simply accept any claims made by the employer despite the worker's words to the contrary. Lesley, the teacher mentioned above, experienced a fear of derogation to her professional reputation. This became apparent when she started employment in a different school. She noted: "... but I suppose the thing is when I started the new job it was awful that kind of fear of 'what do people know about me? What are they saying about me?'"

Appendix 1: Participant details

Code	Pseudonym	Job role*	Sex	Age	Employed**	Ethnicity
Client 1	Maureen	Care worker	F	69	Yes	White Scottish
Client 2	Rachel	Charity worker	F	52	Yes	White Scottish
BiC117	Heather	Cleaner	F	73	No	White Scottish
BiC118	Mary	Cleaner	F	55	No	White Scottish
BiiC100	Lesley	Head teacher	F	44	Yes	White British/Scottish
BiiC103	Helen	Care worker	F	53	Yes	White British
CiC202	Genine	Betting Shop manager	F	37	No	White British
CiC205	Alison	Operations manager in a cleaning franchise	F	62	Yes	White British
FiC112	Kim	Area Resource Co-ordinator in the care industry	F	30	Yes	White British

*At time of the employment dispute

**At time of the interview

Appendix 2: Interview schedule

These questions are guides only. Prompts and follow-up questions were used liberally throughout the interview.

- Tell me about the job you were in when the work dispute occurred?
- What about the dispute itself, what happened leading up to this / what was the nature of the dispute?
- How did you feel about this?
- What did you do afterwards?
- Why did you decide to go to the CAB?
- What happened at the CAB? / who did you see
- How did you feel about this meeting?
- What happened then?
- What made you decide to [not take it further / go back to the bureau / ...]
- How did this make you feel at the time?
- What happened in your life after this?
 - Did you talk to others about the workplace problem?
 - Do you try and do anything else about the workplace problem?
 - Did you find other work?
 - Did you seek out government benefits? (Have you done this before, how did you find this process ...)
- During this period, in what ways did the workplace dispute affect you?
 - Mentally
 - Psychologically
 - Confidence
 - Financially
 - Social connectedness / your interaction with family and friends
- And what about your situation today?
 - How are you managing with the issues above that you faced (mentally, psychologically ...
- Now that some time has passed since this difficulty you had in your (former) job, how do you feel about it looking back?
- What sort of impact did it have on your life?
- Was there a particular turning point or factor that made you decide not to pursue the dispute?
- How could things have been different? / Was there anything that you would change about the process that may have made it easier for you to try and resolve your dispute?
 - More information?
 - More assistance?
 - ...
- Thinking back, if you were to go through this period again, would you do anything different? If so, what?