

## Led Up the Tribunal Path? Employment Disputes, Legal Consciousness and Trust in the Protection of Law

ELEANOR KIRK<sup>°</sup>  
NICOLE BUSBY<sup>°</sup>

Kirk, E. and Busby, N., 2017. Led Up the Tribunal Path? Employment Disputes, legal Consciousness and Trust in the Protection of Law. *Oñati Socio-legal Series* [online], 7 (7), pp1-pp. Available from: <https://ssrn.com/abstract=3057968>



### Abstract

This article explores legal consciousness through a consideration of the trust that workers extend to employment law to protect them, and how they react when their expectations are frustrated, tracing evolving legal dispositions and reflections upon the boundaries of legality. The article uses data from a large-scale research project to explore these themes. Clients of Citizens Advice Bureaux were case-tracked as they attempted to resolve work-related disputes. Generally participants trusted employment law to be 'there' for them, rarely anticipating the limits and conditionality of various rights, or the considerable difficulties that can accompany their enforcement. Frustrated expectations were met with varying degrees of acceptance and fatalism through to cynicism, with the redirection of grievances towards collectivised dissent or activism being exceptionally rare. People tend to engage with employment law in ways that legitimate institutions and reaffirm a system that, for a variety of reasons, offers weak protection and enforcement.

### Key words

Employment disputes; tribunals; false consciousness; legal consciousness; hegemony

---

The authors would like to acknowledge the participation of those individuals who were the subjects of the empirical data collection for sharing their stories and their time with us so generously. Their participation was only possible because of our partnership with a number of Citizens Advice Bureaux throughout the UK whose assistance we also gratefully acknowledge. We also acknowledge the work of the entire research team involved in the collection and analysis of the data used in this article. Thanks are due to Morag McDermont, Emily Rose and Adam Sales. The project was generously funded by the European Research Council. Finally, we thank our colleagues who took part in Onati workshops for offering helpful comments and lively debate around our early drafting of this paper.

<sup>°</sup> Eleanor Kirk, PhD, was Research Assistant on the *New Sites* research programme. She has recently published the article *The 'problem' with the employment tribunal system: reform, rhetoric and realities for the clients of Citizens Advice bureaux in Work, Employment and Society* (<https://doi.org/10.1177/0950017017701077>). Eleanor is now a post-doctoral fellow at Glasgow Caledonian University. Cowcaddens Rd, Glasgow G4 0BA, UK; Email address: [eleanor.kirk@gcu.ac.uk](mailto:eleanor.kirk@gcu.ac.uk).

<sup>°</sup> Nicole Busby is Professor of Labour Law at the University of Strathclyde. She teaches and researches in the areas of labour and employment law, European social law and equality, discrimination and human rights. She has a particular interest in access to justice. She has published widely in all of these areas. 16 Richmond St, Glasgow G1 1XQ, UK; Email address: [nicole.busby@strath.ac.uk](mailto:nicole.busby@strath.ac.uk).



**Resumen**

Este artículo explora la conciencia jurídica, y, para ello, toma en consideración la confianza que depositan los trabajadores en que la legislación laboral los proteja, y cómo reaccionan cuando sus expectativas se ven frustradas, rastreando las disposiciones legales en desarrollo y sus reflejos sobre los límites de la legalidad. El artículo utiliza datos de un proyecto de investigación a gran escala. Se siguieron los casos de algunos clientes de las Oficinas de Asesoramiento a los Ciudadanos que intentaban solucionar conflictos laborales. En general, los participantes confiaban en que la ley del trabajo los protegiera, y rara vez preveían las limitaciones y condicionamientos de diversos derechos o las dificultades de su cumplimiento. Las expectativas frustradas generaban diversos grados de aceptación y fatalismo, llegando al cinismo; la canalización de las quejas hacia la disensión colectiva o el activismo se daba de forma excepcionalmente rara. La gente tiende a comprometerse con la legislación laboral en formas que legitiman a las instituciones y que reafirman un sistema que, por diversas razones, es débil al ofrecer protección y aplicación de derechos.

**Palabras clave**

Conflictos laborales; tribunales; falsa conciencia; conciencia jurídica; hegemonía

**Table of contents**

1. Introduction .....	4
2. False consciousness and the hegemony of law .....	4
2.1 The Fallibility of knowledge .....	6
3. Legal consciousness .....	6
3.1 Awareness of rights and legal consciousness in employment disputes .....	8
4. Redefining Boundaries: Labour Law's Hegemony at Work.....	10
5. Research design and methodology .....	11
6. Findings.....	11
6.1. Legal Consciousness in Employment Disputes .....	11
6.2. Reacting to and reflecting upon frustrated expectations of employment law .....	14
6.3. Framing the Data .....	15
6.3.1. Acceptance and self-discipline: maintaining law's authority .....	15
6.3.2. Cynicism .....	16
6.3.3. Between deferential and dissenting collectivism .....	17
6.4. Rationalising localised inequalities while upholding employment law's ultimate legitimacy .....	19
7. Conclusions.....	20
References.....	21

## 1. Introduction

This article considers the trust individuals generally place in law to be 'there' to protect them should a problem arise, despite the fact that this trust is often shown to be misplaced when they begin to examine or attempt to assert their rights. Our particular focus is on labour law and its application to individuals' disputes at work through the UK's employment tribunal (ET) system, although the theoretical basis could be applied to other legal areas. In this article we explore notions of hegemony, legal consciousness and false consciousness with the aim of enriching our understanding of how, by perpetuating structural inequalities, labour law through the system of employment protection rights constrains as well as enables actors in their attempts to resolve employment disputes. It examines what happens when peoples' expectations are frustrated, either through the advice they are given or through their direct experience of attempting to use the law. Drawing on critical legal studies and legal consciousness literatures, the article considers the trust people place in the system of employment rights to protect them. The article analyses data from a large-scale research project which case-tracked clients of Citizens Advice Bureaux (CAB) as they attempted to resolve work-related disputes. This analysis demonstrates a shift in the legal consciousness of workers who seek legal solutions for a workplace problem; from a hopefulness that the law may provide some assistance to the realization that successfully utilizing the law is difficult and potentially beyond what they can achieve. It explores the range of responses and conceptions of law that result from individuals' attempts to determine what counts as 'legal' (Litowitz 2000, 548), with the most common reactions being cynicism or fatalism.

The paper begins by setting out how false consciousness and hegemony are useful concepts in exploring the nature of public engagement with the law and identifies legal consciousness literature as bringing additional nuance to our understanding. This framework is useful in determining the uses (and non uses) of labour law. The paper then sets out the research design and methods used to collect the empirical data upon which the analysis draws. Findings are then presented which identify the vague notions that individuals coming to the CAB had of their employment rights before focusing on their reactions as their expectations were frustrated, as they learned what is or is not defined as 'legal', and the difficulties they experienced in attempting to use the highly legalistic world of the ET system. Employment law is more bounded than people imagine in terms of the limits of and qualifications for various rights, and traversing the 'boundaries of law' in order to enter into the ET system as actors capable of utilising law and enforcing rights is generally far more difficult than anticipated. A concluding section argues that the way in which so called 'employment protection rights' operate is, in fact, illustrative of law's hegemony by which, in its current incarnation, it promises more than it is capable of delivering.

## 2. False consciousness and the hegemony of law

Although broadly associated with Marxism, the concept of 'false consciousness' was not given extended consideration by Marx himself with his commentary in this context mostly drawn from Engels' correspondence. Specific work on similar notions of ideological domination can be found in Gramsci's prison notebooks (Gramsci 1999/1947) and latterly 'The Frankfurt School' of sociology (Eyerman 1981, for a review). Engels (Marx and Engels Correspondence 1968/1893) wrote of 'false consciousness' as an ideology that dominates the thinking of exploited groups, simultaneously justifying and perpetuating their exploitation, explaining why workers accepted rather than revolted against persistent inequality in society and the exploitation of labour by capital. Engels saw such cognitive distortion occurring through the manipulation of political - and juridical - ideologies. Writing at a time in which much of the optimism about the coming workers' revolution had evaporated

in the light of historical developments, Gramsci (1999/1947) developed a more expansive explanation of how the state exerts control via ideology, manipulating cultural norms and values so that those of the elite appear as 'common sense'. In endeavouring to promote Gramsci's work to a wider audience of critical legal scholars, Litowitz (2000, 516) has drawn attention to Gramsci's insights into 'law's ability to induce submission to a dominant worldview'.

Gramsci viewed the state as deploying two kinds of power, one coercive (or physical) and the other ideological (or hegemonic). The state may coerce submissiveness via threats of restraint, imprisonment, violence or the confiscation of property. However, Gramsci's main innovation was to theorise power exerted via ideological means. For him, false consciousness, defined as the unquestioned acceptance of existing arrangements and ideological explanations provided by the ruling class, makes hegemonic rule possible (Eyerman 1981, 47). Under this hypothesis, the status quo is internalised, forming 'a ragtag and often contradictory set of basic beliefs and presuppositions that reflect the existing arrangement,' which are taken as inevitable and seemingly expected no matter how unequal or exploitative the outcomes that they produce are (Litowitz 2000, 528).

To maintain its dominance and win the consent of the masses, the ruling class must periodically make alliances and strike compromises regarding its essentially narrow economic interests. Over time the ruling class develops hegemonic cultures tied to folklore, popular culture and religion which become embedded in the public consciousness and which enable its dominance to be perpetuated through its accommodation of certain demands (e.g. those of trade unions for minimum conditions). Through such accommodations, the form of hegemony evolves, giving the appearance of a system open to change. In fact any concessions ultimately serve to reinforce the dominance of the ruling class. In terms of resisting hegemony, Gramsci (1999/1947) saw the role of critical scholars in making those outside of the traditional intelligentsia challenge the *status quo* as part of the counter-hegemony. Importantly the working-class would also develop its 'own 'organic intellectuals' (Gramsci 1999/1947).

Gramsci's work 'provides a useful starting point for legal scholars who understand that domination is often subtle, invisible, and consensual' (Litowitz 2000, 519). Law's dual functions, by which it can be both repressive and constitutive, mirror the two forms of state power, physical force and hegemony (Gramsci 1999/1947, 508-509; Litowitz 2000, 530). Law's repression is represented in the presence of police, prisons, courtrooms and the armed forces which can be used to thwart outbursts of social unrest (Litowitz 2000, 530). However, through law-making, the state also 'has the power to authorize and legitimate—indeed, to produce—a set of social institutions and practices. That is, the law authorizes a particular arrangement by enabling a certain way of life' (Litowitz 2000, 530). Gramsci was an early advocate of this social constructionist position which has had a wide influence in the fields of politics and political communication, sociology and more recently socio-legal studies, primarily through the Frankfurt School's development of the Critical Legal Studies movement (Litowitz 2000, 532).

Litowitz argues that the law is hegemonic 'by its very nature' because of its exclusivity - there is no alternative legal system so that an official code is imposed upon the affairs of individuals. Furthermore, law's ability to act as an instrument of social construction gives it a 'world-making' quality which is instrumentalised through the criminalization of certain activities and behaviours and legitimation of others" (Litowitz 2000, 546, drawing on Goodman 1978). Its paradigmatic nature enables it to define the realms of admissible problems, conflicts and grievances, 'admit[ing] such puzzles as it is capable of solving (...) the existing legal system rules out incommensurate inquiries and claims, lending a superior (hegemonic) status to the existing concepts' (Litowitz 2000, 548). Through law's conceptualisation and practical operation, 'we face a code that is self-referring, self-

legitimizing, and very difficult to subvert because it forms a closed system at any given time' (Litowitz 2000, 548). The apparently neutral code of law betrays a firm class affiliation in which appeals to fairness, freedom and equality are contested openly without really changing law's substance, so that reforms merely 'struggle to redefine the boundaries of what counts as "legal"' (Litowitz 2000, 548).

### 2.1 *The Fallibility of knowledge*

Deeming aspects of popular consciousness as 'false' is contentious because of the suggestion of the existence of objectively 'true' interests which people may be ignorant of. However, the notion of false consciousness need not imply that people are mere dupes. As social theory demonstrates, people may (re)construct social reality without full knowledge of the range of forces acting for and against their agency (see Archer 1998). It can be demonstrated empirically that lay-people frequently hold inaccurate understandings of the law and legal mechanisms, often in ways that act as barriers to justice and work against their agency thus further perpetuating structural disadvantages (e.g. Pleasance *et al.* 2015). Following in the lineage of Marx and then Gramsci, the 'Frankfurt School' further developed conceptions of class consciousness and ideology, particularly focusing on more empirically-grounded research into subjective beliefs and behaviour (for a review see Eyerman 1981, Litowitz 2000). In the current context, workers may operate with variegated appreciation of their circumstances and the 'true' sources of their grievance. Through comparison of differing responses to particular conditions, we may side-step the determination of consciousness as 'true' or 'false'; definitions of interests in a given scenario 'cannot simply be true or false, though they can accord more or less comfortably with the reality of the situation' (Hyman 1972, 125). Edwards (2006, 579) posits that comparative analysis:

does not require us to say what the real interests of particular people might be. Instead, it is possible to analyse people similar in relevant respects and see how the same issues are handled. This offers up the opportunity to show what the different options are.

Thus, analyses of consciousness and hegemony need to be approached with caution and subtlety, avoiding the supposition that theorists can discern the objectively 'true' interests of those they research. Legal consciousness literature adds further nuance to this method of analysis in general and to our understanding of trust in the law in particular.

## 3. Legal consciousness

Building on the idea of law as an instrument of social construction which can be dominant or hegemonic through its very presence as well as in its practice, 'legal consciousness' research explores how people not only tolerate the law but also actively embrace and uphold it (Ewick and Silbey 1998). Silbey (2005, 326) outlines the field's core problematic as explaining why people display unrelenting trust in legal institutions, despite what appear to be 'consistent distinctions between ideal and reality, law on the books and law in action, abstract formal equality and substantive, concrete material inequality.'

Legal consciousness refers to more than knowledge or awareness of the law. It is not simply 'an individual-level variable (how people think about the law),' but refers to activity that contributes to the 'construction of legality' (Silbey 2005, 347). Legality is viewed as 'an ongoing structure of social action' (Ewick and Silbey 1998, 33–56), shaping the derivation of meaning, sources of authority, and cultural practices that are commonly recognized as 'legal'. Legal consciousness research is concerned with 'the ordinary, quotidian and, crucially, almost invisible life of law in society,' wherein conceptions of legality 'structure and inform everyday thoughts and actions' (Halliday and Morgan 2013, 2). Equally as important as when and how law is used is when and why it is not, for example in circumstances where legal

intervention could effectively right an identifiable wrong but no relevant provision or mechanism exists (Silbey 2005, 326).

Explanations of law's resilience despite the persistent inequalities it produces abound. Some focus on an overarching 'myth of rights' which reflect common ideals within society, while others stress the robustness of formal institutions in guaranteeing procedural justice regardless of substantive outcomes which enables the perpetuation of law's legitimacy and domination (Silbey 2005, 336-8). Whether or not they truly inform or reflect law's operation, ideals 'such as open and accessible processes, rule-governed decision making, or similar cases being decided similarly (...) [are] part of the popularly shared understandings that shape and mobilize support for legal institutions' (Silbey 2005, 328). Merry (1990) has highlighted how government policy and accompanying rhetoric propagated by the civil court system itself shaped a particular view in the minds of working-class Americans. The courts promoted themselves as a system for the 'everyman', available for the problems of ordinary people, and encouraged engagement. In reality, the system was focused on diverting would-be litigants away from actual hearings and towards alternative methods of dispute resolution such as mediation. Likewise, the public aspirations of the ET system (originally 'Industrial Tribunals') in the UK are framed as providing 'easily accessible, speedy, informal and inexpensive' justice for all (Donovan Commission 1968, 157). Yet the system can be experienced as legalistic, lengthy and intimidating (Busby and McDermont 2012). Rather than questioning the legitimacy of law's hegemony, users may rationalise frustrating personal experiences, distinguishing the specifics of their particular encounter with law from its general application by highlighting process-based factors and their own role (if only they had obtained a lawyer/a better lawyer, run the case better, gathered more evidence) without questioning the operation or dominance of law itself. Such rationalisation serves to reinforce maintenance of law's authority.

In contrast to Gramsci's largely top-down view of law as being imposed by powerful law-makers, Ewick and Silbey (1998, 17) have emphasised a bottom-up view of legality as 'an emergent feature of social relations rather than an external apparatus'. Their emphasis on 'legality' rather than 'law' recognises the plurality of situations from which it emerges and the institutions it has shaped and adds nuance to Gramsci's account of why power structures are so resilient. Notions of legality have an 'internal complexity' (Silbey 2005, 350) so that we experience the law as simultaneously constraining and enabling, as frustrating and empowering. It is this complexity that allows the law to retain its hegemony so that it is rarely experienced as entirely disempowering. As Silbey (2005, 350) puts it:

If legality were ideologically consistent, it would be quite fragile (...) if the only thing people knew about the law was its profane face of crafty lawyers and outrageous tort cases, it would be difficult to sustain the support necessary for legal authority. Conversely, a law unleavened by familiarity and even the cynicism familiarity breeds would in time become irrelevant. Either way—as solely god or entirely a gimmick—it would eventually self-destruct.

For Halliday and Morgan (2013) much legal consciousness literature (e.g. Ewick and Silbey 1998), is overly focused on deferential, individualistic and fatalistic orientations to law resulting in pessimistic conclusions about public legal consciousness. They offer a more optimistic view, arguing that the focus on 'disempowered resistance' (Ewick and Silbey 1998), overlooks the existence of legal cultures which, through collective agency or 'dissenting collectivism', attempt to change law's power structures (Halliday and Morgan 2013, 13). They produce a typology of four legal cultures representing 'key "narratives" or characterizations of legality that may be invoked in making sense of everyday life' (Halliday and Morgan 2013, 11). They are: (I) deferential collectivism; (II) dissenting collectivism; (III) individualism; and (IV) isolation/fatalism. Dissenting collectives reject the legitimacy of official law and seek to exploit 'the gaming potential of state law,'

'fuelled by a sense of a higher transcendent law above state law' (Halliday and Morgan 2013, 6). However, dissenting collectives are a fragile and usually temporary accomplishment as group members shift from towards fatalism or oscillate between positions, often becoming pessimistic that their efforts will ever bear fruit, leading to burn-out (Halliday and Morgan 2013, 22).

### 3.1 Awareness of rights and legal consciousness in employment disputes

Available evidence suggests that many people trust that there is a body of law to protect them should they require it, without anticipating the difficulties associated with attempting to use it. '[M]ost people have very little knowledge about the law itself and what they have is often inaccurate' (foreword to Genn 1999, p. V). A number of large-scale surveys have confirmed that awareness of civil law's provisions and applications tend to be slight among the general public. Analysing data from the Civil and Social Justice Panel Surveys 2010 and 2012 (University College London Faculty of Laws 2015), Pleasance *et al.* (2015, III, 168) found a substantial knowledge and capability 'deficit' in relation to the law in general, including employment law, which left individuals vulnerable to social exclusion and had a detrimental effect on access to justice. Individuals tend to be optimistic about the likelihood of a successful and just outcome where an identifiable right has been breached. Meager *et al.* (2002, 197) found that of economically active, working-age people they surveyed only 14.6% were not confident that they would obtain justice, 52.2% were confident and 33% were not sure.

Detailed knowledge of employment rights tends to be restricted to those with personal experience of attempting to utilise them so that legal disputes can be more difficult to resolve than people imagine. Awareness of specific rights is also generally higher among those to whom they apply, so that women and those aged between 26 and 45 are more knowledgeable about work-life balance legislation; the national minimum wage rate is known by lower-paid workers; disabled workers are more likely to be aware of disability discrimination provisions (Meager *et al.* 2002, XV). That those with experience of employment disputes tended to have a higher level of awareness of employment rights while being more modest about their knowledge suggests that understanding reveals more complexity than might have been supposed (Meager *et al.* 2002, 182). Likewise, Pleasance *et al.* (2015) found that experiencing a (general) problem which they attempted to resolve using legal means reduced an individual's confidence about solving legal problems in the future.

The process of formal employment dispute resolution in the UK presents some particular challenges. Critics of the system of employment protection law argue that it is imbalanced in favour of business interests rather than protection for workers (Heery 2011). 'The state's role in employment relations is far removed from that of a neutral, disinterested server. Rather, it is largely concerned with providing an environment which privileges the interests of employers' (Williams 2014, 71). The employment relationship is defined by an imbalance of power (Hyman 1972, 109). Through its legislative capacity, the state recognises this in seeking to provide employment protection for workers by laying down minimum statutory standards relating to pay and conditions including protection from unfair dismissal (Employment Rights Act 1996). Yet, while the UK's framework of individual rights looks progressive and comprehensive on paper, weak enforcement mechanisms can severely undermine their effectiveness (Pollert 2007) making them 'paper tigers, fierce in appearance but missing in tooth and claw' (Hepple 2003, 238).

Dickens (2012) has defined the system of employment rights enforcement in the UK as 'passive/reactive' due to its reliance on victims to complain with little proactivity required by employers. The system requires a high level of legal capability from individuals to understand and assert their rights in order to pursue claims and assumes that the ET system is accessible to the general public. In fact

formal dispute resolution rarely offers claimants the kind of remedies they seek (to remain in their jobs, or to receive an apology), and may also confound employers who may only learn about the law when they face an ET claim (Dickens 2012, 212). This retroactive, self-help approach 'requires certain preconditions: awareness of rights; knowledge of how to enforce them; capacity to claim (including financial capacity) and willingness to do so' (Corby 2015, 174). In the UK, while state agencies monitor, inspect and enforce certain employment rights such as those relating to health and safety, the minimum wage, and equality duties, all other rights must be enforced by individuals (Dickens 2012). Such enforcement agencies are in any event under increasing budgetary pressure which has reduced the scope of their inspection activity (e.g. Health and Safety Executive (HSE) 2016).

While knowledge of rights appears to be on a 'need-to-know' basis, those in low-skilled, low-paid and precarious arrangements are likely to have the lowest levels of knowledge of employment rights overall (Pleasance *et al.* 2015). Greater overall awareness is found among managerial and professional workers, those in public administration, education and health and the business and financial services sectors, and among permanent employees and trade union members (Meager *et al.* 2002, XIII). Furthermore, those with a relative 'labour market advantage' or general social privilege (i.e. white/male/better qualified/ white collar employees with permanent full-time jobs and written particulars of their terms and conditions), were more likely to have high knowledge and awareness of their rights. Such individuals are less likely to need to use such knowledge to enforce rights, being less likely generally to experience breaches (Meager *et al.* 2002, XV).

Genn (1999) found that most people do not do take formal action to resolve disputes, including those that are work-related, which could potentially be considered legally actionable, or 'justiciable'. Survey evidence suggests that the majority of problems at work do not become claims; rather, they lead to informal attempts at resolution within the workplace, voluntary exit or inaction (Pollert and Charwood 2009). Casebourne *et al.* (2006) found that only 24% of those who experienced a problem at work put it in writing to their employer, while 3% made an ET claim. Once they look into utilising the ET system, people generally give up when they learn of law's limits, difficulties and the forbidding nature of formal legal procedures; that is, when they meet the boundaries of law which they may have underestimated.

Following a myriad of reforms, the accessibility of ETs has been eroded over several decades (Corby 2015). The location of ETs, the ease of making a claim and of having one accepted have all diminished since the system was introduced. The use of screening mechanisms, a mandatory requirement to register for Acas conciliation before submitting a claim, prehearings, the ability to require deposit orders from claimants, the rise in potential costs awards against claimants, the imposition of fees and the general move away from the use of panels comprising lay members at full hearings towards judges sitting alone have all made ETs less accessible. Furthermore, the increasing complexity of employment law makes it difficult for claimants and respondents to participate effectively in the ET system without representation. If they ever were, 'ETs are no longer cheap, informal (given increasing legal complexity), or accessible with long claim forms replacing simple letters' (Corby 2015, 173).

While the dominant political rhetoric has focused on the increasing 'litigiousness' of worker-claimants (e.g. Department for Business, Innovation and Skills (BIS) 2011), a counter-critique of the system comes from those who view it as being increasingly stacked against workers- particularly those with limited education, or the funds to pay for representation (Busby and McDermont 2012, 2016, Dickens 2012, Ewing and Hendy 2012, Renton 2012, Hepple 2013). Concerns over access to justice feed into a broader agenda of fairness at work, the extent of workplace voice for employees, and the broader degradation of work and conditions are also

relevant as is the curtailment of collective rights and demise of collective bargaining making it more difficult and costly to challenge work-related injustices. With only approximately half of the awards made by ETs ever received (BIS 2013), such weak enforcement may do little to deter employers from treating workers and employees badly (Saundry *et al.* 2014).

#### **4. Redefining Boundaries: Labour Law's Hegemony at Work**

A more radical critique of employment law is that reliance on individual rights is part of the counter-mobilisation of labour, fragmenting conflict and diverting more radical challenges to workplace injustice as part of a subduing of trade union and class consciousness (see Bacon and Storey 1996, Pollert 2007, O'Sullivan *et al.* 2015). The decline of trade unions is complex, involving multiple factors of which legal intervention is only one; also important are concomitant changes in the global economy, occupational structure, workplace size and failings of trade unions themselves (Kelly 1998). Yet, it would be remiss not to underline growing legal interventions that restrict collective action in tandem with the proliferation of rights that may offer worker protections (see Smith and Morton 1993). There is an argument that people have become increasingly reliant on the 'myth' of individual rights as insurance should a problem occur at work, i.e. 'legal enactment' rather than the 'mutual insurance' of trade unionism (Webb and Webb 1897) and conduct themselves accordingly, for example not joining a trade union until a problem arises.

If there is an increasing tendency for people to expect that the law will be 'there' for them if something they perceive as unfair happens, such beliefs may prevent workers from taking alternative actions such as trade union membership. Corby and Latreille (2012, 388) argue that 'legal norms have superseded industrial relations norms and values.' This means that individual dispute resolution may act as a substitute for collective action through union membership (McLoughlin and Gourlay 1990) so that, 'if a problem arises my employer will attempt to resolve it amicably with me'. Likewise, the imagined assertion of rights may have this substitution effect, 'if a problem arises I can take it to an employment tribunal where my employer will be forced to resolve it or face a penalty'. Colling's research into trade unions' use of 'legal mobilisation' (Colling 2009) suggested that the framing of disputes as relating to individual rights need not be in contest with more traditional collective action, but that this does in practice occur. Despite policy controversy, our understanding of how notions of legality structures thinking in relation to employment relations, and disputes in particular, is limited. However, there is some common ground between proponents of tighter employment regulation and those who support deregulation (see Heery 2010) based on the shared understanding that individuals may harbour illusions about their legal protections and entitlements. According to Pleasance *et al.* (2015, III) people do hold 'erroneous beliefs' about the law distinct from 'legal reality.' Public perceptions of legality are based on social norms and cultural values and are slow and difficult to change. From such a perspective, it might be argued that workers have been encouraged by successive governments to place their trust in individual rights as providing adequate employment protection.

We see the repressive power of the state being exercised through law in the policing of strikes and demonstrations, with the extension of potential legal intervention in the Trade Union Act 2016, and through the use of armed forces to substitute for striking workers, for example during fire-fighters strikes. The hegemonic nature of labour law is seen in the authorisation or legitimation of certain practices as 'legal' through accommodating measures, such as the ban on exclusivity clauses in zero-hours contracts rather than the full ban that many campaigners are seeking (UK Parliament 2015). Policy papers trumpet the openness and accessibility of the ET system to all (BIS 2011). The nature and extent of employment rights are openly contested without really changing law's

substance, so that reforms merely 'struggle to redefine the boundaries of what counts as "legal"' (Litowitz 2000, 548). One example of this arises through the setting of the qualifying period for unfair dismissal which has become a political football, having been changed from two to one years' continuous service and back again in recent years with profound effects on many workers' access to secure employment. Some radical changes to the system have gone largely un-debated - fees for claimants (although withdrawn following a Supreme Court ruling) were imposed after a short and arguably pointless consultation in which opposition to them was largely ignored (Dickens 2014, 242).

Despite the difficulties inherent in utilising the current system, individuals are enabled by employment protection law as well as constrained. In the present study, on which this article will now focus, some participants had success in using the law, however, this often fell short of what they had always trusted and expected would be 'there' for them in times of need. The following analysis will thus explore in more depth how individuals react when they learn the limits of employment protection law and how this influences their further interactions with law.

## 5. Research design and methodology

Data are drawn from a large-scale research project that case-tracked 158 workers as they attempted to seek justice for work-related grievances between late 2012 and the end of 2014. Participants were recruited via Citizens Advice Bureaux (CAB), access points to those most likely to face the greatest barriers to justice, who cannot easily afford a lawyer or access trade union assistance. For such individuals, often subject to precarious working arrangements and low pay, the avenue to an ET claim is increasingly important given the decline of collective routes to dispute resolution. It is notable that during the period of data collection, radical reforms to the system were imposed including the extension of the qualifying period for protection from unfair dismissal from one to two years in 2012, and, in 2013 the introduction of fees for claimants to submit claims and to have them heard.<sup>1</sup> Both reforms restrict access to justice, so that the data were collected in a time of change and turmoil making frustrated expectations and disappointment even more likely.

The project is unique in providing longitudinal, qualitative data on experiences of the ET, from the early formulation of problems or disputes into legal issues, through submission of a claim, to hearing and beyond. In the following analysis we are particularly concerned with the trust individuals invest in the law to protect them and the ways in which they respond when expectations are frustrated.

## 6. Findings

### 6.1. Legal Consciousness in Employment Disputes

In studying popular consciousness we typically 'become aware of its illusions (Sayer 1992, 39). To varying degrees participants in this study learned, through advice as well as through direct experience, that the process of making an ET claim was more

---

<sup>1</sup> Fees of up to £1200 were imposed in July of 2013 but have since been ruled as unlawful by the Supreme Court as a result of a judicial review brought by the trade union Unison; see *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017]*. Following their introduction which led to a dramatic fall in the number of claims brought, fees have been the subject of considerable controversy with parliamentary reviews focusing on their impact on access to justice. The Government continued to endorse fees, arguing that "while it is clear that many people have chosen not to bring claims to the Employment Tribunals, there is nothing to suggest they have been prevented from doing so" (Ministry of Justice 2017, 3). The lack of evidence to support this assertion was contested, and it was argued that an impossibly high standard was being set to demonstrate the impact of fees on the behaviour of actual and potential claimants (for critiques see Busby 2015 and Kirk 2017). The Supreme Court's judgment has led to the immediate removal of fees for claimants in Scotland, England and Wales with refunds available for those who have already paid them.

difficult than they had imagined or their rights more limited, even where they had some degree of success. When problems arise at work, individuals suddenly find themselves having to venture into the highly legalistic world of the ET system. As Ewick and Silbey (1998, 15) observed regarding law in general, few participants had given detailed thought to employment law or the legal nature of their working arrangements until a problem arose. Participants generally held vague notions of what was 'right', which were not necessarily based on what was 'legal'. One participant commented: 'I think that common sense would say that disabled people are protected, that they have to be. I didn't know that much about it, I just knew that there was [sic] things in place to protect you.' The limits of law are only acknowledged and understood once individuals attempt to use it, with the majority of those giving up before formalising their disputes, and others learning through experience how difficult it is to chase an outcome that too often is ultimately disappointing.

#### 6.1.1. Learning the limits of law

Citizens Advice and similar organisations participate in the construction of legality, 'purposely, explicitly, and self-reflexively developing forms of legal consciousness' (Silbey 2005, 357). The cultural dispositions of individual CAB advisers may also vary significantly and change over time. As a non-political organisation, CAB do not seek to radicalise their clients, though they may encourage more or less strategic engagement with the law where they feel that it is weak or lacking. Like the divorce lawyers in the study by Sarat and Felstiner (1995), CAB advisers 'negotiate realism' with clients, explaining that the law is often perverse, unfair, uneven, judges capricious and emphasising the need for insider knowledge and tactical engagement with it. Felstiner and Sarat's client-participants tended to react to this initially with disbelief, suspicion and resistance followed by grudging acceptance. Lawyers' encouragement of their clients' willingness to settle rather than to go to full hearing was often met with ambivalence. Clients 'resist the power that lawyers seek to exercise' (Sarat and Felstiner 1995, 139).

In the current study participants would often fail to distinguish in any conscious sense the differences between the civil and criminal justice systems. Thus, while Veronika, a Lithuanian migrant, might have had particular difficulties expressing her thought-processes in English, it is nonetheless significant that her first thought when she was attempting to force her employer to pay owed wages was to tell her employer, 'I want my money and if you don't give it to me I will go to the police' (as recounted to an adviser). In such situations, advisers are tasked with instilling realism about the nature of ETs and their remedies.

CAB advisers manage the expectations (and emotions) of clients who may well have legitimate grievances against their employers which may only be partially redressed in the (uncertain) event of a successful ET claim. The recent changes to the qualifying period for unfair dismissal protection and imposition of ET fees alongside cuts to legal aid mean that there may be little positive advice to offer. A CAB adviser explained the tensions of advice giving in the context of austerity:

The tears in people's eyes when you tell them that the law is no good to them (...). 'But that's not fair'. You're darn right it's not! (...) [A] lot of my conversations to do with employment law are negative (...) you have to tell them what the hurdles are going to be.

A bureau manager echoed this sentiment, suggesting the difficulties for advisers being the bearers of bad news:

With the cuts, you know, we get the brunt of it (...) we're the messenger [that] gets shot.

One adviser, discussing fees in particular felt constrained in how she could help clients:

You're meeting people and you can't help (...) basically there's very little that you can do (...) you almost feel a bit de-skilled (...) you're not doing what you want to do, or what you feel you should be doing.

### 6.1.2. Types of disappointment

Advisers and participants explained the various types of disappointment individuals experience when receiving employment advice or through attempting to use the law. Examples include finding that the law does not conform with 'common sense' ideals or what is considered 'natural justice', that rights are more limited and qualified than expected, how long and time consuming making a claim will be, how hard it will be to 'prove' the 'truth' to an ET and that there will be more work to enforce any successful award which may never be paid. Individuals sought advice from CAB about whether their employers' behavior was illegal, yet often ended up 'being the loser, because the employer has the backing of the law' (migrant, male). One bureau manager succinctly articulated the divergence between common understandings of protections provided by employment law and 'legal reality'.

As always, people who don't understand the law have a difficult time understanding what is fair and just what the law actually can deliver.

Both client-participants and advisers referred to what they saw as the limited protection of employment rights as unjust. Cases that did not progress to the ET often involved circumstances that, while appearing to be unfair, were either not strictly illegal or difficult to provide evidence for. Client-participants learned of the limits, restrictions and qualifications around most employment rights (Ewing, 2011).

Advisers often sympathised but had to inform clients that bringing a successful claim over common problems like bullying by management is very difficult because of the particular way that the law operates in this respect:

There's nothing you can do about that, it seems, it wouldn't stand up (...). I've seen a lot of general 'picking on me' stuff that really upsets people (...) it sounds awful, and then I've got to turn it to people and say, 'look, employment law is (...) [limited]. (Volunteer generalist adviser)

Advisers can only legitimately encourage clients to raise those aspects of their complaints which are demonstrable, and clearly covered by legal jurisdictions:

Have you had any unpaid wages? Or are you being paid the minimum wage? (...) These are the things you can claim for here. Have you got anything that fits into these categories?' (...) [T]here's nothing you can really do for being just picked on. (Volunteer generalist adviser)

CAB advisers undoubtedly face constraints relating to available resources which will have an influence on the cases that they can support or represent with claimants increasingly acting as litigants in person. With the advent of fees, advisers are likely to spell out the risks associated with pursuing more complex cases and to focus on the more straightforward cases which have a higher chance of success. Better resourced claimants will have more opportunity to pursue cases requiring complex legal argument or detailed evidence such as discrimination and/or dismissal cases involving bullying or harassment.

Ideas of the force of the law, such as assumptions that the law would prevent an employer from doing something, would often later be rationalised down towards at least stopping the employer mistreating others in the future, recognising the reactive nature of employment law. Thus, expectations of the law are downgraded as people meet obstacles in their paths to justice, or are advised of the limits by advisers.

Client-participants also appeared unprepared for how long ET claims would take to be heard. Some referred to the span of the dispute as 'that tribunal chapter in my life' (Davide), where their 'life was preparing for the tribunal' (Bridgette). This

whose cases went to full hearing were frequently shocked at how long, formal, legalistic and generally difficult they found the hearing to be. Many of those who made awards were in disbelief that they had to do more work to enforce them. Grant, a telemarketer who had won a default judgment when his employer disappeared owing him several weeks' wages, was shocked at how much work and expense was involved in tracking down the employer and enforcing payment. Grant was struggling financially and:

Had to put it on the back burner for a while (...). I'll try and get I'll see what the next step is and how much it's going to cost (...). I'd really need to think about it, throwing good money after bad.

### *6.2. Reacting to and reflecting upon frustrated expectations of employment law*

The legal consciousness literature reminds us that people do not only construe legalities and act accordingly, but they also participate in their (re)construction, with potential for deconstruction (Ewick and Silbey 1998, Silbey 2005). Participants in the current study tended to react to their disappointment with law with resignation rather than radical rejection so that a system that is perceived and experienced as unjust goes unchallenged and is reproduced rather than transformed (Archer 1998). Even those participants who achieved a satisfactory outcome still experienced the law as quite different to the vague ideas they previously held. Generally they learned that it was much more complicated and involved a great deal of effort on their part. In the following sections we provide specific examples of how people responded to frustrated expectations, charting evolving legal consciousness.

Those who had a clearly successful outcome sometimes felt 'empowered' (Cheryl) by their experience. Pauline, whose employer settled her case as soon as an ET claim was submitted, spoke of standing up for her rights in future and advising a colleague on his rights when she felt he was facing discrimination. However, most participants faced at least some frustrations and constraints in their attempts to use law, while experiencing enablement to a degree, but usually not to the extent that they desired or expected. As well as success in litigation, enablement can relate to more subtle 'wins' such as simply being given a say in what is perceived as a neutral venue. Constraints related to the near impenetrability of employment law due to its complexity, the disparity between workers' and their employers' abilities to pay for legal representation to help participate as a competent actor. Thus, Bridgette, a financial administrator who represented herself in her unfair dismissal claim reflected upon how her conception of legality was shaped by the outcome of her case. She might have felt differently had the difficulties she encountered proved insurmountable. Throughout the process, which lasted for a year, Bridgette was often unsure which way her case would go. However, the experience of self-representing appears to have empowered her. 'Whether I win or lose I'm so glad I went ahead and all the stress has been worth it,' she said, 'because I got a chance to be treated equally. I actually spoke up for myself. I questioned why they had done certain things.' Bridgette was successful and reflected on the legal system: 'Well, obviously I have faith in it because it works (...) but I'd have a different thing to say if I hadn't won.'

As individuals' assumptions about law are tested through direct experience or in relation to the advice they receive, their differing responses build from and augment their orientations to law illustrating a plurality of legal cultures (Halliday and Morgan 2013). Through their attendance at the CAB participants were generally hopeful that the law may be able to provide them with some protection, at least early on in their dispute. There was evidence of variations in cultural biases among participants, so that those with backgrounds in trade unionism and radical politics were more likely to display greater degrees of dissenting collectivism than others from the outset. This chimes with Colling's findings that a rejection of state

law, reference to a transcendental law and 'gaming' approaches were evident among trade unionists when attempting to engage in 'legal mobilisation' (Colling 2009).

Responses to frustrated expectations were quite diverse, ranging from acceptance of the law's position and localized rationalization of disappointments, through cynicism and plans to avoid reliance on employment law in future, towards outright dissenting collectivism, as articulated by the 'radical activists' identified by Halliday and Morgan (2013). Such moments may be critical junctures in legal consciousness, a fork in the road where individuals rationalise some fault in the law, perhaps localising it as a minor glitch - something overlooked by the legal system - continuing with their faith in the law, whereas others turn away towards a more serious rejection of the law as being useful to them in line with notions of fatalism or with dissenting collectivism (Halliday and Morgan 2013).

### 6.3. Framing the Data

Following frustrating encounters with employment law, most participants showed irritation, dissonance, and cynicism towards the law while retaining their ultimate admiration for labour law's legitimacy and centrality to orderly relations and fairness, albeit with lowered expectations. In the following section four types of reaction are identified with illustrations from the data provided. These mirror Halliday and Morgan's dispositions towards law, i.e. individualism, isolation, deferential and dissenting collectivism (Halliday and Morgan 2013). The residuals will be explained in discussion below. The four reactions to a negative experience are:

- 1 Acceptance and self-discipline, attributable to their own 'dumb luck' so that the individual would avoid having to rely upon the law again, maintaining belief in the authority of law, and largely blaming themselves for failure to play within its rules;
- 2 Cynicism, where frustration with and dissonance from the law remained individualized and agency-negating;
- 3 Collectivized dissent combined with fatalism;
- 4 Collectivized dissent combined with agency/planned attempt to bypass the law through. This was the rarest reaction - a radical rejection of employment law's value to the individual who prepared themselves to take alternative, more radical action immediately or in the longer-term to improve their lots.

The range of responses is discussed below using vignettes selected to exemplify each reactive disposition. The latter two dispositions are handled together, reflecting the way in which dissenting collectivism tends to be a rare oscillation from its more deferential form.

#### 6.3.1. Acceptance and self-discipline: maintaining law's authority

Helen was working as a care assistant in a private care home for around a year before she was dismissed for airing a complaint about her employer on social media. Helen did not deny her wrongdoing but felt that her dismissal was overly harsh and handled poorly. However, at the CAB she sought simply to raise issues of owed wages, holiday pay and questioned some unauthorised deductions. The CAB-affiliated solicitor she saw reviewed her case and advised her to submit an ET claim for around £850. The solicitor submitted the claim on Helen's behalf. However, for reasons Helen did not fully understand, the solicitor later withdrew her case:

Its been all cancelled due to the other party wanting me to pay there [sic] lawyers if I loose [sic] my case spoke with my lawyer a week ago and not herd [sic] anything back so I take it that its been cancelled completely now. (Text message)

During the phone call, the solicitor told her: "well it's up to yourself," he says, "but really," he says, "I wouldn't go for it." Helen did not understand why the lawyer was advising she drop it and felt some resentment because of this:

I thought I was very unfairly treated (...) when I got the letter in stating that I was having to pay for their lawyer if I didn't win the tribunal you know and it made me very, very angry (...) Mr [name of CAB solicitor], he more or less said well look let's just forget this you know what I mean, because I mean it was eight hundred and odd pounds you're looking for.

Helen did not feel willing or able to question or challenge her representative's recommendation after he put it in writing; he 'more or less put this down on paper you either accept it or you don't accept it.' Helen had initially felt that the way that she had been dismissed arbitrarily by her employer was unfair but had let that slide. Now she would not even get the chance to claim the wages she was owed.

Following the dispute, Helen was unemployed (receiving benefits) for around a year. She then worked for a short-spell in a temporary assembly-line job. Later, she obtained a job on a zero-hours contract with an agency providing care work which she was very grateful for. When asked if there were any lessons she had learned from her experience, Helen felt that she was more likely to 'mind her Ps and Qs' now to avoid getting into trouble again with an employer. The dispute had not however made her more attentive to her employment rights, or likely to find out about employer's policies:

Well working with this agency right now, I mean I'm no' too thingmied up on their laws do you know what I mean I've no' actually read into a' that stuff. I mean they usually send us out things you know like different things.

Most participants were not quite as deferential as Helen. The majority grew more cynical through their attempts to use law, either learning how to use it more cleverly in future or finding ways to avoid it altogether. Preeti, a care worker, was very disappointed that legal procedures did not conform to her conception of substantive fairness. Preeti had been disciplined for fighting at work with a colleague, although she felt bullied by the colleague and had finally snapped. Preeti wanted her disciplinary record wiped clean. However, her employer countered that she had not formally lodged a complaint about bullying. Responding to advice that her employer seemed to have acted reasonably in their handling of the situation, Preeti said: 'According to me, it doesn't matter that they followed the right procedure, but whether they have been fair.' Preeti felt let down by the legal protection for her situation but resolved to engage with law more skilfully if another problem arose:

That's a really good learning for me you know. In future if I'll do any kind of thing, you know, if I'm doing any complaint or anything I have to sign the paper and give (...) a written statement for my manager like, 'yeah, I informed you'.

Preeti felt let down by the law, but did not dwell on its systemic effects. Even where participants developed more cynical orientations to law, and its usefulness to them in future, there was a widespread tendency to see this as immutable, rationalised as just 'the way things have to be.'

### 6.3.2. Cynicism

Frustrating experiences with law sometimes led to cynicism about employment law's usefulness in general. Some participants spoke in individualistic terms of self-reliance as a result of finding the law unhelpful in resolving an employment dispute. After being made redundant, Sandy, a middle manager, came to the CAB for help reviewing a compromise agreement from "somebody with a bit more legalese." Sandy closed his correspondence with a researcher with the following:

PS - a tip from my experiences, look after N[umber] One because when it comes down to the crunch there is no-one but you looking after your best interests. (Email)

Sandy felt his selection for redundancy was unfair but had not found the law useful in contesting it. He felt he had no evidence that he was a good performer or any way of measuring the relative performance of others which would have enabled him to build a case. He explained that he was not disputing his redundancy, only ensuring he was getting the best package, as there was 'no smoking gun' to show that he has been wronged or by whom. He would no longer expect the behaviour of others to correspond to a code of ethics he had subscribed to.

A related form of rejection of the legitimacy of law can lead to attempts to avoid relying upon it in the future by seeking self-employment. Graham, a leisure attendant was dismissed after a colleague had made an allegation against him which Graham said was false and that there was little evidence to support it. Graham raised an unfair dismissal claim and was surprised by the limited protection offered by employment law in relation to his particular situation and the difficulty of the ET process.

[I] looked into all the black and white part of it and there's actually no law that, the law gives works the right to do an investigation, they gave it their own law basically (...). I could not believe that and I was like that's like letting anybody step over anybody they want so if you're a boss you can just step over somebody if you really wanted to.

Graham had lost trust in employers completely and planned to be self-employed from now on: 'I don't really feel like I want to work for somebody (...). I don't have to worry about answering to somebody now.' Although Graham did not want to be part of an employment relationship that left him so vulnerable to abuse, his rejection did not lead him to any form of radical action in opposing employment law but rather escapism, a retreat from law.

### 6.3.3. Between deferential and dissenting collectivism

Deferential and dissenting collectivism to employment law was more obviously separated here in deed than thought, and as Halliday and Morgan (2013, 22) note, oscillation between acceptance and rejection of the law or aspects of it were common, often in concert with partners and families who were advising and assisting participants in decision-making. Sally and her husband were disappointed by the outcome of Sally's ET claim, but felt worn down by the stress of the dispute. Sally had accepted a settlement which secured a fair reference but later regretted as she saw it, 'letting the employer away with it'. Sally and her husband spoke scathingly about employment law, the incumbent government and the state generally, attitudes which had severely hardened following their let down by the dispute, and learning of reforms of the ET system (e.g. the imposition of fees).

Sally's employers changed her hours of work, stipulating that she must begin to work evenings and weekends. This was difficult for Sally to balance with her daughter's care. Eventually, the employer sacked her for allegedly lying about her circumstances (which Sally denies). Sally recalled her CAB adviser as saying:

Government is on the side of the employer, not the employee, so basically (...) they were within their rights to make me redundant or sack me or whatever (...). I couldn't afford to not have a job (...). The employee has got no rights whatsoever when they're working, and I think that's wrong.

In Sally's view, the law favoured employer interests, and she displayed a critical class-based consciousness:

The law isn't there for the everyday person. They don't, they don't care about the everyday person. As long as you've got money and they're getting' tax money off of you, they don't care about you as a person. You're just a number. I think they care more about their prisoners than the working class. For the amount of things prisoners get, for breaking the law, yet the working class are getting punished every single turn.

Nevertheless, when asked about recent reforms to the ET system such as the charging of fees, Sally's partner, who attended all her advice appointments and helped her take decisions regarding the dispute, articulated more deferential sentiments towards law, even though the couple had struggled with the claim, and were struggling financially. He suggested that government *had* to bring in fees to discourage weak and vexatious claims:

I know, I know why they've done it is to stop a lot of people just wasting time on frivolous [complaints]- 'well I'm just gonna do it to get up your nose'.

Thus the couple jointly expressed a mixture of beliefs that pointed to class-based inequalities on the one hand, but resignation about 'the way things have to be' on the other.

Traces of 'dissenting collectivism' were rare in the sample. Richard, a forklift driver provided the only obvious example of someone who responded to the failings of law to resolve an employment dispute with any kind of attempt at collective action.<sup>2</sup> Richard's employer had attempted to make a number of unilateral changes to employees' terms and conditions, such as reducing hours and changing the nature of the job resulting in a pay cut. At least ten workers were directly affected. Richard was vocal in his opposition, and soon found himself on the receiving end of unfavourable treatment and intimidation. He sought to organize a trade union in the workplace but found his colleagues fearful of victimization. Indeed, Richard was certain that his more recent ill-treatment by his employer was the result of him attempting to stand up for his rights, and to organize the workforce: 'The problem is I'm standing up for myself.' Certain managers were aggressively anti-union and threatened to move the plant if workers organised. Richard was fairly certain that his employer 'can't do this.' He told the manager this and he said, 'I can do what I like.' Other drivers had put grievances in about this manager in the past and the way he treated staff. After coming to a CAB and finding that his understanding of the law was not entirely correct, Richard spoke with disdain of so-called employment protection law and sought to redouble his efforts to organise his colleagues. He had organised a meeting in a pub but only six people showed up. It was unclear what happened next and whether Richard was successful in organizing a union. He had not returned to the CAB several months on and lost contact with the research project.

In the more common scenario of dissenting collectivism oscillating with fatalism (Halliday and Morgan 2013, 22), a combination of the sheer difficulty in organising alternative forms of action, weighted against additional ties and responsibilities such as dependents and general subsistence. Grant had grown increasingly cynical of law. His firm belief in the 'mutual insurance' of trade unionism (Webb and Webb 1897) as the most effective means of protection was overridden by the difficulties of organizing in the contemporary workplace. Grant was sceptical about law and the 'establishment' including the ET system and Acas. Since 2014 claimants to the ET have been required to notify Acas so that Early Conciliation can be attempted. Acas also offers an arbitration service and advice on individual and collective disputes as well as providing an approved code of practice on disciplinary and grievance procedures. 'Grant' went as far in his critique in suggesting that the role of Acas was to tie-up claimants and to discourage them from going forward:

The tribunal contacted Acas and it's as if you know like somebody brings up this to the tribunal and the tribunal sort of kicks it into the long grass, 'Acas can you do something with this?'

Grant's suspicion was that Acas had been created by the business lobby or right-wing interests to moderate or suppress trade unions:

---

<sup>2</sup> Lesley, a school teacher, did ask a researcher for advice on if there was anything she might do to collectively but had not taken any action at the close of research.

I don't know who set up Acas in the first place? (...) [I]t was business wasn't it? (...) Probably it was a thing that was maybe forced on to the unions well I'll tell you what you're going on strike all the time what we'll do is we'll get an arbitrator in Acas and that's probably how it came about.

Grant felt that unionism and collective action were not only legitimate means of interest expression but perhaps the only viable means of holding employers to account:

At the end of the day what else has a worker got to do but withdraw their labour there's nothing else you can do, going back to the old days but it would be withdrawing your labour and it's like a total no-no.

However, having been displaced from a public sector job (in which he was a union representative) towards the now dominant non-union service sector (the job in which the dispute arose was a call-centre position in business-to-business marketing), Grant saw little prospect for collective action to resolve problems he faced like arbitrary dismissal/redundancy or unpaid wages.

Similarly, Jack strongly supported unionism and felt that his unfair dismissal had resulted from him trying to uphold collective interests in health and safety and that formally organised collectivism was unfeasible in his present world of work. Jack has been working as a scaffolder before being dismissed. On learning that he did not have sufficient qualifying service to claim unfair dismissal, Jack described how bosses in construction always treated workers 'like animals.' On hearing that there had been a recent change of law extending the qualifying period from one year to two, Jack said that this was just another example of 'government giving them [employers] their own way again.' However, being advised that that he would probably only get a week's notice pay, he felt that pursuing this was not worth the hassle. Jack was critical if not hostile towards government. He nonetheless developed cynicism rather than activism in response. When asked if he had ever been part of a union or would consider it in future, Jack said that he should have been, looking back but he had not taken a great interest or believed he would need protecting. He said that he would now most likely get some kind of 'phone-job' ('the easiest to get'), but one in which the likelihood of being part of a workplace union was slim.

Ray, a maintenance technician, was asked, following his unsuccessful claim for unfair dismissal, how he perceived employment law. He replied, 'Ma reflections is [sic] that I was let down.' While he spoke of class-based inequalities and how they system worked against the 'working man' [sic], approaching retirement age he seemed resolved to avoid having to rely on employment law. Traces of a radical rejection of law in Ray's case were tempered by absorption into economic and life-cycle considerations, e.g. proximity to retirement in this case.

What of other participants, who displayed traces of rejection of law's legitimacy but did not have retirement, marriage, a mortgage or childrearing to blame as dampeners to their radical fire?

#### *6.4. Rationalising localised inequalities while upholding employment law's ultimate legitimacy*

Work in the legal consciousness tradition has stressed the complexity of perceptions of legality within which people often attack localised deficiencies of law and the inequalities it produces while retaining respect for the legitimacy of law as a whole. Numerous examples were found among the participants in this study, often reiterating faith in some types of employer to respect the law. Participants who tended to display such arcs of rejection followed by dissipating radicalism usually rationalized employment law's barriers and inequalities as localised.

Doug felt he had not known, or needed to know, much about employment law when he had been employed in the public sector. When the Job Centre encouraged him to

take a casual job in construction this employment situation became problematic. Doug became wary of private sector employment which appeared to him to be 'dodgy' compared to the public sector:

I didn't really know anything because nothing like that had ever happened to me, I was always I've always worked through like council or local government companies.

The first time I've ever worked for a private company (...) it just put me off the idea (...) because they try to make you work for a month and then like kind of not have a leg to stand on (...) if something goes wrong.

Doug worked for around a month without being paid. The employer disappeared and Doug struggled to pursue his wages. He complained to the Job Centre for placing him with such disreputable employer but felt fobbed-off. Somewhat ironically, Doug, was aggrieved by his treatment by the Job Centre (i.e. part of the public sector) as well as his employer and the ET system, but localised his course of action to avoiding working in the private sector again if possible. Doug, did not wish to take any form of alternative or collective action even though he identified that many others had suffered the same problem with the employer. Doug said that he was not necessarily now more likely to investigate his rights following his experience but that, if he was taking a job with a private employer again, he might need to do so:

Well ever since that has happened to me I'm a bit wary o' stuff but it's no' really like I've not looked up like the law or anything (...) if there was a job coming up and if it was with a private company then that's when I would look into stuff to see if anything's like different scenarios if something went wrong again what rights have I got.

## 7. Conclusions

For many people, the system of employment protection rights is failing to meet its public aspirations: on its inception, the ET system was presented as an accessible, cheap and informal means of resolving disputes at work and achieving justice (Donovan Commission 1968). It is debatable whether this vision was ever actually achievable and recent reforms have moved reality and aspiration even further apart. It is likely that downgraded expectations following the recent withdrawal and weakening of many rights, and new barriers to bringing claims will only gradually melt into a public legal consciousness of employment protections that is already, at best, vague.

The complexity of the system and difficulty of enforcing rights make it almost impenetrable to lay-people, but this lack of access is largely hidden from public view in the UK's privatized system of dispute resolution (Colling 2004). People generally only realise the limits of law and of the ET system when they are personally confronted by them. All participants in the current study expressed at least some hope in using legal remedies, although some in a 'gaming' capacity compatible with cynical and dissenting dispositions to law. However, there were among some participants pre-existing scepticism towards the fairness and authority of the law. More often views had hardened after disappointing advice regarding legal remedies and rights protections at CAB and/or attempts to use the law.

Few people proclaim 'I've been oppressed!', meaning that we require subtle forms of analysis that can lay bare taken-for-granted assumptions about law and legality and how robust these are when challenged by experience and new knowledge. Exploring consciousness and hegemony can be controversial as they may imply that the researcher can discern what the 'true' interests of their participants are. However, as noted above, by the use of comparison of individuals' reactions to particular conditions, we may side-step this responsibility and instead explore the range of options open to individuals (and collectives) who contemplate them (Hyman 1972, Edwards 2006).

Public legal consciousness is dominated by a vague faith that employment law will be 'there' should a serious work-related problem arise. For participants in this study, upon learning of law's limits, its qualifications, the difficulty of enforcing it, criticisms of law tended to be localised or led to cynicism. Reactions to frustrating experiences or bad news from advisers tends to lead to cynicism and resignation, only very rarely does it lead to 'dissenting collectivism' or challenges to law's hegemony. Litowitz (2000, 541) tells us that hegemony is defined by seeing the existing (and worsening) order of things as natural and immutable:

The lived experience of hegemony consists largely in a series of unreflective actions that are not perceived by the individual as submissive; at most, the individual has merely a vague sense of injustice and an inarticulate belief that things could be better. Hegemony, then, is an extremely common but extremely subtle phenomenon.

Employment law is expected to be 'there' as a form of protection from ill-treatment but the boundary around it can be invisible and its impenetrability underestimated, like a walled-garden that we think is bright and lush, though we cannot see into it. We trust in its beauty because of public pronouncements to this effect, and usually have little reason to question this until we seek some of the fruits or blooms it contains.

Dissenting collectives can inspire counter-hegemonic modes of thinking and engaging with law. However, potential action may be impossible to galvanise among hard-to-reach groups such as unorganised workers seeking the help of CAB in work-related grievances, often working in small workplaces without trade unions or HR departments, in increasingly common forms of precarious employment.

Participants in this study very often learned law's limits and shared sympathetic leanings towards trade unionism and collective action. However, there was a distinct lack of union presence in their workplaces and in the workplaces they were likely to encounter in the future. Trade unions have an image problem which is at least partly related to the juxtaposition of the 'bad old days' of loud, aggressive and confrontational collective action with the quiet, civilised, sanitized resolution of individual rights breaches, done largely in private, behind closed doors. Trade unions have been vocal in their opposition to reforms of the ET system such as the imposition of fees, with Unison leading the judicial challenge (see MOJ 2017), but perhaps trade unions should be campaigning more strongly to challenge the notion that employment law is 'there' for workers who need it. Maybe solidarity would be easier to garner if people were disabused of the myth of the unerring strength of employment protection rights and the ability of the ET system to deliver justice effectively within its current constraints. Recently, the labour movement's call (now formally adopted by the UK Labour Party) is 'to shift the focus of labour law from statutory minimum rights to collective bargaining, allowing workers to organise and negotiate for higher wages and conditions' (Institute for Employment Rights (IER) 2016).<sup>3</sup> This shift and the repositioning of power that it would engender are essential to providing any meaningful form of protection for people at work.

## References

- Archer, M., ed., 1998. *Critical Realism: Essential Readings*. London: Routledge.
- Bacon, N. and Storey, J., 1996. Individualism and Collectivism and the Changing Role of Trade Unions. In: P. Ackers, C. Smith, and P. Smith, eds., *The New Workplace and Trade Unionism*. London: Routledge.
- Busby, N. and McDermont, M., 2012. Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings. *The Industrial Law Journal*, 41 (2), 166-83.

---

<sup>3</sup> The authors are grateful to Morag McDermont for making this connection with their argument.

- Busby, N. and McDermont, M., 2016. Access to Justice in the Employment Tribunal: Private Disputes or Public Concerns? In: E. Palmer *et al.*, eds., *Access to Justice: Beyond the Policies and Politics of Austerity*. London: Hart.
- Busby, N., 2015. Challenging Employment Tribunal Fees: R (Unison) v Lord Chancellor and another. *Edinburgh Law Review*, 19 (2), 254-259.
- Casebourne J. *et al.*, 2006. Employment Rights at Work – Survey of Employees. *Employment Relations Research Series* [online]. London: Department of Trade and Industry. Available from: <http://www.employment-studies.co.uk/system/files/resources/files/errs51.pdf> [Accessed 23 March 2017].
- Colling, T., 2004. No Claim, No Pain? The Privatisation of Dispute Resolution in Britain. *Economic and Industrial Democracy*. 25 (4), 555-79.
- Colling, T., 2009. Court in a Trap? Legal Mobilisation by Trade Unions in the United Kingdom. *Warwick Papers in Industrial Relations* [online], 91. Industrial Relations Unit. Coventry: University of Warwick. Available from: [https://www2.warwick.ac.uk/fac/soc/wbs/research/irru/wpir/wpir\\_91.pdf](https://www2.warwick.ac.uk/fac/soc/wbs/research/irru/wpir/wpir_91.pdf) [Accessed 23 March 2017].
- Corby S. and Latreille P., 2012. Employment tribunals and the civil courts: isomorphism exemplified. *Industrial Law Journal*, 41 (4), 387-406.
- Corby, S., 2015. British employment tribunals: from the side-lines to centre stage. *Labor History*, 56 (2), 161-179.
- Department for Business, Innovation and Skills, 2011. *Flexible, Effective, Fair: Promoting Economic Growth through a Strong Effective Labour Market*. [online]. London: Department for Business, Innovation and Skills. Available from: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32148/11-1308-flexible-effective-fair-labour-market.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32148/11-1308-flexible-effective-fair-labour-market.pdf). [Accessed 23 March 2017].
- Department for Business, Innovation and Skills, 2013. *Payment of Tribunal Awards* [online]. London: Department for Business, Innovation and Skills. Available from: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf) [Accessed 23 March 17].
- Dickens L., ed., 2012. *Making Employment Rights Effective*. Oxford: Hart.
- Dickens, L., 2014. The Coalition government's reforms to employment tribunals and statutory employment rights—echoes of the past. *Industrial Relations Journal*, 45 (3) 234-249.
- Donovan Commission, 1968. *The Royal Commission on Trade Unions and Employers' Associations Report (Cmnd 3623)*. London: Her Majesty's Stationery Office.
- Edwards, P.K., 2006. Power and Ideology in the Workplace: Going Beyond even the Second Version of the Three-dimensional View. *Work, Employment and Society*, 20 (3), 57-81
- Employment Rights Act 1996.
- Ewick, P. and Silbey, S., 1998. *The Common Place of Law: Stories from Everyday Life*. University of Chicago Press.
- Ewing, K. and Hendy, J., 2012. Unfair Dismissal law Changes – Unfair? *Industrial Law Journal*, 41 (1), 115-121.

- Ewing, K., 2011. What today's charter of workers' rights looks like. *The Guardian* [online], 31 January. Available from: <https://www.theguardian.com/commentisfree/2011/jan/31/cable-abuse-vulnerable-workers> [Accessed 8 August 2017].
- Eyerman, R., 1981. False Consciousness and Ideology in Marist Theory. *Acta Sociologica*, 24 (3), 43-56.
- Genn, H.G., 1999. *Paths to Justice*. Oxford: Hart.
- Goodman, N., 1978. *Ways of Worldmaking*. Cambridge, MA: Hackett.
- Gramsci, A., 1999/1947. *Selections from the Prison Notebooks* [online]. Edited and translated by Q. Hoare and G. Nowell Smith. Transcribed from the edition published by Lawrence & Wishart. London: The Electric Book. Available from: [http://courses.justice.eku.edu/pls330\\_louis/docs/gramsci-prison-notebooks-vol1.pdf](http://courses.justice.eku.edu/pls330_louis/docs/gramsci-prison-notebooks-vol1.pdf) [Accessed 23 March 2017].
- Halliday, S. and Morgan, B., 2013. I fought the Law and the Law Won. *Critical Legal Problems*, 1-31.
- Health and Safety Executive, 2016. *HSE Business Plan 2016/17* [online]. Available from: <http://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan1617.pdf> [Accessed 23 March 2017].
- Heery, E., 2011. Debating Employment Law: Responses to Juridification. In: P. Blyton, E. Heery and P.J. Turnbull, eds., *Reassessing the Employment Relationship*. London: Palgrave Macmillan.
- Hepple, B., 2003. Enforcement: The Law and Politics of Cooperation and Compliance. In: B. Hepple, ed., *Social and Labour Rights in a Global Context*. Cambridge University Press.
- Hepple, B., 2013. Back to the Future: Employment Law under the Coalition Government. *Industrial Law Journal*, 42 (3), 203-23.
- Hyman, R., 1972. *Strikes*. London: Fontana.
- Institute for Employment Rights, 2016. *A Manifesto for Labour Law* [online]. Liverpool: IER. Available from: <http://www.ier.org.uk/manifesto> [Accessed 23 March 2017].
- Kelly J., 1998. *Rethinking Industrial Relation: Mobilization, Collectivism, and Long Waves*. London: Routledge.
- Kirk, E., 2017. The 'Problem' with the Employment Tribunal System: Reform, Rhetoric and Realities for the Clients of Citizens Advice Bureaux. *Work, Employment and Society* [online]. Available from: <http://journals.sagepub.com/doi/abs/10.1177/0950017017701077> [Accessed 8 August 2017].
- Litowitz, D., 2000. Gramsci, Hegemony, and the Law. *Brigham Young University Law Review*, 2 (1), 515-51.
- Marx and Engels Correspondence, 1968/1893. *Engels to Franz Mehring* [online], 14 July. International Publishers. Available from: [https://www.marxists.org/archive/marx/works/1893/letters/93\\_07\\_14.htm](https://www.marxists.org/archive/marx/works/1893/letters/93_07_14.htm) [Accessed 23 March 2017].
- McLoughlin, I. and Gourlay, S., 1990. Enterprise Without Unions: Employment Relations in Non-Union Firms. *Management Research News*, 13 (6), 12-13.
- Meager, N, et al., 2002. Awareness, knowledge and exercise of individual employment rights. *Employment Relations Research Series* [online]. London: Department of Trade and Industry. Available from:

- <http://www.esds.ac.uk/doc/5082/mrdoc/pdf/5082userguide.pdf> [Accessed 23 March 2017].
- Merry, S.E., 1990. *Getting Justice and Getting Even*. University of Chicago Press.
- Ministry of Justice, 2017. *Review of the introduction of fees in the Employment Tribunals Consultation on proposals for reform*. [online]. London: Ministry of Justice. Available from: <https://www.gov.uk/government/consultations/review-of-the-introduction-of-fees-in-the-employment-tribunals> [Accessed 23 March 2017].
- O'Sullivan, M. et al., 2015. Is Individual Employment Law Displacing the Role of Trade Unions? *Industrial Law Journal*, 44 (2), 222-245.
- Pleasance, P., Bamber, N.J. and Denvir, C., 2015. Groundbreaking national survey demonstrates worryingly low levels of legal understanding amongst the general population in England and Wales. *The Legal Education Foundation* [online]. Available from: <https://www.thelegaleducationfoundation.org/report/how-people-understand-and-interact-with-the-law> [Accessed 23 March 2017].
- Pollert, A. and Charlwood, A., 2009. The Vulnerable Worker in Britain and Problems at Work. *Work Employment and Society*, 23 (3), 343-362.
- Pollert, A., 2007. Britain and Individual Employment Rights: Paper Tigers, Fierce in Appearance but Missing in Tooth and Claw. *Economic and Industrial Democracy*, 28, 110-39.
- R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC 51 On appeal from: [2015] EWCA Civ 935.*
- Renton, D., 2012. *Struck Out*. London: Pluto.
- Sarat, A. and Felstiner, W.L.M., 1995. *Divorce Lawyers and Their Clients*. New York: Oxford University Press.
- Saundry R. et al., 2014. *Reframing Resolution* [online]. Acas Discussion Paper. London: Arbitration and Conciliation Advisory Service. Available from: [http://www.acas.org.uk/media/pdf/6/9/reframing\\_policy\\_paper\\_FINAL.pdf](http://www.acas.org.uk/media/pdf/6/9/reframing_policy_paper_FINAL.pdf) [Accessed 23 March 2017].
- Sayer, A., 1992. *Method in Social Science*. London: Routledge.
- Silbey, S., 2005. After Legal Consciousness. *Annual Review of Law and Social Science*, (1) 323-68.
- Smith, P. and Morton, G., 1993. Union Exclusion and the De-Collectivisation of Industrial Relations in Britain. *British Journal of Industrial Relations*, 31 (1), 97-114.
- Trade Union Act 2016 [online]. Available from: <https://services.parliament.uk/bills/2015-16/tradeunion.html> [Accessed 24 October 2017].
- UK Parliament, 2015. *Key Issues for Parliament 2015* [online]. Available from: <https://www.parliament.uk/business/publications/research/key-issues-parliament-2015/> [Accessed 23 March 2017].
- University College London Faculty of Laws, 2015. *English and Welsh Civil and Social Justice Panel Survey: Waves 1-2, 2010-2012* [online]. Data collection. UK Data Service. Available from: <http://doi.org/10.5255/UKDA-SN-7643-1>. [Accessed 24 October 2017].
- Webb, S. and Webb, B., 1897. *Industrial Democracy*. London: Longmans, Green and Co.

Williams, S., 2014. *Introducing Employment Relations*. Oxford University Press.