Fighting with the Wind: Claimants' Experiences and Perceptions of the Employment Tribunal

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Key Words: Employment Tribunal, civil justice system, access to justice, vulnerability, Taylor Review

Abstract

The conceptualization of access to justice in the Employment Tribunal (ET) as a public benefit essential for the realization of the rule of law has recently been reaffirmed by the Supreme Court's judgment in *R v Lord Chancellor* [2017] UKSC 51. However, reforms to the law and policy framework in recent years have been framed by Government as providing a necessary shift away from the use of full hearings due to the costs incurred by both the public and business. This article reports on the findings of research which tracked workers with ET claims who could not afford to pay for legal advice and representation. Their experiences and perceptions shed valuable light on the operation of the ET system. Many claimants were left dissatisfied, in particular those whose cases did not make it to full hearing. The data identify a range of barriers to justice which impact on the ability of individuals to advance their claims and to enforce remedies. The article considers the use of 'worker vulnerability' in this context and the different interpretations applied by policy-makers. With reference to the research findings, we argue that vulnerability is universal and that, to counter it, the State has a central role to play in building individual and institutional resilience. We conclude by calling for the need to reclaim the concept of access to the civil justice

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system as a public good, capable of transcending private interests and providing fundamental protections against worker exploitation.

1. INTRODUCTION

This article reports on recent research[1] conducted by the Universities of Bristol and Strathclyde which explored the perceptions and experiences of claimants[2] to the Employment Tribunal (ET). Taking as its starting point Hazel Genn's contention that 'the civil justice system is a public good that serves more than private interests'[3] through the courts' significant contribution to 'social and economic well-being',[4] the article explores whether, in its current conformation, the ET system is capable of providing this 'public good' function, specifically the enablement of distributive justice and substantive equality.[5] Genn's view that the judicial system transcends private interests and serves the public by providing access to justice which is 'an essential element in the rule of law'[6] has recently found support in the specific context of employment law litigation through the Supreme Court's landmark judgment in *R v Lord*

[1] 'Citizens Advice Bureaux and Employment Disputes' funded by the European Research Council, see further http://www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project/. The authors acknowledge the invaluable contributions of the research team, Eleanor Kirk, Emily Rose and Adam Sales, and of the participating Bureaux. Our deep gratitude is owed to the individual claimants who so generously shared their time and their stories with us. All data has been anonymised with pseudonyms used.

[2] The term 'claimant' is used to refer to our research participants all of whom were assessed as having viable Employment Tribunal claims which were resolved (or not) in a variety of different ways including, but not exclusive to, judgments handed down by the Tribunal.

[3] H. Genn, 'What is Civil Justice for - Reform, ADR, and Access to Justice' (2012) 24 Yale Journal of Law and the Humanities, 397, 397.

[4] Ibid.

[5] On the 'public good' function of labour law specifically, see K. Ewing 'Democratic Socialism and Labour Law' (1995) 2 ILJ 24; A. Adams and J. Prassl, 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees' 80 (2017) 3 MLR 412; M. Ford 'Employment Tribunal Fees and the Rule of Law: R (Unison) v Lord Chancellor in the Supreme Court' (2018) 47 ILJ 1.

[6] Ibid, n 3, 411. See also H. Genn (2012) 'Why the Privatisation of Civil Justice is a Rule of Law Issue', 36th FA Mann Lecture: https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/36th_f_a_mann_lecture_19.11.12_professor_hazel_genn.pdf

Chancellor.[7] In finding the Fees Order, which had imposed charges on claimants to the ET to be unlawful, Lord Reed opined,

> When Parliament passes laws creating employment rights…it does not do so merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect.[8]

In line with the Court's distinction between the provision of rights and their effective realisation, the central issue in the research reported here is not whether justice is being served by the ET itself but rather whether, due to severe difficulties in gaining access to the system, those workers most in need of protection are being denied basic employment rights.

The claimants in this research were contacted through their local Citizens Advice Bureaux (CABx) where, without any other form of available support, they had gone for advice. These individuals were followed over a four-year period as they attempted to reach resolution culminating in 158 stories which together paint an enlightening albeit complex picture. The claimants engaged with the tribunal system at various levels: some only got as far as submitting the ET1, others achieved settlements including through Acas early conciliation (EC), a small number ended up at full hearing, and others reached no resolution.

As our findings illustrate, claimants experience the system in different ways depending on the range of resources – legal, social and financial – at their disposal. Unsurprisingly, those without access to legal advice and representation often have the

[7] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.
[8] Ibid, para.72.

most difficult journeys and do not always stay the course.[9] With stretched and dwindling budgets, CABx are not always able to offer much more than case preparation so that, increasingly, claimants are left with no option but to self-represent. Although the advent of fees[10] certainly exacerbated the difficulties faced by claimants, they were by no means the sole cause of those difficulties and many of the cases we tracked pre-dated their introduction.

In analysing our data, we were particularly interested in how what is essentially a private litigation process could best serve a wider social justice purpose. We sought to uncover the impact of law and legal processes on the everyday lives of this group of claimants to find whether their experiences and perceptions could be used to shape and improve the system for those who follow, enabling lived experience to be turned into an outcome for the public good. The most obvious route to achieving such an outcome lies in ensuring that a review of the current system is informed by empirical findings, leading to direct improvements for future users. Employment law and the ET system has been the subject of a number of internal government and commissioned reviews in recent years,[11] and so it might well be assumed that this process is in motion. However, in considering the wider implications of our findings against the

[9] Representation by non-lawyers and self-representation are increasing for claimants to the ET. Nearly three quarters of claimants (74%) were represented by a lawyer in 2017/18, down from 86% in 2016/17. In contrast, 17% of claimants in 2017/18 had no representation, up from 9% in 2016/17: Ministry of Justice, Tribunals and Gender Recognition Statistics Quarterly, April to June 2018 (Provisional), September 2018.

[10] The Fees Order SI 2013/1893.

[11] For example, the New labour Government's Green Paper Routes to Resolution, at: http://webarchive.nationalarchives.gov.uk/20060214180434/http://www.dti.gov.uk/er/individual/resolution.pdf; M. Gibbons, *Better Dispute Resolution* (DTI, 2007), at: https://thetcmgroup.com/wp-content/uploads/2015/01/A-review-of-emplyment-dispute-resolution.pdf; the former Coalition Government's *Resolving Workplace Disputes: A Consultation* (BIS, 2011), at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31435/11-511-resolving-workplace-disputes-consultation.pdf; A. Beecroft, *Report on Employment Law* (24 October 2011) at: https://www.gov.uk/government/publications/employment-law-review-report-beecroft; Matthew Taylor, 'Good Work; The Taylor Review of Modern Working Practices', Report available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf ('the Taylor Review').

backdrop of the recent Taylor Review,[12] we found that little account appears to have been taken of the experiences of claimants such as those in our study. In Taylor's report, repeated reference is made to 'the most vulnerable workers' who, it is recommended, require enhanced protection in certain respects.[13] However no definition is provided of the term 'vulnerable' in this context nor is there any indication of the common characteristics shared by 'vulnerable workers' although it is assumed that the type of claimants in the current research would be included. This approach raises concerns regarding the efficacy of Taylor's recommendations which are based on a particular conceptualisation of contemporary working arrangements and the nature of workplace conflict which is not empirically supported. This article concludes that, in classifying certain workers as 'vulnerable', the Review and the Government's response to it could serve to entrench the status quo. Rather than identifying and addressing the causes of worker vulnerability, including systemic failures to protect against exploitation, this approach implicitly conceptualises it as personal weakness ascribing responsibility to the individual. This raises serious concerns regarding the operation of labour law's public function through litigation in the ET, particularly in light of the move towards the online provision of advice services and alternative methods of dispute resolution including settlements involving non-disclosure agreements.

2. THE BACKGROUND

Political interest in the workplace dispute resolution framework has been the cause of intense scrutiny in recent years under the New Labour, Coalition and Conservative governments. The rationale for reviewing the system has largely focused on the

[12] Ibid.

[13] For example, through public enforcement of remedies for non-payment of holiday pay which would be restricted to certain groups of workers: see Taylor Review, 55.

financial costs incurred by the state for provision of the system and by employers in defending claims.[14] A resulting shift away from state support[15] towards a focus on alternative dispute resolution (ADR) has occurred, specifically (although not exclusively) through Acas early conciliation.[16] Although ADR may offer a viable alternative to employment litigation in some circumstances, it is not a replacement[17] and, as the research reported here shows, for the unrepresented claimant the process can be just as difficult to navigate as the route to full hearing. Wider concerns go beyond the mere supplantation of one process with another as using compromise in place of justice can suppress claims and conceal the ill treatment and exploitation of workers.

As was the case for many of our participants, workers who experience egregious breaches of the law through, for example, non-payment of wages, discrimination or unfair dismissal are often denied any recourse to law. To cast the circumstances in which such individuals find themselves as 'disputes' would be to mislead – these are not generally disagreements or misunderstandings about what has happened, but rather a denial of what is owed by one side to the other.[18] In such circumstances it is easy to see the importance of access to justice for the individual litigant and, thus, to

[14] For example, the Ministerial foreword to the 2011 consultation on the introduction of fees placed emphasis on the promotion of growth and the need 'to confront the structural barriers that impede competitiveness, employer confidence and the creation of jobs' (Ministry of Justice, Charging fees in employment tribunals and Employment Appeal Tribunal, Ministry of Justice, December 2011, 3). The policy of charging fees was justified on the basis of the need 'to relieve pressure on the taxpayer and encourage parties to think through whether disputes might be settled earlier and faster by other means' (at 3). The policy went ahead despite the fact that, in its own impact assessment, the MoJ had concluded that 'claimants would tend to be worse off while respondents, taxpayers and HM Courts and Tribunals Service would be better off' (at 8).

[15] Through, for example, cuts to civil legal aid and changes to the funding model for law centres and advice agencies. For a full critique see M. Mayo, G. Koessl, M. Scott and I. Slater *Access to Justice for Disadvantaged Communities* (2015, Policy Press).

[16] The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014.

[17] Genn, n 3, 401-405; OM. Fiss, 'Against Settlement' (1984) 93 Yale Law Journal, 1073; L. Dickens, 'The Role of Conciliation in the Employment Tribunal System' in N Busby, M McDermont, E Rose and A Sales (eds), *Access to Justice in the Employment Tribunal: Surveying the Terrain* (Liverpool, Institute of Employment Rights, 2013).

[18] Dickens, ibid.

recognise employment law's public function by which private interests become matters of public concern. If individuals are denied basic employment rights, wrongdoing flourishes and society suffers in both social and economic terms.

The shift from litigation to private settlement in place of 'public justice'[19] is not new and has been ably and extensively explored in the wider literature on civil justice through the use of empirical inquiry and the development of theoretical framing.[20] However, as has been noted,[21] surprisingly little regard has been paid by policy makers to research concerning the accuracy of underlying assumptions and normative effects of such a shift on the operation of the rule of law in the employment context. The experience of bringing a claim to the ET and the effect it can have on individuals have attracted surprisingly little attention from policy-makers over the last 20 years or so.[22] This is echoed in the academic literature which contains few empirical accounts of claimants' experiences, with existing studies tending to be either largescale[23] or focused on relatively small numbers of claimants with specific types of claim.[24]

The Government's Survey of Employment Tribunal Applications (SETA) provides time series data, most recently from 2013. The survey aims to provide 'information on the

[19] Genn n 3, 412.

[20] Particularly in the US 'disappearing trial' literature, for example, H. M. Kritze 'Disappearing Trials? A Comparative Perspective' (2004) 1 Journal of Empirical Legal Studies 3, 735. In the UK context, see, Genn (2012) n 6; T. Colling 'No Claim, No Pain? The Privatization of Dispute Resolution in Britain' 25 (2004) Economic and Industrial Democracy 4, 555; L. Dickens 'Employment Tribunals and Alternative Dispute Resolution' in Dickens, L. . (ed.) *Making Employment Rights Effective: Issues of Enforcement and Compliance* (2015, Hart).

[21] Genn (2012) n6 ibid.

[22] The exception being the SETA series, discussed below.

[23] E.g. L. Dickens, M. Jones, B. Weekes, M. Hart *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* (1985, Basil Blackwell). In the wider civil justice context, see H. Genn *Paths to Justice: What People Do and Think about Going to Law* (Hart, 1999). For recent contributions to the empirical literature on workers' experiences of the ET system see E. Barmes *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (2015, OUP) and C. Barnard, A. Ludlow and S. Fraser Butlin 'Beyond Employment Tribunals: Enforcement of Employment Rights by EU-8 Migrant Workers' 47 (2018) 2 ILJ, 226.

[24] For example, J Aston, D Hill & ND Tackey, *The Experience of Claimants in Race Discrimination Employment Tribunal Claims* (DTI, ERRS 55, 2006) and A Denvir, A Broughton, J Gifford and D Hill, *The Experiences of Sexual Orientation and Religion or Belief Employment Tribunal Claimants* (ACAS, 2007), discussed below.

characteristics of the parties in, and the key features of ET cases.'[25] The data tend to paint a generally positive picture of claimants' experiences. In SETA 2013, three in four claimants (77%) concluded that it had been worthwhile bringing their claims.[26] When asked how satisfied they were with the workings of the ET system, the majority (72%) said that they were satisfied or very satisfied. As might be expected, satisfaction varied according to the outcome of the case and was highest where the claimant was successful at tribunal (82%), where the case was settled by Acas (80%) or privately settled (79%). The reasons for dissatisfaction included unfairness (25%), a lack of support (14%), the timescales involved (11%), and poor communication (10%). These factors are echoed in the empirical findings presented in this article.

SETA is undoubtedly a valuable resource which provides information about how the system is accessed and experienced by both claimants and employers. When compared with smaller scale empirical data this can be particularly useful in the confirmation of general trends and/or the identification of notable differences in smaller and specifically focused samples. However, the data is drawn from large scale random sampling with, for example, the 2013 survey comprised of 3,999 short telephone interviews, 1,988 with claimants and 2,011 with employers.[27] The claimant interviews were conducted following the conclusion of the case and, as the authors of the SETA analysis note, this limits the findings' usefulness as a source of detailed and accurate testimony,

> When people are asked to talk about social processes that happened in the past, they have a tendency both to post-rationalise their behaviour and to forget

[25] Department for Business, Innovation and Skills (2014) Findings from the Survey of Employment Tribunal Applications 2013, Research Series No 177, 3.
[26] Ibid, 80.
[27] Id, 3.

details of their experience. Their responses may therefore be subject to selective recall or social desirability effects.[28]

The methodology used in the research reported in this article differed significantly from that used in SETA which nonetheless provides useful contextualisation for our findings.

Smaller scale studies have explored the experiences of ET claimants in specified circumstances. Aston et al focused on the experiences of claimants in race discrimination cases[29] and Denvir et al on those bringing claims of discrimination on the grounds of sexual orientation and religion and belief.[30] Both studies' findings broadly correlate with each other and with those in the current research. Many of the sexual orientation and religious or belief discrimination claimants felt that they were viewed as the problem by their employers rather than the victims of unfair treatment.[31] Alston et al found low levels of awareness of what would be involved in taking a claim, including the timescales involved, the amount of work and legal knowledge required, and the need for representation.[32] Both studies found that, rather than being financially motivated, most claimants cited the pursuit of justice as their reason for bringing a claim.[33] Participants found legal representation to be unaffordable which, coupled with the stress involved, left no other option but to withdraw.[34] A lack of money was also the main reason why many settled at pre-hearing stage with other factors being the health and wellbeing of the individual and/or her or his wider family.[35] Both studies

[28] Id, 18.
[29] Aston et al, n 24. 40 in depth qualitative interviews were conducted with claimants.
[30] Denvir et al, n 24. 15 in-depth qualitative interviews were conducted with claimants with sexual orientation discrimination claims and 15 with religion or belief discrimination claims.
[31] Ibid, 3.
[32] Aston et al, ix.
[33] Aston et al ibid; Denvir et al, 3.
[34] Aston et al, xi; Denvir et al, 3.
[35] Aston et al, xi, Denvir et al, 3.

reported long-term negative impacts on individuals' physical health, emotional well-being and finances.[36] Despite this, most participants reflected that bringing a claim was the right thing to have done - 'an important symbolic gesture'.[37]

Both studies were concerned with the accessibility and application of well-defined employment rights guaranteed by statutory provision. Yet, as the findings show, statutory protection does not guard against the imbalance of power between claimant and respondent serving as a barrier to justice. Some race discrimination claimants attributed being unable to follow what was happening in their own cases to the respondents' access to paid representation and wider support, including from witnesses, which gave their employers more power whilst reducing their own agency.[38] Many of those with sexual orientation claims felt disadvantaged from the outset, regardless of the merits of the case, with cost threats by employers leading to withdrawal or early settlement for some.[39] For religion or belief claimants who made it to full hearing, this imbalance of power was evident in the levels of representation and other resources available to employers as well as in understanding the 'jargon, etiquette and legal technicalities.'[40] Participants in both studies noted a difference in the impact of the case on claimants and respondents:[41] whereas claimants often experienced long-term adverse effects on their wellbeing and finances, employers were able to move on apparently unscathed. These findings paint a bleak picture even in cases which are apparently well supported by established legal frameworks,

[36] Aston et al, xii; Denvir et al, 3.
[37] Denvir et al, 4.
[38] Aston et al, xii. The issue of power relations in the context of the research reported in this article has been specifically explored in E. Rose and N. Busby 'Power Relations in Employment Disputes' (2017) 44 *Journal of Law and Society* 4, 674.
[39] Denvir et al, 129.
[40] Denvir et al, 130.
[41] Ibid,

begging the question of how those with work-related problems which are less clearly defined in legal terms fare.

Pollert and Charlwood[42] analysed the Unrepresented Workers Survey (URWS) consisting of data from telephone interviews with 501 workers who had experienced or were experiencing problems at work. The 'problems' were not necessarily linked to legal claims, although they were potentially underpinned by law, included pay, stress, bullying, workload, working hours, health and safety, taking time off, and discrimination.[43] All of the workers concerned had attempted resolution using internal grievance and associated procedures. The research focused on the 'most vulnerable' workers, defined as those in low paid and non-unionised jobs[44] who often find themselves outside of the triple regulatory regimes of collective bargaining, employment protection and the national insurance system.[45] Unlike the workers in the studies by Aston and Denvir or those in the research reported in this article, most (58%) were still in their 'problem' jobs when they were interviewed. Pollert and Charlwood concluded that such workers had a 'very poor chance of resolving problems satisfactorily at work': only 16% did so and 47% achieved no outcome.[46] This finding matches other studies on resolution: Genn[47] found that 52% of workers who took action to resolve a work-related problem with potential legal redress reached no agreement and no resolution. In considering what the findings reveal about the wider employment rights landscape, the authors reflected on the powerlessness of

[42] A. Pollert and A Charlwood, 'The Vulnerable Worker in Britain and Problems at Work, Work' 23 (2009) *Employment and Society* 2, 343.
[43] Ibid, 334.
[44] Ibid.
[45] S. Fredman, 'Women at Work: The Broken Promise of Flexicurity', 33 (2003) *Industrial Law Journal* 4, 299.
[46] Pollert and Charlwood, 334.
[47] Genn (1999) n 23, 157.

such workers which could, 'to a limited extent, be mitigated by collective representation combined with statutory individual employment rights.'[48]

The workers in the URWS matched the (then) New Labour Government's 'definition' of 'vulnerability', which was,

> 'someone working in an environment where the risk of being denied employment rights is high and who does not have the capacity or means to protect themselves from that abuse. Both factors need to be present. A worker may be susceptible to vulnerability, but that is only significant if an employer exploits that vulnerability'.[49]

Working in certain specified sectors[50] was identified as placing the worker as being at risk of vulnerability, as did the absence of human resources departments within organisations and non-unionism.[51]

Pollert and Charlwood asserted that the scope should be broadened to include all low paid and unrepresented workers who 'face a significant risk of being denied their employment rights because they are likely to face problems at work which are not resolved in their favour'.[52] Furthermore, the authors argued that the Government's description of vulnerability was not a definition but a list of symptoms related to industries and characteristics associated with risks with no attempt to identify and address the reasons for those risks. The pre-condition that 'exploitation' (undefined)

[48] Pollert and Charlwood, 354.
[49] DTI (2006) *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers. A Policy Statement for This Parliament* (Department of Trade and Industry, 2006), 25.
[50] Such as retail, hotels, restaurants, care homes, textiles, construction, security and cleaning.
[51] DTI, n 49, 25.
[52] Pollert and Charlwood, 354.

must be present meant that, 'to be vulnerable, a worker must already be a victim of abuse'.

As the current Government's commissioned review of modern working practices[53] considered later in this paper reveals, the nebulous concept of worker vulnerability continues to inform and shape public policy. The current formulation's implicit attribution of vulnerability to the workers themselves is a consequence of the individualisation of labour law and the predominance of the labour market as the main determinant of policy-making.[54] Law and policy encourages and enforces workers' self-identification as market actors and this is shaped and perpetuated by individual experiences of contracting and the wider context within which it takes place.[55] Workers are 'entrepreneurs of themselves',[56] and are called upon to command their own work-life balance by becoming 'the CEO of me'.[57] Implicit is the expectation that individuals bear the risks of finding and maintaining paid work with an inability to do so perceived as a failure to perform successfully in the market. Within organisations the exercise of participative and consensual forms of regulation up to and including collective bargaining has been replaced by formalised unilateral managerialism exercised by human resource practitioners and their legal advisors[58]. Working arrangements are dictated through, for example, the use of standard contracts including zero hours and enforced self-employment; the means of resistance and contestation are controlled and organisational risk, both economic and legal, is minimised.[59]

[53] The Taylor Review, n 11.
[54] See R. Dukes 'Introduction to Special Issue on Labour Laws and Labour Markets: New Methodologies' 27 (2018) Social and Legal Studies, 4, 407.
[55] Rose and Busby n 38.
[56] M. Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978 -1979* (2010); Rose and Busby ibid, 681.
[57] E.E. Kossek *CEO of Me: Creating a Life That Works in the Flexible Job Age* (2007, FT Press)
[58] Barmes n 23.
[59] Ibid.

Alongside the shift away from organisational and institutional conflict resolution, the mechanisms for accessing justice have also been the target of change with the ET system subjected to considerable recent reform. As well as restricting the accessibility of the system through the introduction of mandatory fees prior to the Supreme Court's intervention,[60] such change has been aimed at shifting the epicentre of resolution in all but the most entrenched cases from the ET to alternative methods such as conciliation and other forms of private negotiated settlement. The overall effect has been a reframing of the nature of individual workplace conflict so that, rather than being cited as exploitation and an abuse of power, the denial of rights is categorised as a disagreement between the parties which can be ignored or resolved with minimal third party intervention.[61] This reframing can have a devastating effect on the individual involved who, even where a 'positive' outcome by way of a negotiated settlement is achieved, is left to bear the ongoing costs - financial and psychological - compounding a deep-seated feeling of unjustness.[62]

Fuelling the move away from adjudication by the ET is the underlying assumption that the provision of a free and accessible system has made it too easy for workers to bring ill-founded claims. Rather than the victim of alleged wrongdoing or exploitation, the claimant has been recast as, at best, unnecessarily litigious and, at worst, vexatious and vindictive. This characterisation has taken hold in the public consciousness through ideological endorsement and media reporting against the backdrop of economic instability and the austerity agenda. Normalised by the political rhetoric

[60] Unison judgment, n. 7.

[61] See L. Dickens (ed.) *Making Employment Rights Effective: Issues of Enforcement and Compliance* (2015, Hart), especially Chapter 11.

[62] As well as the feeling of vindication, negotiated financial settlements may not provide the same financial compensation as a Tribunal award which may, for example, take injury to feelings into account in discrimination claims.

accompanying policy reform,[63] 'the hard working tax payer' or 'striver' is pitted against the feckless claimant or 'skiver' who represents a drain on the system.[64] In this analysis the suppression of ET claims, rather than being an affront to the rule of law, is in the public interest: without expensive litigation to fund, the state and employing organisations can get on with business and economic efficiency will be restored to markets without costly regulatory drags.

The subjugation of labour law, including its interrelationship with the civil justice system, to macroeconomic policy has also been reflected in the focus on the market as the primary site of analysis by labour law scholars.[65] In our analysis of the research reported in the rest of this article, we seek to challenge the assumption that the public interest is best served by the denial of conflict and the suppression of claims and to reaffirm Genn's proposition that the opposite is true: that the civil justice system is, in itself, a public good.[66] In rejecting a 'market first' approach by which law serves as a policy-making tool, used to corral market forces as a means of improving narrowly defined economic indicators, we focus on the human stories of those attempting to use the ET to achieve justice and on how such individuals perceive and experience the system. Our overriding aim is to explore whether within this reconstituted context

[63] See, for example, the Coalition's Business Secretary Vince Cable's speech to the Engineering Employers' Federation in which he confirmed the Government's plans 'to radically reform employment relations' referring to 'a widespread feeling it is too easy to make unmerited claims' (see: www.gov.uk/government/speeches/reforming-employment-relations). In 2011 Chancellor George Osborne announced the increase in the qualifying period for unfair dismissal from one to two years stating, 'We respect the right of those who spent their whole lives building up a business, not to see that achievement destroyed by a vexatious appeal to an employment tribunal. So we are now going to make it much less risky for businesses to hire people' (see: https://www.telegraph.co.uk/news/politics/georgeosborne/8804027/Conservative-Party-Conference-2011-George-Osborne-speech-in-full.html). On the vilification of ET claimants, see further E. Kirk The 'Problem' with the Employment Tribunal System: Reform, Rhetoric and Realities for the Clients of Citizens' Advice Bureaux' (2017) Work, Employment and Society, and 'Employment Tribunal Claims: Debunking the Myths', at: https://www.bristol.ac.uk/policybristol/policy-briefings/employment-tribunal/

[64] This characterisation is not empirically supported as most claimants do in fact pay for legal advice and representation - n. 3 ibid.

[65] R. Dukes *The Labour Constitution: The Enduring Idea of Labour Law* (2014, OUP), 110-112.

[66] Genn n 3,

for workplace conflict, the means by which individual legal claims are dealt with still have the capacity to convert private interests into matters of public concern in order to serve labour law's public interest function.

3. NEW SITES OF LEGAL CONSCIOUSNESS: CITIZENS ADVICE BUREAUX AND EMPLOYMENT DISPUTES

A. The Pilot Study

The current research originated from a pilot study conducted in 2011. Although the methodology used in both was similar, the pilot covered only 10 participants drawn from one geographical area. As the findings from the pilot study demonstrated[67] the experience of bringing an ET claim can be particularly daunting for those with limited resources and low levels of support. Claimants reported feelings of isolation and alienation from the process so that they increasingly felt like bystanders in their own claims. Moreover, despite the important role played by CAB advisers in performing 'acts of translation',[68] individuals struggled with the language of law – terms such as 'bundles', 'claimant', 'respondent' are meaningless to those outside of the system - as well as with the complexities of employment law itself. The results of the pilot study left us keen to explore whether and to what extent these findings might be replicated in a larger-scale project involving a greater number of participants within different geographical locations. We embarked on the current project in 2012.

B. The Current Project

[67] N. Busby and M. McDermont 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41 ILJ 2, 166.

[68] M. McDermont 'Acts of Translation: UK Advice Agencies and the Creation of Matters-of-Public-Concern' Critical Social Policy 33 (2012) 2, 218.

The research was conducted through a partnership between the Universities of Bristol and Strathclyde and Citizens Advice and Citizens Advice Scotland. The research participants ('the claimants') were recruited through a network of Citizens Advice Bureaux (CABx) in Scotland, England and Northern Ireland where, having sought assistance with a work problem or related issue such as debt, they were assessed as having a viable ET claim. Their experiences and perceptions were observed and recorded using a case-tracking methodology to collect longitudinal data. By focusing on the encounters and interactions between client, advice bureau, and other institutional actors such as Acas, the ET and the Courts and Tribunals Service (CTS), we considered how the relationship between the CAB and the claimant shaped the strategy adopted in the case and how the different levels of support affected claimants' decision-making and actions including the identification and assertion of their rights.

C. The Policy Backdrop

Over the four years during which the data were collected (2012-2016), the legal framework was subject to change and instability. The qualifying period for unfair dismissal was extended from one to two years' continuous employment[69] and the provisions of the Equality Act 2010 were subject to repeal[70] or not enacted.[71] The introduction of claimants' fees in July 2013, not part of the policy horizon during the pilot study, led to reductions in claims across all jurisdictions.[72] Following a judicial

[69] The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 came into force on 6 April 2012.

[70] The third-party harassment liability provisions under section 40(2) were repealed by the Enterprise and Regulatory Reform Act 2013 .

[71] In November 2010 then Home Secretary Theresa May announced that the Government would not be implementing the socio-economic duty provided by s.1. See https://www.gov.uk/government/speeches/theresa-mays-equality-strategy-speech. The duty has recently been implemented in Scotland as the Fairer Scotland Duty.

[72] Amounting to a reduction of around 67% in single cases and 72% in multiple cases based on official quarterly statistics, see D. Pyper, F. McGuiness and J. Brown, *Employment Tribunal Fees* (House of Commons Briefing Paper, No.7081), at: http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07081

review brought by Unison, the fees regime was ruled unlawful by the Supreme Court in 2017[73] and fees were abolished. As our findings demonstrate, although the imposition of fees exacerbated the difficulties faced by ET claimants, they were by no means the sole cause of those difficulties.

The introduction in 2014[74] of mandatory Acas notification prior to submitting an ET claim aims to encourage early conciliation (EC) and thus avoid litigation. Following notification, Acas will appoint a Conciliation Officer (CO) charged with attempting to achieve a negotiated settlement between the parties. Although EC can offer a suitable alternative to the ET, many claimants still require support and advice in the resulting negotiation. Cuts to legal aid and changes to the funding arrangements of CABx mean that the level of representation which might once have been available in negotiations or at hearings is no longer an option in many cases. With stretched and dwindling budgets, CABx are increasingly unable to offer much more than case preparation leaving a growing number of claimants with no option but to self-represent.

D. The Bureaux[75]

Table 1 shows a breakdown of the participating bureaux and the employment case support available in each. Seven bureaux took part in the research, three based in Scotland, three in England and one in Northern Ireland.[76] There was a diversity of provision in the employment advice and support available: one bureau offered an in-house solicitor until legal aid was withdrawn for this service; one had an arrangement

[73] Unison, n 5.
[74] The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014, in force 6 April 2014.
[75] During the research period Citizens Advice's rebranding exercise resulted in its discontinuation of the term 'bureaux'. The term is retained here as it is how most research participants referred to their local Citizens Advice office.
[76] Fees were never payable in Northern Ireland.

with a local solicitor; others employed specialist advisers and all provided trained volunteer advisers. In addition, some bureaux were able to provide solicitors under pro-bono arrangements and others had ad hoc arrangements with law centres and/or with student-run law clinics. Most of the participating bureaux were unable to offer representation for most cases due to a lack of resources.

Table 1: Summary of Participating Bureaux

Site	Location	% Ethnic minorities[77]	% JSA claimants (% males)[78]	CAB employment service provided
A	London borough	46	2.8 (3.3)	CAB advisor with specialist employment knowledge provides basic advice; clients with on-going casework referred to local law centre. Pro bono solicitor offering one free session.
B	Town and surrounds, Scotland	2	4.2 (6.3)	Solicitor, acting for clients up to and at ET.
C	Town and surrounds, Scotland	1	3.8 (5.5)	CAB advisor with specialist employment knowledge (including legal training), advice up to and occasionally at ET Generalist advisors
D	Urban, England	11	2.5 (3.2)	CAB advisors developing specialist employment knowledge, advice for less complex cases only, up to but not at ET. Solicitor will take on limited cases, up to and at ET
E	Urban, England	16	2.1 (2.7)	CAB advisors with specialist employment knowledge, advice for 'simple' cases only, up to but not at ET. Generalist advisors.
F	Urban, Scotland	2[79]	3.8 (5.4) [80]	CAB advisor with specialist employment knowledge (partially legally qualified), advice up to and occasionally at ET.
G	Town and surrounds Northern Ireland	10[81]	6.8 (2.7) [82]	Experienced generalist advisors deal with initial employment queries. Specialist employment advisor will undertake case work up to and including, in limited circumstances, at the Northern Irish Industrial Tribunal.

[77] Based on the 2011 Census published by ONS: www.ons.gov.uk/ons/datasets-and-tables/index.html?pageSize=50&sortBy=none&sortDirection=none&newquery=KS201UK

[78] Figures (except for Sites F and G) as at February 2015, published on the NOMIS website: www.nomisweb.co.uk/reports/lmp/la/contents.aspx,. The comparable figure for Great Britain as a whole was 2.0% (2.6% males) and for Scotland was 2.5% (3.5% males).

[79] From the 2001 Census, which has been analysed to Neighbourhood level (a comparable 2011 figure has not been found), as published on the local authority website.

[80] Figures relate to the local authority area and not the specific neighbourhood in which we undertook the research.

[81] Local Authority website.

[82] Figures are only available for the whole of Northern Ireland, whereas all other figures cited reflect regional population densities.

Recruitment occurred at the bureaux where a researcher took notes at initial and subsequent advice meetings. Regular contact was maintained with the claimant with his/her thoughts and reactions recorded at each stage of the case including, where relevant, following the hearing itself which was observed by the researcher. All claimants gave informed consent and were free to withdraw from the study at any time.

E. The Claimants

A total of 158 claimants were recruited. Table 2 shows the actions taken and levels of support and representation received beyond the initial advice meeting. Not all claims were submitted to the ET and, of those that were, only a small minority went to a full hearing. In addition to the individual case studies, focus groups and one-to-one interviews were conducted with CAB advisers who shared their insights and personal experiences of advising and supporting claimants. The resulting data were used to inform the overall research findings.

The claimants in this study represent a particular constituency: those who cannot afford to pay for legal advice and representation and who are not generally able to access such support through other means such as trade union membership. We did not intend to provide a representative sample with initial contact being fairly random. Nonetheless, many of the claimants shared certain common characteristics. They worked largely in unskilled occupations focused in a narrow range of sectors including catering, care work and other forms of manual work with a proliferation of zero hours contracts. The vast majority (90%) were employed in the private sector and were not trade union members. There was a high representation (24%) of migrant workers[83]

[83] Represented by 38 claimants in total, only two of whom spoke English as their first language. The breakdown of nationalities was: 6 Polish; 4 Lithuanian; 3 Spanish; 2 Portuguese; 2 Somalian; one each from Brazil, Colombia,

and 60% of the claimants were women. Both the average and median age of participants was 43 years. These individuals are often the unheard voices in research and also in exercises such as government consultations on the operation of the ET and/or the civil justice system more generally.

Table 2: Actions Taken and Levels of Support Received

Category	Action Taken (% of total)	
Total number of claimants	**158**	
No ET1 submitted	**93** (59%)	
Claim submitted to small claims court	**2**(1%)	
Unknown	**5** (3%)	
ET1 submitted, of which:	**58** (37%)	
End status		
Not processed (insufficient info for remission)		1
Struck out		1
Withdrawn		6
Post-ET1 settlement		19
Default judgment		5
Outcome unknown		8
Full hearing		18
Levels of Support Received beyond Initial Advice (including assistance with case preparation, negotiation and, where applicable, representation at hearing)		
Little or none		20
CAB Solicitor		19
CAB Adviser		13
Paid for a solicitor[84]		6

4. THE FINDINGS

The presentation of the findings[85] is structured loosely in line with the life course of a claim, starting with the initial advice meeting at which the 'problem' is reframed as a

East Timor, Ethiopia, France, Germany, Hungary, India, Iran, Latvia, New Zealand, Nigeria, Pakistan, Slovakia, South Africa and Swaziland. The nationality of the remaining five migrant claimants is unknown.

[84] A number of clients from Bureau A were represented on a no win no fee basis by a solicitor who provides free initial consultation, others across different bureaux sought private legal representation.

[85] Further information is available in a series of reports published on the project website: http://www.bristol.ac.uk/law/research/advice-agencies-research/citizens-advice-bureaux/publications/

'claim', ending with successful claimants' experiences of attempting to enforce financial awards.

A. From 'Problem' to 'Claim'

Individuals who seek advice from the CAB have varying degrees of knowledge of their legal rights and varying expectations about how the law may apply to their particular circumstances.[86] Advisers are involved in complex processes of interpretation, pinpointing whether a legal problem exists and identifying what can be done about it. They 'translate' back to their client whether and how employment law relates to their case. Some individuals are empowered by the process of gaining insight into how what has happened to them corresponds with the existence of legally enforceable rights and by becoming actively involved in the resolution process. For others the advice that, despite a deep feeling of personal injustice, there is no legal foundation for a claim or that their case will be too difficult to prove can be shattering.

Marta, a Polish hotel worker, believed that there was a racial element to the bullying she had experienced by her line manager resulting in her dismissal which had been attributed to her attitude. However, she was advised that she lacked the necessary two years continuous employment to make an unfair dismissal claim and that her allegations of race discrimination would be extremely difficult to prove. Marta described the impossible battle in which the limits of the law meant that her employer would not be held accountable,

> You think you can fight with the wind…there's nothing you can do if you start to fight the wind.

[86] E. Kirk and N. Busby 'Led up the Tribunal Path? Employment Disputes, Legal Consciousness and Trust in the Protection of Law', available: Oñati Socio-Legal Series, Vol. 7, No. 7, 2017

Despite being owed wages, Marta decided not to take any action and described her experience thus,

> It was just hell, it was just awful. I felt that I was so unimportant basically, all of my power…all of that had just gone down.

In those cases which do proceed, the extent to which an adviser encourages claimant involvement will often depend on an assessment of the individual's competencies, abilities and resources. Unsurprisingly those with greater levels of education, social capital and economic resources on which to draw are better able to navigate the system and to engage with relevant legal processes. Those with less resources and additional difficulties such as low levels of written and/or spoken English rely more heavily on the advice and support of the CAB. For such claimants, even 'simple' claims can prove to be very complex. Veronika a Lithuanian kitchen porter with a claim for unpaid wages often struggled to understand the advice she was given if a translator was not present and found written communications problematic. Rosa, a Portuguese migrant seeking £400 in unpaid wages from a cleaning job, saw a 'no win no fee' solicitor at Bureau A. Although her claim was assessed as viable, the solicitor advised her to pursue the claim by herself, presumably due to its low value. Rosa was frustrated by the lack of support available,

> I think [the CAB] could help more… be more involved with problem. Maybe when I went there ... I think before, they tell me, oh, go and fill up these and send this, maybe they could call to the company and check what's going on exactly, and then see what can I do, what's the next stop, and also, because I don't think my English is very good, they could help me to fill up this claim form. They didn't explain nothing.

For some, the reframing of their problem as a legal claim at the centre of a legal process, was the cause of stress and an inability to cope often exacerbated by certain phases and features. Such triggers, which include perceptions of the timescales involved, preparation for EC,[87] and the legalism encountered at every stage, often came on top of a protracted dispute, loss of a job, financial and emotional instability and uncertainty about the future. Many individuals decided to settle their case before reaching a hearing or to simply walk away without any resolution, reporting that they felt unable to continue.

B. The Pre-Hearing Period

Following online submission of the ET1, the timescales imposed at various stages of the process can be experienced as lengthy. In most cases, these timescales are not particularly long, for example, the employer is required to respond to the ET1 within 28 days of receiving it. Nonetheless, many claimants *experience* the process as subject to long delays and defined by waiting, probably due to the high stakes and degree of personal investment in the outcome. This frustration was reported by claimants at various stages: waiting for the Acas conciliation process to reach its conclusion, waiting for the employer to act, waiting to hear back from an advisor, waiting for news from the CTS.

Although most of the tracked cases pre-dated the introduction of ET fees, we did investigate their impact on claimants' experiences in two ways: through a sub-sample of 14 individuals who considered pursuing ET claims after the introduction of fees[88] and by conducting research with CAB advisers in Scotland using an online survey and

[87] Although EC itself was experienced positively by many.
[88] On 29th July 2013.

focus groups.[89] Most of the claimants in the study lived in low income households making them eligible for a full or partial waiver through the Fee Remission Scheme.[90] However, proving eligibility brought its own challenges due to the lengthy and complex paperwork and detailed documentary evidence required. The name 'Remission' which was unfamiliar to many users caused difficulty and misunderstanding.[91]

Even among our relatively small sample, it was clear that fees had a deterrent effect on workers' ability to pursue claims as, having recently lost their jobs, few are in a position to pay to take a case to the ET. This is particularly so if their previous work was low paid and there is a high likelihood that their future employment will also be. As one adviser explained, the relatively low value of claims among this group meant that a simple financial calculation often ruled out seeking justice,

> So their claim might be for £400 but the total fee is £360 so…they just think 'what's the point, it means I'm doubly out of pocket'… quite a lot of people are put off because their claims are on the lower end. [CAB Advisor Focus Group Participant]

As well as placing additional stress on the claimant and their CAB adviser, increasingly a non-specialist volunteer, the shadow of the fees influenced employers' strategies and prevented claimants from being able to access critical information relating to their claim which would have been disclosed on the ET3 response once the ET1 was submitted. As one adviser put it,

[89] See E. Rose, L. Wood and E. Kirk (2015) 'The Price of Justice: The impact of Employment Tribunal fees - A perspective from Citizens Advice advisers in Scotland', at: http://www.bristol.ac.uk/media-library/sites/law/The%20Price%20of%20Justice%20final%20with%20cover%20and%20back.pdf

[90] The Courts and Tribunals Fee Remissions Order 2013, SI 2013/2302.

[91] Following streamlining of the application form, associated guidance and assessment process and renaming of the scheme as 'The Help with Fees Scheme' in October 2015, users reported improvements.

> …if someone came to me and gave me their story - unfairly dismissed - you take all their story, we usually do… depending on time limits you put the ET1 in and see what you got back. And then you say to the client "Can you counter this? No? Just withdraw". But now they can't do that [as] it's going to cost just to get a copy of what [the other side is] are saying. [CAB Advisor Focus Group Participant]

The imposition of fees undoubtedly served as a deterrent to claimants and also influenced their decision-making during the course of their claim as the impact of paying the higher second-stage hearing fee became apparent. In this respect, fees were one of a range of factors that prevented claimants from proceeding to full hearing. Others included resolution through EC or other form of settlement, a new job and new start, or a decision that the stress and impact on other areas of life were just too great to continue. The non-pursuance of justice can have a detrimental effect on a worker's employment prospects: an unexplained departure and/or lack of a reference from a previous employment can leave a 'blemish' on an employment record substantially affecting future employment prospects.[92]

Sally's case was assessed as an unfair dismissal claim with a good chance of success. Just before the hearing was due to take place, Sally accepted the offer of a financial settlement and reference despite feeling that justice would have been better served by her having her day in court. She had already lost one job opportunity because of the lack of a reference and now had an offer that was dependent upon one. Since losing her job in a local shop, Sally had become virtually housebound: she felt

[92] See E. Rose, E. Kirk, N. Busby and R, Simms (2017) 'Inaccessible justice: What happens to workers who don't pursue employment claims?' available: http://www.bristol.ac.uk/law/research/advice-agencies-research/citizens-advice-bureaux/

ashamed of her situation and was unable to pick up her daughter from school. Settling became the most rational course of action. In reflecting on her strong sense of dissonance with her decision and her inability to stand up to her former employer, Sally acknowledged the State's responsibility for her predicament,

> The law isn't there for 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… the working class are getting punished every single turn.

As Sally's case shows, the ET process offers the claimant an opportunity to right an injustice. By the time it enters the system as a claim, the dispute can be entrenched and of a highly personal nature. The claimant often has to interact with a range of different organisations and individuals, retelling the story of what has brought her to this stage. For the unrepresented claimant in particular this can be highly pressurised and confusing. Some claimants become unsure of their own role within the process, finding it difficult to identify what is expected of them and to understand the involvement of their advisor or the ET itself. A further source of confusion was the interaction between the claimant and Acas. As the following section illustrates, this is not because COs and other Acas personnel are ineffective communicators or because the service is not well received by claimants – on the contrary the overall evaluation of the range of services offered by Acas was positive. Rather, the multiple roles performed by the organisation and its apparent shape-shifting are often a source of confusion raising unrealistic expectations on the part of the claimant.

C. Perceptions of Acas

67 of the claimants in our study reported some interaction with Acas: 27 merely consulted the website and/or made use of the free helpline and 48 went on to engage

with EC[93] - 36 with the assistance of an adviser or CAB-provided solicitor and 12 without assistance. Although Acas has always offered conciliation in employment cases, the EC scheme makes pre-claim notification mandatory. Following notification and subject to the agreement of both the employer and claimant, conciliation is attempted which may result in a binding settlement (a COT3 agreement) or in the issue of a certificate to the claimant who can then submit an ET1.

The claimants in our study were often unaware of Acas' independence and its range of functions,

> I got this letter through. I don't understand it properly. From Acas. [When asked by the researcher if he knows who they are] I haven't got a clue. All it says 'The Employment Tribunal has sent this copy of the claim to Acas as our' – what's that? 'collectors'? [Keith]

Some saw it as part of the advice sector,

> … it's a bit like the CAB, I thought. Is it somewhere for your rights, really? Is it like a human rights association or something like that? [Ali]

> Well, all I really knew was they were like a … they were a union or … they would give you advice on employment law and your, your rights like. [Fran]

The free Helpline service run by Acas is an extremely useful point of contact for this particular group of claimants, providing advice about their employment rights and how to go about invoking them, including signposting to the CAB as a means of gaining face-to-face advice and assistance. Many claimants used the service as a first point

[93] Including merely making a notification to Acas as the first step in the ET process up to reaching a COT3 agreement.

of contact, returning to it intermittently as their claim progressed, describing it as helpful in enabling them to understand and engage with the dispute resolution process and empowering them to make decisions about how to proceed. The fact that EC is also administered by Acas and typically encountered after claimants' awareness of its advice and support function has been established can represent a bewildering shift in Acas's role. The CO assigned to the case takes a neutral stance and is thus unable to offer advice to the claimant who, as conciliation progresses, is likely to find himself embroiled in complex negotiations involving the terms of a settlement. Some claimants misunderstood the CO's impartiality believing him or her to be a 'go-between' in interactions with the employer. When requests for specific advice were refused by the CO, this could be misinterpreted as a sign of complicity with the employer. To the informed, EC and the helpline service are separate Acas functions, provided by distinct parts of the organisation, but this demarcation is not always clear to claimants.

> I mean he [the CO] does listen to my issues that I have but he can't really help me because he doesn't get involved with the documents or the paperwork. He says that his job is to try and settle out of court. … He doesn't really get involved. He just kind of like puts up with me really. I'll explain what my concern is … But most of the things he can't advise me on ... So no, it's not really much help Acas conciliation. I mean the helpline was excellent before [Tommy]

In the online guidance[94] to which all would-be claimants are directed from the ET claim submission page[95] EC is described as 'the better way to resolve workplace disputes' and 'the free, fast and less stressful alternative to an employment tribunal for resolving workplace disputes'. This can imply that EC offers an alternative to legal advice and

[94] http://www.acas.org.uk/index.aspx?articleid=4028
[95] https://www.employmenttribunals.service.gov.uk/apply

representation or at least that the claimant should be able to go it alone, navigating the process without legal assistance. In reality, a lack of experience and knowledge of how to participate in negotiations and what to expect by way of outcome can leave unrepresented claimants feeling exposed and alone. In addition, claimants and advisers reported feeling under pressure to settle, making independent legal advice even more important in ensuring that the best outcome is achieved. As one adviser commented,

> Clients often don't know what they want [from Acas conciliation] or what they could get. And so they're having to approach Acas, "Oh, I've been dismissed"… And Acas ask them, "Well, what do you want?" And they don't know what they want. [Maria, specialist CAB advisor].

The suitability of conciliation as a means of resolving some claims, particularly the more contentious, is questionable. Its neutral stance, by which success depends merely on both parties reaching agreement, means that it is not concerned with the quality or justness of the settlement.[96] There is, thus, an implicit assumption that the parties know their legal rights and understand the implications of settling, including the confidential nature of the agreement reached, and are equally situated with regard to their ability to negotiate until a mutually acceptable position is achieved. In reality, the claimants in our research often lacked the knowledge and skill required to reach an informed settlement, particularly regarding what to ask for financially.

[96] L. Dickens, 'The Role of Conciliation in the Employment Tribunal System' in N Busby, M McDermont, E Rose and A Sales (eds), *Access to Justice in the Employment Tribunal: Surveying the Terrain* (Liverpool, Institute of Employment Rights, 2013).

As well as ignoring the inequality in available resources, this overlooks the power dynamics at play.[97] Perhaps the greatest cause of disappointment for those claimants who felt they had little choice but to settle their claims through EC is that the process does not directly address the wrongdoing so that the employer is not required to apologise and is not admonished or punished for their treatment of the claimant,

> From my point of view, [Acas conciliation has] always been quite positive. But I know a lot of clients come back to me and say that they're sometimes not very helpful or even, as one client recently said, [the CO] was quite rude because this client was saying 'No, I don't want that'. It's almost like they expect you to just say, 'Yes, I'll settle for that amount of money'… I think sometimes they think, 'Oh, it's just about the money', where it's not necessarily just about the money, is it? [Maria, specialist CAB advisor].

D. **Legalism**

The particular complexity of employment law is widely acknowledged within the legal profession. As well as a detailed understanding of procedure, domestic legislation and common law and their interpretation by tribunals and courts, legal practitioners are required to be familiar with the technicalities of EU law. The identification of legally material facts and applicable law can prove extremely difficult for a lay person with a highly personal investment in the case. As Lena, an unrepresented claimant explained,

> A barrister can express his opinion very openly and very precisely, whereas somebody like me, I mean I was very emotional.

[97] See Rose and Busby, n 38.

Technical issues such as whether employment status applies, and the nature of civil law and its operationalisation through party-party litigation can prove problematic. Veronika had a vague sense that the non-payment of wages was illegal but expected there to be some form of public enforcement available. When directed to the CAB by a friend, she appeared confused about the whole process. Later she reflected,

> I didn't know anything about the tribunal whatever, I came to [the CAB] because I needed help in recovering my P45 and the last two/three weeks' wages because I was going to [the place of employment] several times…and the manager was always saying you know like, 'Okay, come next week, phone tomorrow.'…and I was calling and going for about two or three weeks.. [eventually I told the manager] 'I want my P45 and I want my money and if you don't give it to me I will go to the police', but I didn't… Well I wanted [my] P45 more than money… everyone went to Housing Department, the Job Centre, I didn't know where else to get this P45 and I went to the Advice Bureau for them to help me and when I have told them my story you know they started it. (through a translator)

Veronika's difficulty in comprehending the system illustrates how law remains 'out there', accessible only in a vague way by the individual claimant. Where a solicitor or advice worker provides support or runs the case on the claimant's behalf, this might not matter so much. However, where individual claimants have to go it alone or with minimal support, ignorance of the law can have consequences. Margaret, a claimant with basic schooling, worked on her own case constructing multiple claims including constructive dismissal and direct discrimination which she outlined on her ET1 form. A CAB adviser had suggested she could do this by herself, but she found it 'daunting',

> I just looked it up in the books… I can remember the [respondent's] barrister saying at the beginning I'd submitted five different cases, but I did it to the best of my ability. I'd read in a library book that that comes under … what I thought was direct discrimination but I had read that very few people win on direct discrimination but I felt it matched, and I just assumed that even if I got it wrong somebody would say to me at the Employment Tribunal.

In an initial case management discussion it became clear that, in the judge's view, Margaret's claim was not clearly set out. The poorly prepared ET1 would be the start of a long and protracted process for Margaret consisting of three case management discussions and a preliminary hearing resulting in simplification of her claim.

Most people are unfamiliar with the nature and extent of employment rights let alone the actions required to invoke them. This is not surprising as we take the regular payment of our wages for granted, only engaging with the relevant law on a 'need to know' basis. Furthermore, many claimants have little or no knowledge of what to do should their invocation of rights fail to produce results. Unrepresented claimants like Margaret are unlikely to understand the significance of what they include on the ET1, how to make reference to appropriate facts or legal provisions or the procedure involved in an ET case. Despite the online accessibility of detailed guidance offered by the CTS,[98] many claimants remain unaware of its existence or fail to read and engage with it demonstrating that online resources or printed materials cannot substitute face-to-face personal interaction, particularly at a time of great stress. Lena described the overall experience of bringing a claim without representation thus,

[98] Making a Claim to an Employment Tribunal: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/737804/t420-eng.pdf

> It was all so peculiar. It was kind of mind-boggling… I am not educated in law, so the actual technicalities of it all and the actual wording of the paperwork, if you're not aware of all this, you need help really because you need somebody who actually understands it all and can say, 'this is what you need to do, 'this is how you need to present it, this is what the procedure is'. I didn't know any of that, I was just like doing what I thought was right.

Lena's lack of knowledge of the process proved to be a barrier in her pursuit of justice and resulted in her case being struck out despite, as the judge at her pre-hearing acknowledged, she did have a case for unfair dismissal. However, Lena had submitted her ET1 after the three month time limit and the prehearing had been set to determine whether she should be granted an extension. Having failed to understand this, Lena expected her case for unfair dismissal to be heard. She had not prepared appropriately and was pitted against a barrister acting on behalf of the respondent, raising another difficulty faced by claimants, that of the adversarial nature of the ET.

E. The Hearing

Claimants' perception of the ET as 'court like' is not inaccurate as, despite its name, the ET has more in common with the civil courts than with its fellow tribunals. As a party - party adversarial process the hearing can be a combative and contentious forum in which the employer – often through legal representatives – will fight to defend their position. Where this takes place before a judge, attempts will generally be made to remain polite and courteous. Even then, the experience of being cross-examined by a lawyer on the employer's behalf can be a very unpleasant and intimidating experience.

Bridgette, unrepresented at the hearing and accompanied by her mother, who was upset and tearful, felt

> …totally shocked that there would even be a barrister…They had four witnesses… a barrister, a solicitor and then there was a paralegal at the back and another girl, I think she was taking notes, and then the four witnesses, so eight of them…I think it was all a bit much.

Margaret, also unrepresented, thought it unfair to be up against an educated, legally trained and experienced litigator who was able to communicate freely with the judge,

> It was the barrister and the judge together, backwards and forwards… the barrister produced a wonderful documentation of his laws and everything, well he would do, he's been doing it all his life…I did feel like saying well, 'that's not fair; he's been to university and law school, and been doing it for years'… they've got all this experience and I've got none…If I do fail, I do think it's going to be on their laws, procedures, time limits.

All unrepresented claimants believed that if they had been represented at hearing, or if the respondent had not been, it would have made a positive difference to the experience. Reasons given for this included a lack of knowledge and experience as well as being able to avoid having to interact directly with the employer or his representative,

> I never expected someone like me to represent myself against the person who had been bullying them all this time. I find that a really weird and odd thing to have expected upon you. [Caroline]

Away from the judge's gaze, employers and their representatives can sometimes engage in unscrupulous game-playing and intimidating tactics. Examples include threats made in the waiting room that an unsuccessful claimant will have to pay the employer's costs and purposefully stalling in the provision of paperwork so that the claimant has less time to prepare for the hearing. Bridgette fought back, but this was unusual,

> The solicitors from their side though have been challenging to deal with… calling me at home, and threatening to sue me for college fees, to not give me a reference… paying their legal fees too - all through the mask of 'without prejudice' conversations. I have let the tribunal know directly of this intimidating behaviour, and will not be bullied into settling.

Margaret felt equally threatened but less able to fight her corner:

> They tend to try and get my letters to be received on a Saturday when I can't pick up the phone and speak to Acas or other professional establishments that can offer me assistance... they obviously can't hurt you physically, but they'll try their hardest to affect you mentally.

Interestingly, although only a small minority of the claimants in the study actually went to a full hearing, this tended to be less stressful than the path to it. That is not to deny that the prospect of appearing before a judge in what it was assumed would be a 'court-like' environment was a cause of great concern: almost all participants who faced the prospect were apprehensive about it. In advance of the hearing, few had a clear sense of the process involved or what would be expected of them. Many were concerned about their ability to engage with unfamiliar language and concepts and

worried that they would not be able to communicate what had happened to them in a meaningful and articulate manner. Brenda who was unrepresented said,

> it worries the life out of me really. I don't want to stand up there and make myself look a dick.

Caroline, who eventually reached a settlement with the support of a CAB advisor, said,

> I can't tell you the amount of worry that went through my head, thinking that I was going to have to do this myself.

Many of those representing themselves held on to the idea that the judge would somehow 'get to the truth'. Should the claimant fail to articulate their case clearly, their 'bundles' of evidence could be used as a fall back, the 'facts' therein would speak for themselves. However, as Margaret learned, this is not always the case,

> I felt as though [the judge] didn't have all the evidence in front of him… I was quite confused about that. I just thought I'd hand over all my files and they would just get read but you have to pull out sections and submit them.... He did say he hadn't had time to read it.

Nonetheless, it is apparent that judges often go to significant lengths to try and ensure that unrepresented claimants do have their say although this does not always enable them to do so due to a lack of confidence in what is often a new and alien environment and feelings of intimidation due to the formality of the hearing. However, judges' actions can have a positive effect on perceptions of the process and acceptance of the outcome regardless of whether judgment is given in the claimant's favour. Many claimants expect some level of formality so that the status of the person deciding their case (i.e. that of a 'Judge') is symbolically important. For many, the hearing before a

judge may be the first time that they feel that what has happened to them up to and including the loss of a job has been taken seriously.

In the lead-up to his hearing Alfie felt disadvantaged by not having legal representation but did look favourably upon the judge afterwards,

> One of the things that's intimidating is talking to the tribunal and speaking in front of a judge, but the judge was quite nice; she was understanding. She knew I didn't have a representative. Maybe if I'd had a solicitor, things might have been a little bit different.

Drawing on our observations of tribunal hearings and claimants' reflections, judges were often seen to explain procedures to unrepresented claimants using everyday language. Brian had been employed for eight years as a car valet until, following verbal abuse and threats by his line manager, he was forced to resign when his health began to suffer. Brian was severely dyslexic and relied on his partner to help with paperwork and written communications. He was reluctant to take his claim to the ET because he lacked confidence in his ability to explain what had happened to him and feared reprisals from his ex-manager. In the lead up to the hearing, he became extremely stressed and nervous.

Brian represented himself at the hearing as did his ex-employer. The judge explained that, as his claim was for constructive dismissal, Brian would have to demonstrate that he had resigned due to a breach of contract on the part of the employer and asked Brian the specific nature of the breach. Confused, Brian replied that he had never had a contract. In response, the judge reformulated his question, asking whether the specific incident that resulted in Brian's resignation was a 'one off' or if he had resigned due to a series of events with the latest being the 'final straw'. This encouraged Brian

to tell his story without feeling the need to use legal language and enabled the judge to deduce the legal relevance of what Brian recounted.

During cross-examination Brian and his ex-manager's exchanges became bad tempered and peppered with swear words. The judge was firm but clear,

> Excuse me, both of you … the point of me being here is to make a decision. If you want to have a carry on, go into the car park.

Through such interventions ET judges attempt to ensure that unrepresented parties receive a fair hearing, although it should be noted that some individuals still struggle to understand proceedings and to identify what is required of them. This is not to say that judges give any particular support to claimants which would compromise their own position, rather that they perform a levelling function ensuring, as far as possible, that unrepresented claimants and respondents have an equal chance to be heard. As in Bridgette's hearing, judges are quick to stress their own impartiality,

> "[The judge] seemed like quite a no nonsense sort of person. I'd say she was fair. People had told me, 'oh, representing yourself will go in your favour and they'll hold your hand' but I didn't feel that they held my hand at all... when she asked if I had the cross-examination questions and I said, 'yes', and she said, 'well, that's good because I'm not here to represent you'. I felt that if there was something that I'd majorly missed out that maybe they wouldn't have helped, because she kept saying, 'oh, I'm explaining this to you because you're not represented, I can't tell you…' [She] didn't overly try to be nice or anything, she just said the facts.

Perhaps unsurprisingly the claimants who had the most negative experiences at hearings were those with poor standards of spoken English. While translators are provided by the CTS, there was a disinclination to use them among some migrant participants because of the perception that this would weaken their case in the eyes of the judge. Unsurprisingly, those who lacked representation struggled to follow hearings without translators. One claimant had to ask the project researcher what the judge had said in her oral judgment. At a pre-hearing Maja, a warehouse picker engaged by an employment agency, felt that the judge was unsympathetic and disrespectful to her due to a reference to her Polish nationality. Maja perceived a lack of concern with the details of her case and attributed this to possible racism on the part of the judge,

> I cannot understand the judge, why she don't check every statement, why she don't read everything what I have got from [CAB Advisor]…I feeling like, you know, she don't care about myself, she don't care about the case….I feel like nobody important for her….she don't want to be honest, because in the moment, she is not honest, she says to me, 'we've got many Polish people in England for our work and then we've got many similar problem in the court'. What? I don't know. Maybe she don't like the Polish people. I feel really, really uncomfortable there.

What Maja perceived as the judge's attempt to avoid a full hearing by getting her to settle for £300 rather than the £1222 in unpaid wages that she had claimed was, in her view, akin to corruption, 'It was not like court. Seriously, I feel like crazy kid.' Maja refused to settle and a full hearing was scheduled before which the agency agreed to pay the full amount.

F. Enforcement: The Final Barrier

Success at the ET is by no means the end of the story for many claimants as enforcing an award can itself be highly problematic.[99] The most common experience for those claimants given a financial award against their employer was that they did not receive this money initially or, in some case, at all. Table 3 shows the enforcement outcomes achieved by claimants in England and Scotland. The success rate was high: of the 18 that went to a full hearing, 17 were granted an award including two default judgments in favour of the claimants. One case was appealed to the EAT and, of the remaining 16, only four received payment before interest became payable. From that group, seven took formal action to recover their award and two took informal action. The remaining three, all based in Scotland, had not taken any further action at the date of last contact with them. One was intending to pursue payment and two reported that they were unsure whether they wanted to spend more money trying to obtain their awards given the risk involved.

Table 3: Enforcement Outcomes[100]

Outcome Following ET Award	Claimants
Employer appealed to EAT	1
Prior to interest becoming payable:	
Received full award	4
After interest becoming payable:	
Received full award with formal enforcement procedures	5
Received partial award (through NI fund)	1

[99] Department for Business, Innovation & Skills (2013) *The Cost of a Hollow Victory: CAB Evidence on Enforcement of Employment Tribunal Awards* http://www.citizensadvice.org.uk/index/policy/policy_publications/the_cost_of_a_hollow_victory.htm. In the context of the current study, see E. Rose, M. McDermont, N. Busby, A. Sales and E. Kirk 'Employment Tribunal Fees: Effect on Clients of Citizens Advice Bureaux, at: http://www.bristol.ac.uk/media-library/sites/law/Fees%20report%205.8.15.pdf.

[100] This data does not include the outcomes for site G Northern Ireland.

Did not receive award with formal enforcement procedures	1
Received full award with informal action	1
Did not receive award with informal action	1
No action taken to recover award	3
Total	**17**

The outcomes for our claimant group broadly correlate with the findings from large-sale research carried out by the Department for Business, Innovation & Skills (BIS) into the payment of ET awards[101] which found that only 34% of participants who received their ET award did so without taking enforcement action. The comparable figure in our study is 36%. In the BIS study only 49% of claimants were paid their award in full with 16% receiving partial payment. The comparative percentages for the claimants in our study were 63% and 6% respectively. A similar percentage received all or some of their award: 65% in the BIS study compared with 69% in ours. The fact that a larger component of our claimants received their full award compared with the participants in the BIS study may be explained by the predominance of claims for unpaid wages involving relatively small amounts. Even for such claims, achieving full payment can require perseverance and determination.

As a first response to the non-payment of an ET award, claimants tended to seek advice from the CAB advisor or solicitor demonstrating a general willingness to pursue payment. Informal action was taken by two claimants who sent letters to their former employers. In one case the letter was written by the CAB advisor who had assisted in the claim resulting in payment of the award. The other case was that of Rosa who had not received any of the £400 of unpaid wages six months after the judgment. Her employer at a new cleaning job happened to be a solicitor who wrote to Rosa's former employer on her behalf to no avail. Not wanting to risk the £60 it would cost to utilise

[101] Department for Business, Innovation & Skills, ibid.

the Fast Track scheme[102] and feeling uncomfortable about seeking assistance to initiate the process, Rosa decided not to pursue formal enforcement. She spoke of 'a set of situations that have made me totally depressed with my experience.' and was considering returning to Portugal.

Of the seven claimants who took formal action, four were based in England and three in Scotland where the relevant processes vary. Three of those in England successfully used the Fast Track system to recoup their award. The remaining claimant obtained payment of the redundancy component through the National Insurance fund but lost the remainder of his award as he did not want to pay to force his ex-employer into insolvency. The three claimants in Scotland instructed Sheriff Court Officers to recoup their awards: two were successful and one was not. Veronika, who had been awarded a default judgment for £1540 in unpaid wages, did issue the instruction but the CAB which had helped with her claim was unable to provide any further assistance. Hindered by her poor English, Veronika found the process extremely difficult. She paid £100 for a bailiff to visit to the restaurant premises but the owner was not there. The Officers wrote to tell her that they believed the owner was on holiday, passing on a mobile number they had obtained for him. Following further contact with the Officers, Veronika believed that she had been advised to return to the CAB before her fee could be refunded, but admitted 'I don't know whether I understood everything correctly'. Having been passed from one institution to another and unable to grasp what she was being told, she felt hopeless,

[102] Details of the Fast Track Scheme for Enforcement can be found at: https://www.gov.uk/employment-tribunals/if-you-win-your-case For more on the experiences of our broader sample with respect to enforcing awards see: http://www.bristol.ac.uk/media-library/sites/law/documents/new-sites-publications/Enforcement%20report_final.pdf

> Worst kind of thing [is that] there is kind of no result from it… but perhaps I am doing something wrongly, I don't know… I think that all the organisations did what they could in establishing justice you know but [the ex-employer] is a hard person to deal with, hard to part with his money…I do not believe that something will come out of it.

5. REFLECTIONS AND FUTURE DIRECTIONS

A. The Taylor Review and Vulnerability

The findings from the earlier pilot were replicated in this larger-scale study with claimants' negative experiences exacerbated by the substantial changes to the civil justice landscape which had taken place in the intervening five year period. The presence of fees overshadowed the whole process: even those who qualified for remission felt that others' views of them were affected by the 'skiver'/'striver' dichotomy and this impacted on their self-identity. Where fees were payable, they influenced claimants' decision-making, advisers' strategies and employers' behaviour. Most of the cases in the study pre-dated fees but, as the data shows, they were only ever one of many barriers to justice. The others remain. Claimants, particularly those who are unrepresented, continue to express feelings of bewilderment and alienation in their interactions with the system. Whether procedural, financial or caused by a lack of other resources such as social capital, these barriers cause the abandonment of well-founded claims despite the existence of a comprehensive employment rights framework and a specialist tribunal. Even those whose claims are successful may be left without remedy due to the lack of effective enforcement procedures.

The current study's contribution to the literature lies in its intimate and detailed retelling, in the claimants' own words, of how the system is experienced by a growing

number of individuals who are left with little choice but to self-represent.[103] These accounts often go unheard in larger and more general studies. Already marginalised by labour market structures, such individuals remain outside of the system as they attempt resolution: they are not the participants in surveys intended to identify satisfaction levels[104] or national user groups aimed at improving the system. Despite that, we found them relatively easily and, if time and resources had allowed, could have found plenty more with similar stories. It is, therefore, somewhat surprising that in in its consideration of modern working practices, the Taylor Review appears not to have consulted those most likely to be directly by its recommendations. The Review's lack of independent research and transparency in the findings from public consultations, and details of any wider evidence base have already been criticised and its recommendations ably critiqued elsewhere.[105] One issue worth highlighting in the current context is the use of vulnerability as a means of categorising workers which is replicated in the Government's response to the Review.[106] The Review's report contains over 20 references to 'vulnerable workers', 'vulnerable people', 'vulnerable self-employed' and 'the most vulnerable', yet no attempt is made to define the term and its use in this context beyond some vague references to being 'vulnerable to exploitation' and to 'those on low wages'.[107] As Bales et al have observed in their critique of the Report, 'Abuse of power is treated as an issue for the most vulnerable

[103] See n. 3. The findings correlate broadly with those in the earlier studies from over a decade ago by Aston et al (2006), n 29, and Denvir et al (2007) n 30, with a wider range of claims included in the data reported here.
[104] See the largescale Satisfaction of Employment Tribunal Applications (SETA) survey last conducted in 2013: https://www.gov.uk/government/publications/survey-of-employment-tribunal-applications-2013.
[105] K. Bales, A. Bogg and T. Novitz ''Voice' and 'Choice' in Modern Working Practices: Problems With the Taylor Review' 47 (2018) 1 ILJ 46, 54.
[106] The Good Work Plan (HM Government, 2018), available: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766167/good-work-plan-command-paper.pdf
[107] Taylor Report, 44. In contrast to the New Labour Government's definition of worker vulnerability critiqued by Pollert and Charlwood (n 42), the current Government does not appear to offer any specific definition.

rather than inevitable in the context of employment (or endemic in the labour market).'[108]

The binary categorisation of workers who are vulnerable and workers who are not overlooks that status and agency are not static. An alternative account recognises that vulnerability is omnipresent and universal as 'the characteristic that positions us in relation to each other as human beings and [which] also suggests a relationship of responsibility between the State and individual'.[109] Despite its universality, vulnerability is also particular so that, although all humans 'stand in a position of constant vulnerability, we are individually positioned differently'.[110] Different individuals and groups may, at certain moments, be particularly susceptible to societal or institutional harm and it is the State's responsibility to address such inequality by building resilience, defined as 'having the means to address and confront misfortune',[111] through law and policy. By failing to recognise vulnerability's universality, the Review risks apportioning responsibility and blame for an individual's circumstances to that individual.

Moreover, rather than any disquietude with the predicament of those workers deemed 'vulnerable', the Review's concern appears to be with the extent to which any attempt to address vulnerability would risk unsettling the flexibility which is identified as a core feature of the UK's labour market, so that 'in taking steps to protect those who are in a vulnerable position, we should not remove important working options for others.'[112] Worker exploitation is viewed as an inevitable consequence of a flexible labour market

[108] Bales et al, n 53, 50.
[109] M. A. Fineman 'The Vulnerable Subject and The Responsive State' 60 (2010) *Emory Law Journal* 251, 255.
[110] Ibid, 268.
[111] Ibid, 269.
[112] Taylor Report, 15.

with the challenge for Government identified as being 'to balance access to flexibility with suitable protection for those workers that may be more vulnerable to exploitation'.[113] The ill treatment of workers is identified by the 'many examples of increasing media and public concern in relation to worker exploitation'.[114] This betrays the lack of an evidence base or any deep consideration of the root causes of exploitation so that the need to provide 'suitable protection' appears as a public relations exercise. The preservation of flexibility is combined with post facto enforcement of rights once exploitation has occurred, as 'Action is needed to ensure employment protections are enforced and that vulnerable people have confidence that they will get redress for exploitation'.[115] Such an approach will not address the significant barriers to justice highlighted in research reported here.

The Review concludes that 'redress for exploitation' could be provided through public enforcement of the 'basic set of core pay rights',[116] namely National Minimum Wage, sick pay and holiday pay by HMRC. However, in the case of holiday pay, this would be 'restricted to those on low pay and not be a state-funded resource for those who could afford to take their case to an employment tribunal'.[117] In its response, the Government accepts this recommendation but is silent on the issue of affordability.[118] Although the introduction of a broader public enforcement regime would be a very welcome addition to the current framework, the Review's advocacy of a two track approach, coupled with its enthusiasm for the development of an online tool,[119] would

[113] Ibid, 28.
[114] Id.
[115] Id, 56.
[116] Ibid, 55.
[117] The review predated the Unison judgment and did not make any recommendations regarding the removal of fees.
[118] The Good Work Plan, n. 106, 48.
[119] Taylor Report, 39.

lead to further structural barriers for the type of claimants included in the current research. The suggestion that online provision could 'provide…advice and information on entitlement to rights, how to qualify for them, signposting further relevant information'[120] is accepted and included in the Government's Good Work Plan.[121] The assumption is that claims are based on a single issue which can be extracted from the full set of circumstances and dealt with in isolation. In practice, those with undefined employment status, may find it impossible to progress their claim until the status issue is settled. For example, the non-payment of holiday pay may come to light only at the end of a contract and coincide with a dispute about employment status. That an individual with no advice or support should use an online toolkit to assess their own employment status and entitlement to rights, apply to an enforcement body to claim outstanding holiday pay whilst potentially engaging in EC and/or submitting a claim to the ET for an unfair dismissal or discrimination claim would be problematic to say the least. In recognising the complexities involved, the Review does at least recommend that an authoritative determination of employment status should be made available at an expedited preliminary hearing without a fee.[122] The Government's response which, unlike the Review's report was written following the Supreme Court's ruling on the unlawfulness of the Fees Order, is that the abolition of fees makes further action unnecessary but that 'if fees are reintroduced, we will consult on this'.[123]

B. Employment Law's Public Interest Function

As the findings presented here demonstrate, the current ET system contains many barriers to justice. Fees may have gone (for now) but they were not the only barrier

[120] Ibid.
[121] Ibid n. 106, 45.
[122] Taylor Report, 62.
[123] Good Work Plan, n. 106, 48.

faced by claimants who, as our data show, are able to articulate the deficiencies of the current system through their first-hand experiences if called upon to do so. The lack of engagement with those who use the system, increasingly as self-represented litigants, is a worrying feature of the approach adopted by the Taylor Review. The categorisation of certain workers as 'vulnerable' for the purposes of providing piecemeal solutions, presumably with strict qualifying criteria, would do little to realise labour law's public interest function so keenly expressed by Lord Reid.[124]

The subversion of the adjudicative system for employment claims by the replacement of full hearings with alternative methods of dispute resolution and private settlement has been led by policy developments over the past decade. The conception of civil justice as a 'public good' has been replaced with a widely espoused view that the opposite is true. Instead, recourse to the ET is seen as damaging to economic prosperity: unnecessary burdens are placed on businesses whose growth is restricted by regulation: costs are inflicted on taxpayers to fund the system. Although the substantial difficulties in accessing adequate advice and representation can result in the denial of employment rights for some of those workers most susceptible to exploitation, the failure to deliver individual justice may appear to have no wider significance than the direct impact on those unfortunate individuals. An alternative narrative recognises the substantial public benefits lost. The social and economic costs of not providing justice to those most in need are inestimable and are exacerbated and reinforced by wider inequalities within society including poverty across all life stages. Individual health and wellbeing suffers and the suppression of conflict can have severe and deep seated effects on organisations with lower

[124] N. 7 ibid.

productivity and an inferior delivery of public services. However, overriding all of these concerns and in line with an understanding of the civil justice system as a critical component in the realization of the rule of law is the belief that every individual matters and that each and every one of us is entitled to the law's full protection. A properly resourced ET system with a guarantee of equality of arms, regardless of ability to pay, accompanied by the public enforcement of awards would go some way to providing access to justice for all including those whose voices have for too long gone unheard.