

(In)equality of arms at the ET

Usually costs are not awarded to the successful party in employment tribunals (ETs). LAG believes that if costs were awarded routinely, this would act as a barrier to access to justice by deterring many employees with strong cases from bringing claims against their employers.

ETs are a particularly daunting forum for unrepresented applicants as their procedures are analogous to those of the civil courts rather than to those of other social welfare tribunals. The problem that faces many claimant employees is how to pay for representation with little prospect of recovering costs from the other side.

Damage-based contingency fees in employment cases: a survey of practitioners by Richard Moorhead and Rebecca Cumming confirms that, all too often, employees seeking redress are outgunned by employers' legal representation.* The research points out that employers' expert resources in employment law outweigh those of employees by a factor of three to one. LAG has been made aware by practitioners in the field that it has become the norm for most employers to be represented by either a solicitors' firm or employment law consultants, with their services often paid for by an insurance policy. Now that the maximum award for unfair dismissal is £66,200 and with no limit on awards for discrimination, it makes good business sense for employers to manage the risk of employment litigation through insurance-backed legal services.

LAG argues that unfortunately there are few viable, alternative funding sources for the majority of claimant employees. While some people will be covered by legal expenses insurance sold as an add-on to household insurance policies, it is still rare for employees' representation to be paid for in this way. Also, many employees in low-paid, insecure jobs are unable to afford such insurance premiums.

Representation before ETs is outside the scope of legal aid and many potential claimant employees fall foul of the means test. One of the great iniquities of legal aid is that employees cannot get publicly-funded advice to save their job; such assistance is only available once they are dismissed and so qualify for legal aid. Of course many trade unions offer representation, but union

members make up only one in four of the workforce and are concentrated in the public sector.

So, where can an unfairly-dismissed employee go for advice and how will it be paid for? S/he might be lucky enough to live in an area with a not-for-profit agency that is funded to provide representation or has links to a pro bono provider. According to the research, many employees who are not able to access such services are turning to damage-based contingency fees (DBCFs). DBCFs involve a percentage being taken from any ET award, typically 30–40 per cent, if the claim is successful. While DBCFs are common in the USA, they are rare in the UK. The research points out that low-value, high-risk cases lose out as representatives are not prepared to take them on under DBCF arrangements. Also, clients are often forced to settle claims if their adviser deems it appropriate to do so, and have little chance of challenging such decisions. At the heart of DBCFs is the ethical dilemma that the adviser has a stake in the client's case: there is a danger that rather than risk losing at a hearing and not being paid, s/he will advise the client to take a settlement.

While some respondents to the survey which was conducted as part of the research had used DBCFs for many years, they concluded that the use of these arrangements has only increased significantly in the past five years: around 11 per cent of cases are now funded in this way. LAG agrees with the researchers' recommendation that DBCFs need to be better regulated to iron out anomalies around the charges. For example, many firms using DBCFs base their fee on the award the ET makes before any deductions for earnings and benefits. This would make sense if DBCFs use is set to grow, but by their nature the use of such arrangements excludes a large number of low-paid claimant employees. While the average unfair dismissal award is around £8,000, the median award is only £3,800. Many practitioners told the researchers that cases with a value of less than £6,000 were not economical to take on; however, such cases make up over 60 per cent of all ET claims.

So, it would seem that DBCFs do not provide improved access to justice for the majority of claimants. The research states that 72 per cent of employers as opposed to 42 per cent of employees are represented at hearings. LAG has argued for many years that the extension of legal aid to representation at ETs would be a starting point in addressing this fundamental inequality of arms before the law.

* Available at: www.law.cf.ac.uk/researchpapers/papers/6.pdf.

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